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THE AMERICAN LAW INSTITUTE.

The Law: "A few strong instincts and a few plain
rules."—*Wordsworth.*

The formation, under the laws of the United States applicable to the District of Columbia, on February 23, 1923, of a corporation under the name of

THE AMERICAN LAW INSTITUTE,

for educational purposes and specifically

"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,"

marks a definite and important step in a movement which has been under discussion and in progress in England and America for a number of years past. The significance of this particular incorporation is indicated by the fact that it was authorized and directed at a meeting attended by the Chief Justice of the United States and two of the Associate Justices of the United States Supreme Court, by five Judges of United States Circuit Courts of Appeals, by Judges of twenty-seven of the highest courts of States of the American Union, besides the President and mem-

bers of the Council of the American Bar Association, and representatives of seventeen State Bar Associations, of thirty-three law schools, of Commissioners on Uniform State Laws from twenty-two States, as well as by two hundred other lawyers from various parts of the Union. The Chief Justice of the United States, the Secretary of State, the Chief Justices of the Supreme Court and of the Court of Appeals of the District of Columbia, the United States Attorney for the District, and the acknowledged leader of the American bar—the Honorable Elihu Root—were incorporators, and, immediately upon compliance with the requirements of corporate existence, all of the persons assembled in the meeting above referred to became members of the corporation.

Throughout its history, the bar constantly has busied itself with various methods for improving the administration of justice. Institutions for the encouragement and pursuit of scholarly and scientific legal work never have been lacking, from the early days of the Inns of Court, so picturesquely described by Fortescue,¹ until the present time. The especial need of the work undertaken by the American Law Institute and the particular direction in which it intends to pursue that work, require some detailed consideration, in order to mark out the boundaries within which it proposes to operate, as well as to indicate the fields into which it does not intend to enter.

The initial purpose of the organization, as set forth in the charter, is to promote the clarification and simplification of the law.

“The law,” wrote Dr. Samuel Johnson, “is the last result of human wisdom acting upon human experience for the benefit of the public.” Sir John Salmond, in language of professional precision, defines law as “the body of principles recognized and applied by the state in the administration of justice, or, more shortly: the law consists of the rules recognized and acted upon by courts of justice.”²

¹ *The Laws of England*. Trans. by A. Amos, Cambridge, pp. 178-9 (1825).

² Salmond. *The Science of Jurisprudence*.

These rules, in America, are to be ascertained, first, from the Constitution of the United States and those of the several States; second, from statutes enacted by the Federal Congress and by the legislatures of the several States; and, third, from decisions of courts. The second and third sources of law mentioned, Mr. Justice Holmes says, consist of: "a body of reports, of treatises and of statutes, in this country and in England, extending back for six hundred years and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system."³ Hence, Judge Holmes says, the object of the study of the law is prediction—"The prediction of the incidence of the public force through the instrumentality of courts."

Judge Cardozo, in the introduction to his lectures on "The Nature of the Judicial Process," describes the field which a judge must explore in deciding a given case which is not specifically covered by a written constitution or a statute, as "the land of mystery," in which "the judge must look to the common law for the rule that fits the case." The common law "which consists of customs and principles handed down from remote times and accepted from age to age as furnishing rules of legal right," has been embodied in and to a great extent created by judicial decisions and dicta. "These, indeed, so far as they have relation to the common law and statute law, are not so much a source of law as authoritative expositions of it; . . ."⁴ Nevertheless, they are for all practical purposes "the law," which all citizens are presumed to know and which every lawyer and every judge seeks to ascertain, with the aid of countless digests, myriads of reports and many textbooks.

The civil codes of North and South Dakota, respectively, define law as "a rule of property and of conduct prescribed by

³ The Path of the Law, in "Collected Legal Papers," p. 167.

⁴ Report of Digest of Law Commission, 1867.

the sovereign power." The rule of the sovereign power, they declare, is expressed:

- "(1) By the constitution of the State;
- (2) By the statutes of the State;
- (3) By the ordinances of other and subordinate legislative bodies;
- (4) By the decisions of the tribunals enforcing those rules which, though not connected, form what is known as customary or common law."⁵

The evidence of the common law, they further declare, is to be found in the decisions of the tribunals.

