

THE RESTATEMENT OF THE COMMON LAW BY THE AMERICAN LAW INSTITUTE

THE organization of the American Law Institute grew out of discussions at the annual meetings of the Association of American Law Schools. These discussions began more than ten years ago. The teachers of law composing that Association had become increasingly impressed with the growing complexity and uncertainty of the common law. The thousands of new decisions annually added to our already bursting storehouses of learning were making it continually more difficult to understand, to state, and to teach the common law. To the same extent and for the same reasons the work of the practicing lawyer in advising clients and the work of the judges in deciding cases were becoming increasingly difficult. Necessarily, this situation was reflected in the published opinions of the judges. Uncertainty of mind produced confused reasoning and actual conflict in decision. Legal terminology, always shift and inexact as in the case of all the other branches of social science, became more and more inefficient in obtaining clarity of expression and more unsatisfactory to everybody concerned, as the strain upon it was increased by the rapidity and complexity of modern life.¹

Largely for the foregoing reasons, doubts began to be expressed, both by the public at large and by thoughtful members of the legal profession, that our judicial organization and our system of law were rendering adequate service to the community. In law school faculties there was much agitation for the study of jurisprudence in all its phases, particularly as regards legal analysis and terminology. It was believed that there is a science of jurisprudence and that law schools should be places for its development, and not merely professional training schools. The organization of a national school of jurisprudence was proposed a number of times; and one ill-starred attempt, wholly outside of the Law School Association, was made to organize an academy for the creation of a modern Corpus Juris.

¹ That uncertainty may also exist under a codified system of law, see Wurzel, 9 Modern Legal Phil. Series, 304, who says: "If the fact of uncertainty is to be seen in all its nakedness, one has but to observe the guessing process that goes on regarding the decisions of our courts of last instance."

At a meeting of the Association held in December, 1921, a resolution was adopted directing the appointment of a committee, with power to associate others with themselves, "for the purpose of jointly creating a permanent organization for improvement of the law." The committee thereafter appointed brought together a group of about forty men, meetings being held in May and June, 1922. The work of this group resulted in the organization of the American Law Institute at a large meeting in Washington held in February, 1923.²

At the meeting of the Association of American Law Schools that authorized the formation of "a permanent organization for improvement of the law," an address in support of the resolution was made by Judge Benjamin N. Cardozo, of New York. In that address he stated the benefits to be expected from such an organization as follows:

"You have provided here for the bringing together of all the forces that are at work in the making of the law—the Universities, the Bench, and the Bar. That, it seems to me, is a fine thing, a thing so fine and so useful that of itself it justifies this project. I hear around me on all sides an insistent demand that the work of the universities shall be supplemented by the work of the men who deal with the law in action, the men in the thick of the fight, the lawyers and the judges. There is a distrust of mere theory. The last speaker showed that there was the same distrust in Canada. At all events, I find it here; and the result has been to deny to scholarship its just meed of recognition and respect. I feel at liberty to speak with candor about this because I do not share the distrust myself; and so, in speaking as I do, I am playing, not the critic, but merely the observer and reporter. Now, in this proposed Academy you are bringing all these agencies together and inviting them to act in unison. That, it seems to me, in itself, is a great and useful work, a work that will co-ordinate and unify many forces that are acting now in isolation and antagonism. We are to substitute for the attitude of mind, the temper, that spends itself in hostility and distrust, the attitude and temper of mutual helpfulness, of willing co-operation, a fusion of diverse types and capacities and attainments. Of course, in such a process there are losses as well as gains. Sometimes one has to scrap the things that one would like to keep. One's pet hobbies are sometimes derided, and one's dearest formulas rejected. One who sits in an Appellate Court, with the necessity of convincing or placating six minds or more, becomes finally more or less inured to these scenes of carnage and mutilation. But in exchange one gains other things that mitigate

² 1 Am. L. Inst. Proc., Pt. 2.

the sacrifice. One gains a fusion of points of view; a balance, a moderation, and above all, a prestige and an authority that could not otherwise be won.

"Do not underrate, I beg you, the power that such an Academy will exert with the passage of the years. Those who begin by scoffing will end by paying the tribute of adherence and applause. Little by little, if such an Academy arises, it will establish a background, an atmosphere more pervasive than you think. And it will be true, perhaps, of this atmosphere, as it is of the air we breathe, that many who are not conscious of its presence will none the less inhale it and gain its vital force."³

Elihu Root was the chairman of the large committee that organized the Institute and outlined the work of restatement of the law that is now in process. In presenting the report of this committee to the large national meeting at Washington that organized the Institute in 1923, Mr. Root gave reasons for attempting a restatement of the substantive common law. He commented on the "increasing complexity and confusion of the substantive law," just as the members of the Association of American Law Schools had for some years been commenting. As to this he said:

"It was apparent that the confusion, the uncertainty, was growing worse from year to year. It was apparent that the vast multitude of decisions which our practitioners are obliged to consult was reaching a magnitude which made it impossible in ordinary practice to consult them. It was apparent that whatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view upon the same topic. The great number of books, the enormous amount of litigation, the struggles of the courts to avoid too strict an application of the rule of *stare decisis*, the fact that the law had become so vast and complicated that the conditions of ordinary practice and ordinary judicial duty made it impossible to make adequate examinations—all these had tended to create a situation where the law was becoming guesswork."⁴

³ Ass'n of Am. Law Schools, Proc., December, 1921.

