

HISTORY
OF THE
AMERICAN LAW INSTITUTE
AND THE
FIRST RESTATEMENT OF THE LAW

"How We Did It"

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*The Organization of the Institute*¹

The desire of the legal profession for an orderly statement of our Common Law led to the formation of the American Law Institute in 1923. There existed then, as there exists now, a growing feeling among the members of the legal profession that the profession owes a duty to the public to improve the administration of justice. Many lawyers felt that the "growing indigestible mass of decisions" threatened the continuance of our common law system of expressing and developing law.

In December 1914 Wesley N. Hohfeld of Yale read a paper before a meeting of the Association of American Law Schools on a "Vital School of Jurisprudence and Law." At the same meeting Joseph H. Beale of the Harvard Law School read a paper on "The Necessity for a Study of the Legal System." The following year

¹The Proceedings of the American Law Institute, Volume I, published in the fall of 1923 covers the steps taken in the spring of 1922 by those who desired to form the Institute; also the organization meeting in Washington, D. C. February 23, 1923 and the things done in the spring of that year which enabled the work on the Restatement to begin in June. The Volume is divided into three parts: (1) "Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law proposing the establishment of an American Law Institute"; (2) an account of the proceedings of the Organization of the Institute; (3) "Minutes of the Meetings of the Council and its Executive Committee with an Appendix including the Statement of the Council in applying to the Carnegie Corporation for the necessary funds and the Report on the Organization Work and Budget." Subsequent events in the life of the Institute covering the period from June 30, 1923 will be found in the Annual Volumes of the Proceedings, each volume covering a period of one year from July 1 to June 30.

The Appendix printed at the conclusion of this paper contains eight Tables pertaining to the matter in the text.

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Dean Harry S. Richards of the Law School of the University of Wisconsin in his address as President of the Association expressed the hope that "in time the idea back of Professor Hohfeld's paper may be realized by the establishment, under the auspices of this Association, of a center for such studies in Washington where students can come in contact from time to time with representative American and English scholars in these broad lines of jurisprudence." Though a Committee was appointed, World War I interrupted the meetings of the Association. It was not until 1920 that the matter was again taken up, at the suggestion of its then President, Professor Eugene A. Gilmore of the Law School of the University of Wisconsin "that a committee of five be appointed for the better organization of the round table conferences of the Association looking to their ultimate perfection as an Institute of Law." The suggestion was adopted and a committee was appointed with Joseph H. Beale, Chairman.¹ This Committee in its report to the Association in December, 1921, recommended that a committee be appointed with power to invite the appointment of similar committees representing the Courts and Bar Associations "for the purpose of jointly creating a permanent organization for the improvement of the law; with power to name a time and place for the meeting of the conference of these committees." The members of Mr. Beale's Committee, thereafter known as the "Committee on the Establishment of a Juristic Center" were appointed to carry out the purposes of the resolution.

I was a member of Mr. Beale's Committee. It was clear that if the "Permanent Organization for the Improvement of Law" was to be started the initiative must come from Elihu Root. He was the leader of the American Bar. In late March of 1922 on my own responsibility I took the project to him, as far as I had been able to work it out, with the hope, but not the assurance, that he would take a responsible part in creating the Organization. My plan was the creation of an organization, like that which The American Law Institute became, which could produce an orderly Restatement of the Law tending to clarify and, as far as possible, simplify what we may term the general Common Law of the United States. Mr. Root grasped the possibilities of the Institute and the importance of the work proposed and before the interview ended all the necessary organization steps had been planned. At that interview the Restatement was born.

¹ For the names of the members of this Committee, see Appendix, Table 1.

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In accordance with the plan worked out in Mr. Root's apartment at 998 Fifth Avenue the first step was a meeting called by Mr. Beale as Chairman of the Committee of the Association of American Law Schools to which were invited a small group of leaders of the Bar. The meeting was held at the Association of the Bar of the City of New York, adjourning to the Harvard Club of New York, on May 10, 1922. Mr. Root acted as Chairman; I was appointed Secretary. The group formed a "Committee on the Establishment of a Permanent Organization for the Improvement of Law" and directed the preparation of a report on the creation of such an organization. Twenty were present at the first meeting.¹

As secretary of the Committee, during the following summer I wrote a preliminary draft of this report. After going over it with Samuel W. Williston of the Harvard Law School, who suggested several important additions and changes in arrangement, it was submitted to the Committee and by them, with minor changes, adopted. The Committee printed the report and distributed it to some four hundred selected persons who were invited by the Committee to come to a meeting in Continental Memorial Hall, Washington, D. C., February 23, 1923, for the purpose of discussing and taking action on the report.

The meeting was well attended. Chief Justice Taft and Justices Holmes and Sanford were present from the Supreme Court. There were also five judges of the Circuit Courts of Appeals and twenty-eight judges of the highest courts of their respective states, as well as special representatives of the American Bar Association, and the National Conference of Commissioners on Uniform State Laws. Mr. Root was chairman, and made an address summarizing the reasons for the meeting.²

On motion of George W. Wickersham it was unanimously resolved:

"That we approve the formation of the American Law Institute, the object of which shall be to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

¹ For the names of the members see Appendix, Table 2.

