

F. of I. No. 1

AMERICAN LAW INSTITUTE

THE FUTURE OF THE INSTITUTE

REPORT NO. 1 ON THINGS
TO BE CONSIDERED AND HOW WE SHOULD
PROCEED TO CONSIDER THEM

Submitted by the
Director
to the
Executive Committee
November 30, 1928.

I. INTRODUCTORY

To the Members of the Executive Committee:

I believe we all feel that the time has arrived when those of us who are primarily responsible for the guidance of the Institute should begin to give serious consideration to its future.

It is now nearly six years since a representative meeting in Washington of the bench and bar formed a permanent organization for the improvement of the law, and began the work on the Restatement of the Law; the one "specific work of importance" selected to be undertaken "on its foundation". (Vol. I. Proc. Am. Law Ins.) The Institute has succeeded better than those of us most concerned with its foundation then dared to hope. We find ourselves in the position of counselors and guides of an organization which is already recognized by the leaders of the bench and bar in the several states as, not only in name, but in fact the permanent agency through which the legal profession may perform its public obligation, to do constructive legal work for the improvement of law and its administration. This of itself would be sufficient to impose on us a duty to give serious consideration to the question how the Institute may best prepare itself properly to perform this important function. In addition, however, we are confronted by the fact that the generous donation made by the Carnegie Corporation on March 16, 1923, of \$1,075,000 for work on the Restatement of the Law at our present rate of expenditure will be exhausted on December 31, 1931. If we are to maintain our present working force at its existing efficiency, problems which confront us in relation to our

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future should be solved at least a year before that date, or December 31, 1930. The time we have to work out these problems is none too long.

As indicated by its title, it is not the object of this Report to make even tentative recommendations as to the future organization and work of the Institute; its object is to point out some of the chief things which should be considered and to make recommendations in regard to how we should proceed to consider them.

II. Summary of Things to Be Considered

The things to be considered may be divided into four classes:

(1) those pertaining to the continuation and completion of our work on the Restatement of the Law

(2) those pertaining to work other than that on the Restatement

(3) those pertaining to the organization of the Institute and the character and place of its permanent home, if any.

(4) those pertaining to the method by which plans for the future of the Institute should be considered and matured.

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III. THINGS TO BE CONSIDERED PERTAINING TO THE CONTINUATION AND
COMPLETION OF OUR WORK ON THE RESTATEMENT OF THE LAW.

At present we are undertaking to restate seven Subjects:

Agency, Business Associations, Conflict of Laws, Contracts, Property, Torts, and Trusts. We hope to finish the work on the Conflict of Laws in the spring of 1930; the work on Agency, Contracts and Trusts Laws in the spring of 1931. By "finish" I mean be prepared to publish the final official drafts covering the Subject. At the present rate of progress on the remaining Subjects while we shall have completed significant portions of each of them which may be separately published by December 31, 1931, large parts will remain to be done.

You will observe that the heading of this Part of this Report embodies the idea of the completion of our work on the Restatement. The extent of the law is so wide that it would not be difficult to conceive the work of its orderly restatement going on indefinitely. On the other hand, we have already confirmed our first opinion that, while the Restatement is not rigidly confined to statements of the common law, it is primarily an orderly expression of the common law. Therefore, where the common law has been the subject of non-uniform statutory abolition in many States, there has been a proper tendency to refrain from treating elaborately the common law pertaining to the topic. I believe that the entire body of the common law is not for purposes of orderly restatement a field of vast and indefinite extent. It is practically possible to regard the Subjects on which we are now engaged

together with other well-known Subjects to which I shall refer in a moment as composing the main body of the common law. Considered in this way the work remaining to be done after December 31, 1932, may not be so great that we cannot plan to complete it in a further period of eight or ten years from December 31, 1931.

It is very desirable that we should visualize the Restatement in this way. There is a stimulus which will affect ourselves and all others engaged in the work if we see it as a completed whole; to be done, if not tomorrow or the next day, at least within a few years. I am assuming, therefore, that we shall want so to plan our further work as reasonably to be confident of completing what we may term the first Restatement of The Common Law in eight or ten years from January 1, 1932, that is perhaps by 1940 or 1942.

Under this assumption the first thing to be considered is the work which will yet have to be done on Business Associations, Property and Torts, and what, if any reorganization of the respective forces now working on these Subjects should be effected to insure their completion by 1940.