⁴ 1 Am. L. Inst. Proc., 48. In an article making an argument against codification, "A Century of Judge-Made Law," 7 Col. L. Rev. 453, 457 (1907), Wm. B. Hornblower said: "This vast mass of decisions is appalling and one is inclined to welcome any scheme which promises relief to the bewildered practitioner."

In 1894 John F. Dillon wrote: "This colossal body of case-law is wholly unorganized. . . . The infinite details of this mountainous mass in its existing shape—bear me witness, ye who hear me—no industry can master and no memory retain. . . . As we attempt to survey it we are reminded of the dread and illimitable region described by Milton where "Chaos umpire sits, And

Mr. Root further proceeded to express his views as to the character of the restatement and the effect that it might be expected to have in eliminating uncertainty and confusion. These were, in part, as follows:

"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 that we have here, if that can be done when the work is completed, we will have a statement of the common law of America which will be the *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.

"If such a thing is done it will tend to assert itself and to confirm itself and to gather authority as time goes on. Of course it cannot be final, for times are continually changing and new conditions arise, and there will have to be revision after revision; but we will have dealt with the past and will have gotten this old man of the sea off our shoulders in a great measure."

More than six years have now gone by since the Institute was organized. To what degree is it realizing the hopes of its founders? Does the work already done afford new ground for expecting future accomplishment? Do the already published fragments of a general restatement of the common law give promise of becoming "the *prima facie* basis on which judicial action will rest" and of reducing the existing uncertainty and complexity?

Some of the benefits that were expected from the organization of the Institute and from its attempt to restate the common law are certainly being attained. In the quotation printed above, Judge Cardozo said that the Institute would bring together "all the forces that are at work in the making of the law—the Universities, the Bench, and the Bar." The experience of six years has already shown that this is true in some degree, although the three forces

by *decision* more embroils the fray By which he reigns." 1 Essays in Anglo-American Legal Hist. 512.

mentioned by the learned judge are far from being all the forces that are influential in law making. While the work of drafting the Restatement is very largely the work of university professors, the drafts that they produce are constantly subjected to the criticism of members of the Bench and Bar. This occurs to some extent in the committees that prepare the drafts, and to a further extent in the Council of the Institute and in the annual meetings at Washington. There is no doubt that as time goes on the work of the Institute will afford increasing opportunity for this co-operation of the three forces named. Within the committees actively engaged in drafting the Restatements there is a most unusual opportunity for co-operation and mutual education. Some of the committees, largely composed as they are of men from different law schools, have already succeeded in abandoning the "temper that spends itself in hostility and distrust" and in substituting the "temper of mutual helpfulness, of willing co-operation, a fusion of diverse types and capacities and attainments." Law professors here get some of the education that Judge Cardozo tells us is the constant lot of the appellate judges. "Pet hobbies" and "dearest formulas" that have been rammed down the throats of helpless students in a class room must now compete for their lives and shed their sacred blood amid "scenes of carnage and mutilation." Whatever may be the merits or demerits of the Restatements thus far prepared, the making of them has been a necessary process in the creation of better things; it is doing much to "establish a background" and to create an "atmosphere" that may enable our successors to climb the heights we do not reach.

Thus far, the committees of the Institute have prepared Restatements of large parts of the fields of Contracts, Conflict of Laws, Agency, and Torts; and much work has been done in Property and Trusts. In addition, a Code of Criminal Procedure, consisting of 296 sections with extended commentary, has been submitted to the Institute. The present writer cannot pass judgment on the merits of these various documents: first, because he would not pose as a competent expert in more than one of the fields mentioned; and secondly, because in the one field in which he might regard himself as competent, he assisted in the preparation of the documents to be appraised. The Restatements are in large part still in the course of revision; and any criticism or suggestion for betterment ought to be sent to the Reporters and Advisers who are doing the revising. There is no question that the work of the Insti-

tute is such a great public undertaking that every person having special knowledge in any field of law is in duty bound to make a careful study of the documents that are being prepared in his field and to send to the Institute all the criticisms and suggestions that he thinks to be of importance. There are certain parts of the Restatements, however, that may now properly be made the subject of published criticism and controversy; these parts have been published in the form of Official Drafts without any restriction as to citation as authority or quotation for purposes of criticism and improvement.⁵

It is proper, however, to consider several questions in the light of six years of experience in the work of restatement. The first of these questions is: Do the United States of America have a common law that can be restated? The answer to this requires a brief statement as to what is meant by "law." If by "law" is meant an unchangeable rule expressed in words and handed down by divinity or by some great human law-giver of the past, it is clear that we have no such law or system of law. Not only do the United States have no such law or system; neither does the state of Iowa nor the state of New York have such a law or system. In a comparatively recent dissenting opinion, Mr. Justice Holmes has suggested that there is no "august corpus," no "transcendental body of law," no system of "common law" outside of a particular state; and he thinks it "an unconstitutional assumption of powers" for a federal court to attempt to declare and apply within any state a rule of supposed common law that is repudiated by the courts of that state.⁶

⁵ A criticism, already published by Professor Whittier, will be considered further on in this article.

⁶ "Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind

The present writer is quite in agreement with Mr. Justice Holmes if he means an august corpus of universal and unchangeable rules; but he is no more able to find such an "august corpus" within the confines of the state of Iowa than in all of the United States put together; and he believes that the federal courts are just as fully authorized to declare and build up common law in the cases properly arising before them, as are the courts of a single state.⁷ The result may occasionally be added conflict; but it is nothing new in either kind or quality. A stated rule used by either court as a basis of decision must fight for its life, whether the rule is enunciated by a state court or by the United States Supreme Court.