The courts of forty-eight American States, besides those of the Federal jurisdiction, are daily adding to this volume of the "evidence of the common law." Naturally, the more complex and varied the sources of authority from which the rules of law are derived, the greater the uncertainty and the more difficult the effort to predict what rule will be applied in any given case.

How the common law is found by a judge in actual practice, is described by Judge Cardozo as follows:

"The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. . . . Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn. None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law."⁶

The volume of decisions by judges, declaring the common law, a century ago had begun to accumulate with sufficient rapid-

⁵ Civil Code N. D., Sects. 4326-4328, 4330; Civil Code S. D., Title, Substantive Law, Secs. 1, 3.

⁶ Nature of the Judicial Process, pp. 19-20.

ity to cause apprehension and alarm in the minds of thoughtful lawyers and judges. In an address to the bar of Suffolk County, Massachusetts, delivered by Justice Story in 1821 (referred to by Charles Warren in his "History of the American Bar"), he said:

"The mass of the law is, to be sure, accumulating with an almost incredible rapidity. . . . It is impossible to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our jurists."

And thirty years ago Judge Dillon, lecturing before the law school of Yale University, said:

"There inevitably comes a stage in the legal history of every people when its laws become 'so voluminous and vast' that an authoritative and systematic recompilation and re-statement of them is necessary, to the end that they may be accessible and of (to use in default of a better, Bentham's uncouth but expressive word) *cognoscible* bulk, if not to those who are governed by them, at least to those whose business it is to advise concerning them and to those whose duty it is to administer and apply them."⁷

This condition had become so alarming in England that in the year 1866 a Royal Commission was appointed, known as the "Digest of Law Commission," composed of the most eminent lawyers and judges of that day, including, among others, Lord Cranworth, Lord Westbury, Lord Cairns, Lord Hatherway and Lord Selbourne,

"to inquire into the expediency of a digest of law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions."

The word "digest" was here used in the sense of what we term "restatement"—a methodical compendium of what the law is, not merely a collection of abstracts of decisions arranged

⁷The Law and Jurisprudence of England and America. John F. Dillon, (1894) p. 269.

under various topics and indexed for reference. In the first report of the Commission, made May 13, 1867, reference was made to the vast number of judicial decisions dispersed through upward of thirteen hundred volumes of reports of the English courts, comprising upwards of 100,000 cases, exclusive of 150 volumes of Irish Reports, besides yearly accessions; all of which the Commissioners characterized as "*a great chaos of judicial legislation.*" This mass of decision has been increased enormously since 1867—not so much in England, as in this country, where the courts of forty-nine separate sovereignties are daily adding to the mass.

In the year 1921 alone, 143 volumes of decisions of the courts of the States of the Union were published, and 155 in the year 1922. The American Digest of decisions of American courts (Century Edition), issued by the West Publishing Company, covering the period from 1658 to 1896, consists of fifty portly volumes, each of which contains from 2900 to 3450 page columns, aside from the index. Sixty-three bulky supplemental volumes bring the series down to the close of 1922, each volume containing about 2377 pages. These are merely digests, or brief summaries of decisions, indexed to particular topics. The National Reporter System for the year 1922 reports decisions rendered by courts in a total of 23,468 cases.⁸

A little encouragement in the gloom of this increasing cloud of witnesses may be derived from the fact that, while 152½ volumes of State and Federal reports were published in 1900 and 166 in 1901, there were only 148 in 1921 and 156 in 1922.