Two years ago, although the work on Torts had then proceeded far enough to enable us to make at least an attempt to foretell the time probably necessary for its completion with the existing organization of the Group working on the Subject, the work on Business Associations and Property had not advanced far enough to enable us to make even an educated guess in respect to the probable time of completion. Today, however, after I shall have had conferences with the respective groups working on these Subjects, I hope to be in a position to make estimates in which we can have confidence.

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A somewhat more difficult task but one which it should not take very long to perform is the determination of those Subjects on which we are not now working which should be included in any Restatement of the Common Law. Following the terminology of the modern law school curriculum the principal common law subjects not included in the scope of the Subjects on which we are already engaged are Criminal Law, Equity Jurisdiction, Evidence, Admiralty, the Law of Persons and Domestic Relations, Associations Not For Profit and Municipal Corporations. Besides these there are special types of Contracts and analogous relations which lie outside the work as now planned for the Contracts, Property or Torts groups, as Insurance, Sales, Promissory Notes, Bills of Exchange, Suretyship and Mortgages, and Quasi Contracts. Conflict of Laws as originally planned included jurisdiction for the purposes of taxation. At a cost of approximately \$4000 a very considerable work was done, the results of which, principally in the form of preliminary drafts and manuscripts for Mr. Beale's Treatise, are the property of the Institute. We decided to omit the Topic from Conflict of Laws, not because it could not fairly be considered as part of that Subject, but because we found ourselves considering matters with which the Conflict of Laws group as constituted regarded themselves as not fully competent to deal. The question of the utilization, by the Restatement of this Topic, of the material already collected, is one of the things to which careful attention should be given.

In mentioning these Subjects, I purposely refrain from expressing at this time any opinion as to whether all should be included, and if not which ones, in what we may call the second half of our work on the first Restatement of the Common Law. Our ultimate conclusions properly will be in-

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fluenced by such considerations as the relative practical importance of the respective Subjects, the extent to which non-uniform statutory law has already rendered obsolete the common law rules, and our ability to secure proper groups of reporters and advisers to do the work in view of the existing state of available American legal scholarship. We shall also properly be influenced by a desire to utilize the knowledge and experience of certain great scholars now connected with our present editorial force as reporters and advisers.

IV. Things to Be Considered Pertaining To Work
Other Than That On The Restatement.

Not only am I convinced that we should now visualize our work on the Restatement of the Law as a task capable of being finished before the end of the second decade of our existence, but I am also convinced that we should visualize the Institute as the permanent agency of the American Legal Profession to carry on such work for the improvement of law and its administration as primarily can be done properly only by trained legal scholars, judges and practitioners. This is the way the group responsible for the Report to the representative gathering of the bar which formed the Institute regarded the organization the creation of which they recommended. They called themselves a Committee on the Establishment of a Permanent Organization for the Improvement of the Law. Speaking of the Institute they said "it will be created in response to the growing feeling that lawyers have a distinct public function to perform in relation to the improvement of law and its administration". This function is necessarily confined to work for which they are qualified by training and experience. The proposed organization should concern itself with such matters as the form in which public law should be expressed, the details of private law, procedure, or the administration of law and judicial organization. It should not promote or restrict political, social or economic changes." (Vol. I Proc. Am. Law Ins. pps. 4 & 5) Even as thus restricted the proposed organization was sufficiently wide in its scope to require the committee to point out "at least one specific work of importance which the organization could undertake on its foundation". (Ibid)

The specific work recommended was the Restatement of the Law. For the Institute on its foundation to have attempted more than this would have been

utter folly. While we were feeling out the best method of work on the Restatement and its proper form it would have been to invite failure to have been also engaged in other tasks. Even today with our five and more years of experience in work on the Restatement other things, however meritorious and strictly within the province of the Institute as outlined in the Report from which I have just quoted, should not be undertaken lightly or without serious consideration of the adjustments, if any, which should be made in our organization for their proper accomplishment. Personally though I believe we should have undertaken when we did the work we are now doing on Criminal Procedure (and I submit the event proves the correctness of this view) I sympathized with the hesitancy that many of the Council felt when they were asked to approve our undertaking the work, in as far as that hesitancy was not due to the belief that any other work than that on the Restatement was beyond the proper province of the Institute. There is not a line or word in the Report on which the Institute was founded giving countenance to the idea that the Institute should be permanently restricted to work on the Restatement. It would be contrary to the whole concept of the Institute as there pictured, if we should now, in considering its future, refuse to consider the possibility of other work. To believe that we should take every precaution against rushing into new tasks without careful consideration is not incompatible with a belief that it is important at this time to survey the lines along which the public may justly expect help in the improvement of the law from the legal profession. As stated in the first part of this Report we find ourselves the responsible guides of an organization which is in fact what the Committee on the Establishment of a Permanent Organization for the Improvement of the