² Proceedings of the Institute, Vol. 1, Pt. 2, pp. 48-55.

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A charter and bylaws were adopted. Mr. Root appointed a committee to incorporate the Institute.¹ Incorporation having been secured, the afternoon session was devoted to an organization meeting. All those present, numbering three hundred and two, expressed their desire and became with the incorporators, the first members of the Institute. The meeting also elected the members of the first Council.²

The next day, February 24th, the first meeting of the Council was held. It was the unanimous desire that Mr. Root should be President; but he was firm in his position that his age made such a step unwise. He consented to become Honorary President and gave us essential help until his death in February, 1937. The Council elected George W. Wickersham the first President. I resigned from the Council and was appointed Director. Mr. Wickersham held the office of President until his death in January, 1936. He was not only a good lawyer but an able executive, capable of loyalties to the organizations with which he was identified and above all to the Institute. After his death on January 25, 1936 he was succeeded by our present President, George Wharton Pepper.

Planning the Work on the Restatement

The spring of 1923 was spent in planning the subjects which should be first undertaken and the organization of the work. First, however, the necessary money had to be obtained. We had no idea how long the work would take but thought that adequate financing for some ten years would be sufficient to demonstrate conclusively the practicability of the project. Furthermore, we had analyzed the work sufficiently to know that we would have to spend something over \$100,000 a year. At the first interview between Mr. Root and myself nothing was said about possible sources of donations; but I realized as subsequently did the Committee submitting the report to the organization meeting that there was a well founded hope that with Mr. Root's active interest, the Carnegie Corporation might give the financial co-operation needed. Indeed, Dr. Henry Smith Pritchett, the then President of the Corporation, attended the meeting on May 10, 1922, and there-

¹ For the names of those appointed see Appendix, Table 3.

² Proceedings of the Institute, Vol. 1, Pt. 2, pp. 7-47; for a discussion on the submission of the report see pp. 56-88. For the names of those elected members of the Council see Appendix, Table 4.

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after took a keen interest in the Committee's report and the organization of the Institute. The first step taken by the Executive Committee of the Council at its meeting on March 3, 1923, was to appoint a sub-committee to assist me in the preparation of an application to the Corporation. On March 17th the application prepared was adopted by the Executive Committee and John G. Milbourne was requested to place the statement before the Corporation. At the Executive Committee meeting held on April 21st I was able to read to them a letter from the Corporation, dated April 17th, notifying us that it had granted us \$1,075,000, approximately the sum requested, payment to be made over a ten year period.

Subsequent donations of the Corporation increased this generous initial donation to the Restatement work to a total of \$2,419,196.90. In addition the Corporation also appropriated \$25,000 for the expenses of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, and \$10,000 for the special work on State Annotations besides several donations for other projects of the Institute.

At the meeting of the Executive Committee of the Council held on May 5, 1923, I submitted a Plan on Organization of Work and Budget which was approved and reported to the second meeting of the Council on the 19th. The "Plan of Work"¹ with little change has been followed in all our work on the Restatement of the Law. The main features have also been adopted, not only by the Institute in the drafting of Model Codes and Statutes, but by other public and private organizations in the prosecution of serious legal drafting work.

The plan involves four steps:

1. The appointment of a Reporter for each subject undertaken. This Reporter prepares all drafts.
2. The appointment of a Committee of Advisers presided over by the Director as Chief of the Editorial Staff. The Committee with the Reporter for the subject considers all preliminary drafts and in a series of meetings each usually lasting from three to five days develops a final preliminary draft for the consideration of the Council; the Committee also reconsiders in the same manner any draft referred back to it by the Council or a meeting of the mem-

¹ Proceedings of the Institute Vol. 1, Pt 3, pp. 85-122.

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bers. The Reporter is obliged to incorporate into a draft any statements of law adopted by the Committee of Advisers or by the Council or by a meeting of the Members of the Institute; but except in the preparation for the printer of the text finally adopted by the Institute as the official draft the Reporter registers his own dissent, if any, and on the request of any member of the Committee or the Council the dissent of such member.

3. The final preliminary draft is considered by the Council, the Reporter being present. The Council returns the draft for further consideration to the Committee of Advisers, or, as amended by them, submits it to the Annual Meeting of the Institute either as a tentative or as a proposed final draft.

4. The consideration of the tentative drafts by a meeting of the Institute and their return to the Council and the Committee of Advisers with any amendments adopted by the meeting for further study; the consideration of the proposed final drafts and their final adoption, with any amendments made, or their return for further consideration to the Council and the Committee of Advisers.

When a proposed final draft is amended by the meeting it is re-submitted to the Council which either agrees with the meeting or asks it to reconsider its action. When both the Council and the meeting of members approve the same text, it is printed and promulgated as an "official draft."

