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Report of the Committee on the Establishment of a
Permanent Organization for the Improvement of
the Law Proposing the Establishment of an
American Law Institute. To be Submitted to a
Meeting of Representative Judges, Lawyers and
Law Teachers, to be held on February 23, 1923,
at Washington, D. C.

PART I.

RECOMMENDATIONS.

(A) INTRODUCTION.

There is today general dissatisfaction with the administration of justice. The feeling of dissatisfaction is not confined to that radical section of the community which would overthrow existing social, economic and political institutions. If it were, we as lawyers could afford to ignore it. But the opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions.

It is unnecessary to emphasize here the danger from this general dissatisfaction. It breeds disrespect for law, and disrespect for law is the corner-stone of revolution. The danger would be real, even though the feeling that much is wrong with our law and its administration had no foundation in fact. There are, however, just causes for complaint. Rightly we are proud of our legal system considered as a whole, but as lawyers we also know that parts of our law are uncertain and unnecessarily complex, that there are rules of law which are not working well in practice, and that

much of our legal procedure and court organization needs revision.

With the knowledge of the need for improvement in the administration of justice has come a consciousness of the obligation which rests upon the profession to take informed action to better existing conditions. Ever since the formation of The American Bar Association in 1878 that Association and state and local bar associations have been increasingly active in endeavoring to maintain high standards of legal ethics and to promote the simplification of procedure, the uniformity of law among the several states, and the improvement of legal education. But the possible scope of the activity of such associations in the improvement of the law is limited. They are without endowment and moreover they are not organized for that patient legal scientific and scholastic work which must precede all real improvement of our substantive and procedural law.

The formation of our Committee was due to a recognition of these facts. The specific cause of our organization was the action taken by the Association of American Law Schools at its meeting in Chicago in December, 1921. For several years that Association has had under consideration the establishment of a juristic center which should direct the attention of the law schools towards the improvement of the law and utilize the learning of their faculties to that end. Investigation by its committee convinced the Association that the success of the undertaking required the co-operation of all the organized forces of the profession, that is, courts, bar associations, law schools and learned societies. They therefore appointed a committee to secure this necessary co-operation.

At the invitation of this committee of the Association of American Law Schools, a number of us met, on May 10th last, in the rooms of the Bar Association

of the City of New York and formed a Committee on the Establishment of a Permanent Organization for the Improvement of the Law. Since the formation of the Committee we have added to its number. The object of our Committee has been to make a report on the establishment of such an organization, its constitution, and the specific work which should be first undertaken, and to submit the report to such a representative gathering as we have asked to assemble in the City of Washington on Friday, February 23d.

The generosity of the Carnegie Corporation has enabled us to make the investigation necessary to give us a reasonable confidence in the soundness and practicability of the specific recommendations contained in this Report. On the 27th of last May we appointed two groups of advisers, denominated, respectively, Reporters and Critics. All the members of these groups are now members of our committee. In June a conference attended by the members of these groups and also by many other members of the Committee, was held in Cambridge, Massachusetts, and the matters to be considered by us and embodied in this Report were thoroughly discussed. During the summer and autumn the Reporters, with the aid of suggestions from the Critics, gave elaborate consideration to the scope and proper organization of a permanent agency for the improvement of the law and to the work which it should first carry on, and they then submitted to us the results of their deliberations. The Report which we here make to a representative gathering of the American bar is the result of a conference between those who have given much of their time in the past six months to a consideration of every detail of the important subject with which it deals, and other members of the Committee.

(B) GENERAL CHARACTER OF THE WORK OF ANY ORGANIZATION ESTABLISHED BY LAWYERS FOR THE IMPROVEMENT OF THE LAW.

An association organized to improve the law might conceivably busy itself with reforms as various as the activities of man. The organization we have in view, however, is to be an organization founded by the American bar. It will be created in response to the growing feeling that lawyers have a distinct public function to perform in relation to the improvement of the law and its administration. This function is necessarily confined to work for which they are qualified by training and experience. The fact that a man is a lawyer does not make him an expert on the tariff, or on the proper organization of city government, or enable him to speak with authority on hundreds of other questions of existing or proposed law debated on public platforms and in legislative assemblies. It is therefore important to a correct understanding of the objects we have in view and vital to the permanent usefulness of the proposed organization that we regard its activities as restricted to improvements in existing law and administration in relation to those subjects of which the legal profession has expert knowledge.

It is the province of the people and of legislative bodies, through constitutions and statutes, to express the political, economic and social policies of the nation, of its states, and of smaller communities. It is the province of lawyers to suggest, construct and criticize the instruments by which these policies are effectuated. The proposed organization should concern itself with such matters as the form in which public law should be expressed the details of private law, procedure or the administration of law, and judicial organization. It should not promote or obstruct political, social or eco-

conomic changes. In order to ascertain what its work should be we have examined the defects in our law, rather than those merits of which the legal profession is justly proud.

Even as thus restricted the proposed organization is sufficiently wide in its scope to require those who advise its establishment to point out at least one specific work of importance which the organization could undertake on its foundation, the way in which that work should be carried on and the results which may reasonably be anticipated.

(C) TWO CHIEF DEFECTS IN AMERICAN LAW.

Two chief defects in American law are its uncertainty and its complexity. These defects cause useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense.

When the law is doubtful most persons are inclined to adopt the view most favorable to their own interests; and many are willing if necessary to test the matter in court while those willing to overreach their neighbors are encouraged to delay performing their obligations until some court has passed on all the novel legal theories which skilled ingenuity can invent to show that they need not be performed. In either case litigation is carried on, which but for the law's uncertainty would be avoided. Again, the present degree of uncertainty in many parts of the law tends to create the feeling that the outcome of all court proceedings is uncertain no matter how just the claim, the result being that many whose legal rights are clear indirectly encourage a failure of justice by compromising with opponents who are conscious of the lack of merit of their own contentions.

Furthermore, injuries caused by uncertainty in the law are not confined to situations in which controversies have arisen so that rights claimed must be either compromised or referred to the courts for their decision. Though one function of law is to provide rules by which disputes may be settled, its other equally important function is to provide rules of action. Because of the existing uncertainty in the law those who turn to it for guidance in conduct often find that it speaks with a doubtful voice. For example, the lawyer who assists in the combination of commercial enter-

prises, or the lawyer who draws a will with provisions suggestive of the rule against perpetuities, will often find that he cannot positively inform his clients of the legal consequences of their acts.

The same bad effects, though in a less degree, result from the law's complexity. Besides which, complex law tends to make the administration of justice a game in which knowledge and skill are more important for obtaining victory than a just cause.

The time consumed by the courts in disposing of cases is an obvious fact which all persons may note and criticise. Furthermore, everyone realizes that long-drawn-out litigation is, on account of the expense, a greater hardship on those of relatively small means than on the litigant with a long purse. It is therefore natural that the delays of the law rather than its uncertainties or complexities is the defect on which those who criticise the administration of justice usually lay stress; and yet, the most of these delays are due to uncertainties and complexities.

