Restatement of the Law of Property

John P. Maloney
The recent publication in two volumes of the Restatement of the Law of Property as adopted by the American Law Institute presents in final form the first two and one-half divisions of the entire field of property. A substantial fragment, these portray a more definite picture of the form and content of the final Restatement of the Law of Property as a whole, than did the tentative drafts, published piecemeal in the past. Although allowances are made for the speeding up of the work by dividing it among separate groups, working concurrently, the completion of restating the entire field of property is still a thing of the future. These considerations suggest that an estimate of what has been done is not out of place, especially if one assumes that the partial facts disclosed by these two volumes can be used as a basis for predicting the probability of the ultimate success of the whole. If that assumption is unfounded, and predictability is lacking, we can at least appraise the extent to which these volumes have accomplished the purposes of restatement within the policies of the American Law Institute.

As originally planned, the Restatement was to be "a summary of principles stated with such fullness as will afford an adequate presentation of the subject, somewhat after the manner of Dicey's Conflict of Laws or Stephen's Digest"
of the Law of Evidence ** *. Accompanying each Restatement there will be a treatise which is to consist of a complete exposition of the present condition of the law and a full citation of authorities." 2 Furthermore, "The work should contain a complete citation of authorities, decisions, treatises and articles. The legal profession will never have confidence in the result unless those responsible for the work give this tangible proof and set forth any differences between the law expressed in statements of principles and that found in the decisions of the courts in each state considered separately." 3 In the field of Property, the policy of the Institute provided for "an orderly statement of the general common law of the United States ** *; and also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years." 4 It was not intended to restate all of the law comprehended by the term Property, but only those parts which have an "underlying and widely pervasive importance" 5 or which are aspects of the subject in which the clarifying and simplifying process of restatement is particularly needed. Nor is the Restatement intended to be "a complete philosophical system by which every possible case can be tested" 6 but the more modest task of clarifying the law.

The arrangement is a scientific classification of rules within the comfortably flexible outlines of a very broad field. In reality, the criteria of inclusion and exclusion have been to some extent fashioned by the Institute. Simplicity and classification to the end that certainty might be achieved are controlling desiderata. "It will be invested with unique authority, not to command, but to persuade ** *. Universities and bench and bar will have had a part in its creation." 7 The work is being done by carefully selected lawyers for the use of the profession. The accuracy of the statements of law made, rests upon the authority of the Institute.

2 Car dozo, Growth of the Law (1924) 7.
3 American Law Institute Proceedings, pt. 1, 22.
4 1 Restatement, Property (1936) pp. viii, ix.
5 1 Restatement, Property (1936) 1.
6 Scott, Restatement of the Law of Trusts (1931) 31 Col. L. Rev. 1266, 1269.
7 Car dozo, Growth of the Law (1924) 9.
The foregoing are general statements concerning the Restatement of law which can be applied to each one of the various fields covered. The Restatements are the products of belief and faith that the law can be restated as a logical system abstracted from the cases according to the traditional method of legal thought and action. But there are those who have not conformed either in whole or in part. Critics have not been wanting. When one considers the number of distinguished leaders in American legal scholarship who have contributed to these two volumes and who have been work-


*A partial list is as follows: Dean Harry A. Bigelow of the Law School of the University of Chicago; Professor Robert R. Powell of the Law School of Columbia University; Professor W. Barton Leach of the Law School of Harvard University; Dean Charles E. Clark of the Law School of Yale University; Dean Everett Fraser of the Law School of the University of Minnesota; Professor Oliver S. Rundell of the Law School of the University of Wisconsin; Henry Upson Sims, Esq., of Birmingham, Ala.; Professor Ralph W. Aigler of the Law School of the University of Michigan; Professor George G. Bogert of the Law School of the University of Chicago; Professor A. James Casner of the Law School of the University of Illinois; Professor Albert C. Jacobs of the Law School of Columbia University; Professor J. Warren Madden of the
ing for nearly a decade in their production, without sparing time or effort, one can realize what a formidable task a complete evaluation presents. Fully performed, it might require a restudy of the thousands of cases examined by the Reporter;—which approaches impossibility and even raises an unpleasant presumption. For surely, the promulgation by the American Law Institute creates a presumption of validity for conclusions derived from the data used, but not necessarily a guarantee or assurance as to utility to the profession. How far has the work in the two volumes complied with the original plans and purposes, and if there have been departures or shortcomings, what is their effect, if any, on its ultimate success? This inquiry may be the basis of a fair criticism—a partial evaluation based on these two volumes.

