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The Restatement of the Law of Agency

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THE RESTATEMENT OF THE LAW OF AGENCY

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THE agency Restatement is three years old. Since the appearance of the final draft appellate courts have cited it frequently. Law teachers have criticized it. Lawyers have probably used it. Generally speaking, the critics have agreed with the reporter and his advisers that the judicial process, as it functions in the field of agency, is susceptible of comprehensive and authoritative statement.[1] Some critics have differed with the authors about definitions and language, and sometimes about the adopting or rejecting of propositions indicative in some degree of expressed policy choices.[2] Some critics, however, have attacked the whole scheme of the Restatements and the American Law Institute including the agency compilation indirectly among the others.[3]

This paper is primarily a criticism but it is also something of an apology. For two years this "critic" and "apologist" has been laboring with the Wisconsin annotations, and he is giving it up as a bad job, although not necessarily a bad job for some other person.

A dissertation on a legal subject can be descriptive but it cannot be definitive. A workable and satisfactory statutory prescription must be specific. It must be phrased in language sufficiently descriptive so that courts can discover what the legislature has attempted to lay down as objective standards for future concern. If the statute is not so phrased the legislature has made no final choice of policy. The courts will be concerned about the "legal significance" of the words of the statute. When, for example, the legislature uses such typically traditional law terms as "proximate cause," "legal title," "merger," power of control," "malice," or "scope of authority," it is probably doing little more than re-phrasing general propositions in language which has peculiar significance for common law lawyers. In any event, whether the legislature is

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[1] Faville, Book Review (1934) 19 IOWA L. REV. 490; Fifoot, Book Review (1934) 2 U. OF CHI. L. REV. 159; Merrill, Book Review (1934) 43 YALE L. J. 678; Thorne, Book Review (1934) 28 ILL. L. REV. 725; Whiteside, Book Review (1934) 19 CORN. L. Q. 349. The criticism in the IOWA LAW REVIEW is the estimate of a member of the bench and is not the criticism of a "professional" law teacher.

[2] Merrill, Book Review, *supra,* note 1, in which the reviewer gives some suggestion that he does not believe the ideals of the American Law Institute can be attained; Thorne, Book Review, *supra,* note 1; Whiteside, Book Review, *supra,* note 1, in which the reviewer sets out a detailed criticism of some fundamental concepts, apparently conceding that the law of agency can be restated.

[3] Arnold, Book Review (1936) 36 COL. L. REV. 687; Yntema, *The Restatement of the Law of Conflicts* (1936) 36 COL. L. REV. 183; ROBINSON, LAW AND THE LAWYERS (1935) 36, 215, 280. And compare Goodrich, *Institute Bards and Yale Reviewers* (1936) 84 U. OF PA. L. REV. 449.

purporting to declare its understanding of the "common law," or whether it is striving to lay down new standards of conduct through the particular enactment, if it does make use of this legal terminology, the legislature must expect the courts to work out what the language of the statute shall be taken to mean. Only common law lawyers can understand the mysteries of the language of the law. When the authors of the Restatement use the phrase "manifestation of consent"[4] in their definition of agency, they are devising what is apparently a new combination of words. But this phrase has all the earmarks of typical legal language. It is figurative and academic. What shall amount to "manifestation of consent," the court, the policy-chooser, the standard-maker, must prescribe in a variety of cases. The words, "consent," "authority," "control," as used in the definition sections of the Restatement, are argumentative. They are not descriptive.[5]

Blackstonian jurists have perpetuated a traditional technic. They rely upon general propositions engrained in the judicial process (the "law" from the Blackstonian point of view) as justifying a choice of policy immediately necessary in a particular lawsuit. Perhaps the general propositions have been accepted by several generations of common law lawyers. A particular court may be stating one for the first time. But the Blackstonian technic requires that a legal proposition be discovered as the rule of every case.[6] The reporters of the several Restatements have consciously or unconsciously pursued the Blackstonian approach. The law is a scheme of general propositions. The law is flexible in the matter of application.

