Volume 30 | Issue 3 Article 8

April 1924

The First Year's Work of the American Law Institute

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beautification when reasonable has *in effect* been recently held legally permissible, at least in certain classes of cases, in New York and Massachusetts and some other states[29] where aesthetic sensibilities of the majority of the community are rather acute and public opinion probably preponderates in favor of such beautification. It has been recently held not legally permissible in Texas and some other states[30] where there is probably not a preponderant settled public opinion in favor of municipal aesthetics. Will a court, *e. g.*, the West Virginia court, when the question arises again, uphold such aesthetic city planning and zoning? It depends largely on whether the preponderant settled public opinion in that jurisdiction is, at the time, in favor of such municipal beautification. For, to repeat, the law is, or tends to be, an expression of community ideals, an expression of the preponderant settled opinion, the *mores* of the times, as understood by the judges of the time being.

—T. P. H.

THE FIRST YEAR'S WORK OF THE AMERICAN LAW INSTITUTE.—The American Law Institute, founded in Washington, D. C., on February 23, 1923, held its second annual meeting on the same date this year, at the same place. The notable progress which the organization has made during the past year may justify a review of its activities. The purpose of the Institute, as formulated at the organization meeting in 1923, was the authoritative restatement of the law. It was evident that a substantial financial backing would be necessary in order to carry on the work, but Elihu Root, the chairman of the first meeting had intimated that, if the interests and support of the legal profession were demonstrated, the necessary funds would be forthcoming.

On April 17, 1923 the secretary of the Carnegie Corporation advised the Institute that the Board of Trustees of that Corporation had appropriated the sum of $1,075,000 for the general purpose of the Institute, to be paid in annual installments of substantially $100,000, and that after the completion of the last payment in 1933, the corporation assumed no further obligation for the support or maintenance of the Institute.

Its financial arrangements being thus secured for a considerable period of years, the council of the Institute elected at the first meeting Mr. William Draper Lewis of Philadelphia, Director of the In-

[29] See cases cited in foot note 26 *supra*.

[30] See *e. g.*, Spaun *v.* City of Dallas, 111 Tex. 350, 235 S. W. 513 (1921); City of St. Louis *v.* Evraiff, 256 S. W. 489 (Mo. 1923), 3 Jj. dissenting).

stitute. The council was then confronted with the problem of what to do first in the prosecution of the enormous undertaking of the Institute. Director Lewis says, in his annual report:

> "In beginning the work on the Restatement two courses were open: one, to make as complete a classification of the law and as complete a legal terminology as possible, and when this preliminary work was completed, and not before, begin work on specific topics; the other was to select a few topics and begin work on these topics at once, and at the same time begin work on classification and terminology."

The council concluded that to require the beginning of the restatement to wait the completion of a complete classification would unnecessarily delay the restatement, without any assurance that a satisfactory classification would result, and that if some parts of the restatement were carried on simultaneously with the work of classification the practical requirements of classification for purposes of the restatement would be demonstrated. Dean Roscoe Pound, of the Harvard Law School, was selected by the Council to submit a report on the main lines along which the law should be classified, for the purpose of the restatement. Dean Pound's familiarity with the literature of the Roman, Modern Continental, and Common law, fit him preeminently for the task. The Institute is assured that it will have the benefit of the entire experience of civilized law makers and writers in solving the important problem of classification. Dean Pound's preliminary report will be hereinafter noticed. Dean Pound was also selected to make a preliminary report upon the terminology to be used in the restatement, the council recognizing that, since one of the *desiderata* in the restatement is certainty, the expressions must be capable of definition. When one recalls the variety of meanings with which such expressions as "law, obligation, liability, debt, right, etc." are used, the importance of an authorized terminology, for each particular topic of the law, if not for the entire restatement, is apparent.

The Council determined to begin work on the topics of Contracts, Conflicts of Laws, Torts, and Agency at once. It selected for each topic a Reporter "who should be primarily responsible for the production of a draft of the restatement." Professor Mechem of the University of Chicago Law School, the author of the excellent treatise on Agency, which has largely determined the law of that subject in the American courts, was selected as the Reporter in Agency. Professor Beale of the Harvard Law School, who has had in preparation for many years and has partly completed a

treatise upon Conflict of Laws, was named Reporter for that topic. Professor Williston of the Harvard Law School, whose recent treatise upon Contracts is the leading authority of that subject, was named Reporter for Contracts. Professor Bohlen of the University of Pennsylvania Law School, who has prepared an excellent Casebook in Torts, was made Reporter for that topic.

