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The American Law Institute

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THE AMERICAN LAW INSTITUTE

At the 1914 meeting of the Association of American Law Schools held at Chicago, some papers were read and discussion had evidencing a conviction on the part of those present that the volume, complexity and uncertainty of the unwritten or common law in the United States had become such that there should be set on foot a movement looking to the establishment of some permanent organization having for its object the clarification of our unwritten or common law by way of restatement in a simplified, direct and orderly form. The World War checked the progress of this movement, though it received some further consideration in 1915 and 1916, but it was not until 1920 that the matter was again seriously considered by the Association of American Law Schools, with the hope of material progress, when a committee of that association was appointed looking to the establishment of a law institute. The membership of that committee was added to from time to time until it had thirty-nine members, a considerable number of whom were outside that association. Honorable Elihu Root became its chairman, and Dr. William Draper Lewis, Dean of the Law School of the University of Pennsylvania, became its secretary All of its members were of the highest rank among the jurists, practitioners and law educators of the United States. The committee was to prepare a report with a view of submitting it to a large representative assembly of judges, practitioners and law educators of the country, to be held at such time and place as the committee might designate, to the end that the sentiment of such an assembly be ascertained touching the proposed undertaking, and, if favorably expressed, some united formal action be taken looking to the formation of a permanent organization to undertake at least the beginnings of the manifestly large task of making a restatement of the unwritten or common law in the United States.

The committee brought to its aid considerable research work touching the volume, complexity and uncertainty of our law as expressed in decisions and texts, and the causes thereof. The committee also seriously studied the practical aspect of the problem, as to the form in which the proposed restatement should be made, the efficient division of subject matter, the question of what subjects should be first undertaken, having in mind that many years would be required to so cover anywhere near the whole field of our unwritten law, and also considered possible ways and means, both

mental and material, necessary to the making of progress towards the desired end.

There resulted from these labors of the committee its report in pamphlet form of over one hundred pages of ordinary law book size, wherein there was ably set forth the conceived necessity for the making of such a statement, discussion of ways and means looking to that end and a proposal that there be incorporated and organized an American Law Institute to undertake the work. This report was sent out to the chief justice of each court of last resort in the United States, the senior judge of each United States Circuit Court of Appeals, and several hundred other judges, practitioners and law educators, accompanied by invitations to attend a meeting to be held in Washington, D. C., on February 23, 1923, to consider the committee's report and its proposals. There responded to those invitations by attendance at the meeting three justices of the Supreme Court of the United States, five senior judges of the United States Circuit Courts of Appeal, twenty-seven chief justices of the state supreme courts, thirty-three law educators, representing nearly as many law schools of the country, and a large number of other outstanding legal scholars from nearly every state of the Union, in all approximately 400.

The meeting was called to order at the appointed time by Mr. Root, the chairman of the committee, who was made chairman of the meeting. He briefly outlined the views and recommendations of the committee as expressed more in detail in its report already in the hands of all present. This was followed, during the morning session, by a general and spirited discussion evidencing practically a unanimous opinion of those present, in harmony with the views and recommendations of the committee. Accordingly, there was then appointed a committee to cause to be incorporated under the laws of the District of Columbia, a corporation to be known as the American Law Institute, and make statement of its objects in its articles of incorporation as follows.

> "The particular business and objects of the society are educational, and are 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."

During the noon recess formal articles of incorporation, which had already been tentatively prepared, were executed by the ap-

pointed incorporators and placed of record in the proper office of the District of Columbia, thus bringing into existence as a legal entity the American Law Institute.

After the noon recess those present at the morning session reconvened as charter members of the incorporated institute. By-laws were formally adopted declaring all present to be charter members, also making certain public and semi-public officials members during their incumbency of office, such as the chief justices of the state and federal courts of last resort, the senior judges of the federal circuit courts of appeal, presidents of state bar associations, deans of law schools, and some few others. Increase in the general membership was also provided for by election of new members up to a total limited general membership of 500, which has since then been increased to 750. The articles of incorporation having provided for a council, as the governing body of the Institute, to consist of twenty-one members, an election of members of the council was accordingly held. Those so chosen were well distributed throughout the Union, two being chosen from the Pacific states, one from California and one from Washington. At a later annual membership meeting of the Institute the membership of the council was increased to thirty-three, its present number.