A general principal of fundamental importance, a traditional concept of morality, conscience, or equity, to use a word more professional than "justice," can not be phrased as a legal proposition. A due process clause in a written constitution, a device of judicial supremacy as a part of the political scheme, a declaratory statement in a bill of rights,

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[4] RESTATEMENT, AGENCY (1933) § 1. If "manifestation of consent" is accepted as a part of the definition describing the relationship of principal and agent, it is interesting to speculate about the possibilities of "constructive consent." That concept may fill the niche now occupied by "agency by necessity." Perhaps, "delegation of authority" will be sufficiently explanatory in most cases so that the courts will not feel much concerned about constructive consent. Certainly "delegation of authority" [RESTATEMENT, AGENCY (1933) § 17] is literally consistent with "manifestation of consent."

[5] RESTATEMENT, AGENCY (1933) §§ 2, 7.

[6] As typical Blackstonian propositions outside the field of agency, the following are suggested: The finder has good title against all the world but the true owner. See *Armory* v. *Delamarie,* 1 Strange 505, 93 Eng. Rep. 664 (1722). A chattel becomes a fixture and acquires the legal characteristics of real property when it is annexed to the premises to be used there permanently and conveniently. See *Lipsky* v. *Borgman,* 52 Wis. 256, 260, 9 N.W. 168 (1881). A law under which incorporation can be effected, a good faith attempt to organize thereunder, and corporate user, are essential to the existence of a *de facto* corporation. 7 R. C. L. 60.

or in a civil code, all allow for the testing of particular policy choices according to ideas of good living traditional among western peoples, a testing to be worked out through the judicial process by disinterested umpires.[7] The Blackstonian jurist with his academic scheme of legal propositions, and the realist with his descriptive explanations and statutes, must allow for these factors of conscience, these factors of philosophy. The Blackstonian and the realist must allow for the equities of the case. No realist believes that a legislative assembly can prescribe specifically about probable judicial controversies so as to eliminate the factor of administration. The realist knows that law givers can not have minds profound enough to foresee all of the possible controversies which may arise among men. Moreover, the policy choosers of one generation ought not to prescribe specifically for the ills of the future. Judges are expected to administer justice.

There is, however, a difference between a legislative prescription that a chattel mortgage is "void" against all persons but the original parties to the transaction, if there is no change of "possession," or filing

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[7] The judges are impartial umpires. At least they are as impartial as human beings ever can be. They are not interested in the immediate consequences of the specific adjustments they are making. They are subject to professional criticism.

American states all have written constitutions and all recognize the common law doctrine of *stare decisis*. But American jurists have refused to accept this doctrine with its English common law limitations. American judges have refused to permit the carrying out of specific policy choices of legislative bodies and administrative officials which the judges have felt were inconsistent with American social and political ideals. Practical application of the theory of judicial supremacy leads to that result. Associating the doctrine of precedent with the practical application of the theory of judicial supremacy has resulted in the judges' writing into the constitutional scheme specific prohibitions against particular choices of policy. The Supreme Court of the United States decides in one generation that a legislature cannot limit the hours which a man may undertake to work because the legislature must not interfere with a right which by tradition is a part of every citizen's political heritage. That choice is final for all time unless the cumbersome amending process is brought into play and made to perform a law-making function, or unless the Court, perhaps by devious rationalizing, can distinguish a subsequent policy choice from the first. A written constitution of fundamental principles, together with the practical application of the theory of judicial supremacy, is enough to insure the administration of justice according to traditional ideas of right and wrong. To attach the common law doctrine of precedent, developed in a jurisdiction where there was no written constitution, nor any theory of judicial supremacy, to the other kind of political scheme stifles the functioning of government. Provisions in a constitution about qualifications for office, make-up of legislative bodies, times of sessions, and such, represent specific policy choices which are meant to be permanent. The tradition of *stare decisis* performs a valuable function within the field of every day civil law when a legislature may change by ordinary processes a choice of policy established as a standard of conduct by a court through the administration of the judicial process. But in the political field, when a court is exercising its powers of judicial supremacy, and justifying its position by reference to the enunciation of fundamental principles in a written constitution, American jurists must eventually accept the approach of continental lawyers. It is the only way out of a political impasse. See Llewellyn. *The Constitution as an Institution* (1934) 34 COL. L. REV. 1.