Perhaps, however, the most serious result of these defects is that they create a lack of respect for law. Their effect is the same as the effect of clear, certain but unjust law, and for the same reason; law to perform its functions must be adapted to the needs of life, and no such need was ever satisfied by uncertain and complex rules. Lack of respect for law, whether it has its origin in the law's uncertainty or in the injustice of its provisions, undermines the moral fibre of the community. In itself it becomes a cause of anti-social conduct; the rich are more apt to use their wealth to oppress; the business man is more apt to cheat; those in immediate want are more apt to steal. In our opinion the most important task that the bar can undertake is to reduce the amount of the uncertainty and complexity of the law. It is essential if an adequate

administration of justice is to be had that lawyers awaken to the extent to which the law should be and may be simplified and clarified.

At the outset we realized that it was useless to attempt to come to any final conclusion in regard to the right way to reduce the present uncertainty and complexity of our law until we had made a thorough analysis of the principal forces now operating to make our law more or less certain or more or less complex. The specific recommendations made in this Report are the result of this analysis which is set forth in Part II, "The Law's Uncertainty and Complexity." (*Infra*, p. 66.).

Our investigation shows that among the causes of the law's uncertainty are: lack of agreement among the members of the legal profession on the fundamental principles of the common law, lack of precision in the use of legal terms, conflicting and badly drawn statutory provisions, attempts to distinguish between two cases where the facts present no distinction in the legal principle applicable, the great volume of recorded decisions, the ignorance of judges and lawyers and the number and nature of novel legal cases. We also find that among the causes of complexity are, the complexity of the conditions of life, the lack of systematic development of the law, and the unnecessary multiplication of administrative provisions.

All these causes of the law's uncertainty would continue to exist were the Federal Constitution repealed and the United States made one state. The fact, however, that the nation is composed of forty-eight states, each of which as well as the Federal Government is an independent source of law, means that the law on any subject in any one jurisdiction may differ from the law of one or more or all of the other jurisdictions. These variations in law are themselves a potent cause

of uncertainty and complexity, and because of this and for other reasons do much injury, not only where transactions are carried on in two or more states, but also where transactions are carried on wholly within one state.

Any practical plan devised and carried out by lawyers to promote certainty and simplicity in the law must meet those conditions causing uncertainty and complexity which it is possible for the profession to modify or eliminate. It is manifest that some of the causes are beyond the power of the bar to remedy. The number and nature of novel legal questions, and those differences in the law of different states due to differences in economic or social conditions, are entirely outside the control of the bar. Furthermore, the great volume of the annual increase to the already overwhelming mass of reported cases, which is another cause of the law's uncertainty, cannot be directly checked by any action which may be taken by the profession. As lawyers, our instinct to regard as an authority the prior decision of any court on a matter pertinent to the case under consideration is too strong to be arbitrarily limited to the decisions of particular courts or to the particular decisions of any one or more courts. Should only a few selected cases appear in the officially printed reports, the enterprise of private publishers would soon result in the printing of "Cases Omitted from the Official Reports," and consequently in their continued citation and use by lawyers and judges.

On the other hand, many causes of the existing uncertainty and complexity are more or less within the power of the legal profession to control by intelligent united action. Bar associations have done and are now doing much to improve legal education and thereby create conditions which will tend to reduce one cause of

the law's uncertainty—the ignorance of judges and lawyers.

Badly drawn statutory provisions and the unnecessary multiplication of administrative provisions set forth in statutes are, as stated, causes of uncertainty and complexity. The wisdom of the purpose which the substantive provisions of the statute law are intended to effect is beyond the province or the power of the profession. So, too, the means adopted to attain an end is also often largely a question of public policy. On the other hand, not only the principles of legislative draftsmanship but also the administrative details of many statutes, especially the provisions for the enforcement of regulatory statutes, are matters concerning which the public have a right to secure from the bar an informed opinion. Again, the procedural law is in great part expressed in statutes and rules of court, and this field of law, in so far as it applies to methods for the determination of rights and duties, is a subject on which the people have a right to expect from the profession more than an informed opinion; they have a right to efficient direction.

Finally, the more detailed study of the subject in Part II shows that lack of agreement among lawyers concerning the fundamental principles of the common law is the most potent cause of uncertainty. The bad effect of this lack of agreement is not confined to creating uncertainty in the law of each state. To it is due much of the unnecessary and harmful variation in the law of the different states. Closely interwoven with this cause is the lack of precision in the use of legal terms. Fortunately these two causes of uncertainty and complexity are precisely those over which the legal profession has the greatest control. The people through the legislatures are theoretically responsible for the uncertainties and complications of statutory enactments.

The common law and its terminology, however, have been developed solely by lawyers. To say that the system of developing and applying law is primarily responsible for the lack of agreement on legal principles and the lack of precision in the use of legal terms does not excuse the profession which through the centuries of English history has evolved the system with all its great merits and also with all its defects. As the common law has been developed under the guidance of the legal profession, that profession has the power and the duty to reduce its principal defects. At present chief among them is this lack of agreement among lawyers concerning the principles of the law and lack of precision in the use of legal terms. The fact that lawyers have so far failed to appreciate the extent of the resulting evil or to recognize the responsibility of the profession to try to improve conditions is the sole reason that today these defects loom so large.

(D) NEED FOR A RESTATEMENT OF THE LAW.

The American legal encyclopedias summarize the decisions of the courts, and to a limited extent the statutes, in such manner as usually to enable the lawyer to learn without the necessity of consulting further authority the simple and certain matters of the law.

On single branches of the law, as corporations, property, torts, there is also a large number of books, the object of which is to do for one topic what the encyclopedia undertakes somewhat summarily to do for all. These treatises and text-books vary in excellence. The majority are poor, but there are some which are well written, and from which a full and accurate knowledge of the law may be obtained.

The law encyclopedia, being a collection of treatises written by different persons, also varies greatly from topic to topic, both as to the completeness and accuracy with which the authorities are cited and, as to the skill with which the law is analyzed and stated. It is not, and from the very nature of its objects and uses should not be either critical or constructive. While properly calling the reader's attention to direct conflicts between cases, especially where the courts making the decisions have expressly recognized the conflicts, the object of the work is not to point out conflicts and uncertainties that do not lie on the surface and to suggest solutions, or to make a critical analysis of the law, or to enter upon a learned discussion of what is or ought to be the law. What is true concerning the legal encyclopedia is also very largely true in regard to most American legal treatises. The author's point of approach is usually that of a photographer. Tradition as to the kind of law-book that is useful leads him largely to confine himself to matters that have been a

subject of litigation. His end is to place before the reader the law as announced by the courts. Even a statute which affects his subject, if it has not been discussed and interpreted by the courts, is given slight, if any, consideration. It would not be correct to say that the modern American law book never contains any critical or even constructive features; but it is correct to say that such features are almost entirely absent from most of our legal treatises and are almost never the author's principal object. The fact that among our modern law-books there are only a few prominent exceptions to this statement proves that it is for all practical purposes accurate.