* Atlantic Reporter	Vols. 114-118,	1,700 cases;
Northeastern Reporter,	" 133-136,	1,609 "
Northwestern Reporter,	" 185-190,	2,394 "
Pacific Reporter,	" 202-210,	4,133 "
Southeastern Reporter,	" 110-114,	2,565 "
Southern Reporter,	" 90- 93,	2,301 "
Southwestern Reporter,	" 235-244,	4,432 "
Federal Reporter,	" 276-284,	2,164 "
N. Y. Supp. Reporter,	" 191-196,	1,387 "
Supreme Court Reporter,	" 42- 43,	703 "
Grand total;.....	23,468	"

The reason for this improvement is not apparent on the surface. Despite the use of thinner paper, there is no marked increase in the number of pages in each of the official volumes of reports printed in recent years. But in the State of New York, particularly in the Appellate Divisions of the Supreme Court, there has been a large increase in the number of cases in which only "memorandum opinions" are written. The number of reported opinions of these Appellate Divisions increased from 3255 in 1901, to 5042 in 1922, but the number of memorandum opinions included in these figures increased in the same period from 1915 in the year 1901 to 4279 in 1922. This increase in the use of memoranda also resulted in decreasing the average length of opinions from 2.7 pages in 1901 to .62 page in 1922, and this fact largely explains the reason for the slightly diminished number of volumes of reported decisions above mentioned. An examination of the reports of the forty-eight States which I have had made, shows that in twenty-one States the number of volumes of reported decisions issued annually has increased, in fourteen it has remained stationary, and in thirteen there has been a diminution. Outside the State of New York, the gain and loss in the number of volumes almost balance each other. Still, even with the reduction above referred to in New York, the State courts alone are adding to the literature of the law—the *authoritative* literature of the law—at the rate of upwards of 150 volumes a year.

A needless complexity in the law, is one of the defects especially commented upon by Sir John Salmond in his work on "Jurisprudence":

"It is not possible, indeed," the learned Judge admits, "for any fully developed body of law to be such that he who runs may read it. Being, as it is, the reflection within courts of justice of the complex facts of civilized existence, a very considerable degree of elaboration is inevitable. Nevertheless, the gigantic bulk and bewildering difficulties of our own labyrinthine system are far beyond anything that is called for by the necessities of the case. Partly through the methods of its historical development, and partly through the influence of that love of subtlety which

has always been the besetting sin of the legal mind, our law is filled with needless distinctions which add enormously to its bulk and nothing to its value, while they render a great part of it unintelligible to any but the expert."⁹

The Committee organized in May, 1922, at the instance of the Association of American Law Schools, to consider the possibility of a permanent organization for the improvement of the law, in its report to the meeting held in Washington on February 23, 1923, enumerated as among the particular causes of uncertainty and complexity in the law the following:

Lack of agreement on fundamental principles of the common law;
 Lack of precision in the use of legal terms;
 Conflicting and badly drawn statutory provisions;
 Great volume of recorded decisions;
 Ignorance of judges and lawyers;
 Number and variety of novel legal questions;
 Complexity of the conditions of life;
 Lack of systematic development of the law;
 Unnecessary development of administrative provisions;
 Varying law in different jurisdictions.¹⁰

The first report of the British "Digest of Law Commission," made May 13, 1867, contained the following recommendation:

"A digest correctly framed and revised from time to time would go far to remedy the evils we have pointed out. It would bring the mass of the law within a moderate compass and it would give order and method to the constituent parts. For a digest (in the sense in which we understand the term to be used in Your Majesty's Commission and in which we use it in this report) would be a condensed summary of the law as it exists, arranged in systematic order, under appropriate titles and subdivisions and divided into distinct articles or propositions which would be supported by references to the sources of law whence they were severally derived, and might be illustrated by cita-

⁹ Jurisprudence, Sec. 10, p. 25.

¹⁰ Report, Part II, pp. 66-84.

tions of the principal instances in which the rules stated had been discussed or applied. Such a digest would in our opinion be highly beneficial. . . .

"Moreover, such a digest would be the best preparation for a code, if at any future time codification of the law should be resolved on."

The term "digest" in this report, as already has been noted, is used in the same sense as the term "restatement" is employed in the proceedings leading up to the organization of the American Law Institute, and in its proceedings. The Royal Commission pointed out that such a work could only be performed by a commission and would involve considerable expenditure, and it recommended that a portion of a digest sufficient in extent to be a fair specimen of the whole, should be prepared in the first instance.