The result of the operations of the plan is that the official draft is the successive composite work of the three groups; first, the advisers who have special knowledge of the subject; second, the Council, a body of some thirty-three eminent lawyers consisting mainly of judges and practicing attorneys, and, finally, a meeting of the members of the Institute. In relation to any subject of the Restatement the most important person is the Reporter. The ultimate result is his work as discussed, changed and developed by group consideration. It is this careful group study and development that is the significant feature of the plan. The fact that the Restatement is the final product of highly competent group scholarship subjected to a searching criticism of equally learned and experienced members of bench and bar justifies both the time and large financial expenditure.

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Changes in Scope and Form of the Restatement During its Execution

As our work progressed certain changes in the form and scope of the Restatement from that originally conceived and expressed in the report to the Organization Committee have been made. These changes primarily are due to the greater part played by the group of Advisers. As conceived these groups were to assist the Reporter by checking his conclusions as expressed in preliminary drafts. They were to read over the drafts and offer a few suggestions; but they were to be as they were called nothing more than "Advisers." In the early conferences between the Reporters and their Advisers this pattern was largely adhered to. But the fact that they met in conference and became more and more interested in the work tended to make them look upon themselves and to be looked upon as co-workers with the Reporter. As such they examined all things with minute care. It was the Reporter's work, but it was their work also. This shift in the concept on the part of the groups of Advisers, though varying in degree among their members, is the secret of much, indeed most of that which is good about the Restatement. The only regret is that the name "Advisers" does not express accurately or adequately their actual relation to the work which, except in individual instances, would be more properly described as "Co-Workers with the Reporter."

The greater emphasis on the work of the Advisers, of course, increased the time and the expense beyond what was anticipated. It also eliminated the possibility of the production, as originally planned, of parallel treatises to the Restatement citing and discussing authorities. Indeed, the report to the organization meeting stated that "the work as a whole must actually be done and show on its face that it has been done with a thorough examination and careful consideration of the present sources of the law. This means that the work should contain a complete citation of authorities, decisions, treatises and articles."¹ When we started work on a subject we naturally started with the first preliminary draft of a part of the Restatement. When the draft was submitted to the group of experts the case authority accompanying the draft tended to be confined to the more difficult or debatable points. There was much law which they knew was certain and concerning which

¹ Proceedings of the Institute, Vol. 1, Pt. 1, pp. 21 and 22.

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they were familiar with the authorities. It was therefore not necessary that every possible applicable case should be called to their attention.

Although the meaning of a case and the extent of its authority was often in dispute the rule that the Restatement should be prepared in the light of case authority has been adhered to. The Restatement does represent the considered opinion of those constructing it, of the way in which the law would be decided in the light of decisions by the courts.

On the other hand the original intention above quoted that the Restatement should be accompanied by treatises citing and discussing case authority had to be abandoned, although not until after a fair trial had been made. About a year after work on the Restatement of the Conflict of Laws was begun, Mr. Beale, as Reporter, submitted to his group of experts text sections of a treatise pertaining to corresponding sections in the proposed Restatement. The group, already trained to feel responsibility, considered the tentative text of the treatise as carefully as they considered the text of the Restatement. This meant that every sentence was examined and very often became the subject of debate. Several conferences were held without really any progress being made. It became clear that a group development of the text of the treatise was impossible in any reasonable time or by the expenditure of any funds then or likely to become available. A good treatise discussing decisions might be written by an individual, but could not be produced by a group; the attempt to do so would have forced us to abandon the whole Restatement project as impossible.

It became the duty of the Council and its Executive Committee to decide whether they were willing to ask the Reporters to write treatises discussing authorities which would be published as Institute publications. This they did not care to do, though they have encouraged Reporters after the publication of their respective Restatements to write treatises on their sole responsibility and three of them already have done so: Samuel W. Williston, the Reporter for Contracts, Joseph H. Beale, the Reporter for Conflict of Laws and Austin W. Scott, the Reporter for Trusts; Mr. Williston's work being a second edition of his work on Contracts, the first having been written before the organization of the Institute.

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In view of the abandonment of the production of treatises, the second question to be decided by the Council was whether comment or other notes to the Restatement should discuss case and other authorities. For several years this question recurred, sometimes at the suggestion of a Reporter, more often at the suggestion of a member of Council. In Volume II of the Restatement of Property, the Reporter, Richard R. Powell, was allowed to publish in an Appendix notes written by him on certain questions which had been much discussed by his group, the notes containing citations of authorities. The experiment was not repeated. It became clear that it was not necessary to add individual opinion to support the official statements of the Institute, and that the professional position of the Institute and the known care with which the Restatements were prepared in the light of existing authorities permits it to speak with authority on the general law in the United States. The omission of the citation of case or other authority is practicable only because the Institute has attained an influence far greater than at the start of the work was thought possible. The Institute in its Restatement has become like the Courts an agency for the statement of the law.