One reason for the absence of critical and constructive features from the law treatise that cites all the decisions is the great volume of case law. Legal authors of the requisite ability are rare who at once have the time and the patience to collect, examine and arrange thousands of decisions and, when this labor is accomplished, have left sufficient energy to do high-class analytical and constructive legal work. Indeed the mere task of collecting and examining the material on a legal topic of any scope is rapidly becoming too great for any one person, no matter how great his patience and his capacity for work; while even in topics of comparatively narrow scope, the necessary expenditure for typewriting and secretarial assistance is so great as usually to eliminate the probability of financial return. And yet our examination of the causes of the present uncertainty of the law shows conclusively the need of a restatement of the law that will have an authority much greater than that now accorded to any existing encyclopedia or treatise. We are convinced therefore that the specific work which any organization created by the legal profession to improve the law should undertake on its formation is the production of such a "Restatement of the Law."

We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life. The character of the restatement which we have in mind can be best described by saying that it should be at once analytical, critical and constructive.

The statement must be analytical because there should be a division of topics based on a definite classification of the law the result of thorough study by a group composed of persons qualified by their studies and their intellectual attainments. Each topic also should be treated analytically, not historically. Those who state the law must, of course, do so with full understanding of its development, but the primary object of the restatement is to set forth the law, not to give an account of its growth.

The restatement should be critical, because it must be more than a collection and comparison of statutes and decisions, more than an improved encyclopedia of law, more than an exposition of the existing law, even though such exposition were an accurate photograph of all the law's existing certainties and uncertainties. There should be a thorough examination of legal theory. The reason for the law as it is should be set forth, or where it is uncertain, the reasons in support of each suggested solution of the problem should be carefully considered.

The restatement should be constructive. In the first place, while necessarily largely based on the two official sources of the law, statutes and decisions, it should not be confined to examining and setting forth the law applicable to those situations which have been the subject of court action or statutory regulation, but

should also take account of situations not yet discussed by courts or dealt with by legislatures but which are likely to cause litigation in the future.

Again, where the law is uncertain or where differences in the law of different jurisdictions exist not due to differences in economic and social conditions, the restatement, while setting forth the existing uncertainty, should make clear what is believed to be the proper rule of law. The degree of existing uncertainty in the law would not necessarily be reduced by a mere explanation of rival legal theories. Indeed, a restatement which confined itself to such an explanation would reduce the degree of existing uncertainty only in those instances where but one line of decisions was supported by reasons worthy of consideration. Where the uncertainty is due, as it often is, to the existence of situations presenting legal problems on the proper solution of which trained lawyers may differ, the courts can best be helped by support given to one definite answer to the problem.

Furthermore, there can be little doubt that the law is not always well adapted to promote what the preponderating thought of the community regards as the needs of life. The limitation on the character of any reformation of the law by an organization formed to carry out the public obligation of the legal profession to improve the law is reasonably definite. Changes in the law which are, or which would, if proposed, become a matter of general public concern and discussion should not be considered, much less set forth, in any restatement of the law such as we have in mind. Changes which do not fall under the ban of this limitation, and which will carry out more efficiently ends generally accepted as desirable are within the province of the restatement to suggest.

The limitation just stated would exclude sugges-

tions of changes in governmental organization, except possible changes in the details of court organization. It would also bar the suggestion of any change in the law pertaining to taxation and other fiscal matters and matters connected with governmental administrative policy, as well as advocacy of novel social legislation, such as old age or sickness pensions, or a method of improving the relations between capital and labor, or of protecting the public from industrial controversies by the establishment of arbitration tribunals.

When, however, a social or industrial or any other policy has been embodied in the law, and also has been so far generally accepted as to be no longer a subject of public controversy, then the improvement of the law in relation thereto may not be beyond the province of the restatement. Thus the system of employees' compensation for industrial accidents, or the system of regulating by commissions the rates and service of public utilities, having become a part of the settled policy of our national and state governments, modifications in the substantive law or in the procedure relating thereto may be no more beyond the province of the restatement than would be proposals affecting the law of real property or the admissibility of evidence in an action for damages due to an alleged trespass.

In view of the limitation just suggested, the changes proposed would be either in the direction of simplifying the law where it is unnecessarily complex or in the direction of the better adaptation of the details of the law to the accomplishment of ends generally admitted to be desirable. Thus in the law of property, especially as the result of distinctions in the rules governing real and personal property, there are complications which have no present justification in existing conditions; and likewise in the law of evidence there are

rules of exclusion which are perhaps no longer applicable to the circumstances surrounding a modern trial.

Attempts better to adapt the details of the law to the accomplishment of ends generally admitted to be desirable may often involve changes in the procedural law. Rules of procedure are designed for the most part to secure as prompt administration of justice as is compatible with a real consideration of the questions presented. Any restatement of a topic of the procedural law which does not take into consideration whether its rules accomplish the object for which they exist would degenerate into a mere text-book of present practices. The legal profession in connection with the remedial side of the law has duties beyond the mere writing of text-books. The public may rightly look to us not only for suggestion in minor details, but for active organized work to establish and maintain the most efficient system of remedial law which we can devise. Any restatement in this field which did not seek improvement based on careful observation of the operation of existing methods, would therefore not be worthy of the effort of an organization created to fulfill the obligation of the legal profession to improve the law.

Possible changes in the law, however, designed to adapt its details to the accomplishment of ends generally admitted to be desirable, are not necessarily confined to the procedural law. In drafting the uniform commercial laws the Commissioners on Uniform State Laws have usually found in connection with each act that certain rules of law generally applied in all the states are not considered desirable by those primarily affected. Though the commissioners are avowedly primarily engaged in expressing the law as it is, some of the best results of the statutes they have drafted have come from modifications of existing and generally accepted rules of law, made at the suggestion of commercial and

other bodies whose members have an expert knowledge of the things that need correction. The attitude of the commissioners towards such changes has been one of marked conservatism, coupled however with a willingness on clear proof of its advisability to suggest what is in effect a change in existing law. A similar attitude should be taken by those charged with making the restatement of the law we have in view.

The restatement here described, if adequately done, will do more to improve the law than any other thing the legal profession can undertake. It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, which it is proper for an organization of lawyers to promote and which will make the law better adapted to the needs of life.

(E) FORM OF THE RESTATEMENT.

Though there necessarily will be minor variations in the manner of presentation of different parts of the restatement due to the special exigencies of particular topics, general uniformity of type throughout the restatement is important.