The second report of the Digest of Law Commission, submitted May 11, 1870; set forth that the Commission had, pursuant to the authority granted to it to carry out the recommendations in its first report, selected the three subjects of Bills of Exchange, Mortgages and Easements, and had secured the services of three members of the bar, each of whom was directed to frame a digest of the law on one of those subjects; that these gentlemen had submitted

"Materials of considerable value,' but the Commission thinks it inadvisable to continue this mode of proceeding.

"We have found," runs the report, "that the examination and revision of these materials with that rigorous care and accuracy which would be requisite before we could lay them before Your Majesty as specimens of a digest of law would involve considerable further delay and expense, while on the other hand we have satisfied ourselves that these specimens would have again to be revised, and perhaps recast, when the time arrived for inserting them as portions of a complete and systematic work."

They say that experiment had served to bring out the inherent difficulties in the undertaking.

"A complete digest cannot be executed without the assistance of the most highly skilled persons whose services

can be procured. The success of the work will depend on their efficiency. They must give to the undertaking the whole of their time and energy. And it is obvious that the services of such persons cannot be obtained without the offer of permanent employment and high remuneration."

The Commission therefore recommended the appointment of a body of three such persons, charged with the duty of executing a digest as a whole, provided with every assistance and acting under the control of a committee of the Privy Council or otherwise. Sir James S. Willes, who upon the death of Lord Cranford had been substituted as a member of the Commission, dissented from the report, because, while he thought a first-rate modern digest of the English law desirable as a whole for professional use, he considered that, after all, it would be only a makeshift for a code or series of codes, which he thought preferable to a digest.

One of the remedies for the complexity and uncertainty of the common law, which has been recommended by members of a school whose principal exponent in England was Jeremy Bentham, and in the United States, David Dudley Field, is the codification of the common law. Four of the States of the American Union, Georgia, California, North and South Dakota, have followed this course by enacting codes of substantive law. But in none of these States has the legislature attempted to abolish all law but the statute law. How far the law has been clarified by reducing it to these statutory forms is a matter of controversy.

After the failure of the "Digest of Law Commission" to accomplish any practical result, professional efforts in England were directed, first, to improving the system of law reporting, and second, to a careful systematic revision of statutes on different subjects, which has gone far in the direction of completely codifying the common law of England. But the inability of this Commission to accomplish the purposes of its original appointment, inspired Lord Halsbury to the preparation and publication of his series of twenty-nine volumes of "The Laws of England." In the introduction to this work, Lord Halsbury says:

"The alteration of existing law and the process of merely stating what the law is, are two very different functions, and the confusion between the two has marred many an effort to get a clear and intelligible code. Mr. Gladstone once said in the House of Commons that you should first get a comprehensive account of what the law is before you commence amending it; and a great many law reformers have failed because they have not observed the necessity of this preliminary inquiry."

Referring to the failure of the work of the Digest of Law Commission, he says:

"It has occurred to some minds that an attempt might be made by private enterprise to carry out in its main outlines the scheme which was recommended in the report of the Commission appointed in 1866, and such an attempt has been made in this work. Different treatises upon various divisions of the law, and by different authors, have been brought together, so that a selected body of writers may expound their several topics, and at the same time refer to such authoritative decisions and enactments as support the propositions which they lay down."

The result, as Lord Halsbury pointed out, was not a mere encyclopædia, not a mere collection of cases, but a number of treatises composed by learned lawyers, supported by the decisions of great judges.

Following this work, there also has been published in England, under the editorship of Mr. Edward Jenks, "A Digest of the English Civil Law," divided into five volumes, of which Volumes 1 and 2 were published in 1905, Volume 3 in 1911, and Volumes 4 and 5 in 1916.