of the instrument,[8] and a statute which provides that no corporation can enforce against the transferee of a stock certificate any by-law purporting to restrict the transfer, unless a copy of the by-law is printed on the certificate.[9] The words, "void" and "possession," in the first statute, are not descriptive. Interpretation by the court leads to surprising results.[10] When a legislature adopts the Uniform Sales Act it supposedly lays down the tests to be applied by the courts in determining when "property passes."[11] There are physical things and chattels, but these physical things are not meant to be synonymous with "property." That word, used in the act as a substitute for the more familiar word "title," suggests so many implications that its use in any definition or statement of a general proposition is meaningless. A legislature does little through the Uniform Sales Act to affect policy choices of the courts even where the judges are led to believe that their decisions are controlled by the statute.[12] The Uniform Conditional Sales Act is a different kind of statute. The provisions in this act concerning filing and the provisions about foreclosure are specific.[13] The statute presents a scheme of procedure rather than a general statement of subjective legal propositions. The job of the court under it is to hold the contending parties in any lawsuit to a compliance with its more or less positive and ascertainable prescriptions.

In a statutory scheme of comprehensive scope precision in the use of descriptive language is necessarily a matter of degree. Because the statute cannot be minutely all-embracing, the courts must be free to make policy choices, to lay down explanatory standards of conduct, to "fill the crevices" consistently within the scheme of the statute as it is understood by them. Detailed regulatory statutes in which the legislature provides for the setting up of administrative boards to supervise the enforcement of the statutory prescriptions are an essential governmental device in our complex industrial society. These administrative boards are expected to prescribe regulations within the general scheme of the particular statute to insure its more effective enforcement. That is not so different from the process of prescribing by statute for some more or less definitely described situations, which

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[8] WIS. STAT. (1935) § 241.08.
[9] WIS. STAT. (1935) § 183.14; *Cf. Magnetic Mfg. Co.* v. *Manegold,* 201 Wis. 154, 229 N.W. 544 (1930).
[10] See *National Bank of Commerce* v. *Brogan,* 214 Wis. 378, 253 N.W. 285 (1934); Note (1934) 18 MARQ. L. REV. 248.
[11] WIS. STAT. (1935) § 121.17-121.20.
[12] This statement is dogmatic. It requires detailed comment. A number of cases must be examined objectively to get data upon which the conclusion can stand. The writer has put forth this "hypothesis" after teaching sales for three years. Some day in the not too distant future he hopes to have his objective analyses prepared for publication.
[13] WIS. STAT. (1935) §§ 122.05, 122.07, 211.14, 122.16-122.23.

leaves to the courts the working out through policy choices, specific rules of administration within the outline of the statutory scheme.[14] Typical legal language may be written into regulatory enactments. Scope of employment as used in a Workmen's Compensation Act is a concept that must be defined during the process of litigation by commission or court with little in the statute to guide them.[15] The legislature, however, in adopting such a statute is consciously planning for administration by court or commission. But when a legislature prescribes that stock issued at less than the fixed price or less than par[16] is void, or when the reporter defines a servant as one subject to the master's right of control,[17] each is intending, at least, to speak with some authority and to speak finally.

Several centuries ago the English Parliament enacted the Statute of Frauds. Legislatures in Anglo-American jurisdictions have been enacting statutes of frauds ever since. Certain contracts must be in writing, and perhaps there must also be included in the written memorandum an expression of consideration, or the contracts are void or unenforceable.[18] Literally the legislature seems to be speaking with final voice, but "expression of consideration,"[19] "void" and "unenforceable," the word "executory" if it is in the statute, or "delivery of a part of the goods," are words that may have many meanings for common law judges. The "equities" of the case have a lot to do with specific policy choices which the courts pretend to justify as decisions necessarily within the language of the statute. Suppose the legislature had listed some typical cases, sales of goods, land deals, accommodating party cases, as the legislature does in the usual statute of frauds, and suppose the legislature had gone on to prescribe that no plaintiff could get relief in any particular case covered by the statute unless there should be some evidence in the record to corroborate the oral story of the plaintiff and his witnesses about the terms of the bargain. If the statute were so phrased, the legislature would be consciously allowing for the exercise of administrative discretion on the part of the courts in working out adjustments within the scheme of the statute. And the statute would be approximately descriptive of the process of administration as it works today under statutory prescriptions which

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[14] The National Bankruptcy Act is suggested as a representative illustration. Certainly the Uniform Conditional Sales Act and perhaps the Negotiable Instruments Law are typical.

[15] See (1936) 20 MARQ. L. REV. 159.

[16] WIS. STAT. (1935) § 182.06.