The profession would find great difficulty in the use of the publications of the organization if each topic was treated in a different manner. Again radical differences in form would rightly be taken to indicate a lack of agreement among those preparing the restatement as to its objects.

As the restatement will be the work of a number of persons all fundamental questions of form must be determined before the work on any topic is begun. These questions of form are of the first importance. The form adopted should reflect the objects of the restatement, and if it does so will materially aid the attainment of those objects.

The chief characteristic of the form of presentation should be the separation by typographical or other device of the statement of the principles of law from the analysis of the legal problems involved, the statement of the present condition of the law and the reasons in support of the principles as stated.

The statement of principles should be made with the care and precision of a well-drawn statute, though it will not be necessary and may often not be advisable to adopt language appropriate for statutory enactment. The adoption of a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended.

This separation of the statement of the principles of law from the discussion of legal problems, authorities and reasons, lends itself to the constructive objects

of the work far better than that mixture of statement of present law, historical description and discussion of legal theory which is characteristic of the law treatise. It is essential that the attitude of mind of those doing the work shall not be that of those who are writing a treatise solely based on the existing decisions of the courts and some knowledge of the statutes. The mental attitude should be more like that of those who desire to express the law in statutory form. Even though those who draft such a statement may not be doing more than express the existing law as found in the decisions and scattered statutes, they think primarily of the topic, and therefore deal, as we have pointed out the restatement should deal, with situations that have not as yet been passed on by the court or made the subject of statutory enactment. Again, a group of persons primarily absorbed in setting forth a complete body of principles are perhaps more apt to perceive possible improvements. Each change, however, before being suggested, must pass through the test of precise statement. This necessity for precise statement will tend to make the writers give careful examination to the effect of the proposed change in view of the law as set forth in other related parts of the restatement. We do not intend to imply that the treatise form of restatement precludes the possibility of care rather than the separation of the statement of principles from the body of the accompanying analytical and expository treatise is more apt to impel its exercise.

The statement of principles should be much more complete than that found in European continental codes. The common law student of foreign codes is impressed with the fact that the statements of law are for the most part expressed in such general terms that the court, in applying the principles without other control than the code has a much wider discretion than the

judges of our own courts, who are usually guided in the most minute details by former decisions in cases presenting almost every phase of the case before them. The difference between the position of the continental European court and that of the American court in determining a case is that the former is bound by every statement made in the code, but these statements are expressed in such general language that the court has wide discretion in their application; the American court, on the other hand, though always in the position of being able to change and modify the common law, practically, because of the detail in which the law is set forth in prior decisions and its respect for such precedent, has usually a far narrower field for the exercise of discretion. We believe any restatement of our law to be of practical use should follow this characteristic of our law, and that therefore the principles of law should be set forth with a fullness made possible by the care with which rules pertaining to the application of more general principles have been considered in the decisions of our courts.

As intimated, the statement of principles should be accompanied by a thorough discussion of legal theory. Principles cannot be properly applied without full knowledge of the legal theories on which they are based. While this discussion of legal theory should be separate from the statement of principles, to refer to it as notes or annotations will convey the erroneous impression that the discussion intended is a mere explanation or expansion of the principles, rather than what we believe it should be—a thorough and scientific discussion of the legal theories underlying the principles made in the light of a full knowledge of the authorities.

Finally, the work as a whole must actually be done and show on its face that it has been done with a thorough examination and careful consideration of the

present sources of the law. This means that 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 of care and thereby also show that they know and have set forth any differences between the law expressed in the statement of principles and that found in the decisions of the courts in each State considered separately. In view of the present great volume of the sources of American law this examination and setting forth of authorities will entail much labor and materially affect the details of the organization necessary to carry on the work. If, however, the work is to be constructive respect must be shown to the sound instinct of the legal profession to distrust any statement of what is or what should be the law unless the statement is based on a careful study of the record of courts which administer justice, not in supposititious, but in real cases.

We here also desire to call attention to the importance of expressing the restatement in clear and simple English, avoiding so far as possible, the use of technical and unusual terms. The restatement should be understandable by an intelligent, educated person who is not a trained lawyer. This, of course, does not imply that any restatement would enable a man to act as his own lawyer or that the need of trained lawyers would be diminished to any considerable extent.

(F) LEGISLATIVE ENACTMENT OF THE RESTATEMENT AS A CODE OF LAW NOT DESIRABLE.

From what has been said in regard to the form of the restatement it is clear that we do not look forward to the principles of law therein set forth being adopted as a code.

Two features distinguish the common law from statute and code. The first of these features is its flexibility. Where the law has been made statutory and the statute covers the facts of a case presented to the court, the court has no discretion; the judges must apply the statute even though they feel that the rule of law stated in the statute as applied to the facts does a real injustice. Where, however, the same statement of law is the clear result of prior decisions, but has not been made part of the statutory law, if the members of the court feel that the application of the law as found in prior cases will produce injustice, they frequently announce a modification or exception to the universality of the previously accepted statement of law; the modification or exception being based on those facts which made a real difference between the case before them and the ordinary case in which the rule of law as previously stated is applied. The second feature of the common law and one which we have just explained is the greater fullness with which it is possible by an examination of the decisions of the courts to express the law.

If the "principles" in the restatement of the law were made with a view to their adoption by legislatures as a formal statutory codification of the law, one or other of these two distinctive features of the common law, its flexibility or its fullness of detail, would have to be sacrificed. We have already stated our belief that the principles of law should be set forth with a fullness

made possible by decisions of the courts. We fear that if the law stated in this detail were given the rigidity of a statute, injustice would result in many cases presenting unforeseen facts.

If the principles of law set forth in the restatement are not to be adopted as a formal code it is nevertheless not impossible that they may be adopted by state legislatures with the proviso that they shall have the force of principles enunciated as the basis of the decisions of the highest court of the state, the courts having power to declare modifications and exceptions. It has been suggested that such action on the part of a state legislature would at once give an authority to the restatement which it otherwise would not possess, and at the same time would not fetter the courts as would a formal legislative code; and furthermore, that the courts would have greater freedom in adopting the rules laid down in the restatement, and at the same time would be free to deal with those cases which inevitably will arise wherein the rigid application of the principles set forth in the restatement would result in injustice. The possibility that the proposed restatement of the law may receive *quasi* statutory sanction, either in whole or in part, as a "guide and aid" to the courts is one that we should keep before our minds while the work is in progress as a possible outcome of our labors. The suggestion is at least an interesting one, though at this stage of the project we are not required to commit ourselves to an approval of it. The important thing now is so to plan the work that the restatement from its inception shall be recognized as a work of great public importance for the execution of which the American legal profession as represented by its leaders on the bench, in practice, and in the schools, is responsible. The way in which these things may be accomplished is the subject of later sections of this Report.

If the organization which we suggest can be formed and supported there is reasonable assurance that the restatement, even though it may not be formally adopted by legislatures as a guide to the courts, will be given by courts not already committed to a contrary rule approximately such authority as is now accorded a prior decision of the highest court of the jurisdiction, and therefore that its effect in correcting existing uncertainties and otherwise improving the law will be very great.