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Law hoped it would become; that is, the agency through which the legal profession may perform its public obligation to do constructive work for the improvement of the Law for which the lawyer, as such, is alone primarily qualified.

In considering the future of the Institute, we should first get some knowledge of the existing defects in the law and its administration, (besides the uncertainty of our common law) for the correction of which the legal profession is primarily responsible. We should also know the various types of work necessary to effect improvement. It is only when we have obtained a reasonably clear and correct picture of both these things that we can intelligently consider the part which should be played by the Institute as the permanent agency of the profession for the improvement of the law. To give this picture there are three questions which any report on the future of the Institute should answer. These questions may be stated as follows:

Question 1.

Existing Defects In Law And Administration

Which Are Primarily The Concern Of The

Legal Profession.

What are the Subjects in which Improvements in the Law are most needed (apart from the uncertainty of the common law) where the principal work necessary for improvement must be done by legal scholars, trained judges and experienced lawyers?

The answer to this question should give us a picture of the

existing public obligations of the profession to improve the law other than its obligation to make the law more certain, an obligation which is being performed by our work on the Restatement. Any attempt to answer it will involve among other things a consideration of matters pertaining to Procedure, Evidence, Court Organization and Certain Subjects of the Private Law, such as the Law of Real Property, the Law of Negligence, certain parts at least of our Commercial Law and our Law of Business Associations as well as Criminal Law and its Administration.

Question 2.

How Far Surveys of Existing Conditions
Are Required.

Whether Improvements in Existing law can reasonably be expected along any of the lines indicated by the answer to Question 1 unless the improvements suggested are based on the results of scientific surveys of existing conditons.

To make the import of this question clear I call your attention to the fact that the work which the Institute has so far done and is now doing is work which does not involve investigation conducted by scientific surveys. Our researches have been confined to the ascertainment of the present law or to the ascertainment of the opinion of lawyers and judges, expert on particular subjects, of existing defects and the lines along which improvement should proceed. Indeed, it is only our work on the model Code of Criminal Procedure that involves ascertaining, in the manner indicated, "existing defects". The work on the Restatement for instance involves nothing beyond research as to the existing law. In that work, the reform

of law not being an object, the opinion of the legal profession as to what rules are defective and how far they should be altered has not been sought. Our work on the model Code, being an effort to improve existing Procedural Law, has involved obtaining the opinion of lawyers and judges of experience concerning the defects in existing Procedure and the ways in which these defects should be remedied. Even here, however, we have made no attempt to carry on surveys, scientific or otherwise, of the way existing Criminal Procedure works. There are, of course, good reasons for this, chief among which being the fact that the state of existing court records would prevent for many years the completion of a survey which would be of any value in drafting a Criminal Procedure Code.

It is evident, however, that in considering any work for the improvement of the law in connection with the future of the Institute the character and extent of the survey, if any, of existing conditions which would have to be made in connection with the work should be recognized, not only as an important matter in itself, but also because of its bearing on the part, if any, which properly might be taken by the Institute.

Question 3.

Extent To Which Necessary Surveys Are
Legal or Non-Legal

Where any intelligent attempts to improve existing law along any of the lines indicated by the answers to question 1 involve, according to the answers to question 2, the necessity of scientific survey, does such a survey require for its proper execution legal,

or technical but non-legal experience and training?

Two examples will illustrate the full meaning of this question. Suppose it is determined that one of the lines along which lawyers should endeavor to improve the law is court organization and it was also determined that any intelligent attempt at improvement at least would be greatly aided by a survey of the comparative results now attained under different types of court organization. Such a survey would require for its planning and guidance legal training and court experience. To use a shorthand expression what would be required is a "legal survey", that is a survey which must be under the immediate direction of lawyers.