After the adjournment of the general membership meeting the council met and organized by the election of Mr. Root as honorary president. Had he felt able to undertake the active duties of the office of president, he would undoubtedly have been elected to that office. It was manifestly only in deference to his personal wishes in that regard that he was not so elected. But, because of his leadership in setting the movement on foot, it was unanimously agreed that he should be named as the honorary president of the Institute. Thereupon Honorable George W Wickersham, formerly Attorney General of the United States, was elected president of the Institute. Judge Benjamin N. Cardozo, present chief judge of the New York Court of Appeals, was elected vice president, and Dr. William Draper Lewis, Dean of the Law School of the University of Pennsylvania, was elected secretary These gentlemen have remained in these respective offices up to the present time.

Some time after that meeting, the management of the Carnegie Foundation, evidently prompted by the spirit of that meeting, endowed the Institute to the extent of approximately $100,000 a year for a period of ten years. So, the Institute seems to be fairly well financed for the carrying on of its work for at

least that length of time, during which it will, no doubt, be demonstrated as to what extent its aspirations will be realized. If then it has been proven to be worthy of continuance as a permanent institution for legal research looking to the betterment of the law and the better administration of justice, it may attract further endowment.

Aside from ex officio membership in the Institute, an effort is being made to distribute the general membership throughout the states of the Union as nearly as may be according to their population. The limit of general membership, at present fixed at 750, has not yet been reached. Whether it will be desirable or necessary, from a practical standpoint, to maintain such a limitation upon membership is not yet demonstrated, though it seems to be the general view that a larger membership would result in making the Institute unwieldy in its practical operation. There are no financial obligations incident to membership in the Institute, that is, there are no initiation fees or dues.

Members, other than ex officio members, are, however, expected to show interest in the work by attending the general annual membership meetings, or in some other manner evidence their interest and contribute in some measure to the work. For any marked failure of a member to so manifest his interest, his name may be stricken from the roll of membership, such failure being taken as evidence of lack of desire to continue his membership. While this rule does not apply to ex officio members, such members are strongly urged to attend, and many of them do attend, the general membership meetings which are held in Washington near the first of May each year. The principal council meeting is held in December each year, some special meetings of the council are also held. At the council meetings the ordinary administrative and business affairs of the Institute are given attention, though the larger work of the council meetings is the consideration of the tentative restatement drafts prepared by the reporters and their advisers.

The director of the Institute, who, since the beginning of the work in 1923, has been Dr. William Draper Lewis, has general charge and supervision over all the research and restatement work of the Institute. The work with reference to each separate general subject is carried on by and under the immediate supervision of a reporter on that subject, who has assistants in his research work and associate advisers in making his tentative restatement

of the law upon the subject assigned to him. The reporter, when he has made a tentative restatement of some division of his general subject, for instance, some division of the law of torts, holds a conference with his advisers when his tentative draft, so far as he has gone, is painstakingly examined and discussed section by section, and revised if found necessary, to the end that it be presented to the council as a tentative restatement of such division of his general subject. Later, such restatement is presented to and by the council, painstakingly examined and discussed section by section, and revised if found necessary, to the end that it be presented to a general membership meeting of the Institute, still as a tentative restatement, where it is again examined and considered section by section.

Any member of the council is privileged to attend and participate in any conference of a reporter with his advisers, though not obligated to do so. A few members of the council have attended some of these conferences, prompted by interest in some particular subject being there considered. The director, the reporters and their assistants and some of their special advisers are compensated for their services. The members of the council are not compensated for their services, though they are reimbursed in the amount of their expenses incurred in attending meetings and conferences. Dr. Lewis, the director, maintains headquarters for the general administration work of the Institute in the law building of the University of Pennsylvania, at Philadelphia, devoting all his time to the work of the Institute. The reporters carry on their research and restatement work at their respective law schools.