But in general, the tendency in England has been mainly in the direction of reducing the law to statutory form. This is said by Sir John Salmond to be the tendency of modern times and one which he believes ultimately will prevail; yet he points out:

"The process is one of exceeding difficulty owing to the complexity and elaboration of English legal doctrine. Many portions of the law are not yet ripe for it and pre-

mature codification is worse than none at all. . . . Un-enacted law is the principal and enacted law is merely accessory. The activity of the legislature is called for only on special occasions to do that which lies beyond the constructive or remedial efficacy of the common law."¹¹

Judge Dillon, lecturing before the Law School of Yale University in 1892, said:

"One related question of great practical interest and moment still remains to a large extent undecided, and that is as to the wisdom of undertaking a systematic restatement of the body of our statutory and case law. This subject is actively engaging the best minds of the profession in both countries."¹²

And speaking of this work of restatement, he said:

"It is not possible to doubt that the bulk of the existing law can be greatly, and, if the work be properly done, advantageously reduced. This is in fact demonstrable both by reason and examples. Cases do not constitute the law, but are illustrations and practical applications of its general principles. These principles are comparatively few. Lord Mansfield went to the pith and marrow of the business when . . . he said: 'The law does not consist of particular cases, but of general principles which are illustrated and explained by these cases.' *Re. v. Bembridge*, 3 Doug. 332. It is therefore practicable to extract these principles and state them in authoritative form. This is undoubtedly, as Lord Hale says, 'a very choice and tender business' and must be performed deliberately and by the most competent hands. Mr. Justice Stephen's digest of the law of evidence is an example, among others, of what may be done in this direction. Mr. Taylor's treatise on evidence contains, says Mr. Justice Stephen, 1797 pages, refers to 9000 judicial decisions and cites nearly 750 Acts of Parliament. Greenleaf's work is quite as extensive. Now Mr. Justice Stephen extracts the essential principles of the law of evidence, states these with precision, illustrates them by example, ar-

¹¹ Jurisprudence, Sec. 53.

¹² Law and Jurisprudence of England and America, Lecture XIII.

ranges them in a systematic form in 143 articles, all of which, with annotations and references to the American cases by Professor Chase, is brought within the moderate compass of 245 pages."

The report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, enumerated certain factors promoting greater certainty and simplicity in the law, among which were:

- (1) The influence of the decisions of one State on the common law of other States;
- (2) The enactment of uniform State laws;
- (3) The increasing exercise of legislative power by the Federal Government;
- (4) The application of uniform laws by the Federal Government;
- (5) The national law schools.

The Committee reached the conclusion that one of the most potent factors in the removal of the uncertainty of the law, would be the formulation of clear and accurate statements, in simplified form, of the common law on various topics, prepared by trained students of the law, submitted to the criticism of the bar, and published with the authority of the Institute and the prestige of the great body of lawyers and judges of the country. Specifically, they pointed out that the work thus performed was not intended to be submitted to the legislature for enactment into law. It is designed to appeal to the intelligence of bench and bar. The Committee expressed the belief that, if the work be done as designed, the restatement would be accepted by the profession as evidence of what the law is at the date of its publication, without the necessity of ransacking the thousands of precedents which will have been examined, analyzed and weighed by the authors of the respective treatises.

Examples are not lacking as to the influence upon the law of the writings of eminent students and text-writers. In England, Coke and Blackstone stand out as more essential law-givers than many Parliaments whose statutes have attempted to

end legal debate. Professor Pound has very clearly described the great services of Kent and Story in restating and simplifying the common law in America. Referring to Story, whose contribution he considers the greater, he says:

"What Story, the judge, failed in, Story, the text-writer, accomplished triumphantly. For more than anything else the books of our great 19th Century text-writers saved the common law. Here were guides for judge and practitioner, well written, learned, well ordered, and, as things went then, well reasoned."

And after enumerating Judge Story's works, he says:

"In quantity, in timeliness, and in its relation to the law that went before, and came after, this body of legal writing is in many ways comparable to that of Coke. In each case the judge-made law of the past was restated and was made conveniently and, as it were, authoritatively available for the future."

This work, he adds, must be counted as one of the controlling factors in the shaping of American law.¹³

Aside from the writings of James Kent and Joseph Story, in more modern times, we have had the "Treatise on the Law of Private Corporations," by Victor Morawetz, which almost immediately upon its publication was accepted as authoritative by the highest courts in the land. Still more recently, such books as "A Digest of the Laws of England with Reference to the Conflict of Laws," by A. V. Dicey; "The Principles of the Law of Contracts," by Sir Frederick Pollock, and in America, Williston's "Law of Contracts," have been published, which, in effect are restatements of the common law of those subjects respectively.