Subjects Included in the Restatement

The first subjects undertaken were Contracts, Torts and Conflict of Laws. Work on these subjects started in June '23; Agency followed in the fall of that year. The reason for this selection in each instance was the existence of an outstanding member of a notable law school faculty who had spent years of work on the subject and was generally recognized by the profession as the leading expert. Samuel W. Williston, in Contracts, Francis H. Bohlen, in Torts, Joseph H. Beale, in Conflict of Laws and Floyd R. Mechem, in Agency, were all in this class.

The dates of starting the other subjects, the Reporters and Advisers working in each group and the date of the final adoption and publication of each volume of the Restatement appear in the Appendix, Table 7.

At the beginning we had thought of including all subjects now appearing in the first Restatement except Restitution and Security. The decision to include the Restatement of Restitution was reached during the work on Trusts for which Austin W. Scott and Warren A. Seavey were Reporters. Although it puzzled

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them to determine the best method of dealing with Quasi Contracts and Constructive Trusts, it had been assumed that the latter would appear in the subject of Trusts. But in the course of conferences of the Editorial group working on Trusts the objection to treating Constructive Trusts as part of that subject increased. Constructive Trusts do not arise out of consensual acts. Finally, the conclusion was reached to treat Constructive Trusts and Quasi Contracts together as a single subject to be called Restitution. The matters included in that subject are carefully explained in its general scope note (pages 1 and 2 of the Restatement). It deals with restitutional rights and does not include a statement of other rights which may also arise from a transaction from which a restitutional right arises. The restitutional rights which arise upon a breach or nonperformance of a contract and which arise from the performance or nonperformance of a trust are included only by cross reference to Contracts and Trusts, except where a constructive trust arises.

The suggestion to place in one work all matters pertaining to quasi contractual and kindred equitable relief was originally made by Mr. Seavey. The practical results of the treatment in one volume of this material plus also constructive trusts, material which has heretofore suffered from lack of co-ordinate treatment, has proved most satisfactory.

The subjects in the first Restatement vary greatly in size. Property is in five volumes; Torts in four; Agency, Contracts and Trusts each in two, while Conflict of Laws, Restitution, Judgments and Security are each treated in one volume. Divisions in the subject of Property on Future Interests and on Social Restrictions Imposed Upon the Creation of Property Interests, which latter includes the Rule against Perpetuities, as well as the treatment of Negligence in Torts occupy many more pages than the subject of Security.

As they vary in size so also they varied in difficulty of execution; though such variations were between different parts of the respective subjects more frequently than between different subjects. Thus at the start of the work on Security, though we knew of several matters which we were anxious to try to straighten out, we had no idea of the many difficulties to be encountered, difficulties which took several years and many conferences of the Editorial group to solve, though the entire subject is treated in only 565 pages. Again in the still smaller Volume V of Property,

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which deals with Servitudes, the part relating to Easements presented no extraordinary difficulties, but it took nearly three years to settle finally all questions relating to Promises Respecting the Use of Land, especially those questions pertaining to the "running of burdens and benefits."

Although the chapter in Torts, Volume IV, relating to Labor Disputes, occasioned more prolonged discussion before the Annual Meeting than any other chapter in the entire Restatement, the chapter on Administration of Estates in Conflict of Laws involved the preparation of sixteen successive drafts and long discussions not only in the editorial group but in the Council and its Executive Committee.

Indeed, the whole subject of Conflict of Laws presented more difficulties than any other, and the single volume took eleven years to complete. Extraordinary as it may appear in view of the fact that we are a nation of forty-eight States, each with its own law, these special difficulties were due to the fact that the profession had failed to recognize the great practical importance of the subject. Although Mr. Beale, the Reporter, and several of his Advisers had for many years given special courses in the subject, instruction in the schools was far from universal. Due to this pedagogical neglect the courts confronted with questions of Conflict of Laws had not in many cases brought to their solution an adequate background of knowledge. Apart from this main source of special difficulty the subject involved extended consultations with Reporters for other subjects. The rules of law in the Restatement of the subject are perhaps better fitted to interstate than to inter-foreign transaction; that is inevitable in view of the ignorance of the American Legal Profession of foreign discussions of the problems involved.¹

Though the execution of the subject of Trusts was much aided by the wealth of case authority and the prior knowledge of the differences of opinion which were to be encountered in the Restatement, we found the subject of Judgments, not that of Trusts, less difficult than any other. The work on the single volume of Judgments was begun in February, 1940, and the final draft received the approval of the Annual Meeting in May, 1942.

¹ See foreword of Hessel T. Yntema, to the recently published notable work of Ernst Rabel on *The Conflict of Law, a Comparative Study*.

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State Annotations

The Restatement states the law as it would be today decided by the great majority of courts. There is always the possibility that a State has followed in the past and will continue to follow a different rule. The variations are not nearly so numerous as was assumed at the beginning of the annotations work in 1927. They can be ascertained from state reports and digests, state and national. But the judge or practitioner in dealing with the law in a particular State should be enabled to find as quickly as possible the decisions, if any, in the State that are in accord or contra, as well as the variations made by statutes and their interpretations.