The common law of the state of Iowa, the law that has been applied and will be applied to the citizens and the transactions of that state, is determined by the great multitude of adjudications in all the courts that have jurisdiction of such citizens and transactions under our complicated governmental organization. Included therein are the federal courts of the United States, declaring and creating the common law of Iowa by the very same consent and authorization as the Iowa supreme court itself. When the United States Supreme Court declares and applies the common law with respect to men and events within the confines of Iowa, there is "definite authority behind it" and there is no "unconstitutional assumption of power." Each court will no doubt pay some meed of respect to the decisions and restatements of the other, occasionally interspersing "scenes of carnage and mutilation;" and together they will continue to lay the foundation for all the new restatements of the future.

With respect to what is called the common law, the English and American courts did not begin with a great body of already crystallized rules. They did not begin even with a set of extremely broad principles; for if there is any difference at all between a principle and a rule of law, it lies only in arbitrarily adopted definitions, making the one a broader generalization than the other. Instead, the common law as a system is the result of centuries of growth.

it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else." *Black & White Taxi & T. Co. v. Brown & Yellow Taxi & T. Co.*, 276 U. S. 518, 48 Sup. Ct. 404 (1928).

⁷ See "The Common Law and Our Federal Jurisprudence" by Chief Justice von Moschzisker in 74 Pa. Law Rev. 109.

It has been constructed by hundreds of thousands of decisions in actual cases. These decisions show a greater or less degree of uniformity and consistency. Precedents are in fact followed. History repeats itself in judicial and administrative conduct, as well as in political events. The extent of this uniformity and consistency is such as to make prediction possible, and thus to enable the members of the legal profession to earn their living by giving advice in advance and preventing litigation, as well as by acting as advocates after disputes have arisen and litigation is begun. The common law consists of this uniformity and consistency in judicial and administrative conduct. Its rules and principles are statements in words of this uniformity and consistency. In this fundamental aspect the common law is no different from the laws that we think we have discovered in physics or in chemistry. A law is a statement of uniformity in the past sequence of events, based upon the recorded observation of those events, by the help of which we believe that we are able to predict the future course of events. This is true, whether the uniformities that have been observed are uniformities in judicial action or uniformities in the conduct of atoms or planets or suns.

Human observation of events, however, is often inaccurate and is always incomplete. The stated laws of physics and chemistry have continually had to be restated in the light of wider observation and more nearly correct analysis. In the same way and for exactly the same reasons, we have had a continuous series of restatements of the common law, from the very earliest times of which we have a record down to the present. The work of the American Law Institute is merely the latest of these restatements; but instead of its being the restatement of a single jurist or legal scholar working alone in his closet, it is being prepared by a large and diversified group of men working through special committees of jurists and scholars. The efforts of these committees are not restricted to the finding and stating of uniformities of judicial action within a single state. They are attempting to state the uniformities that may be found in the judicial action of many courts in all of these United States.

In this attempt they must assuredly find thousands of instances in which there is no perfect uniformity of judicial action. They find variation from the past and conflict in the present. In some instances the conflict may be so great as to make it impossible for the Institute to assert the existence of any uniformity—to state a

rule of law. In other cases of conflict, the Institute may be able to lay down a rule as representing the prevailing "weight of authority." In rare cases the Institute, with a greater or less degree of wisdom, is adopting a minority rule, hoping to direct the stream of decisions in this manner by using its influence and authority in the judicial community. In this, the Institute is doing no more than every jurist of the past has individually done when he states and approves one of two or more competing rules and recommends its use to the community.

In spite of a high degree of uniformity, of the following of precedents, of repetition of the past, there has always been also the element of variation from the past. This variation is at times ignorant and unintentional. At other times it is the result of a conscious choice by the judges. Whatever the cause and however successful or unsuccessful a particular variation may be in satisfying human needs and promoting happiness and survival, it must be taken into account in any restatement of the law. It is this variation that has caused the long series of restatements in the past and that must cause a continued series of new restatements in the future. The restatement by the Institute, if well done, may tend to reduce the amount of ignorant and unintentional variation; it may reduce, but it cannot and should not prevent, that conscious variation that is based upon new experience, changing conditions, and new customs and desires.

Assuming that there is now need for a restatement of the common law in the form of a system of new generalizations from the welter of individual decisions, is the Institute sufficiently taking into account the recent variations already evidenced in court decisions and also the social mores and business practices that are already ripe for new variations that must inevitably take place? The answer to this is easy; most certainly the answer is No. Doubtless, from the standpoint of the less active members of the Institute, the production appears to be making very slow progress; but from the standpoint of an active participant, it seems to be going altogether too fast. No Reporter or Adviser is able to spend more than a fraction of his time and strength on the work; and while each section is reasonably sure of several serious discussions and revisions, it is anything but sure of being founded upon a new and exhaustive examination of the cases. There should be much more paid assistance and a little less pressure for results. Lawyers, teachers, and research scholars have an excellent opportunity for

supplementing and amending the work of the Institute. With respect to some one or more sections, they can collect the court decisions and make a comparative study of them much more exhaustively than is possible to the force now available. On the basis of this study, new and more accurate generalizations can be drafted. Thus gradually the hope of Mr. Root may be realized that the Restatement will deserve to be accepted as a sound *prima facie* basis for judicial action.

