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HOW THE WORK OF THE AMERICAN LAW INSTITUTE MAY BE APPLIED IN PRACTICE

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CERTAINTY and uniformity should mark the scientific development of law. To those who look upon the law as a science based on reason, conflicting decisions and rules suggest a failure to speak a common language or to adhere to basic principles, or both.

In America, we have a peculiar situation so far as the development of law is concerned. We have forty-eight jurisdictions wholly independent of each other except in matters necessarily touching upon national life. We have nine federal judicial circuits, the appellate courts in which are independent of each other, although subject to review in the interests of uniformity and under certain limitations by the federal supreme court. That court is the final arbiter in matters touching national life, but in most other matters it is compelled merely to ascertain and to administer the common law of the various states. This is in direct contrast to the British system where the judiciary is essentially a unit.

There has been great diversity in the matter of adherence to, modifications of, and reforms in judicial procedure in the various states. This has, of necessity, been attended by variations in judicial thought in matters of substantive law. Different sections of our country have been affected further by circumstances of settlement and growth through immigration and, also, by local conditions produced by their respective geographical and physical characteristics and the social and business activities necessarily resulting therefrom. With all of this, there has been developed some diversity of ideals. The result has been a very considerable amount of confusion in the rules which have been worked out and applied in the various states in the administration of the common law.

The thought comes to the student of the scientific development of the law that, notwithstanding varying local conditions, it ought to have been possible to maintain a uniform system which the courts of any one of the various jurisdictions would have applied in the same manner in any of the varying conditions of social and business life resulting from the historical and industrial development of the different parts

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of our country. It is desirable, in order that we maintain ourselves as a true national unit, that judicial thought be moulded into a uniform and comprehensive system. It is with this hope that the American Law Institute was called into existence.

The method adopted by the Institute to accomplish this purpose is the ascertainment and restatement of the common law. The restatement is not a textbook or a treatise. The general purpose is to ascertain and to state in legal language the rule on each subject in accordance with the weight of authority, logic, and adaptability to changing social and business conditions. It might be described as an effort to chart the sea. There is no purpose to resort to legislation nor to frame a code. That is not thought desirable. If the legal mind could not be stimulated into the solution of these problems without resort to legislation, legislation itself would be followed by conflict in interpretation and application. It is believed that the bench and the bar will readily recognize the advantage of having available the concensus of opinion of the ablest minds in the profession for reference on any point not yet passed upon by any given court.

It is hoped that the work itself will stimulate re-examination and reanalysis of decisions wherever the local rule is found to be out of harmony with that on which the workers on the restatement are in accord. Such re-examination of local authorities will ordinarily develop the point of divergence to which the court should return.

In a brief on file in the Supreme Court of Wisconsin, a practical, hard-headed lawyer of the old school, trained in the philosophy of the law, in meeting what he deemed an attack on true principles by organized wealth, said:

> In the work of breaking into the temple of justice, without shocking the moral and political sense of the body politic from the "Circean" sleep that now holds the giant captive in its embrace, the ablest sophists, the most acute casuists, the finest logicians and the most seductive orators, with a some-time venal press to spread their dogmas, are all enlisted in the advancement of the parallels to secure the capture of the fortress. They know it will not fall at the touch of the golden wand, but that the foundations must be sapped slowly and imperceptibly, as it were. The trick of sophism, supported by casuistry, unwittingly directs the listening and enquiring mind upon a line of thought faintly divergent from the true principle, and the battle is won. *When the divergence is made the course is laid, and every step widens the gap between true principle, sound judgment, and pernicious fallacy* (Italics ours).[1]

He was dealing with what he considered departures designedly induced. But the mental operations he so aptly described are the same

[1] Brief of Gen. E. S. Bragg in *Rueping* v. *C. and N.W.*, 116 Wis. 625.

when the departure is made in good faith and induced by good faith arguments. It is hoped that the restatement will provide an added safeguard against departures from true principles and, at the same time, a guide by which to compare, correct, and return where they have already occurred. The ascertainment and statement of the conclusions of the American judicial mind wherever it has worked true to its bearings is an altogether practicable undertaking.

The great mass of the work of the profession has to do, not with the litigation of existing controversies, but with guiding clients in respect to future conduct. In litigated matters, only a minor portion of their work has to do with the trial of cases. By far the greater number of cases which are commenced are disposed of in conferences in which the opposing counsel, in effect, becomes the arbiters between their clients. It is of the utmost importance that the rules by which they and their clients may be guided shall be reasonably certain and shall conform to fixed and recognized principles. Recognition of and adherence to such principles make for the reduction of litigation. Particularly is this true when we enter the field of property rights.

The work is already under way in contracts, agency, conflict of laws, torts, business associations, trusts, and property. Each statement is the result of the work of a reporter and a staff of advisers and coworkers, a review by the council of the Institute, and review and criticism at one or more annual meetings after the submission of the tentative drafts of the work to the members. The membership includes approximately seven hundred members of the bar in active practice selected from the country at large—among them the ablest men in many different fields. The tentative drafts of the work of the various reporters and their staffs are distributed to the members in advance of the annual meeting. At the meetings the drafts are taken up section by section and vigorously debated on the floor. The result is that, as it progresses, the work is subjected to the criticism of men well qualified to judge of its practical value. A final draft covering approximately half of the subject of contracts has recently been issued.

Some illustrative comparisons of the Institute's Restatement and Wisconsin decisions will be found interesting. A very live subject today is that of domicile. Vast improvements in transportation facilities and increasing diversification of the business activities of individuals has resulted in the maintenance of homes distant from places of business, in the maintenance of homes at different places at different parts of the year and in the necessity on the part of very active business men to maintain relatively well established residences in different parts of the country. Only a short time ago, a business man undertaking the management of two important enterprises located at widely separated

points, remarked that for a long time he had lived mainly in sleeping cars. The problem becomes further involved because of conflicts of interests between different states in the matter of inheritance taxes.