(G) EXTENT TO WHICH LEGISLATIVE ACTION
WILL BE NECESSARY TO CARRY OUT THE
PURPOSES OF THE RESTATEMENT.

The principles of law set forth in the restatement will not include deformities, but will eliminate many uncertainties of the existing law, and make improvements which will further the administration of justice.

Where the law is uncertain the courts can adopt the solution suggested in the restatement without waiting for statutory authority. Where the statement of the law set forth is against the weight of authority in most of the states, but the matter has not been the subject of a prior decision by the courts in some one or more of the states, the courts in these jurisdictions, likewise without waiting for any legislative authority, may follow the law as set forth in the restatement. A somewhat different situation will arise in any jurisdiction where the principle set forth in the restatement is clearly contrary to previous decisions of the courts of that jurisdiction. Whether in such a situation the courts will, without legislative action, follow the law as suggested in the restatement rather than the law as embodied in their own prior decisions will depend upon the particular circumstances of each case. Where the cases opposed to the rule laid down in the restatement are numerous, and especially where some of the decisions are of long standing and the rule suggested in the restatement is not found in any prior decision, the courts will be likely to take the position that, though the rule as stated in the case may be subject to adverse criticism it has become so far a part of the accepted law that it can now be changed only by legislative action. This legislative action may be the adoption as a statute of that part of the statement of principles embodying the proposed change in the law. As already explained,

however, it is possible for the legislature, instead of giving the change the rigidity of a statute, to adopt the law as set forth in the restatement as a guide to the courts. Such action would warrant the court adopting the law as set forth in the restatement even though the rule there stated was admittedly contra to the prior decisions of the court.

Where the change proposed in the restatement is a change in the present statute law, the mere adoption of the principles set forth in the restatement as a guide to the courts would not warrant the courts disregarding the statute. Furthermore there are topics of our law where the very rigidity resulting from the embodiment of the law in a legislative enactment is a distinct gain. If, for instance, there is little or no change in the essential conditions which make the law pertaining to a particular topic, and if in many situations constantly arising it is more important that the law should be certain than that one rule rather than another should be adopted, then it is probable that the statement of principles dealing with the topic should be made a part of the statute law. Thus the action of the commissioners on uniform state laws in presenting to the state legislatures statutes to codify the law of sales, the laws pertaining to commercial paper and the law pertaining to some of our business associations is justified not only because uniform statutes on these subjects correct the unfortunate effect of varying commercial law as between the different states, but also because the law on these topics, presenting as they do many of the characteristics just referred to, may with advantage be the subject of legislative enactment.

Outside, however, of those changes which of necessity require legislative action and of those legal topics which, because of their peculiar characteristics,

are perhaps best embodied in a statute, lie the great fields of the common law and that common law of the statutes which consists of the rules for the application of ancient and generally adopted statutes. For the greater portion of these fields the statement of principles, though made with the care and precision of a well-drawn statute, should be made without thought of its adoption by state legislatures or Congress as a code each provision of which was in all cases binding on the courts. As we have said, we are opposed to any attempt at the general codification of the law in the usual sense of the word.

(H) NATURE OF THE ORGANIZATION UNDERTAKING THE RESTATEMENT OF THE LAW.

- (1) The Restatement Must be Generally Recognized as a Work Carried on by the Profession in Fulfillment of a Public Duty.**

A mere academic restatement of the law, whatever its form, will not be sufficient for the undertaking. To fulfill its objects the restatement must have authority greater than that now accorded to any legal treatise, an authority more nearly on a par with that accorded the decisions of the courts. To develop among judges and lawyers the feeling that the restatement has this high degree of authority the work of making the restatement must from its inception be generally recognized as a work carried on by the legal profession in fulfillment of an obligation to the American people, to promote the certainty and simplicity of the law, and its adaptation to the needs of life. If this feeling be developed to any considerable degree, it will not only give to the bench and the bar a sense of professional responsibility for the character of the work which will go far to insure its excellence, but it will also secure for the work as it is published the position necessary to enable it to accomplish the purposes of its creation.

- (2) No Existing Legal Organization Adapted to the Work of Making the Restatement.**

In order that the responsibility of the legal profession for the restatement of the law may be generally recognized, the organization undertaking must adequately represent it.

Today there is no association to which all judges and lawyers belong, and even if there were, the nature

of its organization might not be adapted to the carrying on of a scholarly and constructive work. There are, however, a number of legal organizations, that is, associations composed of lawyers and organized to do some one or more things in connection with law or the legal profession. Thus the courts may in this sense be considered legal organizations created by law for specific and vitally important legal purposes; there are numerous bar associations, all of which are at present voluntary associations; there are law school faculties or groups of persons employed, usually by university corporations, to teach the law; and finally, there are a few societies, each organized to promote some special object or objects which for lack of a better general designation we may call learned legal societies, though they differ from the ordinary bar association principally in that their objects do not embrace all the professional interests of the bar of any court or group of courts.

As stated, the courts are organized by the government for specific legal purposes. Each court is a separate organization. Neither the Federal nor any state government has as yet created for any purpose an association composed of all or a selected number of the judges of their respective courts. In a few instances the judges of certain courts, as the judges of the courts of probate, or the judges of the minor courts in a state, have formed voluntary associations, and there is a judicial section of the American Bar Association, which like the other sections of that Association holds separate meetings during the period of the annual meeting of the Association; but, as yet, none of these organizations has undertaken any large or serious work.

There are more than four hundred bar associations in the United States, besides the American Bar Association. In all but one state there are state bar

associations, and in all the states, county, and in the larger cities, city bar associations. These are voluntary associations organized on the selective principle; that is, while the right to practice in one or more designated courts may be a necessary qualification for membership, each association selects its own members. There are approximately 125,000 lawyers in the United States. It is impossible to state with any accuracy the number of lawyers who belong to one or more bar associations, as many of the county associations have the loosest possible organization, but the following figures will show that a majority of the lawyers of the country are not members of the principal bar associations. The American Bar Association has between seventeen and eighteen thousand members or about 14½ per cent. According to the 1920 census, there were 18,473 lawyers in New York State; 3271 of these, or about 18 per cent., belonged to the State Bar Association. By the same census there were 1978 lawyers in Wisconsin, of whom 766, or about 39 per cent., belonged to the State Bar Association.

Each of these more than four hundred associations is independently organized. Membership in any one of them does not involve or depend upon membership in any other; neither is there any organic federation among all or any group of them, except that on the invitation of the American Bar Associations many of the state and some of the local associations send delegates to meetings of one of its sections known as the Conference of Bar Association Delegates. The American legal profession, therefore, has not as yet developed any such powerful and representative organization as has the medical profession, where all the state and county medical societies are federated in the American Medical Society, which now has more than eighty-five thousand members.