So far as new social mores and business practices are concerned, there is no research machinery for their discovery. The present writer believes, however, that if there were such machinery, it would be influential in affecting the Restatement only in very limited fields. Before this great community for which the Restatement is being made would be willing to adopt it, its doctrines must have received approval and application in some litigated case. Ardent reformers and confident legislators often believe that they are wise enough to generalize for the future; but experience indicates that the best way to turn mores into law is to do it piecemeal by the "molecular motion" of the courts.

This is no argument against research into the economic and social life around us. Every university law school is, no doubt, already engaged in it on a greater or smaller scale; and no law school should be allowed to prepare men for the Bar without being fitted to engage in it and actually doing so. One of the great functions of the Institute in the future will be to provide machinery for this research and to make its wheels go round. Those who believe that certain sections of the Restatement are ancient and out-of-date rules, should at once get busy and prove it publicly.⁸ Such work forms the basis of the new and constant revisions that are to come. But we should remember that new social mores and business practices are in general forced upon the attention of our courts about as soon as they can be described as "prevailing." It is no new or surprising dogma that custom makes law. As fast as custom can

⁸ Concerning the proposed Code of Criminal Procedure, Judge Harry Olson, of Chicago, speaking at a meeting of the Association of American Law Schools in December, 1928, said: "I occasionally sit in with a committee in New York of the American Law Institute who are revising the Criminal Code for the United States; and we are working on the authorities—what judges have said, what courts have said—and we are collecting it all. I do it with great impatience, because I realize that the law upon which the decisions of those courts were based is often fifty years behind time."

safely be turned into law, the courts generally do it; and the Institute will be willing to recognize it. In general, it is best to trust to the recent judicial decisions and to the collective wisdom of a number of selected men. While there is danger that they may not have the time or industry to collect all the decisions and that they may not carry the latest mores in their collective bosoms, the danger involved in stating unadjudicated mores and practices as existing law would be much greater.

Among the benefits that can already be seen slowly emerging from the work of the Institute is the development of a greater certainty and uniformity in legal terminology. If one thing more than any other has been demonstrated by this co-operative community undertaking in making a restatement of the common law, it is the fact that each jurist and scholar, however eminent and however accustomed to the writing of law books, is continually surprised and frequently chagrined by finding that his most cherished and careful generalizations, his dearest formulas, and the legal verbiage to which he has been most religiously wedded convey no clear and definite idea to the benighted minds of the judges, lawyers, and scholars who constitute the other members of the various committees and the Council of the Institute. But the "scenes of carnage and mutilation" in the field of language are nearly always followed by the confession of error and the forgiveness of sin. Out of them there usually emerges a form of expression that is reasonably intelligible to all the members of the restating committee. This is one important step in our eternal struggle for a common tongue. A black letter statement that is finally adopted may still be found to be made up of variables and modes of expressions that may have had their origin on the tower of Babel; but they have the merit of being the survivors in a struggle with other forms of expression that almost invariably are worse. The straining for definiteness and certainty may at times lead the Institute to declare the existence of a uniformity and of a rule of law that in fact does not exist; but at least we are being spared the repetition of those noble labor-saving devices of the encyclopaedist and the hack text-writer, such as "some courts hold" and "probably the better rule is."

The productions of the Institute should receive constant criticism, both destructive and constructive, from within the membership of the Institute and from without. There will be found bad analysis, classification, and terminology. There will be turgidity and com-

plexity of style. In places there will be unfilled gaps where the law should have been stated; and in other places there will be labored efforts to cover unimportant details and to express every possible limitation and exception.⁹ There will be failure to recognize the obsolescence of old rules through disuse by the courts and to realize the existence of new rules already immanent in the more recent decisions and in the life around us. The men available may not be sufficiently expert or sufficiently numerous; and some that are expert and available may not be enlisted. There are problems here to be solved and weaknesses to overcome. The German Civil Code is said to have required twenty-two years for its completion. It has received high encomiums and severe criticism. As applied by officials with narrow experience and dull minds, it may at times result in decisions as harmful as would have been rendered without it. We may be sure that the Restatement of American Law will have imperfections and that new ones will develop in the future; and we should see to it that the American Law Institute is given immortal life in order to have the machinery constantly at hand for their correction.

A critical article, admirable in form and spirit, dealing with the statement of the law as to mutual assent as it appears in the Contracts Restatement, has already been published by Professor Whittier.¹⁰ He expresses adverse criticism of some of the sections on the topic in question. No doubt there are other sections with which he is not altogether satisfied; and no doubt there are many sections with which other jurists will find serious fault. Other critical

⁹ Montesquieu, in his "*L'Esprit des Lois*," gave us a number of observations on the manner of making statutes, which are equally applicable to any restatement of the law made by anybody. Among these observations, are the following:

"The style of statutes should be concise.

"It ought to be simple; a direct expression is always more easily understood than an indirect one.

"It is essential that the words used in a statute should suggest the same ideas in all men.

"Statutes must not be subtle; they are intended for people of average power of understanding.

"When a statute does not need exceptions, limitations, or qualifications, these ought not to be inserted; such details will create the need for new details."

¹⁰ Clarke B. Whittier, "The Restatement of Contracts and Mutual Assent," 17 Calif. L. Rev. 441 (1929).

articles will be certain to appear; and the effect of the Restatement upon the decision of cases by the courts and upon the formal opinions of the judges, will soon begin to be apparent. All such material as this should immediately be collected by the Institute and put into the hands of its committees of restatement. Not only should such material affect the revisions to be made by the present committees; it should be continually collected and preserved by the Institute for the use of future revising committees, to whom the entire Restatement may be periodically referred.