To meet this need, at a District Institute Conference held in Chicago in 1927, Herbert F. Goodrich, then of Ann Arbor, Michigan, as a member of the faculty of the University Law School, now Assistant Director of the Institute and a Judge of the Third Circuit Court of Appeals, suggested that each State Bar Association produce annotations of each subject published giving the pertinent decisions and statutes of its State. The suggestion was enthusiastically received and a number of State Bar Associations began the work. Each year the number of committees undertaking annotations increased until the approach of the present world war. The war has seriously affected the work because the committees in many instances selected young men to prepare the drafts of the local material for their committees. Nevertheless, though much remains to be done, an enormous amount of work has been accomplished. The American Law Institute Publishers publish the State annotations prepared by Annotators appointed and supervised by State Bar Association Committees. Already 127 separate annotations of the different subjects have been published; among these are 28 on Contracts, 27 on Conflict of Laws, 26 on Trusts and 19 on Agency. Eleven have appeared on Torts and a beginning has been made on Property, Restitution and Security. The annotations volumes published represent approximately a third of the possible number and include most of the States having the greater number of official reports. They are an eloquent testimony to the interest taken in the Restatement by the Bar and its intelligent co-operation.

The cost of producing the manuscripts is met by the State Bar Associations except in a few of the smaller States where, with the help of a donation of \$10,000 from the Carnegie Corporation,

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the Institute has been able to carry on annotation work on Trusts in several of these States at one time, though the annotations pertaining to each State are published as separate volumes.

With almost no exceptions the treatment of the material in the published annotations follows a general pattern. This uniformity has been brought about under a system which sends all completed manuscripts to Samuel W. Williston for careful reading, he being empowered to make suggestions to the respective Annotators and their Committees and to reject any manuscript not up to standard. This work which Mr. Williston has carried on for many years with signal success has involved much regular day by day labor. Judge Goodrich has been the representative of the Institute in encouraging the organization of the State Bar Committees and securing the manuscripts. The success of the annotations project is in the main due to his efficiency and to the confidence which the profession has in him.

The Restatement Editorial Force

Though the different subjects in the Restatement are group-products the Reporters carried the heaviest load. Men like Williston, Beale, Bohlen, who were first appointed and those afterwards appointed, as Floyd R. Mechem and Warren A. Seavey in Agency, Richard R. Powell in Property (except for Volume V), Austin W. Scott in Trusts, John Hanna in Security and Oliver S. Rundell for Volume V in Property containing the division relating to Servitudes, are those to whom the greatest credit should go, as it should also go in Restitution and Judgments to Seavey and Scott who were Co-reporters for those subjects. It is the deservedly commanding professional position of Williston, the respect which the profession had for Mechem's wide and accurate knowledge of decisions, the expert knowledge of a wide range of subjects of Seavey and his capacity for constructive generalization, the erudition of Scott and the soundness of his judgment, the brilliancy of Bohlen and his intuitive grasp of the trends of the common law of Torts, the hard and careful work and fine analytical mind of Powell, the patient work of Hanna and the capacity, persistency and brains of Rundell, that have been the principal factors in making the Restatement what it is today. Outside of their teaching work in the law schools with which they were connected the Institute's work took all their time. To be a Reporter for a subject meant complete absorption while the task lasted, and in the

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larger subjects the completion of the drafts took years. With men like Richard R. Powell, Warren A. Seavey, Austin W. Scott, their respective periods of service have taken the best years of their lives; with the older Reporters, Mechem and Bohlen the work occupied their later constructive years. Williston, older than any Reporter now living, whose work in the Restatement of Contracts was completed in '32, as stated, is still working for the Institute as Supervising Editor of the manuscripts of the State Annotations.

In spite of the twenty-two years it has taken to produce the Restatement, we lost only two Reporters by death. Floyd R. Mechem, in his lifetime the foremost master of Agency in this country, died December 11, 1928, in the middle of his work on that subject. His death was a personal loss to his associates and required the reorganization of the work. Warren A. Seavey was appointed Reporter, and after five more years the subject was completed.

For fourteen years, from June, 1923 to June, 1937, Francis H. Bohlen was Reporter for Torts, and for much of that time sole Reporter. The divisions of the subject covered in Volumes I and II were done during this period. The divisions in Volume III were also begun and nearly all of them were completed by him or under his general supervision. Shortly after the Annual Meeting in May, 1937, he was stricken with a serious illness which lasted until his death in December, 1942. One of the most brilliant masters of the common law, the Restatement of Torts as a whole reflects his scholarship and that intuitive grasp of the principles and spirit of the law which was his outstanding characteristic.