Although the matter has been recently under consideration in Ohio, Nebraska and other states, neither the United States nor any of the states has followed the example of European continental countries by incorporating all the members of the bar into a public corporation with definite obligations and definite powers over its members.

There are about 140 law schools in the United States, with faculties of from two or three to fifteen members. In a large number of these schools, however, all or nearly all the members of the faculty are judges or lawyers engaged in practice. On the other hand there are several schools which are real seats of legal learning and in which practically all or at least the nucleus of the faculty devote their time to the work of teaching and legal research.

The leading law schools have united to form the Association of American Law Schools, the primary object being to improve legal education in the United States. The other associations which would fall under our designation of learned legal societies, are the National Conference of Commissioners on Uniform State Laws, the American Institute of Criminal Law and Criminology, the American Society of International Law, and the American Judicature Society.

These organizations are voluntary associations except the Conferences on Uniform State Laws. The purpose of the Conference is to promote uniformity in the statute law of the states, that of the Institute of Criminal Law and Criminology and that of the American Society of International Law are indicated by their title. The Association having the widest purpose is the American Judicature Society, which is organized to promote the efficient administration of justice, the term "efficient administration of justice" being interpreted to embrace all the adjective, though not the substantive law.

These being the salient characteristics of the different kinds of legal organizations, is any one of them adapted to the work of making the proposed restatement of the law? Certainly no court could do so without legislative sanction, and even if such sanction could be secured, of which there is little possibility, the work and responsibility entailed would seriously interfere with the administration of justice. Besides, to secure a satisfactory restatement of the law it should be the product of the co-operation of those having the background of judicial experience with those who have approached legal problems from other points of view. To throw the whole responsibility on the judges of any one or of any number of courts seems impossible, but even if possible, would be most unwise.

Again, the work could not be undertaken by any state or local bar association. The work is not for any one state, but for all. Neither could it be undertaken by any existing learned legal society, except possibly the Association of American Law Schools, as each of the others has been organized to promote particular purposes, and none of these purposes is sufficiently wide to include such an undertaking as the general restatement of the law.

Could it be undertaken by the Association of American Law schools or by any one school? As already explained, our committee was founded as the result of an effort on the part of the Association of American Law Schools to devise ways for securing the co-operation of the courts, bar associations, law schools and learned societies, in the establishment of an organization capable of making proposals for the improvement of the law, based on adequate scientific investigation and knowledge. We understand that one reason for the invitation was the belief, general among the representatives of the

schools forming the association, that any restatement of the law to acquire the authority necessary to enable it to accomplish results of importance, must be undertaken by an organization representative of all branches of the legal profession. In this we agree, and we also think that the same reason which would make it unwise to throw the whole responsibility for the restatement of the law on the judges would make it unwise to throw the whole responsibility on the members of the faculties of the leading law schools. While it is true that the work of restating the law in the manner proposed could not be undertaken had it not been for the scholarly work already done by members of law school faculties, and while it is also true that any organization undertaking the restatement must depend on the law teacher for much of the work involved; nevertheless, the restatement to be thoroughly well done must be the result of collaboration of men of judicial experience and of men of intensive practical experience at the bar with those law teachers whose work has led them to observe, study and compare the operation of legal principles in many jurisdictions and under varying conditions.

These reasons which would make it unwise to attempt to throw the whole responsibility for the production of the restatement on an Association representing the leading law schools of the country, apply with even greater force to any one law school, even though such school were conducted by a university of national reputation.

This leaves for consideration the American Bar Association. The membership of this association is widely diffused. It represents the American legal profession more nearly than any other association. Indeed, it is the only association which in any degree does so. As already indicated, however, it does not

represent the profession in the United States in the sense in which the American Medical Association represents the medical profession. It does not represent the legal profession as organized in state and local bar associations, any more than as organized in courts, or in law school faculties.

Even, however, if the American Bar Association were an organization which united all state and local associations in one body, it is at least doubtful whether it would be equipped to direct such a constructive scientific juristic work as the proposed restatement of the law. The functions of a bar association should be as wide as the obligations, rights and interests of its members as lawyers and judges. Yesterday the membership may have been interested primarily in legal education, today it may be interested in the effectual discipline of delinquent members of the bar, and tomorrow in promoting or opposing some change in the Federal or state constitutions or law. The boundaries of the activities of bar associations are thus not clearly defined, and should not be. Their management should be and is democratic in the sense that their constitutions are so drawn as to enable their management to reflect changes in policy actively desired by a majority of their members. On the other hand, any organization which undertakes to build up year after year a constructive restatement of the law should have a degree of permanency in its supervisory control not characteristic of the American Bar Association and unsuited to its wide and varying purposes.

(3) The Organization Should Have a Definite Connection With Existing Legal Organizations.

While it is thus apparent that no existing legal organization has the characteristics necessary to undertake the proposed restatement of the law, and therefore

that a new organization must be created for the purpose, it is important that the organization which is to carry on the work should have a connection with these existing legal organizations, and that in the sense to be presently explained they should combine to create it and co-operate in directing it. If such connection and co-operation is not established, then the legal profession as now organized would have no part in the undertaking, and it would be difficult if not impossible to develop any feeling of responsibility for the character of the work, or any real desire to use the result effectively when published.

With some minor reservations in relation to courts and law school faculties, the nature of existing legal organizations makes a definite connection and co-operation between them and the new organizations undertaking the restatement entirely feasible.

(4) **The Organization to Make the Restatement of the Law Should be Established by the Representative Gathering of the American Bar to Which This Report is Submitted.**

In view of the constructive scientific work to be carried on by the organization which shall undertake to restate the law, the problem in connection with its constitution is to provide for an organization which will be representative not only of the profession as a whole but also of the existing legal organizations, and yet will have that stability of management necessary successfully to carry out a work of this character. Each of these elements is of vital importance.

At the first meeting of our Committee it was determined that our Report should be submitted to a representative gathering of the American legal profession. The proper composition of such a representative gathering and the proper composition of the organization which is to undertake the restatement, depend on the same considerations. The elements which may be combined to make a gathering representative of the legal profession are not only numerous but varying. Any one may be spared but the co-operation of most of the elements is essential.

It is manifest in view of the existing organization or rather lack of organization of the profession, that it is not practicable to give each member of the bar in the United States a right to vote for district delegate or delegates at large to such a gathering. Neither is it practicable to ask existing legal organizations to elect delegates or to choose them by mail vote. They meet too seldom, and few if any have ever balloted by mail for any purpose, while the majority are too loosely organized and have too little sense of responsibility. Even if it were feasible to carry out such a plan, it would give only a fraction of the profession rights, and these at best would be theoretical.