What law shall be restated, and in what way? The problems of scope and of language demand a plan. This is stated in a scope note as follows: "Volumes I and II, here-with published, embrace general matters of terminology (Chapter I); the creation and general characteristics of freehold estates (Chapters 2-6); and the large body of material stating the characteristics of future interests (Chapters 7-17). Volume III is designed to complete future interests and to include not only the construction of limitations but also the law applicable to powers of appointments and expectancies. Volume IV will treat generally the social restrictions imposed upon the creation of property interests, including the restrictions upon the purposes for which trusts can be created, the rule against perpetuities and the rules against accumulation. Volume V is to restate the law of easements and profits together with other aspects of the rights and privileges of the owner of land as to physical use. Two large aspects of the law of Property have been separately restated as the law of Trusts and the law of the Sales of Land."¹⁰

¹⁰ Law School of the University of Pittsburgh; Professor Lewis M. Simes of the Law School of the University of Michigan; Professor Joseph Warren of the Law School of Harvard University; and Charles C. White, Esq., of Cleveland, Ohio.

¹⁰ 1 Restatement, Property (1937) 1, 2.
Landlord and Tenant, Vendor and Purchaser, are to come; Trusts are treated separately; and Trespass to Land is found in the *Torts Restatement*. Evidently the material is to be arranged to follow classifications familiar to lawyers. One critic, in discussing the difference between conventional and functional classification, maintains that much of the material put in the *Restatement of Trusts* could profitably be placed in the *Law of Future Interests in Property*, but that to depart from the conventional would work against the usefulness of the Restatement to court room lawyers. The treatment of each type of estate by itself, rather than treating all of the estates through a common characteristic, is a logical development. The law of real property is based upon the theory of estates. Due to the development of land ownership under the Feudal System, historically, the development of estates in land under what is known as the formulary theory, necessarily produced what has been called the doctrine of fixed types. Men do not create rights in land by means of an individual expression as in a contract, but rather by the use of one of these fixed types or models. The grantor uses a certain form of deed and on the transfer of the same, the law attaches many legal consequences not written down in the instrument. The personal desires as to alienation, inheritance, use and enjoyment are affixed to the transaction by law; and as they are not set down in express terms according to the individual wish of the creator, he is compelled to use a particular estate as it has developed under the law to suit his particular purpose. The Restatement treatment is historical in that it treats separately each one of the types as to creation, transfer, and legal consequences.

An examination of the table of contents is illuminating. It discloses even to the unpracticed that the Reporter has proceeded according to a plan which in its main outline is conventional, but in detail has distinctive features. One of these is the importance and significance given to terminology. Going from the table of contents to the book itself, one can perceive the awareness of the paramount importance of terminology and language. Not only are the first two chapters devoted to definitions of terms, but the language used
throughout and the many notes which point out the elimination of old terms and their replacement by new, are instinct with the struggle for clarity and simplicity of expression. This desire is well expressed by the present Reporter, Professor Powell:

"The Reporter and this group decided that the most important first step in any work in the field of property would be the attainment of a common parlance of precision with which the ideas found in the American Law of property could be expressed with definiteness and accuracy and in a fashion certain to be understood by the profession with the same connotations as the language bore to those who wrote it for the Institute. Persons familiar only with the ordinary exchanges of ideas between intelligent people, have little realization of the extreme difficulty of so framing a sentence that it expresses exactly what is in the thinker's mind, and the equal difficulty of being sure that the language used will have the same meaning and connotations to his reader as it had to the thinker. It was felt that the terminology of 'right, power, privilege and immunity' would be one useful tool in the attainment of the desired precision. Other terms used with frequency in the law of property have been defined tentatively."  