It was not long after the beginning of the work on the Restatement before the appointment, not merely of younger assistants, a matter envisaged from the beginning, but also the appointment of associate Reporters acting almost independently of the chief Reporter and of special Reporters became necessary. Thus we have had Reporters not only for separate volumes but for particular chapters. The first of these was Arthur L. Corbin of Yale University, who was Special Reporter for the Chapter on Remedies in Contracts. Subsequently, in Property, Barton W. Leach of Harvard University acted as a Reporter for Chapter 15 on the Protection of Future Interests as Affected by Statutes of Limitations and the Doctrine of Prescription as well as for Chapter 25 on Powers of Appointment; A. James Casner of Harvard University acted as Associate Reporter for Chapter 23 on "Limita-

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tions to Heirs," "Heirs of the Body," "Next of Kin," "Relatives" and other groups similarly situated. Julian S. Bush of New York acted as Associate Reporter for Chapters 30 and 31 on "Extent of Validity," "Problems of Construction" and Part III "Provisions in Restraint of Marriage, and Allied Provisions in Wills and Miscellaneous Restrictions." So also in the other large subject, Torts: in Volumes I and III, Special Reporters for some of the chapters were required, while in the fourth Volume all the chapters have their own Reporters. Thus, Edward S. Thurston of Harvard University was Reporter in Volume I for the chapters on Invasion of Interests in the Exclusive Possession of Land, and Fowler V. Harper of Indiana University was Reporter for Chapters 9 and 10 on the Conversion of Chattels. In Volume III Harry Shulman of Yale was Reporter for Division 9 and Fowler V. Harper, Associate Reporter for Divisions 5, 6 and 8. In Volume IV, done after Mr. Bohlen's illness, Harry Shulman continued as Reporter for Division 9 on Interference with Business Relations; Everett Frazer was Reporter for Division 10 on Invasions of Interests in Lands other than by Trespass, and Warren A. Seavey for Divisions 11 and 12 on Miscellaneous Rules and Defenses Applicable to all Tort Claims. Edgar N. Durfee of the University of Michigan began work on Division 13, Chapter 48 on Injunction and after his retirement on account of illness, Morris T. Van Hecke of the University of North Carolina acted as Reporter and completed the work.

All the work of the Reporters for particular chapters was as meticulous as that done by those Reporters primarily responsible for complete volumes. All except Mr. Bush before taking up their respective tasks had had experience as Advisers and in some cases, like that of Mr. Seavey, as Reporter. Several of the chapters, for instance, as that in the Restatement of Torts on Injunction as planned by Mr. Durfee, and executed by Mr. Van Hecke, marks a notable piece of constructive work in the Restatement, especially in its treatment of other remedies in relation to injunction and the recognition, that whether an injunction will be granted is not the adequacy of the common law remedy, but whether the injunction is under the circumstances the best remedy.

The total membership of the Editorial groups, Reporters and Advisers, was 92. Of these 14 were or became Reporters either for entire subjects or for chapters. But as to 78 Advisers their contribution to the Restatement has been confined to their work

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as such. I have already said that the title "Adviser" for the great majority is a misnomer. In many cases the work took a considerable portion of their time for years. Without the kind of cooperation which contributes long and continuous work to a group project with the knowledge that one's own contribution will be merged in the completed whole, the Restatement could not have been done. It would be an injustice to others to refer in this connection to particular individuals or even to groups. At the end of this paper will be found in Table 7 a list of the Restatement subjects, the time occupied in their completion and the list of those who were Advisers. Except where it is there stated that an Adviser only served in connection with particular chapters, he served throughout the time necessary to complete the material in the volume or volumes to which his name is attached. Except in the two larger subjects, Torts and Property, which respectively took sixteen and seventeen years to complete, nearly all the Advisers acted as such throughout the entire subject. This statement means that many of those not at one time Reporters have worked more than ten years at a labor which took a very considerable proportion of their time. As the work involved never less than three conferences a year and often five or six and as each conference lasted from three to five days, the members of each group were thrown much together. The meetings were held for the most part away from big cities. During these conferences the group lived in one hotel; in summer often on the Island of Mt. Desert in Maine, and in the fall, winter or spring in central or southern parts of the country. The resulting intimacy has been an essential element in efficient group production, the group fellowship making lasting friendships and happy memories.

It is of importance to emphasize that in the selection of Advisers it was usual to try to secure representatives of the three classes of the profession: the judge, the teacher and the practitioner. Property was the only subject in which the groups were made up almost exclusively of law teachers or ex-law teachers. This was because of what we may term the specialized nature of the subject. On the other hand, the great majority of the Advisers in the various divisions of Torts were judges or persons in the active practice of their profession. One thing, however, was always recognized as essential. The individual chosen as a member of a group, judge, teacher or practitioner, had to have not only the instinct for public service, but be a group worker.

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From the start we recognized that some fine lawyers are temperamentally so constructed that they cannot do useful work in a group. They either try, though often unconsciously, to overbear the others or, finding themselves unsuccessful, soon cease to take any real interest in the discussion.