On the other hand, suppose in answer to the first question it is determined that one of the lines along which lawyers as such should aid in the improvement of the law and its administration is in respect to the law of negligence, especially in its application to cases arising out of personal injuries in vehicular accidents. It is almost certain that any attempt to ascertain the lines along which improvement should take place should include a careful investigation of the possibility of applying to such cases with advantage the underlying principles of the present Workmen's Compensation Acts. One side of the necessary investigation therefore would have to be conducted by actuaries, that is persons with a non-legal and yet technical training. In short a non-legal survey would be necessary.

When these preliminary questions are answered the Report on the future of the Institute would naturally pass to the answer of another question:

Question 4.

The Relation Of The Institute To Legal And
Non-Legal Surveys

What should be the relation of the Institute to scientific surveys which require for their proper guidance men learned in the law, and what its relation to such surveys which require non-legal technical training?

I have no thought that the Institute in the next ten or fifteen years will find it possible, or, if possible, wise to deal with all the matters I have here touched on by way of illustration. Hence it is not important, indeed it might be very unwise, for us to attempt to determine now in detail the work of the Institute for the next decade but, I submit, it is essential that we shall have a clear idea of the proper answer to the two matters involved in this fourth question. For instance, if we are to look forward to undertaking work for the improvement of the law, which, however primarily legal work, must be preceded by scientific surveys of existing conditions, are we also to look forward to our undertaking such surveys whether legal or non-legal, and if not, what are the organizations by which the necessary work can be done?

V. Things To Be Considered Pertaining
To The Organization Of The Institute
And The Character And Place Of Its
Permanent Home.

We should have a knowledge of existing defects in law and its administration with which the profession is primarily concerned as well as the part which the Institute should take in connection with the work to be done to effect improvement, before we can come to any determination in respect to the modifications, if any, needed in our present organization or the need for and the place and character of a permanent home. I have, therefore, in this Report nothing to suggest in regard to these matters, except that it would save time and the complications which might arise from the appointment of several committees working on different sides of the same problem, if you provided, in appointing the Special Committee suggested in Part V of this Report, that it ~~would~~ include in its report modification of our organization, if any, which it considered desirable as well as the necessity for and, if necessary, the place and character of a permanent home for the Institute.

VI. Suggestion Concerning The Method By
Which Plans For The Future Of The
Institute Should Be Considered and
Matured.

Any serious discussion of the future of the Institute by the Council should be based on a carefully prepared Report made by you as its Executive Committee. It is obvious, if what I have here said gives a reasonably correct idea of the principal matters which such a Report should contain, that it will require both time and care to prepare. A practical method of procedure would be to have a preliminary draft of such a Report prepared by a Special Committee composed of the President, your Director, and those of you who are in a position to give the necessary time. The Special Committee need not be confined to your members. There is I think at least one and there may be two members of the Council not on your Committee who would be willing to serve and whose presence would be a real advantage. If it was understood that the members of your Executive Committee who were not in a position to assume the responsibility of formal membership on the Special Committee would nevertheless be notified of all meetings and expected to attend and take part when it was possible to do so, the preliminary draft of the Report when formally submitted could be discussed by you with a full knowledge on the part of all your members of the details of its preparation.

As to the work of the Special Committee, it is not difficult to see the things it must do to enable it to determine the work which should be done to complete the Restatement. I should be asked to make at the earliest possible moment a statement in respect to the continuation of the work on the Restatement after 1931 with a view to its completion if possible by 1940.

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When the statement was submitted I hope that the Special Committee will desire to have it discussed at one or more of their meetings by the reporters and other leading members of our editorial force.

As to the Special Committee's consideration of matters other than those pertaining to the Restatement, if the questions stated and explained in Part III of this Report give a fairly correct idea of the matters which should be ascertained and considered, they also indicate the proper method of procedure. If we should know what are the existing defects in law and administration which are primarily the concern of the legal profession, I submit there is no better way to obtain a reasonably correct picture than to go into Conference with representatives of the Association of American Law Schools. Two or three conferences, if preceded by a careful statement of the subjects of discussion, would enable us to obtain a reasonably clear picture of the things for the improvement of the law and its administration which the legal profession should do. They would also enable us to answer the second and third questions relating to the extent of the necessity for surveys of existing conditions as well as the character of such surveys. Furthermore, and most important, such conferences should give us definite ideas of the relative functions of the Institute and the Schools. Though I do not wish in this Report to anticipate conclusions I am at present strongly inclined to think that the work of research, whether in the form of scientific surveys of existing conditions or otherwise, will be found to be largely the function of the schools, while the work of formulating concrete proposals for improvement based on the results of such researches will be found to be primarily the function of the Institute. Whether or not I am right in this, as well as the lines along which the Institute should cooperate with the schools, alone can be determined by such conferences as I suggest.