Legal terminology has been the topic of much writing and discussion, particularly among those persons who are

---

1 Restatement, Property (1937) Div. 3, pt. 1, also c. 7, Introductory Note.
2 For example: one hoary term is scrapped in § 24 where we find a new coinage in "power of termination" instead of "right of re-entry" arising on a breach of condition in an estate on condition subsequent. This is a logical requirement of the Hohfeld system of terminology which has been adopted, and is referred to later. § 44, p. 120, Special Note. The terms "base fee", "conditional fee", "qualified fee", "conditional limitation" are not used in the Restatement. § 157, p. 542, Note on Terminology. "Contingent remainder" is not used in the Restatement because the term has been used too frequently in a loose manner to designate any remainder involving uncertainty. § 157, p. 552, Special Note. Here the Reporter points out particular instances that make the use of the term "contingent remainder" undesirable. 3 Powell, A Restatement of the Law of Property (1930) 16 A. B. A. J. 197.
grouped under the name of realists. Discussions, frequently vehement, as to the nature of law, its concepts and language, have often concerned themselves with an attack upon terminology. 14 Such words as property, property rights, possession, title are said to be “magic solving words of traditional jurisprudence, sounds for concepts which have no verifiable existence”! 15 In general, the content of the Property Restatement will furnish little comfort to the modern sociological jurisprudes. For example, one well-known writer speaks of property as a function of inequality. This, of course, is not a definition, but a mere line taken from the text which argues for description rather than definition. The Restatement uses the word “property” to denote legal relations between persons with respect to a thing. 16

The language used in the Restatement and the formation of the rules themselves in the definitions may be said to be molded in the traditional school, but modified to the needs of clarity and precision as interpreted by the Institute. To this end the Hohfeld system of terminology has been adopted almost in toto.

The first volume contains two divisions. Division one comprises an introductory scope note and Chapter I, definitions of certain general terms. The terminology of Hohfeld is introduced here in the definitions of right, privilege, power, and immunity; throughout the two volumes the Hohfeldian system is strictly adhered to. On the other hand, the word “title” is defined in the second note under Section 10, “owner” as a term having a dual signification; (1) ownership or claim of ownership, and (2) the operative facts (note Hohfeldian influence) which result in such ownership. As to (1) ownership is substituted, and as to (2) the explanation is made that it has not been found necessary to use the term as denoting the operative facts which result in the existence of an interest rather than the interest itself. This division is analytically sound. The same can be said of the general terms defined and analyzed in this chapter, to wit: interest, legal and

15 Id. at 820.
16 1 Restatement, Property (1937) 3.
equitable interests in land, possessory interests in land, real property, estate, conveyance, devise and transfer.

These definitions of general terms disclose exact thinking and superb use of language to obtain definite and certain expression, and this comment is applicable throughout the book. But will rejection of the word "title" and if you please, the "title concept", make the books more "useful" to the lawyers? Bearing in mind what the "realists" have tried to do to the "title concept" and the word "title", it nevertheless looms large in the terminology of the practicing lawyer. "Transfer" (Section 13) is defined in a way that makes for clarity: the idea embodied in the words "extinguishment of such interests existing in one person and the creation of such interests in another person" is one that can be grasped.

Treatises and other writings, especially the cases themselves, contain many statements of rules so general that applications to particular fact situations often are not only difficult, but also produce diverse results. The Restatement of the Law of freehold estates (Division II) portrays a conscious effort to particularize within the field of freehold estates by first defining and then stating the rules of creation of transfer and characteristics.

The method employed is the usual triple division, i.e., the black letter definition or statement, and comments, usually, but not always, followed by illustrations. The definitions in Chapter 2 include not only those of estates in fee simple and for life, but the lesser known, such as fee simple conditional and fee tail. The inclusion in "freehold estates" of definitions of estates for years and other (usually) non-freehold estates is somewhat confusing. The explanation is the desire for uniform terminology and as an aid "to the understanding of the freehold estates." 18

Departing for a moment from questions of terminology to consider the form or arrangement, one notes that the common law rule is usually stated in black letter type even though that rule may be one that is socially undesirable, and may not represent the law in many jurisdictions. In Sec-