[17] RESTATEMENT, AGENCY (1933) § 2.

[18] WIS. STAT. (1935) §§ 121.04, 240.08, 241.02.

[19] See and compare the two Wisconsin cases, *Commercial Nat. Bank of Appleton* v. *Smith*, 107 Wis. 574, 83 N.W. 766 (1900) and *O'Neill* v. *Russell*, 192 Wis. 141, 212 N.W. 278 (1927).

literally leave no room for the exercise of administrative discretion.[20]

If a legal treatise or text is not descriptive its usefulness is limited; it may have some value as a digest of cases. The subject of agency can not be defined but those cases which are called agency cases can be described. Agency cases involve a three party set-up. The position of one party to a lawsuit has been affected, or allegedly affected, by the conduct of another person, affected, that is, in a lawsuit between the first party and his immediate adversary. Typical situations can be described and the cases can be classified into some more or less representative factual categories. It is absurd to generalize in legal language, using "apparent authority," "implied authority," "express authority," or "manifestation of consent," about cases where a "third person" is suing a "principal," where a "principal" is suing a "third person," where one or the other is suing or being sued by the "agent," and in any one of these "situations" where the "principal" is "undisclosed."[20a] It is absurd to use the legal language and it is absurd to fit the cases into such academic categories. Real estate cases are different from automobile cases, farm machinery cases are different from perishable goods cases, stock and bond cases are different from grain cases, not merely because the goods, the things about which the parties have bargained, are physically different, but because people who do business in different commercial fields and in different parts of the country have their own ideas about the probable adjustments that should be made among contending business men in the different groups. Industrial and commercial relationships are not so simple that one group of business men can carry on apart from all their

[20] The "fraud" theory and the "suggestive act" theory are suggested as explanations of the doctrine of part performance. See *Bradley* v. *Loveday,* 98 Conn. 315, 119 Atl. 147 (1922); *Papenthien* v. *Coerper,* 184 Wis. 156, 198 N.W. 391 (1924); *Marshall & Illsley Bank* v. *Schuerbrock,* 195 Wis. 203, 217 N.W. 416 (1928); Pound, *Progress of the Law* (1920) 33 HARV. L. REV. 929,933. The cases on part performance are not so simple that they can be classified in two categories. The making of improvements, the going into possession, the payment of a part of the purchase price are all corroborative of the oral testimony. Courts naturally differ in particular instances as to how much of this corroborative evidence is necessary to satisfy them that there is evidence of a bargain which they ought to enforce.

In the accommodating party cases, where a defendant stands upon the statute, the courts clothe their decisions with such phrases as "original" or "primary obligation," "main purpose," and "new consideration." The objective criteria, the corroborating evidence in the record, may be a showing that the seller charged the particular order at the time of the immediate transaction to the account of the deliveree or to the account of the alleged promisor [Champion v. Doty, 31 Wis. 190 (1872)]; that collateral promises are frequently made by business associates like the particular seller and alleged promisor in the case at hand [*Bartalotta* v. *Calvo,* 112 Conn. 385, 152 Atl. 306 (1930)]; that the alleged promisor was personally interested in performance by the alleged principal [*Hewitt* v. *Currier,* 63 Wis. 386, 23 N.W. 884 (1885); *McCord* v. *Edward Hines L. Co.,* 124 Wis. 509, 102 N.W. 334 (1905)].

[20a] See RESTATEMENT, AGENCY (1933) chapters 6-14. The chapter headings suggest the basis of the reporter's classification.

fellow men. But it is an academic approach to the solution of the problems presented in these three-party cases to resolve differences depending upon business or locality into questions of intent, custom, and notice. No predictions can be made about it, no description can be attempted of the judicial process, as it functions in these cases, unless some objective standards are suggested, or can be discovered, as having important bearing upon adjustments to be made among litigants.

In any kind of contract case involving land deals or grain cases, involving retailers or manufacturers, it is important to inquire into the details surrounding the business relations between the active negotiator and the party for whom he has allegedly undertaken the negotiations. Was one literally hired by the other and was he literally on the other's payroll? Was the negotiator-employee permitted much choice as to how the business affairs of his superior were to be conducted? Did the negotiator hold an executive position? Was he a sales solicitor? Were the two persons independent business men, one a broker, the other a grower, or a producer, or a wholesale distributer? In a tort case, where a person is brought into the case as the alleged employer of the active tort-feasor, it is important to find out whether the tort-feasor was in fact on the pay-roll of the other person. If he were not on the pay-roll, it is important to know whether he was actively engaged in some more or less useful function about the "employer's" premises and affecting the "employer's" interests.[21] These inquiries are not literally suggested by the phrases, "implied authority," "apparent authority," and "power of control."

