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Restatement of the Law of Contracts (Book Review)

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RESTATEMENT OF THE LAW OF CONTRACTS. Two volumes. St. Paul: American Law Institute Publishers, 1932, pp. xli, 1-582; xxxi, 583-1206. $12.00.

To attempt to review the *Restatement of the Law of Contracts* within the small compass of the ordinary book review article seems almost as preposterous as to try to review Webster's Dictionary or the Penal Law of the State of New York with its two hundred and twenty-four articles and two thousand five hundred and two sections. Anything approaching an adequate review would require a volume of several hundred pages in itself. The most that can here be accomplished is a brief exposition of the reviewer's impressions of the work as a whole, with reference to a few sections here and there.

The object of the Institute as expressed in its charter is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to carry on scholarly and scientific legal work." The founders believed that "in order to clarify and simplify the law and to render it more certain, the first step must be the preparation of an orderly restatement of the common law, including, in that term, not only the law developed solely by judicial decision, but also the law which has grown from the application by the courts of generally and long adopted statutes." [1]

But there are some sections of the Restatement for which there appears to be no pre-existing law on the subject either in the form of decision or statute,[2] and other sections at variance with preconceived notions of the law on the subject.[3] It would therefore seem that in view of the "better adaptation to social needs" [4] the Recorder and his advisers have attempted not merely to collect and codify the existing law, but also to supply deficiencies in the existing case or statute law or to so modify it as to meet the changed conditions of business and society. In other words, the Restatement is not backward looking so much as forward-looking, not entirely a statement of the Law of Contracts as it is, but, in part, at least a statement of the law of contracts as it should be. The very use of the title "Restatement" instead of "Statement" of the Law of Contracts implies a revision as well as an exposition of the law.

Still other sections are intended to remove doubt as to the law where there is a conflict of authorities between the courts of different jurisdictions.[5] There was a lack of agreement on the fundamental principles of the common law and lack of precision in the use of legal terms. "One does not need to expatiate upon the value of certainty in a developed legal system. Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." [6] With the enormous increase in the number of reported cases there is a tendency to pay less and less attention to individual cases and more attention

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[1] Introduction, p. viii.

[2] *E. g.* §65 dealing with Acceptance by Telephone.

[3] *E. g.* §§41 and 69 dealing with the time when a revocation of an offer is deemed to be communicated to the offeree.

[4] One of the objects of the Institute as expressed in its charter.

[5] *E. g.* §45 dealing with Revocation of Offer for Unilateral Contract; Effect of Part Performance or Tender.

[6] CARDOZO, THE GROWTH OF THE LAW (1924) p. 2.

to the general principles of law on the subject. "Increase of numbers has not made for increase of respect. * * * An avalanche of decisions by tribunals, great and small, is producing a situation where citation of precedent is tending to count for less and appeal to an informing principle is tending to count for more." [7]

The Restatement has made a real contribution to the advancement of law as a science by providing a special terminology for various legal concepts. There is every bit as much need for technical terms in the study of law as in the study of medicine. As stated in the Introduction "shorthand expressions are employed to prevent the constant repetition of long formulæ." Lawyers cannot make themselves understood unless they employ a common language and give the same meaning to the terms they use. It is a well-known condition precedent to an efficient argument that opponents agree on the meaning of the terms used. In this respect the Restatement will materially aid the development of the law as a technical science, although it requires lawyers and law students to familiarize themselves with this special terminology, a burden which to some may seem an imposition and a real hardship.

In order to aid the lawyer and law student in grasping the propositions of law couched in this unfamiliar terminology and to clear up any ambiguities involved in a necessarily concise and condensed statement of the law, the Recorder and his advisers have appended comments and illustrative examples to most of the sections. As every teacher knows, there is always a danger in giving examples to illustrate the point you are trying to make. The example may not contain facts enough or too many facts to fit the principle involved. Indeed, one of the inherent difficulties in the law is to make factual situations fit principles of law and vice versa. It is submitted that some of the illustrations given in the Restatement run foul of this dilemma.[8]

Is the Restatement the law? How much weight has it as authority? In the past there have been drafted, under the supervision of the Commissioners for the Uniformity of State Law, several uniform acts, for example, the Uniform Sales Act, the Uniform Bills of Lading Act, etc. They have not been accorded the sanction of law in any jurisdiction until they have been adopted by the legislature of that state. But it is different with the Restatement. Its sponsors expected it to be accepted as the law without any statutory enactment adopting it. Its weight as authority depends not upon legislative enactment but upon its power of persuasion. It is "something less than a code, and something more than a treatise." [9] It is "invested with unique authority, not to command, but to persuade." [10] "You must not think of the product as a code, invested with the binding force of statute. The only force it will possess, at least at the beginning, will be its inherent power of persuasion." [11]

From what does it derive this great power of persuasion? First, from the character, reputation and learning of the men who drafted it.[12] "If these men

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[7] *Ibid.*
[8] *E. g.* illustration number 2 to §72.
[9] *Supra* note 6, at 9.
[10] *Ibid.*
[11] *Ibid.*
[12] Recorder, Professor Samuel Williston of Harvard; Advisers, Professors Corbin of Yale, Page of Wisconsin, Merton L. Ferson, Dudley O. McGooney,

cannot restate the law, then the law is incapable of being restated by anyone." [13] Secondly, from the method in which the Final Draft was evolved. It was not hastily or ill-advisedly prepared.[14] And thirdly, from the manner in which it has been received and indorsed by eminent legal authority,[15] and by the courts themselves.[16]

In the Introduction, the Director of the Institute says: "The Institute expects that the Restatement will be accepted by the courts and the legal profession generally, as prima facie a correct statement of what may be termed *the general common law of the United States,* although there are instances in which the law in one or more states may vary from the law stated in a particular section." (Italics the reviewer's.)