It seems proper for the present writer to come to the support of the existing official draft, by considering a few of the criticisms made by Professor Whittier. It should not be supposed, however, that the Reporter and his Advisers have always been in entire agreement as to the merits of the official draft, either in form or in substance. That draft is the net result of argument and discussion. There have been "scenes of carnage and mutilation." They have become "inured" to these scenes; and, to a sufficient degree, they have acquired a "moderation" and a "fusion of points of view" to make them feel justified in submitting the whole result to the Institute for adoption and for further improvements, and in assuming such responsibility as appears to be involved in the titles of Reporter and Adviser.

It was somewhat surprising to find that Professor Whittier attacks "the objective theory" of contract. No doubt it would have been profitable if this attack could have been made at the personal conferences of the committee. The present writer is not in any case speaking for the Reporter or for any other Adviser; but he feels sure that the Restatement would not be improved by the adoption of a "subjective" theory of contract, instead of the "objective" theory. The fundamental reason for this is that the subjective theory is based upon the unprovable assumption that "intention" means something other than manifestation; that it means a state or condition of something that we are pleased to call a "mind," as opposed to physical body.¹¹ When courts and text-writers and the Institute speak of "intention" as a fact having legal operation, they are merely using a common form of expression

¹¹ The very same difficulty exists when we attempt to determine the "intention" of a legislature or of one legislator. See Kohler, "Judicial Interpretation of Enacted Law," 9 *Modern Legal Phil. Series*, 187, 195; Gray, *Nature and Sources of Law*, §370.

to say that certain types of manifestation are operative and that others are not.

It may or it may not be wise to use this common form of expression in Sections 55, 71, and 72. They could have been stated in terms of manifestation alone, in more apparent harmony with an "objective" theory. But one who attempts to state any part of our law must at many points yield to the necessity of speaking in the tongue that is in common use, even though it is not as exact and scientific as he thinks himself capable of making it. A limited distance in abandoning certain usages he may safely go; the safe distance for inventing new terms and usages is considerably less. It is not here being asserted, however, that these three sections do not betray the influence of a subjective theory of contract. Even if so regarded, they merely indicate that the objective theory has its limits; and surely no greater fault can be found than with the form of statement that agreement in "intention" is necessary, but that there are exceptions where one party was negligent or where words have a meaning of which he was not aware.¹²

Objective manifestations take many forms; they may be oral or written words, hand motion in the language of the deaf and dumb, a nod of the head, or other visible bodily movements. Also, they might conceivably be heart beats or nervous reactions perceivable only with the aid of some scientist's delicate machine. But if the truth is that it is by objective manifestation alone that we can affect others, we should not begin a restatement of contract law by saying that there must generally be a subjective meeting of minds, an agreement in intention, as differentiated from expression.

The sufficiency of a manifestation to produce a certain legal ef-

¹² It seems clear to the writer that the "objective" method is always used by the courts in interpreting written contracts. The parties are bound by what they *said*, objectively interpreted. The courts do not undertake to discover what the parties *meant*, in any subjective sense; and they hold a party bound by what he said, even though he was not "negligent" in his choice of words. Negligence followed by change of position may work an estoppel; but negligence in the choice of words is seldom made an issue in the interpretation of a contract. It is far too limited a view of contract to hold that agreement in subjective intention is necessary except where a party is "negligent."

Professor Walter W. Cook wrote: "It is fundamental in the law of contracts that a person is bound, not by his real, but by his manifested intention, *i.e.*, by his intention as manifested to the other party." "Agency by Estoppel," 5 Col. L. Rev. 36 (1905).

fect is always a question for judicial determination; this is true even though the manifestation consists of oral or written words. Further, what conduct constitutes a sufficient manifestation under one set of circumstances does not constitute one under another set. It is believed that, whenever the courts or the Institute say that intention is the operative fact, the only meaning that is capable of practical application is that the manifestations that will be operative are not the same as in other cases.

The conflict between subjective and objective theories is not a new one.¹³ It existed in the views of Sir William Anson and Professor T. E. Holland. In his work on Contracts, the former wrote:

"Dr. Holland's view (Jurisprudence, ed. 11, p. 258) is that the law does not require contracting parties to have a common intention, but only to seem to have one, that the law 'must needs regard not the will itself but the will as expressed.' Our difference may be shortly stated. He holds that the law does not ask for 'a union of wills,' but only for the phenomena of such a union. I hold that the law does require the wills of the parties to be at one, but that when men present all the phenomena of agreement, they are not allowed to say that they were not agreed. For all practical purposes, our conflict of view is immaterial."