Senator Root in presenting the report of the Committee to the Washington meeting on February 23d last, described the proposed undertaking of the American Law Institute in the following language:

¹³ Judge Story in the Making of American Law. By Roscoe Pound, 48 AMERICAN LAW REV. 676.

"Now, if you can have the law systematically, scientifically stated, the principles stated by competent men, giving their discussions of the theories upon which their statements are based, giving a presentation and discussion of all the judicial decisions upon which their statements are based, and if such a statement can be revised and criticised and tested by a competent group of lawyers of eminence, and when their work is done, if their conclusions can be submitted to the bar . . . if that can be done when the work is completed, we will have a statement of the common law of America which will be a *prima facie* basis on which judicial action will rest; and any lawyer, whose interest in litigation requires him to say that a different view of the law shall be taken, will have upon his shoulders the burden to overturn the statement. Instead of going back through ten thousand cases it will have been done for him; there will be not a conclusive presumption but a practical *prima facie* statement upon which, unless it is overturned, judgment may rest."¹⁴

The report of the Committee on the proposed organization of the Institute had pointed out, as did the British Digest of Law Commission, that the work involved in the preparation of a restatement of the law which should command the respect and secure the support of bench and bar, would require the employment of the most competent members of the profession and the expenditure of a considerable sum of money. With that practical common sense which is characteristic of American lawyers, the framers of the report submitted with it an estimate of the probable cost of carrying on the work in all of its details, and presented a budget showing estimates of annual expenditures amounting to about \$100,000.

The Carnegie Corporation had contributed \$25,000 to cover the expenses of conducting the preliminary inquiry and securing the services of those who united in the report on the establishment of a permanent organization, including the expenses of the Washington meeting. Shortly after the corporate organization of the Institute, the Carnegie Corporation evidenced its con-

¹⁴ American Law Institute, Account of Proceedings at Organization, p. 51.

tinued interest in the work by appropriating to the use of the American Law Institute for its general purposes the sum of \$1,075,000 to be paid at substantially the rate of \$100,000 a year over a period of eleven years. This generous donation has made possible the practical prosecution of the work for which the Institute is organized. Following out its program and availing of the means thus placed within its grasp, the Institute has appointed the following gentlemen as reporters, that is, persons who are to prepare for submission to and consideration by the Council of the Institute restatements of the law upon the topics indicated:

On the law of contracts, Professor Samuel Williston, of the Law School of Harvard University;

On the law of torts, Professor Francis H. Bohlen, of the Law School of the University of Pennsylvania;

On the law of agency, Professor Floyd R. Mechem, of the University of Chicago;

On the conflict of laws, Professor Joseph H. Beale, of the Law School of Harvard University.

Dr. William Draper Lewis, the director of the Institute, formerly Dean of the Law School of the University of Pennsylvania, one of those most active in inspiring its organization and in the preparation of the preliminary report, is employed in the preparation of a report on the practicability of undertaking a restatement of the law of business associations, and Dean Pound, of the Law School of Harvard University, is preparing a report on classification and terminology.

Mr. Austin W. Scott and Mr. Calvert Magruder, of the Law School of Harvard University, have been appointed to assist Mr. Beale in the preparation of a restatement of the law on conflict of laws, and the Honorable Herbert S. Hadley, recently elected President of Washington University of St. Louis, Missouri, and Messrs. William E. Mikell, Dean of the Law School of the University of Pennsylvania, and John G. Milburn, of the New York bar, have been appointed a committee to prepare and report to the Council a draft of a survey and statement on the

defects in criminal justice, for the purpose of determining whether or not the Institute may profitably undertake a restatement of any branch of the criminal law.