---

18 1 Restatement, Property (1937) Introductory Note, p. 37.
tion 27, the rule is stated that in a conveyance of land an estate in fee simple absolute can be transferred only if the conveyance contains words of general inheritance with respect to the conveyee. This is undoubtedly a correct statement of the early common law rule. The special note following the black letter further states that this rule has been supplanted as to deeds in all jurisdictions except Connecticut, Louisiana, Maine, New Hampshire, South Carolina, and Vermont; that as to New Hampshire, the rule has probably been abrogated by judicial decision and there is doubt as to whether it exists in Vermont. It is submitted that if deeds do not require words of inheritance in nearly all of the jurisdictions, excepting those mentioned above, we have here a statement of the rule in inverse order. In other words, a lawyer might ask, why state a rule of the early common law when it has ceased to be law in so many jurisdictions? Should the rule be stated otherwise and the common law exceptions then noted? This is a question of form that may well be raised by a lawyer. The reason for stating the common law rule even though it may not be the rule in most jurisdictions is explained by the Reporter as a desire for consistency of treatment, and further, that the approach of the Restatement, according to the Reporter, should state what the decision would be today in such cases in jurisdictions following the common law. However, the lawyer, searching for the law, must understand this technique, namely, restating in black letter type the common law rule, and proceed according to the notes and comments. Of course, such treatment makes for uniformity and is in accordance with the usual plan of the Restatement. As to the difficulties involved in studying the Restatement, we agree with the Reporter “that the Restatement is not designed for casual reading and no one who reads it with even a fair degree of attention can be misled as to the relation between the parts in question.”

---

20 A word of commendation should be given for the excellent format of the two volumes; also for the index, pp. 1035, 1179.
21 Restatement, Property (Tent. Draft No. 1, 1929) 5, 15. If the reader had the explanatory notes of the tentative drafts before him, difficulties of this sort would be readily eliminated.
31 states the rule in Shelley's Case as a rule of the general common law. Rationalization shows that this rule should not be applied to our social institutions. Its statement as law by the Institute shows the inherent difficulties of their task. Twenty-seven states by statute have abolished its application to wills and deeds; five have abolished its operation as to wills; and three others have statutes aimed at the rule. In these states, no judicial declarations or statutes exist, whereas eleven states retain the rule as part of the common law of those jurisdictions, and even in some of these the rule is affected indirectly by statutes abolishing estates in fee tail. Again the need of annotation for the Restatement is evident.

The same conscientious effort for accuracy and particularization is reflected in the statements of rules. Here one can find very little to criticize. Where there have been statutory changes, they are carefully noted, as for example, the requirement of such words as "and his heirs" as words of general inheritance. These special notes occur frequently to explain a departure from the usual terminology, and, also to indicate absence of judicial authority, often in the form of a caveat.

The use of caveats to indicate gaps in the law, or as absence of authoritative data, is commendable and in accordance with the original purposes and plans for restatement. On the other hand, the Institute has, at times, stated rules to be law that seem contra to judicial authority. Thus in Section 54, the rule as stated provides that if the husband or wife had a fee simple defeasible, the interest (dower or curtesy) of the surviving spouse is subject to the defeasibility which existed as to the estate of the deceased spouse. Section 54, as thus stated, applies to estates in fee simple determinable, to estates in fee simple, subject to a condition subsequent, and also to estates in fee simple, subject to an executory limitation. In the last named type, the weight of authority holds

---

22 Restatement, Property (1937) § 27, comment a and § 39, Special Notes are examples.
23 Restatement, Property (1937), c. 4, Introductory Note, p. 120. That the terms “base fee”, “conditional fee”, “qualified fee” or “conditional limitation” and their historical application and divergent meanings tend to confusion, all, especially students, will agree; and that there is a danger of anachronistic expression is also true.
that the surviving spouse would retain dower or curtesy even though the estate of the sooner dying spouse has been extinguished. The majority of states have followed Lord Mansfield's decision in *Buckworth v. Thirkell* on this point:

“In the United States, eleven states have followed the lead of *Buckworth v. Thirkell*, three states have refused to follow this lead, and thirty-four states exist in which guidance afforded by the Institute may be sufficient to turn the scales when the question is raised for discussion.”

Even though the able monograph of the Reporter, just referred to, does expose the unsoundness of the rule, the fact remains that the Institute is not restating the law but rather telling us what it ought to be. If Section 54 serves to guide the courts of thirty-four states so much is gained, but since it is “contrary to the general impression prevalent in the legal profession,” the lawyers may develop suspicion that in other places the Institute is more concerned with stating what the law ought to be rather than with the Restatement. Section 54 could have been stated with an exception to cover the executory limitation type with a properly drawn caveat to cover this. That would not be out of harmony with Sections 75, 84 and 93.

Section 115 allowing implications of cross remainders in estates for life held as tenants in common, in deeds as well as wills, involves the troublesome question of lack of authority. The rule is undoubtedly sound and its adoption by the Institute may have guided the New York Legislature which recently adopted a statute to that effect.