In this conflict of theory the present writer agrees with Holland, and not with Anson. He finds that the actual decisions of the courts can best be explained on the theory of agreement in expression, rather than agreement in intention. The legal operation of the words of an agreement depends upon their effect upon other people, and not upon the state of mind of the party using them. It was said by Lord Watson:

"The appellant contracted, as every person does who becomes a party to a written contract, to be bound in case of dispute by the interpretation which a court of law may put upon the language of the instrument. The result of admitting any other principle would be that no contract in writing could be obligatory if the parties

¹³ See the discussion of "Proof of so-called Mental Facts, especially the Intention of Parties" by Wurzel in 9 Modern Legal Phil. Series, 394. He says: "From the beginning two theories have been contending with each other and neither has been able to gain a foot of ground. One is the theory of expressed intention, placing most stress on the declarations the party has actually made and which, therefore, has an objective existence. The other theory is that of the real intention. It seeks to discover behind the declaration the actual psychological processes of which the declaration was the result."

honestly attached in their own minds different meanings to any material stipulation."¹⁴

In another case it was said by Lord Sumner:

"I dare say few assured have any distinct view of their own on the point and might not even see it if it were explained to them. But what they intend contractually does not depend on what they understand individually."¹⁵

It is to be observed that Sir William Anson thought that for all practical purposes the conflict of view is immaterial. Evidently he thought that the rules of court action constituting the law of contracts would be the same and would lead to the same results, whichever theory as to mutual assent is adopted. There is a material difference between a rule of court action and a theory of contract; and it is true that the theory is of importance only as it influences the substance and application of the rules and as it clarifies them to the reader. In the present instance Anson was probably wrong in thinking that the theory held does not affect the judicial decisions made. The present writer is confident that the actual decisions being rendered cannot be explained and their rules restated without making use of the objective theory. There are too many thousands of cases in which a contractor has been held bound in accordance with his objective expression, even though he could convince both a court and a jury that he never had a consenting mind to the agreement enforced by the court and also that he was not negligent in his choice of the expressions used.

With respect to the case of the ship "Peerless" which is used as an illustration under Section 71,¹⁶ it is believed that there was no contract, not because of the absence of a meeting of two hypothetical "minds," but because the objective expressions of the two parties were not in agreement and did not so identify the subject matter of the contract as to make it enforceable. In the light of the surrounding facts, the words used by the two parties might equally well be taken to express any one of the following: (1) agreement to sell the cotton on the October "Peerless"; (2) agreement to sell the cotton on the December "Peerless"; (3) a promise to sell cotton on the October "Peerless" and a return promise to

¹⁴ *Stewart v. Kennedy*, 15 App. Cas. 108, 123 (1890).

¹⁵ *Becker v. London Assur. Corp.*, 117 L. T. 609 (H. L. 1918). See further Pollock, *Contracts* (9 ed.) 5.

¹⁶ *Raffles v. Wichelhaus*, 2 H. & C. 906 (Exch. 1864).

buy cotton on the December "Peerless"; (4) a promise to sell cotton on the December "Peerless" and a return promise to buy cotton on the October "Peerless." The decision has been explained by Mr. Justice Holmes on the objective theory, when he said that there was no contract in this case not because the parties meant different things, but because they said different things.¹⁷

The present article cannot undertake to deal at any length with Professor Whittier's objections to the substantive rules laid down in specific sections, such as 36, 41, and 43-47. No doubt the restating committee would have been affected in some degree, had his objections been made face to face during discussion. One's confidence cannot help being affected when he finds that his "pet hobbies" are derided and his "dearest formulas" are rejected, by men who seem in other matters to have a modicum of intelligence, after he has had unlimited opportunity of oral argument before them. It is certain, however, that no draftsman will be affected by a criticism that a stated rule is "unsound in principle" when the only "principle" that is alleged to make the rule "unsound" is one that the draftsman does not accept. The common law does not have any substratum of grand eternal principles on which it rests, except that judicial decision and administrative action should continually be readjusted to the needs and desires of mankind. Argument from "principle" almost always involves a subtle begging of the question.

It will be interesting to discover how many would be willing to accept a rule that the revocation of an offer is effective as soon as the offeror has used "all reasonably possible haste" in starting it on its way. The justification for holding that the offeree's acceptance is operative, even though the revocation by the extraordinarily diligent offeror is lost by an act of God, or for other reasons not involving any negligence is not received before acceptance, is that the rule is in operation and is not giving dissatisfaction.¹⁸ It may

¹⁷ "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct. If there had been but one 'Peerless,' and the defendant had said 'Peerless' by mistake, meaning 'Peri,' he would have been bound. The true ground of the decision was not that each party meant a different thing from the other . . . but that each said a different thing." Holmes, *The Common Law*, 309.

¹⁸ See the following cases in which a revocation was started before any acceptance: *Patrick v. Bowman*, 149 U. S. 411, 13 Sup. Ct. 811 (1893); *Hen-*

be that the contrary rule would also work reasonably well. There are plenty of rules of law that might equally well have been otherwise.

The rule of *Dickinson v. Dodds*¹⁹ stated in Section 42 was limited by the Reporter to sales of property because some of his Advisers, not including the present writer, believe that the rule is not "fundamentally sound." The stated rule, therefore, was limited in accordance with the facts of the only judicial decisions that thus far support it. It should be observed that there is nothing in Section 42 to prevent a court from applying an exactly similar rule in cases that do not involve sales of property. This is a good illustration of a fact that should be insisted upon over and over again. This is that the Restatement being constructed by the Institute does not purport to be a closed, perfect and complete system of law. If it is offered as constituting such a system, it would do tremendous damage to the community but for the fact that the actual decisions of the courts would promptly riddle the pretension so full of holes that it would cease to obstruct the view. While the present writer does not agree with all of Professor Whittier's criticisms, his attitude toward the Restatement and its use by the courts is exactly the same. "He hopes that it will not be considered oracular. That would hamper the growth of the law and establish permanently some things that should be given further consideration."