Since, therefore, it is not practicable to give even the members of existing legal organizations a right to vote for one or more delegates we determined to make the gathering to which our Report should be submitted representative of the legal profession in the United States in the sense that each of those invited should be a leader of the profession of the law either by reason of official position or of well established professional standing. We have therefore asked to the meeting to which the Report is submitted the Chief Justice of the United States and the Associate Justices of the Supreme Court, the senior Federal Judge of each of the Federal Circuit Courts of Appeals, the Attorney General and the Solicitor General of the United States, the Chief Justice of the highest court of each state, the president and the ex-presidents of The American Bar Association and the members of its executive committee and general council, the president of each state bar association, the dean of each school belonging to the Association of American Law Schools, the president of each of the learned legal societies referred to in this Report, the chairman or senior member of the Commissioners on Uniform State Laws in each State, the president of the National Conference of Commissioners on Uniform State Laws, and between one and two hundred other persons selected because of their knowledge and high professional standing and their known interest in constructive work for the improvement of the law. If a judge, a president, or a dean is unable to attend it is expected that he will appoint some other member of his court, learned legal society or law school faculty to represent him. Confident that the gathering thus secured represents the American legal profession in a very real sense we recommend that it establish the organization more particularly set forth in the next part of this Report.

The suggested constitution of the proposed organization has been framed with the two things in mind which we have here emphasized: First, that a representative body of the American legal profession for the improvement of the law can best be secured under existing conditions in the manner in which the members of the gathering to which this Report is being submitted have been secured; and second, that a high degree of permanency in supervisory direction is necessary to make it reasonably certain that the work undertaken will be well done.

(I) CREATION AND CONSTITUTION OF THE
AMERICAN LAW INSTITUTE.

We suggest that the organization shall be known as "The American Law Institute," and that it shall be composed of two bodies, members and council.

We recommend that those who have been invited to form the representative gathering of the American legal profession to which this Report is submitted form the Institute, constitute themselves the first members, adopt a Constitution embodying the provisions here suggested, and elect twenty-one persons to serve as the first councilors.

The constitution should provide that the members of the council shall by lot divide themselves into three classes; seven to serve for three years, seven for six years and seven for nine years. The council should have full power of management; except that any legal work done under the direction of the Institute, before being published as an official publication of the Institute, should be submitted to a meeting of members, or to the members for their several criticisms and expressions of opinions, or both (see *infra*, page 52). The council should have the power to fill all vacancies in their own number, and to elect all officers and also all new members of the Institute. They will, of course, apply for a charter of incorporation.

A matter vital to the future of the Institute is the personnel of the first council. On them will devolve the duty of making detailed plans for the execution of a novel undertaking of great difficulty. If the gathering to which this Report is submitted agrees with us that such a restatement of the law as we have indicated should be undertaken by an American Law Institute founded by them we have confidence in their ability to select a board the personnel of which will be at

once recognized by the profession as adequate for the task. When the members of the first council are selected full responsibility should be placed on them for the future of the Institute, and their power should be commensurate with this responsibility.

The constitution should state that the object of the Institute is:

“To promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”

The primary object of the Institute is to enable the legal profession in America to carry out its public obligation to improve the law. The immediate as well as the principal permanent work is a restatement of the law in such a manner as to promote its clarity, simplicity and adaptation to the needs of life. We suggest, however, adding to these objects “the encouragement and conduct of scientific legal work.” The line between that research which has for its object suggestions for improvement in existing conditions, and that which is designed to increase the sum of human knowledge cannot be drawn with accuracy.

The methods by which the work shall be carried on and its cost are matters with which the Council of the Institute must deal, and as already indicated we do not believe that its discussion should be hampered by definite direction from the members, and certainly not from us. At the same time it may serve to bring out clearly our conception of the nature of the work for which the Institute would be created if we indicate:

- (a) The topics of the law which we think the Institute may properly undertake to restate on its organization.

- (b) The methods of work which should be adopted to secure good results.
- (c) The annual cost of carrying on an amount of work which will justify the establishment of the Institute.

(J) THE TOPICS WHICH THE INSTITUTE MAY
FIRST UNDERTAKE TO RESTATE.

To regard the proposed restatement of the law as a sort of improved legal encyclopedia, which will be produced in the space of a few years and cover the entire field of law, is totally to misconceive its character. It is possible to write a legal encyclopedia or a series of legal treatises covering the entire field of law. Indeed the enterprise of modern publishers has already accomplished this result. But we desire that the work which we undertake shall not only analyze the existing condition of the law and set forth the legal problems involved, but shall also set forth with the care and precision of a well drawn statute those principles which will not only tend to clarify and simplify the law but better adapt it to the needs of life. It is not possible to forecast the time required to cover the entire law by such a work.

Furthermore, as the conditions of life are never static, law, which is the expression of those conditions, to fulfill the functions of its existence must be a body of rules continuously subject to modification and change. Long before it would be possible to complete a restatement of all the principal topics of the law, the topics first completed might need in one direction expansion, in another modification, in another perhaps positive change. As we conceive it, the work of the American Law Institute which we propose is not like that of those who build a house. There will never be a time when the work is done and its results labelled "A Complete Restatement of the Law." The work of restating the law is rather like that of adapting a building to the ever-changing needs of those who dwell therein. Such a task, by the very definition of its object, is continuous.

Again, the necessity for such a restatement as we propose varies with different topics. In some the need is great; in others the need is slight or perhaps does not exist. Therefore, even if it were possible of accomplishment, to start out with the idea that the proposed Institute should undertake a complete restatement of the entire law in a given number of years would be a mistake.

The work which the Institute should first undertake must obviously be work which is most worth doing. It should therefore discard from its earlier operations such subjects as are not suited for immediate treatment.

The unsuitability of a subject for immediate treatment may come from a variety of causes. Its inherent importance may not be of the highest order. Or it may not be in the power of the bar by a restatement, however good, to attain desirable results. Such a subject is international law. Again, topics of the highest importance have already recently been worked over. Thus the National Conference of Commissioners on Uniform State Laws has prepared statutes on various commercial subjects; for instance, negotiable instruments, sales and partnership. On other subjects we have excellent modern treatises.

Not discarding any of these subjects as permanently outside the scope of the Institute, it should we believe take up for immediate action other topics, which, because of inherent difficulty and lack of adequate treatment by modern scholars, seem more in need of restatement.