General propositions about "Agent's Statements of Facts on Which his Authority Depends,"[22] "Authority Dependent on Facts within Agent's Peculiar Knowledge,"[23] about "general agents" and "commercial documents"[24] cannot be descriptive of the probable fact combinations as they will appear in the course of litigation. If these propositions are not descriptive in some degree, if they are not analytic, they cannot be taken as practical statements of positive judicial determinations. If they are not that, there is no reason for their promulgation as propositions in a treatise, as prescriptions in a statute, or as a restate-

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[21] These inquiries are suggested as typical in the "independent contractor" cases. Obviously they are not exhaustive, nor are the facts discovered decisive in producing judgment for or against the alleged employer. As illustrative of the contention that the *situs* of the accident, and the utility of the tort-feasor's presence, generally, with respect to the situs-owner's interests, where the latter, the defendant, has not in fact hired the tort-feasor, see the following: *Atlantic Transport Co.* v. *Coneys,* 82 Fed. 177 (C.C.A. 2nd, 1897); *Rait* v. *New England Furn. Co.,* 66 Minn. 76, 68 N.W. 729 (1896); *Charles* v. *Barrett,* 233 N.Y. 127, 135 N.E. 109 (1922); *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 29 Sup. Ct. 252, 53 L.ed. 480 (1909).

[22] RESTATEMENT, AGENCY (1933) § 170.

[23] RESTATEMENT, AGENCY (1933) § 171.

[24] RESTATEMENT, AGENCY (1933) § 172.

ment of the "law." The illustrations which the reporter has chosen to list after some of the comments on the general propositions suggest that the reporter appreciates the factor of administration and its importance within the judicial process. These illustrations are quite specific. It is the classification that is academic.

The word "authority" is the most comprehensive word in the agency language. There is express, implied, and apparent authority, and whenever the matter of authority is raised the courts will probably agree about its definition. Within the field of agency cases the determination about the matter of authority represents the sum of all functions of the judicial process. Whether the "negotiator," the agent, had the goods under his physical supervision, whether he drew a salary from the person alleged to be the principal, whether he was accustomed to engage in similar transactions with other persons than the immediate "third party" in the same manner and for the alleged principal, and for others than the principal, are typical facts which must be discovered by the fact finder. But the matter of authority is a question of law. The inferences to be drawn from a record setting out the specific facts, whether, upon those facts, the party trying to hold the principal to the bargain in a contract case was justified in relying upon the negotiator's exercise of discretion, or whether the alleged principal had impliedly "authorized" the negotiator to complete the deal, are matters of discretion. They are specific policy choices, and they are made by the court, or with the court's permission they are made by the jury.[25] Whether they are made by the court or whether they are made by the jury, it bears repetition that the drawing of these inferences from the facts which the policy chooser accepts is a matter of discretion and represents the making of a choice of policy in a particular case. If the court has made the choice of policy, concededly as a determination of a matter of law upon a record of specific facts already found or to be

[25] See for example two of the leading and comparatively recent Wisconsin cases on apparent authority, *Voell* v. *Klein*, 184 Wis. 620, 200 N.W. 364 (1925) and *Zummach* v. *Polacek*, 199 Wis. 529, 227 N.W. 33 (1929). In the first case an automobile dealer sought to get back an automobile from the defendant. The defendant had purchased the car from one of the dealer's salesmen. The salesman had absconded with the purchase price and with the car taken in trade. The record is meager. Nothing is said about any certificate of title. There is no testimony by persons in the trade about accepted understandings as to what salesmen may do. The trial court had let the jury decide whether the purchaser should be protected. Of course the case had been transmitted to the jury under typical instructions about apparent authority. On appeal to the circuit court judgment on the verdict was reversed and judgment was ordered for the plaintiff. The supreme court reversed the judgment of the circuit and ordered judgment to be entered for the defendant. The court made much of "common knowledge," what the jurors might be expected to know from their own experiences. In the other case the jury found expressly with respect to the disputed facts about payment by check or by cash. The "legal" classification, the policy choice, was made by the court.

found by the jury, assuming there is a dispute as to the precise facts, the record is definitely more satisfactory as the basis for future prophecy than where the court permits the jury to draw the inferences under general instructions about "authority" and "reliance by third parties."