The form and character of the Restatement are now sufficiently established to raise the question as to its effect upon the courts and upon students of law. It is evident that the Restatement is not a Code of laws. It does not purport to be imposed upon anybody or to constitute a conclusive basis of decision. Therefore, not only should it not in any serious degree operate to limit the development of law in accordance with changing conditions, practices, and mores; it should not even become the basis of extended commentaries or the subject of textual interpretation. It is materially different from the Negotiable Instruments Law, the German Civil Code, and the Code Napoleon. The continental codes have been severely

thorn v. Fraser, [1892] 2 Ch. 27, revocation mailed several hours before acceptance; *Stevenson v. McLean*, L. R. 5 Q. B. D. 346 (1880), revocation telegraphed 9 minutes before acceptance and received only 12 minutes after acceptance; *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344 (1880); *Thompson v. James*, 18 Scot. Sess. Cas. (Dunlop) 1. Text-writers on contracts seem to be uniformly in agreement. See Anson, Pollock, Salmond, Williston, Page.

¹⁹ 2 Ch. D. 463 (1876).

criticized by the sociological jurists of Europe as having led to much barren textual interpretation, to the narrowing of judicial minds, to the destruction of "free decision," and to the divorce of statutory law from the "living law"—the actual practices of business and social life.²⁰ If the practices of a community come to be greatly disregarded of what the codes say, it may become more important for a lawyer and a business man to know the common practice than to know the "law." Such a situation must frequently lead to great hardship and radical dissatisfaction with government, unless the courts and executives are wise enough to modify the printed word by liberal "interpretation" and judicious fiction.²¹ The moral sanctions—that is, the expressions of approval and disapproval by our neighbors—may be sufficient to prevent many disputes and violent conflicts; but when they fail, there must

²⁰ Professor Lambert rebels against "the sterile and discouraging methods of the 1800's which have paralyzed juristic thought in France." 9 Modern Legal Phil. Series, 251. He says: "No sooner had the Civil Code been promulgated than observation of the incessant action of juridical evolution was laid aside for the easier study of legislative texts. Scientific study gave way to mere commentary. Interpretation was deluded into the belief that the Civil Code and the few laws which have completed it and modified it would serve indefinitely to answer all the juridical problems which the practice of affairs gives rise to each day." With respect to the German Civil Code he adds: "Codification immediately stimulated in Germany the spread of that narrow and sterile method which during the 1800's had paralyzed the work of our own 'school of expounders of the Civil Code.' The already abundant literature upon the German Civil Code presents a striking similarity to those first products inspired by the French Civil Code."

Alvarez, 9 Modern Legal Phil. Series, 447, says: "Judges and jurists have believed that after codification they did not possess the same powers of interpretation as before under early French law or under Roman law. They believed that their only function was to apply the strict letter of the law and to search for the intent of the legislators in cases presenting novel problems, without a thought whether these new situations were susceptible of the same sort of regulation as that already provided by legislation. But we have also seen how, in the course of the 1800's, in spite of a superstitious regard for the letter of the law they yet tried (timidly, it is true, under the guise of interpretation) to adjust codified law to the new exigencies of practice, by rendering it more flexible, by expanding it, or even by creating new rules."

²¹ Some of the European critics seem to direct their attack merely at the codified rule as textually interpreted by professorial jurists and not at the court decisions dealing with the living problems of men. They include the latter in that "living law" for which they yearn. See Lambert, 9 Modern Legal Phil. Series, 251; Ehrlich, *id.* 47 ff., distinguishing "lawyers' law" from "statutory law."

be appeal to a state organization, and its action should be of a kind that gives general satisfaction. If it fails in this, business is strangled, success in the competition with happier nations is made impossible, destructive outbreaks and lunatic experiments are sure to occur. A people is bound to go under in the struggle for existence if it has not the capacity to perfect an organization so that its judicial and administrative action is reasonably uniform and in harmony with the prevailing and deeply approved mores.

It should be observed, however, that this unfortunate situation may arise not merely from the attempt of a despot to impose his will upon others or from an ill-judged reception of a foreign code or system in disregard of the native civilization; it may arise also because the atoms composing the molecule become unruly, because the people become too numerous and too varied in their practices and interests, because there are no "prevailing" and uniformly approved mores, because the arm of the state becomes palsied with uncertainty and the guiding hand that leads along the main traveled road to contentment is missing. The work of the Institute is an attempt to state anew what the practices and customs of this great and seething community now are, as they are evidenced by innumerable instances of judicial action at the pin-points of strain and conflict. It is an attempt to demonstrate and to state in words the uniformities (the rules) that are to be found in those innumerable instances and to make a selection and a recommendation from among competing rules and practices. It is an attempt to analyze and classify and define, at a time when such reorganization work appears to be loudly demanded, and thus supply a guiding hand to those who may desire guidance in directing the strong arm of the state.²²

Is the attempt likely to be successful? Will judges be able to understand the Restatement and be willing to be guided by it? This is yet to be seen. Judge Cardozo predicted that "those who begin by scoffing will end by paying the tribute of adherence and

²² Ehrlich, who certainly cannot be justly accused of underestimating the sociological aspects of law, says: "The codification of the law actually in force becomes a necessity after the body of lawyers' law has increased beyond a certain point. Notwithstanding some undeniable drawbacks, such codification seems to be advantageous on the whole. By summing up the entire course of legal development to date, it creates some sort of order out of the chaos of the law,—which, in the course of time, tends to become an impenetrable wilderness even to the most skillful." 9 *Modern Legal Phil. Series*, 61.

applause." But he is himself the presiding judge in a court that has already refused to apply Section 164 of the Contracts Restatement.²³ Elihu Root predicted that we shall have "a statement of the common law of America which will be the *prima facie* basis on which judicial action will rest," and that, while it cannot be final and there must be revisions, "we will have dealt with the past and will have gotten this old man of the sea off our shoulders in a great measure."