The rights, powers, privileges, and immunities of ownership in law and equity, making up the sum total of the relationships involved, are arranged under the caption of “characteristics”. This organization of material in adherence to

---

24 3 Bos. and P. 652 (C. P. 1804).
26 1 *ReSTATEMENT, PROPERTY (1937) app. 11.
27 R. P. L. § 66-a, c. 48, in effect March 12, 1937.
a plan makes the work more usable. Characteristics of estates are arranged as Topic 2, following the material involved in Creation, Topic 1, except the estate of the fee simple absolute. This material covering the curtailments of rights, powers, privileges, and immunities by easements, profits, covenants, etc., is left for Division V. It is doubtful whether this omission or postponement will make the book more effective for a lawyer. Certainly, here, rigid adherence to a plan which will necessitate a search for the rules of partition through five volumes (when completed) is not the most convenient arrangement. The characteristics of the life estate, on the other hand, is a scientifically organized body of material where one can locate a rule and find it in its proper setting.

In Section 118, it is provided that a life tenant in possession can recover from a tortfeasor only the damages done to his life estate. The authorities in the majority of jurisdictions under the common law do not so hold. The fundamental law of possession makes the one in possession owner against third parties; he has nearly all of the rights, powers, privileges and immunities. Certainly Section 118 does not state the common law of New York as applied in Rogers v. Atlantic Gulf and Pacific Co. The rule is now regulated by statute in New York The rule applied in the Rogers case is not inconsistent with the rule in Section 146 that the life tenant is not liable for damage caused by a stranger. That there is a division of authority is well known. The Institute should at least make this clear. Again we see the need for annotation, not only annotations from the law of any particular jurisdiction, but excerpts, if not all of the material, used in the discussions of this rule by the Institute.

The careful analysis and arrangement of material found in Volume I appears in Volume II, dealing with future interests. The arrangement is somewhat different from that of possessory estates. In Part I, the five types of future interests are differentiated, namely, reversions, possibilities of

---

28 213 N. Y. 246, 107 N. E. 661 (1915).
29 R. P. L. § 538.
30 WALSH, LAW OF PROPERTY (2d ed. 1927) 104.
reverters, powers of termination, remainders, executory interests, and Part II treats them as to characteristics, transferability, succession, subjection to claim of creditors, and partition. Here the arrangement is less historical and more in accordance with the modern trend to consider under one topic aspects of all future interests. The same adherence to Hohfeldian terminology is also maintained throughout the material on future interests. The term “contingent remainder” is not used in the Restatement, as explained in Section 157, “Note on Terminology.” Its loss will not be mourned, when lawyers learn how to speak and think in accordance with the new terms. On the other hand, this new terminology (not necessarily Hohfeldian) is likely to cause confusion for the New York lawyer and the profession generally. Section 159 states that a reversionary interest may be transferred inter vivos, and Section 159, comment, states that a reversionary interest includes a possibility of reverter. A New York lawyer might question the ability to transfer a possibility of reverter in that state. That it may be released in New York has recently been established, but the profession generally has been taught that it cannot be transferred any more than can a right of entry for breach of condition (power of termination). If the Restatement, in Section 159, states the common law of New York, then the profession ought to have an explanation of the position of the Institute. This could be accomplished through a monograph similar to that of the Reporter dealing with the severability of the power of termination, as found in the appendix at page 3.

In Section 154, comment b, it is not clear what happens when there is an interest “left in the transferor” who dies leaving a will which does not otherwise dispose of such interests, but which contains a residuary clause. Does such interest pass as a reversion or as a remainder? Section 160 states the common law rule that powers of termination are not transferable. The various channels of development mentioned in Section 162 that have evolved a change in the rule making remainders and executory interests transferable at

---

common law have not affected this tough old rule which the Reporter in tentative draft number 4, page 114, admits is an anachronism. But is it necessary to retain that relic of antiquity found in Section 160, comment c, that a power of termination is destroyed by an attempt to make such a transfer? The rule as stated has been found in decisions in five states, but these are of doubtful validity. Surely the trend is the other way. However, the position of the Institute may lead to desirable legislation. Here again annotation and citation of cases would make for clarity and usefulness, especially since the opposite rule is stated in the tentative draft number 4, Section 201, comment c.