No sweeping criticism is accurate. There are some black letter propositions in the Restatement that are descriptive to a considerable degree. Sections 114 and 115, for example, about the "Termination of Authority" in the event of bankruptcy or war, or Section 210 about the undisclosed principal's being discharged in the event the third party proceeds to judgment against the agent, and Section 151 about formally executed instruments and the principal as a covenentor, are all quite specific corollaries following more or less general and academic definitions of such words as "authority," "principal," and "undisclosed." There are many more sections like these.

Since the appearance of the final draft of the Restatement the Wisconsin Supreme Court has referred to it in seven or eight cases.[26] It is submitted that the Wisconsin court did not do a better job in these cases than it would have done had no such treatise been available. Perhaps the judges on the bench had more confidence about the acceptability of their decisions when they felt that they were doing what some of the leading jurists of the country seemed to have anticipated. Perhaps they had some satisfaction in declaring that the Wisconsin law is in accord with the provisions of the Restatement. The fact remains, however, that the Restatement offered the court no indicated solutions for any particularly difficult policy choices.

In the comparatively recent case, *Estate of Kaiser*,[27] the Wisconsin court has literally given its approval to five sections of the Restatement.[28] The court quoted the five sections in full, all of them having to do with the matter of "partially disclosed principal," cited three earlier Wisconsin cases[29] as in accord with these propositions, and

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[26] References to the final published draft do not appear in the Wisconsin reports until Volume 213. In addition to those referred to in the text, the following are the cases in which the court has referred to the published Restatement: *Blume* v. *Palace Garage Company*, 214 Wis. 319, 323, 252 N.W. 177 (1934), citing § 469; *Sorensen* v. *New York Life Ins. Co.*, 214 Wis. 430, 432, 253 N.W. 173 (1934), citing § 94; *Neitzke* v. *Kraft-Phenix Dairies, Inc.*, 214 Wis. 441, 451, 253 N.W. 579 (1934), citing § 129; *Weil-McLain* v. *Maryland Casualty Co.*, 217 Wis. 126, 129, 258 N.W. 175 (1935), citing §§ 7, 8.

[27] 217 Wis. 4, 259 N.W. 177 (1935).

[28] RESTATEMENT, AGENCY (1933) §§ 4, 147, 149, 151, 153.

[29] *Kirschbon* v. *Bonzel*, 67 Wis. 178, 29 N.W. 907 (1886), in which the plaintiff, a materialman claiming under a statutory lien, was permitted to reach the security although the literal contract was executed by the present fee-owner's husband, and in his own name, with the plaintiff, the court feeling that the husband and wife had been jointly associated in the undertaking from the beginning; *Hodges* v. *Nalty*, 104 Wis. 464, 80 N.W. 726 (1899), in which the plaintiffs were considered to be the right parties in interest as representatives of

then went on to reverse the judgment in the record before it and to order that relief be awarded to the claimant. First of all it may be pointed out that the listing of the Wisconsin cases as supposedly in accord with the propositions of the Restatement represents just about all that is expected of an annotator. It is true that the propositions referred to are in some degree more specific than the definition sections, but even these sections are broad enough to cover many cases raising different "fact-type" problems from those presented in the three Wisconsin cases. One of the three cases cited has much to do with what the reporter would classify as an "undisclosed principal."[30] When the court says, or when an annotator says that the three Wisconsin cases support the propositions of the Restatement, neither the court nor the annotator tells much about the three cases.