Such questions as these arise: Given a man whose activities present one or more of the situations above set forth, can he be said to have more than one domicile or more than one residence and, if but one domicile, although several residences, what is his domicile and who has the right to determine the question of domicile?

Turning to the Restatement, we find Section 13, reading as follows:

Every person has at all times one domicile and no person has more than one domicile at a time.

For comparison, we turn to the decisions of the Supreme Court of Wisconsin and we find these statements:

One may have more than one home, but he can have only one domicile.[2]

In one sense, a person may have more than one place of residence, but he can only have one which has the element of permanency essential in a legal sense to his domicile. He can only have one domicile at one time.[3]

Two ideas impress themselves upon the mind in making this comparison. One is that we find the Restatement and the well considered decisions of our Supreme Court in entire harmony. The other is that, if our Supreme Court had not spoken on the question and authorities elsewhere had been found in conflict, the Restatement would have proved of marked value in deciding what course to follow.

Recognizing that a man may have, in fact, two or more dwelling places, the question arises; which one is his domicile?

Turning to the Restatement, we find these rules laid down in Section 17:

(1) A domicile of choice is a domicile acquired by a person legally capable of changing his domicile through the exercise of his own will.

(2) To acquire a domicile of choice, a person must give up his home, if he has one, and establish a dwelling place with the intention of making it his home.

(3) The fact of a dwelling place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicile takes place.

(4) A person can acquire a domicile of choice only in one of these three ways:

(a) having no home, he acquires a home in a place other than his former domicile;

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[2] *In re Village of Chenequa,* 197 Wis. 163, at 168.

[3] *Kempster* v. *Milwaukee,* 97 Wis. 343, at 346.

(b) having a home, he gives it up as such and acquires a new home;
(c) having two homes, he comes to regard one of them as his principal home.

We turn now to a well considered decision in Wisconsin in which we find this language:

Where he has more than one home, each of which he occupies for a portion of a year, he is at liberty to determine in his own mind which place shall be his domicile, and, having made a determination, until he does some act which is inconsistent with the place of his domicile such place will continue to be his domicile.[4]

Here again the restatement and the decision are in harmony.

In controversies in which there may be interested, not only private individuals, but different states or different taxing districts as well, a question will arise as to whether the motive in declaring a choice of domicile may be considered in determining whether the choice has been made in fact. There is danger in such situations that the court of a given jurisdiction may be tempted to lose the truly judicial character and to see the question merely as a controversy between two states or two political divisions of a state. We turn to the Restatement for guidance and we find Section 24 reading as follows:

The motive with which a person acquires a new dwelling place does not determine the question of the establishment of a domicile of choice, but it may be important evidence tending to show whether or not, when a new dwelling place is acquired, there is an intention to make a home there.

When we turn from that to our own reports, we find such statements as these:

. . . . the law does not inquire into the purposes or motives which induced him to make such change.[5]

One may change his domicile for any reason or no reason.[6]

Intention is almost invariably a controlling element in determining residence.[7]

We have here examined subjects on which the Supreme Court of our State has had occasion to pass. The comparison confirms the reliability of the work of the Institute; and it may fairly be said that, had these questions not arisen in the court until after the completion and publication of the Restatement, the Restatement would have been found

[4] *In re Village of Chenequa,* 197 Wis. 163, at 168.
[5] *Frame* v. *Thormann,* 102 Wis. 653, 666.
[6] *Will of Heymann,* 190 Wis. 97 at 99.
[7] *Miller* v. *Sovereign Camp* W.O.W., 140 Wis. 505, 508.

a very reliable guide and a source of distinct help to the bar and to the court.

In Michigan, the State Bar Association has undertaken to check the adaptability of the work to the legal system of their state by preparing and publishing annotations of Michigan cases. In Pennsylvania, the annotations are being prepared but their publication delayed until the work of the Institute on each subject is completed.

It is the belief of the members of the Co-Operating Committee of the Wisconsin State Bar Association that the judges, the members of the bar and the students in our law schools can aid the work greatly by procuring, checking, and criticising the tentative drafts, by keeping copies of the drafts at hand and testing the same by comparison during their studies of Wisconsin law. It is believed, also, that we have reached the point at which some use of the drafts of the restatements may be made in connection with actual court work. Of course, it is important that until the final draft on any subject shall be settled, it shall not be cited as an authority. But the writer believes that it may be used by way of reference as an aid in testing the correctness of arguments and decisions. This course will make possible the checking and correcting of the work of the Institute as it progresses and, while making that possible, will prove helpful to the practitioner and to the courts. If notes on their individual studies are mailed by the bench and bar to the chairman of the committee[8] they will be of great assistance in preparing Wisconsin annotations, and in suggesting changes in those drafts which are still in their tentative form.

There is presented an opportunity to participate in a very great undertaking. It is attended with assurances of success because of the co-operation of the leading minds among the instructors, writers, practitioners and jurists. Of course, it must be realized that the ultimate test of the correctness of a rule of law is right reason; and, in the long run, the value of the work of the Institute will be determined by the extent to which it conforms thereto. It is earnestly hoped that the profession will aid in the effort to make this work meet that test. If it does, the Restatement will be of the greatest help to the active practitioner, not merely in litigation, but in that greater field of work in which he guides and counsels his clients from day to day.

[8] Mr. Wm. D. Thompson, Racine, Wis. Drafts of restatements may be obtained by addressing the American Law Institute at 3400 Chestnut Street, Philadelphia, Pa.