Professor Francis H. Bohlen, formerly of the Law School of the University of Pennsylvania and now of the Harvard Law School, is the reporter on the subject of torts, and has covered a large portion of the law on that subject. Professor Samuel Williston, of the Harvard Law School, is the reporter on the subject of contracts, and has covered a large portion of the law on that subject. Professor Floyd Mechem, of the Law School of the University of Chicago, is the reporter on the subject of agency, making similar progress. Professor Joseph H. Beale, of the Harvard Law School, is the reporter on the subject of conflict of laws, and has covered nearly the whole of that subject. Large portions of each of these tentative drafts have been painstakingly considered by the council at their various meetings, and in turn submitted to and considered at general membership meetings of the Institute. The director, Dr.

Lewis, is the reporter on, and has commenced the preparation of a tentative restatement of the law of business associations. This general subject will include corporations for profit and associations of a kindred nature and possibly partnerships, though the full extent of the field to be covered under this general heading is not yet determined. Professor Harry A. Bigelow, of the Law School of the University of Chicago, is the reporter on the law of property, real and personal, and has prepared a preliminary report on that subject. Professor Austin W Scott, of the Harvard Law School, is the reporter on the law of trusts. He has commenced a tentative restatement of the law on that subject, he and Professor Bigelow consulting with each other as they proceed, to the end that they avoid duplication of work so far as possible. When a tentative draft is prepared by a reporter, it is printed in pamphlet form, with comment following each section constituting the proposed restatement. Copies of these are then distributed to members of the council, and later after consideration by the council, with amendment and suggestion, are distributed to the members of the Institute to be considered at a general membership meeting.

A special fund has been given to, and accepted by, the Institute to finance the preparation of what may be conceived to be a model code of criminal procedure. There was some considerable objection by members of the Institute to the acceptance of this fund and the undertaking of such work by the Institute, inasmuch as it might be considered as a departure from its real purpose as evidenced by the expressed sentiment at the original meeting, and as understood by the Carnegie Foundation in its endowment of the Institute. However, since the general funds of the Institute would not be drawn upon to bring about the preparation of such a proposed code, it was finally decided to accept this special gift and undertake the preparation of a code of criminal procedure, though the doing of such work looks to the making of statutory law. Dean William E. Mikell, of the Law School of the University of Pennsylvania, is the reporter on this subject, who, with his assistant, Professor Edwin R. Keedy of that school, is preparing a tentative draft of such a code. A small portion of their work has reached the council for consideration. Much research work has been done in bringing together in comparative form the statutory criminal procedure provisions of the several states of the Union. It may be said in this connection that, while the Institute may ultimately adopt what it conceives to be a model code of criminal pro-

cedure, it is not at all likely that the Institute will go any further looking to the enactment of such a code by our legislatures. Efforts in that direction will probably be considered as apart from the work of the Institute.

Some consideration has been given to the subject of the general classification of the law, this, with a view of avoiding, as far as possible, that duplication and overlapping of treatment which is so prevalent in our legal literature. Dean Roscoe H. Pound, of the Harvard Law School, read at the 1924 meeting a very learned and enlightening paper on this subject. His conclusions seemed not very hopeful of the making of an efficient classification other than a very general one, which should descend but little into details. His observations seemed to suggest, in substance, that a very comprehensive, detailed classification was hardly possible in so far as making for efficiency of the work of the Institute is concerned, and probably not even desirable to that end. However, some attention is being given to the order of progress. The subjects under taken to be covered so far are of prime importance in our jurisprudence at this time and are of such outstanding character that at all events they will be readily recognized as separate subjects in any scheme of general classification which might be adopted. Other subjects will be taken up from time to time and the work of restating the law thereon assigned to reporters of the best legal talent that liberal compensation can command. It is hoped that ultimately the whole field of unwritten law may thus be covered, but before this shall have been accomplished, it is probable that new conditions arising in our civilization, as in the past, will call for revision of restatements already made, and the adaptation of fundamental principles to new conditions as has been rendered necessary from time to time during the whole growth of the common law