It appeared in the *Kaiser* case that the decedent, Kaiser, had solicitated the purchase of the property involved through a real estate firm. Through this firm Kaiser had learned that the property was owned by Krause. The firm negotiated with the representative of Krause and persuaded him to arrange for the deal at a prescribed price. Kaiser signed a memorandum with the firm and deposited at the same time with one of the members a nominal sum to be used as a down payment with the understanding that the land was to be conveyed and the balance of the price paid within thirty days. Krause, the owner, signed a memorandum with the same firm, agreeing to execute a deed covering the property described within thirty days, agreeing to furnish an abstract, agreeing to pay a commission to the firm, and acknowledging receipt of the nominal first payment. Kaiser died before the end of the thirty days. An abstract had been furnished by Krause and there was no question raised about marketable title. Krause filed a claim against the estate to enforce the bargain. The county court dismissed the claim, holding that it was not filed by a party with whom the deceased had contracted. The appellate court, in reversing the court below, said that there was a "completed" contract between Kaiser and Krause and cited in support of that conclusion an earlier Wisconsin case[31] in which it was held that a land contract could be completed between a vendor and a vendee through the medium of several written communications.

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the group with whom the defendant had contracted; *Wilson* v. *Groelle*, 83 Wis. 530, 53 N.W. 900 (1892), in which the plaintiff, a shipper, was given a new trial to build up a case against the defendant, a purchaser from the shipper's immediate consignee, upon the plaintiff's showing that he and the consignee had been associated in the enterprise and that the defendant had not paid anything to the consignee by the time the plaintiff had requested payment from the defendant.

[30] *Wilson* v. *Groelle*, 83 Wis. 530, 53 N.W. 900 (1892).

[31] *Curtis L & L. Co.* v. *Interior L. Co.*, 137 Wis. 341, 118 N.W. 853 (1908).

The *Kaiser* case is difficult to analyze. In spite of the full statement of facts the opinion is cryptic. The court must have felt that the specific facts in the record showed that Krause knew the firm had a prospective purchaser lined up when he signed the memorandum, because the court cites propositions from the Restatement about partially disclosed principals and does not refer to the sections about undisclosed principals. The court concluded upon all the facts in the record that there was a "completed contract." The illustrative case referred to in support of the conclusion was one in which separate papers were taken as evidence of the agreement between the parties, but it was not a three party "agency" case. Unless the *Kaiser* opinion gives some idea of the specific facts which persons must show to get their bargains into the "completed" class it is comparatively useless as a guide in future lawsuits. It is difficult to discover from the opinion whether the court felt that the real estate firm was the particular business associate of one party or the other. Certainly no generalizations can be drawn from this case about undisclosed principals. As a precedent it must be taken as one where both parties prospectively interested in the particular transaction were equally interested in, and aware of, the carrying out of the bargain through a common negotiator.

In several of the Restatement cases the court has been concerned about an agent's negligence being imputed to the principal.[32] In one of these cases a married woman was the plaintiff.[33] A railroad company, the woman's husband, and the husband's insurance company were the defendants. The woman had been riding in an automobile which had been struck by one of the company's trains at a grade crossing within the limits of a town. At the time of the collision the plaintiff's husband was driving the automobile. The plaintiff alleged that negligence of the company's employees and negligence on the part of her husband were contributing causes of the accident. At the trial of the case the jury found that the carrier's employees and the husband were all of them at fault. As against the carrier the appellate court decided on the record that the judgment entered below could not stand, although it appeared that the plaintiff herself was not at fault. The wife and the husband were joint owners of the automobile. Each was accustomed to drive it on short or long trips when the other was present. The court's choice of policy is definite. The working out of compensation to the injured party in a personal injury case is a matter

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[32] In addition to the case discussed in the text see *Georgeson* v. *Nielson*, 214 Wis. 191, 252 N.W. 576 (1934) and *Brothers* v. *Berg*, 214 Wis. 661, 254 N.W. 384 (1934). In both cases the court treated the imputed negligence question as a question of law.

[33] *Archer* v. *Chicago, M., St. P. & P. R. Co.*, 215 Wis. 509, 255 N.W. 67 (1934); see (1934) 19 MARQ. L. REV. 51.

for compromise on the part of the policy choosers. Fault is the dominant factor. In effecting the compromise in this case the court placed the burden upon the husband rather than the carrier. It is not always true that a wife's status in a lawsuit is affected by the past conduct of her husband. Perhaps most often her position is not so affected. Joint ownership and joint use of the automobile were the objective criteria upon which the particular compromise was based. But the court felt that it was necessary to justify the compromise, this policy choice, by classifying the husband as a "gratuitous" agent and referring to a particular comment following one of the propositions in the Restatement.[34] Gratuitous agents, it is said, cannot escape responsibility to their principals when they are at fault. It is not suggested here that the proposition is necessarily untrue, but it is suggested that the proposition is trite and general. To describe the relationship between the husband and the wife in this case as that between a principal and a gratuitous agent, and to declare in addition that there must have been some "manifestation of consent" on the part of the principal to get the agent, even a gratuitous one, into the agent class, is to use big words as descriptive of a comparatively simple and objective relationship.