In most cases, however, where the courts have approved of and followed the Restatement, there has been no pre-existing law on that point in that jurisdiction or the law has not been settled one way or the other by the highest court in that state. What will the courts do in a case where the law is well settled in that state to the contrary of the law set forth in the Restatement? Where that is so, the New York courts have declined to follow the Restatement.[17] Such an attitude is to be deplored as it tends to defeat one of the cardinal purposes of the Institute—namely, to remove uncertainty in the law of Contracts in the sense that it should be uniform throughout all jurisdictions. Judge Cardozo has very aptly written: "I have said that there is a certainty that is genuine and a certainty that is illusory, a symmetry that is

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George J. Thompson, William E. McCurdy, Chafee of Harvard, and Edgar N. Durfee.

[13] *Supra* note 9.

[14] During the nine years in which the work on Contracts was going forward there were thirty-four conferences between the Recorder and his advisers, each from three to seven days duration, fifty-one preliminary drafts considered, no final preliminary draft being presented to the Council of the Institute until the committee was satisfied that it was as nearly perfect as they could make it, and ten tentative drafts submitted by the Council to eight annual meetings of the Institute. Preliminary official drafts were published and distributed to the public from time to time for a period of four years prior to reaching the Final Draft. During those four years these preliminary published official drafts were considered at conferences of the representatives of State Bar Association Co-operating Committees, were used by the courts, by practitioners and in law schools and the draftsmen had the benefit of suggestions and criticisms arising from such use in preparing the Final Revision. Introduction, pp. x, xii.

[15] *E. g.* Elihu Root in an address to the Institute said: "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. (Restatement.) Instead of going back through 10,000 cases, it will have been done for him; there will not be a conclusive presumption, but a practical prima facie statement upon which, unless it is overturned, judgment may rest."

[16] The Court of Appeals of Ohio in 1931 said: "We are content * * * to take the Restatement as the law of this State, without exploring its soundness, and hold that of its own vigor, it is adequate authority. This is not to say that the Restatement is of necessity perfect. * * * We only hold that he who would not have it followed, has the burden of demonstrating its unsoundness." Saunders Co. v. Galbraith, 40 Ohio App. 155, 178 N. E. 34 (1931).

[17] Langel v. Betz, 250 N. Y. 159, 164 N. E. 890 (1928); Smith v. Moring Bros., Inc., 223 App. Div. 562, 253 N. Y. Supp. 368 (1931).

worth attaining and a symmetry to be shunned. One of the reasons why our law needs to be restated is that judges strive at times after the certainty that is sham instead of the certainty that is genuine. They strive after a certainty that will keep the law consistent within their own parish, their little territorial jurisdictions, instead of the certainty that will keep it consistent with verities and principles as broad as the common law itself, and as deep and fundamental as the postulates of justice. * * * The certainty that is arrived at by adherence to precedent is attained, but there is a sacrifice of another certainty that is larger and more vital." [18] It seems that the doctrine of stare decisis is still too strong to admit of the courts' overruling a long line of decisions to the contrary in their jurisdictions in order to attain the larger certainty of the law by following the Restatement. When the Restatement does not conflict with a long line of decisions in that state, it will be followed; otherwise not; that seems to be the present attitude of the courts as to the Restatement. In order to attain the larger certainty in the law for which Judge Cardozo so eloquently pleads it may be necessary to resort to legislative enactment of the Restatement as was found necessary to give sanction to other uniform acts which have been drafted in the past.

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CASES ON CRIMINAL LAW. Third edition. By William E. MiKell. St. Paul: West Publishing Company, 1933, pp. 775.

The focalization of interest on arrangement of topics, which has been manifested in recent publications of case and material books, is extremely gratifying. The result has been an ever-increasing experimentation in the theory of legal pedagogy, with a view to determining a methodology which will best serve the aim and purpose of legal education. Heretofore, case books have been usually compiled with a view to developing the law teacher's approach to his subject, such approach being either historical or logical or a combination of both history and logic. The capacity of the student to absorb the material so arranged, was strangely overlooked. The old way, however, is not necessarily the inadequate. It remains to be proven whether some or all of the varied attempts to revamp the system of legal education, from a pedagogic viewpoint, will result in a substantial improvement in the quality and quantity of student achievement. If and when such improvement becomes an accomplished fact, the pedagogy of legal education can be appropriately restated. In the meantime, it would seem advisable that each proposed experiment be discussed and examined before trial, with the primary purposes of understanding its aim and of appraising its adaptability to the end sought to be accomplished.

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[18] *Supra* note 9, at 17.