It is evident that the Restatement is something more than a mere rewriting. It discloses that the Institute has not only re-examined the authorities closely and critically in order to find the law, but that logical analysis has produced reclassification. The treatment of a possibility of reverter and the right of re-entry, already discussed, is in point. An examination of the text writers shows that these two interests were generally regarded as not alienable, descendable, or devisable at the common law, and that the two were often treated as legal Siamese twins. In the Restatement they are now separated and re-classified. The right of re-entry as stated before, is now described in the Restatement as power of termination in Section 24. The distinction between "reversion" and "possibility of reverter" is historical. The possibility of reverter and a reversion are both reversionary interests, the distinction being that one is subject to a condition precedent and the other is not. This new treatment gives to the Restatement the aspect, at times, of a code. Such innovations as above mentioned may well create a doubt as to whether or not American lawyers, trained in the traditional methods of the common law, will be willing, at first, to accept the almost dogmatic statements to be found here and there in the Restatement of the Law of Property. Here again we see the need of clarifying notes and annotations.

Section 162 states that the owner of any remainder or executory interest in land has the power to transfer his interest. The historical comment containing statutes of vari-
ous states shows very clearly the logical method of analysis
used for this statement. Comment e, however, points out a
large field in which such interests are not transferable, such
as spendthrift trusts. The cross reference to the law of trusts
could be profitably supplemented by annotations. A New
York lawyer would need more than either Restatement
(Property or Trusts) to solve a problem involving suspension
of alienation.

Section 164, comment c, rules that possibilities of re-
verter and powers of termination are governed by exactly the
same rules of descent as remainders, reversions, and execu-
tory interests. This is another case of conflicting common
law rules. Lawyers in four states, including New York,
should be given the reasons for this position, which is contra
to Upington v. Corrigan.32

Section 165, comment a, rules that possibilities of re-
verter and powers of termination are devisable. What has
been said above applies here to the extent that the Institute
has rejected the rule in Michigan and New York.

The material on Estates for Life, Sections 107 to 152
inclusive, is remarkable for its clarity and brevity. The
rules as to creation and characteristics of that interest are
set forth in clear, simple fashion, except that Section 140,
Duty of the Life Tenant Not to Make Changes in the Prem-
ises, perhaps states the rule too broadly. The rule as stated
is that life tenants shall make no changes to which the own-
ers of the interest, limited after the estate for life, have a
reasonable ground for objection. There are many cases pro-
hibiting changes to which owners of the interest, limited
after the estate, did not have a ground for objection. The
law here seems to be shifting under one’s feet and, as stated,
the rule is not a safe guide for a lawyer.

The protection afforded by the law to the owner of future
interests against the acts and omissions of the owner of the
present interest are found in Sections 187 to 210. Although
objection may be raised to the treating of waste in various
parts of the two volumes, it was probably placed here to
maintain uniformity in the plan. Sections 193 and 194 con-

32 151 N. Y. 143, 45 N. E. 359 (1896).
tain a succinct and very clear statement of the rights and liabilities in equity and law of the owner of a future interest in fee simple, following a simple estate in fee simple defeasible, as far as it is possible to restate such rules.

Section 240 provides against the destructibility of remainders subject to a condition precedent in the case where all prior interests are terminated before the condition precedent is fulfilled. That the English rule of the destructibility of contingent remainders never became part of the common law of any one of the United States is very clearly pointed out in the notes in comments a, b, c and d of Section 240. We would prefer to have had made more clear the extent to which the various states have by statute adopted such rules.

Whether the Restatement will be useful depends on whether it will be used. As it stands now it is safe to say that lawyers will buy it and leave it on library shelves. It must be annotated. It is clear that the Institute in many cases has stated as common law many rules that are anachronistic, oftentimes supported by little or no authority. This it has been compelled to do from the very nature of the thing. Again it has been forced to take a position where authorities in different jurisdictions were evenly divided and sometimes have stated rules contra to the weight of authority. The American lawyer trained in the common law tradition will want cases. This was one of the assurances of one of the founders of the Institute, namely, that accompanying each Restatement would be a treatise consisting of "a complete exposition of the law and a full citation of authorities." 33

The desire for a case in point may be so controlling as to prevent the use of the Restatement, not only by lawyers, but by judges. A significant warning from high authority was pointed directly to this requirement by Chief Judge Pound of the New York Court of Appeals:

"Although we are not so closely tied to precedent today as formerly, I venture to say that one well considered decision in point made by a respected court when

33 Cardozo, GROWTH OF THE LAW (1924) 7.
cited on a brief will count for more in winning a decision than all the students' notes and scholars' restatements of the law."  