During the six years following their statements, these two learned men must have had some moments of apprehension and strong temptation to repudiate their predictions; but it may be that they still have hope. It will always remain open to individual courts to feel themselves as competent as the Institute to analyze and classify and to select among competing rules and practices. A *prima facie* basis does not have to be used; but it does not lie in the mouth of the present writer to say that it will not "gather authority as time goes on."

It has often been said that "taught law is tough law." Will the Restatement become the taught law? There may be some hope that it will. Not that the Restatement will be used as a text to be memorized and repeated; it certainly ought not to be. But in the discussion and criticism of judicial decisions, and even in the consideration of social mores and economic theories, when the learned instructor reports that some courts hold *this* and some theorists assert *that*, he must now add that the American Law Institute says *the other*.²⁴

²³ The New York Court of Appeals declared that Section 164 of the Contracts Restatement does not state the law of New York. *Langel v. Betz*, 250 N. Y. 159, 164 N. E. 890 (1928). There were previous New York decisions *contra*; and the court did not feel ready to overrule these decisions, in order to be in agreement with the Institute.

²⁴ Professor Lambert has shown that, in their treatment of a codified system of law, law professors and commentators may be far more subject to criticism than are the judges of the courts. See 9 Modern Legal Phil. Series, 251. Some of his statements are as follows: "Its principal effect has been to create a chasm that widens each day between the theory of text-writers and the rules created by judicial decisions. . . The law expounded in class room and textbooks differs more and more from that applied in the courts. . . On the one hand we shall have a body of "taught law" ("doctrine"), a system fallen into disuse, having a merely conventional and fictitious existence; and on the other hand the rules as applied in the courts, the system which is really in use."

There are very many places in the law where economic needs and social desires are not sufficiently clear to point definitely to one rule rather than another. In such a case the selection made by the Institute may well be accepted. In other cases the courts may have made a false start and then been induced by the doctrine of *stare decisis* to camouflage their subsequent contrary decisions by obvious fiction, confusing terminology, and distinctions without a difference. A large part of the existing confusion and uncertainty is directly due to these two causes.

In many instances there has been obfuscation of intellect by such terms as "privity of contract;" and yet the court will render a just decision in favor of a third party beneficiary by saying that "the law creates the privity."²⁵ The House of Lords has been heard to say that "our law knows nothing of a *jus quaesitum tertio* arising by way of contract,"²⁶ while four years later it gave judgment in favor of a third party on the theory, totally unimagined by the contracting parties, that the promisee had acted as a "trustee" for him.²⁷ The New York courts held that a third party could get no enforceable right unless the promise was to perform an existing obligation owed to him by the promisee;²⁸ and then they held that this requirement was fully satisfied in one case where the promisee was the husband of the beneficiary and was causing her enrichment by buying her a gift of \$50,000,²⁹ and also in another case where the promisee was the rich aunt of the beneficiary and was merely trying to make a donation for her beloved niece's future support.³⁰ In many cases they say that the third party has no legal right unless the contract was made intentionally for his benefit;³¹ but at the same time they hold that, when a debtor arranges for the payment of his debt by another person, he is making the contract not for his own benefit, but for that of his creditors, thus enabling them to maintain action.³²

²⁵ *Brewer v. Dyer*, 7 Cush. 337 (Mass. 1851).

²⁶ *Dunlop Tyre Co. v. Selfridge*, [1915] A. C. 847.

²⁷ *Les Affreteurs v. Walford*, [1919] A. C. 801.

²⁸ *Vrooman v. Turner*, 69 N. Y. 280 (1877).

²⁹ *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724 (1899).

³⁰ *Seaver v. Ransom*, 224 N. Y. 233 (1918).

³¹ *Simson v. Brown*, 68 N. Y. 355 (1877); *Blymire v. Boistle*, 6 Watts 182 (Pa. 1837).

³² *Lawrence v. Fox*, 20 N. Y. 268 (1859), followed in numberless cases. In

In cases of this kind it is possible for the Institute to cut boldly through the labyrinth of verbiage and build a straight path by which courts and teachers and students may reach directly and without difficulty the firm ground to which the courts in the great majority of cases, after a long struggle in the morass, have actually already arrived.³³

It is possible that laymen and members of the Bar may be led to expect too much of the Restatement. They may expect simplicity, where life is itself too complex to permit of simplicity. They may expect finality, when the truth is that no legislator or jurist has the capacity to anticipate or to control the future. They may expect near perfection, as a result of what seems to them a mighty effort of scholars and jurists. These they will not get; and the ensuing judicial development of the law ought soon to disabuse their minds of the error. It may still be hoped, however, that they will get a better systematic statement than they have had before, one that will itself mark some progress in the evolution of law and society.

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Pennsylvania there is a line of cases *contra* to *Blymire v. Boistle*; these include *Delp v. Bartholomay Brewing Co.*, 123 Pa. 42, 15 Atl. 871 (1888), and *Howes v. Scott*, 224 Pa. 7, 73 Atl. 186 (1909).

³³ In *Schneider v. Ferrigno*, 147 Atl. 303 (Conn. 1929), the court was aided by sections 133 and 135 in holding that a mortgagee could maintain suit on a promise made by the purchaser of the mortgaged premises to assume and pay the mortgage debt, even though the promisee was a party who was not himself bound to pay that debt.