The Work of the Council and the Annual Meeting

The question is sometimes asked what was the contribution of the members of the Council and the members of the Institute to the making of the Restatement. The question is easily answered. In the first place, 17 members of the Council have acted also as Advisers. Of these I can mention three who are now deceased: the late Chief Justice Wheeler of Connecticut, Charles McHenry Howard of Baltimore and Judge Burch of the Supreme Court of Kansas. The first, until his death in 1932, was an Adviser in Torts. Judge Burch throughout his long service in the Supreme Court of Kansas was a leading authority on Torts, writing many constructive opinions. His help was most valuable. Mr. Howard was an Adviser in Torts and Restitution. He was one of the foremost masters of the common law.

The Council regularly met in February and devoted several days to a discussion with the Reporters of the drafts submitted. The total volume of the drafts submitted to one meeting was often over six hundred pages. Both Chief Justice Wheeler and Mr. Howard read with care and Mr. Howard made extensive and valuable notes on all the drafts submitted. These feats called for the admiration of their fellow members who found it necessary to confine their meticulous reading to one or two drafts, content to concentrate their study of the other drafts to those matters on the special lists of important questions submitted with the drafts.

As to the work of the Council on the drafts submitted, the value of the submission of the product of a comparatively small group of experts to a body much larger, but not too large to prevent intimate discussion and the upbuilding through many meetings of a thorough knowledge of each other, was clearly demonstrated. On well known differences as to what our substantive law is they could and did give the weight of their own opinions. Furthermore, their questions and criticisms brought out many matters as to which the smaller group of experts thought they had expressed themselves clearly, but had failed to do so. The

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Council practically always made many suggestions and often a few very important amendments. The process of group development through which the drafts presented had passed normally resulted in a draft the Council could with some amendments pass on to the Annual Meeting of members. But this was not always so. In spite of the care of the Editorial force a draft or chapters therein were sometimes returned to the group with instructions again to consider and revise. Rarely, but in more than one case, the Executive Committee of the Council was asked to consider a draft on which differences of opinion among the Council and between the Reporter and the Council made such special consideration necessary. In short, the Council in the production of the Restatement have done much more than make occasional suggestions. Their work has been a real and important factor in the completed Restatement.

What is true of the Council is in a somewhat different way true of the Annual Meeting of the members and its discussion of the tentative and proposed final drafts. The meeting involved a discussion before a group representing the profession in the best sense of that word. The discussion informed the members of the work done by the Editorial force and Council. It also gave to those who had created the draft submitted a knowledge of whether their labors were successful or deficient. Usually the result of the Annual Meeting discussion was to show the necessity for a few amendments, but occasionally the number of criticisms and the general reaction of the meeting made it necessary for the Editorial group to do a serious work of revision.

As a whole the work of the Council and the Annual Meetings formed the vital connection between the Editorial force and the legal profession. The members of the Council and a large number of other members of the Institute feel that the Restatement is a work in which they have had, as indeed they have had, a vital part. Unlike any other law book, the first Restatement is the product of the profession. This fact is an essential factor in the Restatement's present position of authority.

As in the case of Advisers, to mention some individual members of the Council for their work as such would be unfair to others. But one can and should speak of George W. Wickersham and George Wharton Pepper, the two Presidents of the Institute. Mr. Pepper has occupied the office since Mr. Wickersham's death in January, 1936. Both men of commanding position, they have

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done much to give to the Institute professional standing. Furthermore, the untiring labor of Mr. Wickersham and the notable skill of Mr. Pepper as a presiding officer at the Council and Annual Meetings have done much to present the Institute favorably to the profession and the public, as well as to unravel and settle satisfactorily the problems which have confronted us.

Results of the Restatement

The first Restatement of the Law is done. We started with the belief that out of the mass of case authority and legal literature could be made clear statements of the rules of the common law today operative in the great majority of our States, expressed as simply as the character of our complex civilization admits. The result shows that this belief was justified. The Restatement of each subject expresses as nearly as may be the rules which our courts will today apply. These rules cover not merely situations which have already arisen in our courts but by analogy rules applicable to situations likely to arise. The Restatement of a subject is thus more than a picture of what has been decided; it is a picture of present law expressed by foremost members of the profession. As a result of the way in which the work has been done and the persons who have labored on it, the Restatement has acquired an authority far greater than those of us who organized the Institute to do the work anticipated. Though the rules are expressed in the form of a code, except in sporadic instances, there never has been any desire to give them statutory authority. The Restatement is an agency tending to promote the clarification and the unification of the law in a form similar to a Code. But it is not a Code or statute. It is designed to help preserve not to change the common system of expressing law and adapting it to changing conditions in a changing world.

To aid the lawyer and the judge in making the Restatement of maximum usefulness to himself two auxiliary tools have been provided. One of these is the combined index. This is not merely a combination of the indices of the various subjects, but the integration of those indices to take the reader from volume to volume where related subject-matter is treated in different places in the Restatement. It has been done by skillful and experienced hands and it is hoped that its usefulness will justify the very considerable effort put upon it.

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The second aid to the user is the collection called "The Restatement in the Courts." This consists of a brief paragraph indicating the citation of every appellate court decision which has cited the Restatement and the use made by the court of it. The court decisions covered are all those included in the National Reporter System. The time covered is from the appearance of the first tentative draft of the subject of Contracts. By reference to the subject and section number in any volume of the Restatement the user can find every mention made of this section up to January 1, 1945, whether it be approval, disapproval or simply citation in the course of discussion. The object is to inform the user of the reception of a particular statement of law at the hands of courts subsequent to its writing in the Restatement.