Assume that a lawyer brought a case of first impression, or one in which the authorities were divided, and that he cited a relevant section of the Restatement, to be sure, not as authority, but for its persuasive force and as a guide to the court. In such a situation, would not his position be stronger if he could state the reasons that led to the adoption of the rule in the Restatement and the supporting authorities? I do not intend to infer that the courts will refrain from using the Restatement, for such is not true. Even the tentative drafts of property have found their way into the reports.

Of course, the Institute is aware of the need of state annotations, but to render the work usable, the annotations should contain more than cases "accord" and "contra". There should be more material explaining why the rule was stated in such section where there was doubt or dispute among the advisers. Annotations should include all or relevant excerpts from the monographs of the Reporter, to the end that we have a "complete exposition". The papers and monographs (some in these two volumes, to be sure) of the Reporters and advisers are splendid examples. These might

---

36 Nothing written herein should be taken as criticism of the excellent work done by Professor Whiteside and his associates in annotating the Restatement of the Law of Contracts. Indeed, the librarians at this school report that there was an immediate and greatly increased demand for the annotated Contracts Restatement as soon as it came out. Also that the work of David S. Edgar, Jr., of this law school faculty, in annotating the Restatement of Torts, is being awaited with eager anticipation. The results of present annotations argue *a fortiori* for the larger demand mentioned herein. Assume that present Restatements are annotated in fifty-nine jurisdictions. A fully equipped law library would require sixty different volumes. Would it not be better to have annotations, cases, and notes all in one volume, even though it would enlarge the book?
be put in a separate volume. The use of the tentative drafts would hardly be sufficient. If time, energy, and money are available, this should be done, if for no other purpose than to insure the most complete success for work so well done to date.

As stated before, there are those who do not believe that the common law can be restated, earnest and sincere in the conviction that the law is evolving so fast that by the time the Restatement is done it will be necessary to restate the Restatement. There is, of course, some validity in the objection but it does not apply to the law of land. The desire for certainty and stability have always retarded rapid change through either judicial decision or legislation. On the other hand, it has already been pointed out how much of the law of property is anachronistic and hoary with age. Perhaps the Restatement, by disclosing such defects, may be used as a help to eradicate them.

It has been demonstrated that the original plans have not been followed in exact detail, but the original purposes have been, and may be further enlarged upon. One of these is clarification not only for individual use but for law reform. Just recently the Institute has published a revision of Proposed Tentative Draft No. 1 of a Uniform Property Act. While studying the Restatement, the reviewer asked himself if it might not thus be used and this pamphlet is the answer. For here are a few suggestions (taken at random) in the proposed Uniform Property Act: a statute, Section 8, which makes effective, in an otherwise effective conveyance, transfer by one out of possession of land held adversely; Section 9, abolishing estates in fee tail and fee simple conditional; Section 11, a statute abolishing the Rule in Shelley's Case; Section 13, a statute abolishing the doctrine of Worthier Title; Section 15, a statute providing that the termination of precedent estates, before the happening of the contingency, does not destroy the remainder contingent on such an event; Section 23, a reasonable statute permitting ameliorative waste, and many more. It also shows that the Institute probably through its work on the Restatement is not only fully aware of the need of such changes, but has amassed the ma-
terial to indicate such a need. Is it not possible that the Institute can and will go farther along this path?

The state of the law as to future interests in New York is well known. Efforts made to correct the iniquities of "the two life rule" and others contained in the revised statutes have been unavailing. The story of the struggle is found in the combined report of the Decedent Estate Commission of the State of New York.37 Here is a case of professorial frustration worth studying. Here also is a field of endeavor for the Institute and the Restatement. Experience with the law of conveyances in New Jersey has shown the need of change that should be welcomed in that state.