A conference was held in Cambridge, Mass., June 25-27, 1923, which was attended by the President* and the Director, six of the Council, three of the reporters above named, and Messrs. Arthur L. Corbin, of Yale University, William H. Page, of the University of Wisconsin, and William H. Oliphant, of Columbia University, who were specially invited for their advice on the restatement of the law of contracts; Messrs. John G. Buchanan, of Pittsburgh, Pa., Herbert F. Goodrich, of the University of Michigan; Ernest G. Lorenzen, of Yale University, and Monte M. Lemann, of New Orleans, who were specially invited for their advice on the conflict of laws; Messrs. J. Weston Allen, of Boston, Massachusetts, Edwin R. Keedy, of the University of Pennsylvania, and James Bronson Reynolds, of New York, who were specially invited for their advice with respect to a survey or statement of defects in criminal justice; Messrs. Edmund M. Morgan and Karl N. Llewellyn, of Yale University, who were specially invited to discuss ways for securing facts bearing upon the practical application of legal principles, and Mr. Shippen Lewis, of Philadelphia, who was specially invited for his advice on the form which the restatement should take. This conference was called to determine such questions in regard to the form of the restatement as ought to be decided before work on any one topic was substantially advanced. There were also special questions in regard to the work on those different topics, as to which the reporters for the subjects selected desired the comment and criticism of the persons specially invited for that purpose. The conference continued in session for three days.

There were submitted to the conference on the part of the reporters various forms of a proposed restatement, which were criticised and discussed. The conference agreed to make the following recommendations to the reporters and the Council of the Institute:

* The author of this article is the active President of the Institute.—En.

(1) That Restatements should be separate from the Treatises:

(2) That the principles embodied in a restatement should set forth the law with much greater fullness than would be the case if it were merely a "conclusion of general principles" over which at present little or no difference of opinion exists;

(3) That the law as set forth in the restatement shall be capable of being understood and applied without the necessity of referring to the treatise, the statement of principles being accompanied by illustrations and explanations;

(4) That each treatise shall be complete from three points of view:

- (a) citation of authority;
- (b) the presentation of the present certainties, uncertainties and confusions in the law;
- (c) the justification of the principles set forth in the restatement.

If these rules are followed, it is believed that from a reading of the restatement, the law as set forth in the statement of principles can be thoroughly understood and consistently applied; but it will be only by reading the treatise that the certainties, uncertainties and confusions arising from the recorded decisions can be ascertained.

The specific form which the restatement shall take is, of course, to be finally determined when there shall be submitted to the Council drafts of definite restatements of the law prepared in conformity with the rules above stated. Whether the formulation adopted by Sir James Stephen in his "Law of Evidence," or the method employed by such writers as Dicey and Pollock and Williston shall be used, must be left to experience. I have already quoted what Judge Dillon has pointed out regarding the work of Sir James Stephen. Dicey's "Digest of the Law of England in Reference to the Conflict of Laws," is composed, first, of a table of principles and rules covering 60 pages, embracing 203 rules. This is followed by an introduction of 65 pages, 134 pages of preliminary matters, and elaborate notes,

the whole making a volume of 952 pages. Sir Frederick Pollock's principles of the law of contracts (that is, the Third American, taken from the Seventh British, Edition), is divided into 14 chapters, and, in all, fills an octavo volume of 985 pages. Mr. Williston's law of contracts contains three volumes of textbook reading composed of 2044 sections, filling 3456 pages, divided into eight books. The Civil Code of California fills 836 octavo pages, divided into 3543 sections; the two volumes of the Civil Code of Georgia are made up of 4639 sections. Lord Halsbury's "Laws of England" fill 29 volumes of approximately 1800 pages each, besides a supplemental volume. No other code or statement of the law is expressed in the condensed brevity of Stephen's "Code of Evidence."