Another one of the Restatement cases was *Walter* v. *Four Wheel Drive Auto Co.*[35] In that case the court felt concerned about "apparent authority" and about "ratification" and had recourse to the Restatement for help on both matters.[36] The case was one in which the plaintiff sought to recover from the auto company defendant a sum which he had supposedly paid as a first installment on the purchase price of one of the company's manufactured trucks. The plaintiff had in fact made the payment to a third person, the alleged representative of the company. The company's officials had refused to confirm the bargain ostensibly negotiated for the company by the representative. The alleged representative had paid nothing to the company. The plaintiff was not trying to hold the company to the bargain but he was suing the firm rather than the other person to recover the down payment. The company interpleaded Wagner, the negotiator, hoping to get judgment over as against him in case it should be held to respond to the plaintiff. The plaintiff prevailed in the lower court on his claim against the company and judgment in his favor was affirmed. The details of the relationship between Wagner and the company are set out at length in the opinion, how the company officials approached Wagner and suggested that he solicit a purchaser for one of the company's new trucks, a purchaser who could haul the company's freight, how Wagner brought the plaintiff to see the company officials, how he

[34] RESTATEMENT, AGENCY (1933) § 379 (2), comment e.
[35] 213 Wis. 559, 252 N.W. 346 (1934).
[36] RESTATEMENT, AGENCY (1933) §§ 24, 43, 63.

acted as the go-between, accepting and submitting propositions and counter-propositions, how finally he submitted the order for the truck with notice of his acceptance of the down payment. The opinion discloses that the officials said nothing immediately to the plaintiff about Wagner's lack of authority although they did eventually refuse to confirm the order. The court referred incidentally to the finding by the jury that as between Wagner and the company Wagner was not a dealer but was an employee who was to receive a commission on the deal. It is suggested here that that finding is the turning point in the case. The jury had considered the facts as outlined by the court, and the jury had found that Wagner and the company were not bargaining between themselves as independent and competing business men with Wagner anticipating a re-sale to the plaintiff, but that Wagner and the company were bargaining as business associates anticipating that in this relationship Wagner should occupy the subordinate position. That is an inference of which the appellate court undoubtedly approves. With that problem of the nature of the relationship settled the court felt that the handing over of the money to the subordinate was in effect a payment to the other one of the two business associates, and the court held that the finding of the jury with respect to the agent's apparent authority could be supported by the record. It is obvious that apparent authority in this instance is a legal conclusion. Incidentally it may be pointed out that the provision in the Restatement about "authority" to accept a down payment in carrying on negotiations for a sale where part of the price is to be paid, follows as a corollary once the relationship between the parties is classified. Unless there is something in the opinion which discloses objectively the basis upon which this classification was made, the opinion is of little value as indicative of any policy choice for future recognition. Reference to the provision of the Restatement added little to explain the court's reaction to the record in the case.

The Restatement is a treatise and it is a prospective code. As a treatise it is academic just as any treatise which is not factually descriptive is academic. As a code its propositions are trite. They are general enough to satisfy most critics with respect to their accuracy and too general to be positively effective in suggesting policy choices. No legislature or court, in declaring these propositions to be the law of a particular jurisdiction, does much to affect the exercise of discretion on the part of the courts in the same jurisdiction in future lawsuits. Reference to these propositions by the court as the explanation of a particular decision stifles analysis on the part of the judges, themselves, and obscures investigation of the objective factors in the case by members of the profession interested in discovering the scope of the decision.

Some day, perhaps, in the not too distant future, lawyers will discard the traditional language of the law and the Blackstonian technic. The Restatement represents a respectable effort to preserve the professional mysteries. The judicial process is too flexible and too dynamic to be influenced seriously in practice by a planned and comprehensive code of general legal propositions or by a supposedly authoritative but academic statement of the law. A generation hence, when the factor of administrative discretion is literally recognized and planned for, it may be possible and practicable to work out a comprehensive and descriptive statement of the judicial process.