The query, whether or not the Restatements will be used generally as teaching tools, has received varying answers. One dissident has condemned the Restatements in withering terms.38 The position taken here cannot be said to represent that of the majority of the teaching profession. It is, however, symptomatic of an ideology that predicts and desires changes. The article from which it is taken challenges much of the present order and raises issues far beyond the purview of this article. The usefulness of the Restatement to teachers is more truly indicated in the following: "With the completion of the present Restatement project, the principal tasks of doctrinal writing in the major fields of the law will have been performed at least sufficiently for this generation."39 This quotation is a line taken from context not in

38 "The age of the classical jurists is over, I think. The 'Restatement of the Law' by the American Law Institute is the last long-drawn-out gasp of a dying tradition. The more intelligent of our younger law teachers and students are not interested in 'restating' the dogmas of legal theology. There will, of course, be imitators and followers of the classical jurists, in the years ahead. But I think that the really creative legal thinkers of the future will not devote themselves, in the manner of Williston, Wigmore, and their fellow masters, to the taxonomy of legal concepts and to the systematic explication of principles of 'justice' and 'reason', buttressed by 'correct' cases." Cohen, Transcendental Nonsense and the Functional Approach (1935) 35 Col. L. Rev. 833.

any way criticizing the Restatement but delineating the present and future tasks of teachers. Impliedly, the Restatement is usable by teachers. It is submitted that even though "the principal tasks of doctrinal writing * * * will have been performed" by the Restatement, the teachers will desire annotations. Another writer criticizes the Restatement of the Law of Contracts on the ground that the citations of authorities are not given. But this criticism is based on another ground. This writer claims that the Restatement which claims to be a scientific project is not scientifically done: "But what would one think of a scientist who would publish his conclusions to his fellow-experts without the data on which they were based?" Although we are not entirely in accord with this view the fact still remains that teachers, for one reason or another, will require annotations.

That the professors of law have made generous use of the various Restatements is shown by many of the later published case and material books. In his Cases and Readings on Property, Professor Fraser has inserted the first chapter of the Restatement as a basis for a preliminary discussion of terms. Professors Chafee and Simpson in their recent outstanding work on Equity inserted sections and comments (44 in all) from the Restatement of Conflict of Laws and the Restatement of Contracts. Among the recent notable texts, Simes, in his work on Future Interests, acknowledges his obligation of the Institute for material furnished him by the Institute.

Patterson, The Restatement of the Law of Contracts (1933) 33 Col. L. Rev. 402.
Fraser, Cases and Readings on Property (1932) p. v. "The first chapter of the American Law Institute's restatement of the law of property is inserted, with grateful acknowledgment, as a basis for a preliminary discussion of terms, and for convenient reference."
Simes, Law of Future Interests (1936) p. iv. "The greatest obligation is that to Professor Richard R. Powell, of the Columbia Law School, Reporter of the American Law Institute for the Restatement of Property, and to the American Law Institute * * *. As an adviser of the American Law Institute for the Restatement of Property, the writer has also been furnished with all the materials, both published and unpublished, which have been prepared by the Reporter. It has been his privilege for the last three years to be present at the meetings of the Property Group of the American Law Institute at which the Restatement of the law of Future Interests was under discussion. That the materials of the Institute and the discussions of its Property Restatement Group were of great assistance in the preparation of this book goes without saying."
Occasionally one hears an expression of desire for a code in this country. It has even been suggested that the Restatement might be used as a basis for a code in the future. Code adoption is highly problematical and among the problems preliminary to the adoption is the one of preparation. The preparation of a code, if adopted through the efforts of legal scholars or statesmen, would be done only after serious study and research. For such purpose, the Restatement of Property together with the material and experience of the Institute would be invaluable. Already, the convenient arrangement of the Restatement has shown its utility in the study of comparative law. A casual study of the proposed code of property in Germany portraits the extent to which a property code of law of any country reflects prevailing political philosophy. One writer describes the code as merely serving an historic purpose and as one of the steps to be taken in transition to codification. Does codification in the sense there used and predicted mean the abandonment of the property concept? If it does, we believe that it is a long way off. The Restatement of the Law of Property contains nothing about a rational basis for property, but it does outline the history and shows how the rules developed as a part of the common law. There are those of us who think the common law will be with us for a long while yet. It has been an aid in preserving and perpetuating democracy.

The Restatement of Property is the most scientific system, from the standpoint of arrangement and classification of the common law of property, that we know of. It is the result of prodigious effort and sustained hard work. Emerson said that a man is as lazy as he dares to be. The Reporters have not dared to be lazy in the face of an insistent demand, the accomplishment of which was considered by some to be an impossible task. From this partial evaluation, it is apparent that a real contribution to the science of law will have been made when the entire field will have been covered.

JOHN P. MALONEY.

St. John's University School of Law.

43 Franklin, Historic Function of the American Law Institute: Restatement as Transitional to Codification (1934) 47 HARV. L. REV. 1367.