One of the most interesting results of the annotations work is to dispel the idea very prevalent at the start, and even at the beginning of the annotations work in 1927, that the decisions of our courts are to a considerable degree full of conflicts. That there are conflicts in cases is, of course, true, but many apparent conflicts disappeared in the group discussions of the experts in the course of the development of careful statements of law. We found the confusion in our case law is more apparent than real. The impression that our common law is a mass of contradictions is in the main due to the variations in judicial language. When the pertinent facts of the cases are analyzed, much of the apparent contradiction disappears. A careful survey of the State Annotations already published shows that on the average less than two per cent of the cases are contra to the statements in the Restatement text. Except for a few doubtful cases, the remainder are in accord.

However, the number of instances in which there is absence of case authority in a State dealing with the subject-matter of a Restatement section is even larger than expected; the percentage of blanks runs in many States between fifty and seventy-four per cent and even in States like Massachusetts, New York and Pennsylvania there is a substantial number of sections of the Restatement not covered by local case law. In these instances the Restatement is the best evidence of the law which will be followed if and when a case arises in the State where no case authorities now exist.

There have been incidental but important results of the work which has produced the Restatement. It has taught the leaders

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of the legal profession how to unite and work together for important constructive improvements in the law and its administration. Through it the profession first came to know the value of the outstanding members of our law faculties, who devote their lives to their respective subjects, as joint co-workers with the judge and the practitioner, while the teaching members of our profession in their turn have learned to appreciate the value of the public spirited judge and the practitioner in a scholarly enterprise. This spirit of mutual knowledge and respect is bearing fruit. It is resulting and will result in many movements that will have notably good effects. The creation of the first Restatement of the Law has enabled the legal profession to find the way to express itself in permanent worthwhile accomplishment.

The Future of the Restatement

The first Restatement of the Law having been completed and published, the Institute should turn its attention to and if possible accomplish three things :

1. The establishment of a system by which the legal profession will be informed of changes in the law as expressed in the first Restatement, and when the time is ripe therefor, produce a revision of an entire subject.

Law in a changing and developing nation is also rightly always changing and developing. Any subject in the Restatement when published represents the present law. But, in a short time it here and there ceases to be the law. The Restatement has taken twenty-two years to complete. Even in that time there have been changes. Today, the subject of Conflict of Laws probably could be revised with advantage. At different times the need for revision will come to all the other subjects in the first Restatement. In the meanwhile, the Institute is studying the practicability of devising a system which would notify the profession of any important change in any statements made in this first Restatement.

2. The restatement of important subjects capable of useful restatement not dealt with in the first Restatement.

Of these, some at the time the Restatement was planned, were comparatively unimportant. In other cases the character of the subject made it appear too difficult to under-

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take, this objection applying especially to subjects in which considerable non-uniform state legislation exists. Any person familiar with our law reading the names of the subjects in the first Restatement will note that the important field of Association Law, except for Agency, has been omitted. He may wonder why the common law Partnership and the Law of Corporations are not found among the subjects treated, and he may notice in the material in the first volume of the Proceedings of the Institute that Corporations was one of the three subjects which it was assumed would be undertaken. The reason for the omission was that corporations have their origin in statutory enactment. There was a fear that if undertaken the work could not be successfully carried on; that a considerable portion of our funds might therefore be wasted. Today, however, Corporations, when sufficient funds are obtained and war conditions permit, would almost certainly be undertaken, though whether the present restatement form should be followed is a matter for careful study. Indeed, the whole field of Association Law as the most important almost entirely omitted field probably will be included in any plan for the production of additional subjects.

3. Translation of the Restatement into foreign languages.

The war has delayed the translation of the Restatement into foreign languages. The value of such translation has been recognized by legal scholars in many countries. In France, Italy, Spain and South America there is what we know as the code system. One of the great obstacles to the study and use of the law of the English speaking peoples in civil law countries has been the absence of any statement of our law in a form understandable and usable by civil law lawyers. The Restatement is in code form, a form they are accustomed to. Furthermore, the translation of some of the subjects, such as Conflict of Laws and Contracts, will place in the hands of the civilians in any international conference for the promotion of uniform laws relating to international business and other transactions the necessary information in respect to our law on those subjects.

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Already a translation into French of the Restatement of Conflict of Laws has been produced by funds in the control of the law faculty of the University of Paris and the labor of Pierre Wigny of Belgium and W. J. Brockelbank of the United States, supervised by J. P. Niboyet, Professor in the Faculty of Law, of that University. A translation of the same subject into Spanish is nearing completion. The organization of a system by which translations can be produced with reasonable rapidity is a work which it may be hoped the Institute may undertake at the conclusion of the present war.

WILLIAM DRAPER LEWIS,
Director.