Although nearly five years have passed since the commencement of the work of the Institute, it is apparent that some considerable time will yet pass before the publication of any restatement will be put out as the finally approved work of the Institute. Answering some friendly criticism directed to the seemingly slow progress being made, President Wickersham, in his annual address to the general membership meeting in May last, comparing the manifest required labor and time of our present undertaking with the labor of years consumed in the preparation of the Justinian Code and the Code Napoleon, under social, industrial and commercial conditions much simpler and less involved than confront us, very pertinently observed

> "Our work requires consideration of the decisions of the Courts in forty-eight separate states of the American Union, besides those of federal jurisdiction, and it must find its sanction in the voluntary acceptance of the work by bench and bar as an accurate statement of the existing common law. Necessarily, to secure this accuracy, the soundest learning and the utmost care and thorough research are required. If only one hundred pages are produced, they must be demonstrably accurate. The value of the work cannot be measured by bulk. But even so, we may reflect with satisfaction upon the reasonable progress of the undertaking."

It is not contemplated that common law methods of growth and development will be departed from. No code in the European sense is contemplated. The purpose is not to change the law, but by research to ascertain what is the law, and, where conflicting views of state jurisdictions obtain with reference to a particular subject, to ascertain which is the soundest view touching such subject, viewed in the light of fundamental principles and our present social, industrial and commercial conditions. This, it is conceived, has been the real spirit of the common law throughout the centuries of its growth. All such adaptation of fundamental principles to new conditions, the Institute will undoubtedly sanction only in a constructive and conservative spirit. If its present attitude be maintained, it will be constantly conscious of the fact that its mission is not the making of law but the discovery of existing law as applicable to modern conditions, and restating it in as simple understandable form as may be done in human language. This is not a reform institution any more than an institution for research in the natural sciences is a reform institution. It has no propaganda looking to the curing of political or social ills through the law-making power. It neither advocates nor opposes legislation looking to such ends. There is, no doubt, a field for useful public service along these lines, and many people of good intention seem called to labor therein, but the American Law Institute has set its hand to the doing of other work. It seeks by painstaking research to rediscover that which we already have, to resurrect in a sense and bring to new discernible life and to put in simplified understandable form that which is becoming obscure. Roughly paraphrasing the saying of that world Teacher of some two thousand years ago, the American Law Institute can in all good faith say to the world.

> "Think not I am come to destroy or even change the law, but to fulfill the law"

This undertaking has been prompted by the present complex condition of our law, not unlike conditions existing in the Roman law preceding its harmonizing in that great work commonly known as the Justinian Code, and conditions existing in France preceding the enactment of the Code Napoleon. Those restatements, if they may be so called, being made in statutory form, worked greater changes in the Roman and French law than will the present undertaking work in our law, for they, being a creation by sovereign legislative fiat, were the making of law, though in a large measure only the re-making of law As stupendous as the task looms, may we not hope that the learning, ingenuity and industry of the lawyers of the United States, and the good-will of those who may furnish the material resources for this undertaking, will be sufficient to effect, in at least some substantial measure, the consummation of the aspirations of the founders of the American Law Institute.

This is not an undertaking of mere visionary character resting on nothing more than blind faith and desire, but it is an undertaking conceived in the light of experience and of realities, with a consciousness of the large dimensions and difficulties of the task, and still accompanied by a faith and hope which can at least dimly see a great reward. If the vision of the founders finally becomes an accomplished reality, it seems probable that the restatment of the unwritten law in the United States, of the character and quality hoped for, will be ranked in the minds of posterity with the Justinian Code and the Code Napoleon, as the third outstanding milestone in the evolution of the jurisprudence of Europe and America. Is not the vision of the founders of the American Law Institute, rested upon a well-grounded hope, prophetic of the continuing life and renewing vitality and service of our jurisprudence?

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