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with the schools, alone can be determined by such conferences as I suggest.

Apart from the practical considerations urging us to confer with representatives of the Association of American Law Schools, it should be remembered that the Committee whose Report caused the Institute to be created was itself brought into being by a invitation extended by a Committee of that Association. Now that the experimental period of the Institute's existence is drawing to a close, in considering its future and how best it may perform its function as a permanent agency for the improvement of the law, it is both natural and proper that we should invite representatives of the Association to confer on the Institute's future. As we depend at present, so we shall probably always depend in the future, on the members of the Law School faculties to furnish the legal scholarship necessary for the performance of any worth while constructive work which we undertake.

While I have emphasized the importance of conferences with representatives of the American Law School Association, it should be understood that the Special Committee suggested would have, and would be expected to exercise, the power to confer with representatives of other bodies, such as the American Bar Association, the National Conference of Commissioners of Uniform State Laws, the American Institute of Criminal Law and Criminology, the American Judicature Society, the National Economic Association, the Brookings Institution of Economics, the Social Science Research Council, the new Institute for Legal Study of which W. W. Cook is the promotor, as well as representatives of any other associations conferences with whom the Committee felt would aid it in the performance of its duties.

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Laws and the American Judicature Society because they have been doing constructive work for the improvement of the law. We should know the possibilities of a cooperation with either or both which would be helpful to them and practicable for us. As to the American Bar Association, had those in control taken at the foundation of the Institute an attitude of hostility, much harm to both the Bar Association and the Institute would have resulted. The fact has been that we have had and are now having the best kind of cooperation. The present arrangement with the editors of the journal of the Association enables us to keep each month the bar in all parts of the country in touch with some phase of our work. The annual meetings of the Association give us the opportunity to place before large gatherings of the members of the bench and bar the ways in which they can be helpful to us in their respective localities. The two National Associations of the legal profession in the United States, one founded to deal with its everyday concerns and the other to do constructive legal work, are working in the closest harmony, and I am certain that if the Special Committee I suggest is appointed, after it has obtained a clearer picture than we now have of the future of the Institute, it will have more than one question which it will desire to talk over with representatives of the American Bar Association.

The Committee suggested should certainly confer with the advisers or other representatives of the Brookings Institution. This institution has been founded and is in great part supported by the Carnegie Corporation, the Corporation to which we owe our present ability to carry on our work on the Restatement of the Law. I know that the officers of the Brookings Institution are anxious to confer with us as to the ways, if any, in which

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the two Institutes can help each other. I have at the present writing nothing more than general ideas. In the preceding part of this Report I have pointed out the fact that there are certainly some, and maybe many things, for the improvement of the law and its administration with which the legal profession should be primarily concerned, where effective work for improvement must be based on the results of scientific non-legal surveys of existing conditions. As I have doubt as to whether the Institute should ever seriously consider undertaking any large work of this character, I am in hopes that conferences between the representatives of the Brookings Institution and the Special Committee whose appointment I am suggesting would show how far the two organizations usefully can cooperate with each other.

I have referred to the Social Science Research Council because that body has been organized to promote cooperation among those working in the social sciences, including the law as one of these sciences.

I hope also that the Special Committee will desire to give some consideration to the question of how far, if at all, the Institute can do helpful work in the field of International Law and to this end will discuss the questions with associations and individuals especially interested in that subject.

You will observe that nowhere in this report have I mentioned the question of finance except to point out that the generous donation of the Carnegie Corporation which is enabling us to carry on our work on the Restatement will be exhausted on December 31, 1921. The omission is intentional. I submit that our present immediate duty is to get a clear idea of the work to be done to complete the Restatement of the Law and what our future should be; that is the part which the Institute should take

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in work of improving law and its administration. If experience teaches us anything, it is that the best, as it is the only proper way, to secure adequate financial assistance is to first have a plan which shows on its face the care expended upon it and the importance and practicability of its execution.