The selection of these Reporters is proof that it is the purpose of the Institute to draft for the work of restatement the very ablest available talent, and that when that draft is made, the great specialists in the legal profession will respond to the call. The willingness of legal scholars, whose reputation as individual writers is so completely established that even a restatement by the Institute would not override their authority, unless they should join in it, to merge their individual views in the collective judgment of the Institute, shows the high purpose with which the profession is approaching the task of restating the law.

Each Reporter is provided with a competent staff of advisers and assistants, made up of eminent teachers and lawyers who are specialists in the subject in hand. The method of procedure followed by the Reporter and his advisers is described by Director Lewis as follows in his annual report:

> "The Reporters, the Advisers and the Assistants, together with the Director, form what we may call the Legal Staff of the Institute. The plan of work on which we are proceeding is to have the Reporter prepare a tentative draft of a small part of his topic. This is put in print and sent to the Advisers. The written comment of each Adviser on the draft is sent to the Reporter and to me. I have it duplicated and sent to all the other Advisers in the topic. A conference is then called which is attended by the Reporter, all the Advisers in the group and such members of the Council as care to attend. These Conferences are presided over by the President of the Institute, or, in his absence, by me as Director. The time occupied by a Conference on a subject has so far been two days, with morning, afternoon and evening sessions."

The form which the restatement is to take has been determined after a considerable discussion. It has been tentatively decided that the Institute should publish the restatement, and, separately, an accompanying Treatise. The restatement is to consist of principles and, where necessary, comment, and illustrations. The comment, or exposition, is to be confined to (1) direct statements of law explaining the conditions under which a principle operates, in such manner as to facilitate its correct application, and (2) explanations

of the reasons for the principle, and direct statements of law in the comment itself. The purpose of the restatement being primarily to serve the judge who is actually engaged in deciding cases the style of the restatement is to be that of an authoritative or *"ex cathedra"* statement. Even the comment will contain no argumentative defense of the principles, but only a formal statement of the reasons for them. However, the treatise, accompanying the restatement, will contain the argument and authorities justifying the positive statement.

The difficulties which will confront those engaged in making such a positive statement may easily be imagined. It is undoubtedly true, that, with respect to many questions of law upon which there is a conflict of the decisions in our different jurisdictions, there is much to be said on both sides, and the view followed in any particular jurisdiction is often shaped by the "equities" of the case which first presented the question to the court of last resort. In fact many courts have used the fact that the principle is in doubt, as a safety valve by which they have decided cases subsequent to the first one, according to their views of the merits of particular cases. Much is being said about the tendency of courts to follow precedent only when, by doing so, they can decide justly. It is interesting to speculate upon the attitude of such courts, toward a pronouncement, *"ex cathedra"* of the law. Will the merits of certainty, and justice in the abstract, convince such a court? Moreover the known tendency of the "doctors" to disagree will of course make it difficult to settle upon a positive statement upon close questions.

At the Washington meeting this year the Director, and the Reporters in Agency, Conflict of Laws, and Torts made reports, in person, of the progress of the work. Dean Pound also discussed the problem of Classification. It seems likely that, by the time of the next annual meeting, parts of the restatement of some topics will be ready for submission to the Institute and to other interested persons. This will mean, of course, that they have been at least tentatively approved by the legal staff and by the Council of the Institute.

Some changes in the organization of the Institute were approved at the Washington meeting. The number of members of the Council was increased from twenty-one to thirty-three. An amendment providing for a membership of 750, instead of 500, the limit previously set, was adopted. A provision was adopted that any elected member who failed to attend at least one meeting of the Institute in two consecutive calendar years, should be dropped

from the roll of elected members, but that the Council or a meeting of the Institute might, for cause shown, in any specific case, suspend the operation of the rule. It was also provided that the attendance of one fourth of all the members should be necessary to constitute a quorum at a meeting, instead of fifty members, as was the former rule.

The events of the first year of the Institute show that it is being taken seriously by the profession and the public. A corresponding reponsibility rests upon the Institute and the profession. No lawyer can afford to ignore the Institute or its work. It is quite possible that its effect upon the practice of law may be far reaching. It should have the benefit of the collective judgment of the profession upon its work, before that work is put in final form. To that end, state and local bar associations should prepare to have critical studies made of the preliminary drafts of the work, as those drafts are issued.

—J. W. M.