These books merely indicate lines of suggestion to the reporters who are engaged upon the work of restating particular subjects of the law for the American Law Institute. What they may accomplish by way of condensation remains to be seen. It is recognized that the work cannot be done hastily, and that it will involve infinite pains and enormous labor. When the proposals of the reporters have been laid before the Council of the Institute, the work of criticism and suggestion will begin. The great object is to produce accurate statements of what the law actually *is*, which will dispense with the necessity of any one in the future searching through the myriads of precedents which these reporters will have examined and analyzed in reaching the conclusions embodied in their work. As Lord Halsbury says in his introduction to the "Laws of England":

"The alteration of existing law and the process of merely stating what the law is, are two very different functions and the confusion between the two has marred many an effort to get a clear and intelligible code."¹⁵

It is the statement of existing law which the Institute has undertaken. As Mr. Justice Holmes observes:

"The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law

¹⁵ 1 Halsbury CCIX.

and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned."

Our effort will be to attempt this reconstruction before the auto-da-fe, and in so doing, to relegate what went before into as complete extinction as if it had been consumed in Don Quixote's courtyard under the auspices of his curate and the barber.

The affairs of the Institute at present are managed by a Council of twenty-one members. The executive direction is in the hands of a Director, a post which was filled by the election of Dean William Draper Lewis, to whom the Institute largely owes its existence. The by-laws provide that no member of the Council shall, while remaining a member, receive any compensation from the Institute. It was felt that the government of the corporation should be entirely free from any pecuniary interest in its work.

There has been some criticism of the fact that, of the original members of the Council, only two resided west of the Mississippi River. This was unavoidable, because in the early stages of its existence, when frequent conferences and meetings were required, it was necessary that a quorum of the Executive Committee and the Council might be assembled on reasonably short notice. Those most active in the original movement and who were committed to the effort to place it upon a practical basis, very largely came from the law schools and the Bar east of the Mississippi. But it is the intention of the members of the Council that this condition shall be only temporary. By authority of the by-laws the number of the Council has been increased to thirty-three, and the additional members thus provided for will shortly be added. It is intended to select them from all parts of the country in such manner that the body shall be widely representative of the profession in all parts of the United States.

The members of the Council are equally divided into three classes whose terms expire December 31, 1926, 1929 and 1932, respectively. Their successors are to be chosen by the members of the Institute.

The persons whose names appeared on the roll of the Washington meeting, the members of the Council and any other persons elected by the Council or by the Institute, are members; besides which, the by-laws provide that the following shall be members during their continuance of their respective offices, *viz.*:

- (1) The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States;
- (2) The senior Judge of each United States Circuit Court of Appeals;
- (3) The Attorney General and the Solicitor General of the United States;
- (4) The Chief Justice of the Court of Appeals of the District of Columbia;
- (5) The Chief Justice of the highest court of each State;
- (6) The President of the American Bar Association and the members of its Executive Committee;
- (7) The President of each State Bar Association;
- (8) The Dean of each school belonging to the Association of American Law Schools;
- (9) The President of the American Institute of Criminal Law and Criminology;
- (10) The President of the American Branch of the International Law Association;
- (11) The President of the American Judicature Society;
- (12) The President of the National Conference of Commissioners on Uniform State Laws;
- (13) The President of the American Society of International Law.

There were present at the Washington meeting about 315 persons, including those present in a representative capacity, and since the Washington meeting the Council has elected sixty-five members. The *ex-officio* members will number about 180. In general, the Executive Committee is inclined to recommend that the total membership of the Institute, not including members in representative capacity, be limited to 750 persons.

The Washington meeting demonstrated the existence of a nation-wide recognition, by the Bench and Bar of the country, of the need for some such work as that upon which the Institute has embarked. It is the intention of the Council and the officers of the Institute, so far as they may, to keep this interest alive by frequent reports of progress made in the work undertaken. But it should also be emphasized that the work cannot and should not be done hastily. The thoroughness of preparation and the sound learning required, can be secured only by giving those engaged upon it ample time in which to perform their tasks. Considering the character and standing of the men employed and the record of their professional accomplishment, the officers of the Institute are sanguine enough to believe that the work which they have undertaken is not an idle dream, but may soon become an actual realization. If this be so, the Bar will have discharged its highest obligation to the community of which it is a part, by taking a long step toward the removal of the reproach of uncertainty in the character, and delay in the administration of the law. If the effort be successful, our law will have ceased to be what Tennyson reproachfully termed it:

“The lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances.”

George W. Wickersham.

New York City.