With these principles of selection in mind our Reporters and their advisors, referred to in the introduction to this Report, have at our request given careful attention to the first work to be done by the Institute, and after full consideration they have recommended conflict of laws (the entire subject if possible), torts

(dealing perhaps first with negligence) and business corporations. They believe that all of these subjects are in great need of that clarification and improvement which it is possible for a restatement such as we have in mind to produce, while the character of the topics is sufficiently diverse to raise most of the problems connected with a restatement of the substantive private law. The recommendations of the reporters are based by them upon the following considerations: "The great confusion existing in the subject of the conflict of laws has already been referred to, and the importance of the subject in view of our Federal system with its forty-eight states, each with its own law, cannot well be exaggerated. (See *infra*, pages 92-94.) Torts is a subject which has developed unsystematically and is therefore full of the evil of uncertainty. Negligence presents a part of the law of Torts wherein the over-elaboration of rules pertaining to what constitutes due care has unnecessarily complicated the law and made a new emphasis on simple fundamental principles important. The major part of the law of business corporations is the result of decisions made in the past fifty years. The importance of the subject is obvious. The present uncertainty of the law pertaining to it is not so much due to conflicts in decisions and statutes as between state and state, or to an over-elaboration of rules for the application of fundamental principles, as it is to a confusion and conflict in regard to the legal character of the association and to real differences of opinion as to the correct statement of the fundamental principles applicable to the solution of the more difficult problems presented." These and other important topics will, without doubt be given careful consideration by the Council of the Institute.

Before any topic is undertaken, the Council should determine whether a complete analysis of the law and an agreed legal terminology should be adopted.

It is highly important that there should be no duplication of work. Not only would this be wasteful, but it would be quite possible that two restatements of the same subject might not be entirely in accord with each other. At the outset, therefore, some analyses of the law must be made with a view of determining the general scope of the principal topics and the precise scope of the topics first taken up for restatement.

Furthermore, an important part of the work of the Institute must be to secure precision in the use of legal terms. No group working on a single topic of the law can accomplish this result. It might precisely define the terms it uses in its work; but another group working simultaneously might adopt a different definition of identical terms. For this reason some distinct body must be charged with the general duty of determining the meaning and use of legal terms.

On the other hand we do not believe that the council will find that it is desirable to postpone the work of restating the law of any topic until a complete classification of the law and a complete legal terminology is adopted. It is not merely that such classification and terminology would necessarily take many years to prepare, though that in itself is a serious objection to this method of proceeding, because it would so far postpone any practical results as to make the establishment of the Institute improbable. The fundamental objection is that a complete and satisfactory classification and terminology can more certainly be produced as the result of actual experience in the work of restating the different subjects. The danger of all classification pursued as an end in itself, is that when actual problems of classification arise, the classification fails to indicate a place for every state of facts. A priori classification has also a tendency to stress unimportant distinctions and invent strange legal terms.

It is of course necessary to have from the start a general analysis of the law, and the part of such analysis which affects the topics first undertaken must be thoroughly thought out. So also, there are certain generally used legal terms which must be defined at the outset. But it will be in accordance with the spirit underlying the genius of our people if much of the outline of the analysis of law and the creation of a complete legal terminology is the result of the gradual growth of the restatement itself.

The work on the topics which we have suggested that the Institute first undertake to restate can therefore be begun on its organization without undue delay.

(K) METHOD OF WORK.

(1) The Experience of the National Conference of Commissioners on Uniform State Laws.

The National Conference of Commissioners on Uniform State Laws during the thirty years of its existence has drafted a large number of statutes many of which now form important parts of the present commercial law in most of our states. The experience of the commissioners, while confined to the preparation of Acts for presentation to legislatures for enactment as part of the statutory law, is useful as indicating the standards of care which should be employed in making any important restatement of the law, whether such restatement is or is not intended to be embodied in a statute. Their experience indicates that the best results may be anticipated when the act has been prepared as the result of:

- (a) The reference of the subject to a committee composed of persons who have some special knowledge of the subject. (It has not been always possible for the Conference to do this, as among the members of the Conference there may not be a group of experts on the subject of a proposed act.)
- (b) The selection of a draftsman or reporter who after conferences with the committee prepares and submits to them a draft.
- (c) The revision of this tentative draft by the committee, the draftsman or reporter being present and taking part in the discussion.
- (d) The publication and wide distribution of the tentative draft among judges, lawyers and others who are believed to have special knowledge of the subject, the draft being also sent to associations which represent the business per-

sons or other classes in the community especially affected by the law. The object of the distribution is to obtain suggestions and criticisms.

- (e) The further amendment of the revised draft in the light of the criticisms and suggestions received and the submission of the draft so further revised to the Conference.
- (f) The discussion, adoption or amendment of the draft section by section by the Conference, the draftsman or reporter and of course the members of the committee being present and taking part in the discussion.
- (g) The return of the draft to the committee after amendment by the Conference for re-examination, republication, further general distribution and discussion and a resubmission to the Conference for a second detailed discussion and amendment section by section.
- (h) A repetition of this process until the commissioners feel that the act may be published as an act which the Conference recommends the legislatures of the several states to adopt.

When the Conference began this work no member had any idea that the draft of a statement of the law in a form suitable for enactment into a statute would require the time and care which experience has since shown to be necessary. The restatement of the law which we have in mind, while it will not be adopted by the legislature as a code should, as already explained, be prepared with all the care of a properly drawn legislative enactment, and this necessity for care applies not only to the restatement of principles but also to that part of the work which will undertake to analyze the existing conditions of the law and set forth the legal problems involved.

The various steps taken by the Conference of Commissioners embody the idea that an adequate statement of the law on any subject usually requires the combination of three stages :

(a) The appointment of some one person who is made primarily responsible for the production of a definite draft.

(b) The submission of this draft to a group of experts on the subject, the experts having authority to make any change no matter how extensive.

(c) The submission by the experts of a statement of the law satisfactory to them to a larger body composed of judges, lawyers and law teachers, who taken as a whole represent wide and varied experience.

We agree that these three steps represent the process by which the restatement of at least the greater part of the law, and especially the substantive law, should be made. The actual results will of course not only depend on the method of work, but also on the ability of the persons selected to do the work, on the time, and even more on the real attention which is given to it. The defects of the work done by the Conference of Commissioners—and in spite of the general excellence of their work there are defects—have not been due to lack of ability, or in recent years to lack of a full realization of the necessity for exhaustive as well as wide and varied criticism before final publication, but to a lack of means. This lack of means has prevented the Conference from establishing a permanent central executive force charged with the duty of seeing that each work undertaken is being thoroughly done. It has also prevented the Conference from paying for the services of any experts except the draftsmen or reporters, while the commissioners serve without pay, and even in some cases pay their own traveling expenses in attending the meetings of the Conference.

The result of this lack of means is that the committees meet to discuss an act for a day, instead of for a week, two weeks or a month, and the Conference itself can only meet for one week in each year.

The conception which we have of the way in which the work of restating the law in any subject should be carried on is, that the Council having determined that a restatement of the law of a given topic should be made, should entrust its execution to a committee, the members of the committee being selected for their ability and special knowledge of the subject; that reporters should also be selected, who, under the direction of the committee, would be primarily responsible for the production of a preliminary draft; that the committee should secure the benefit of suggestions and criticisms by wide distribution of their preliminary and any subsequent tentative drafts, and submit the final result of their labors to the council; that before the final adoption of the work as a work of the Institute it should be submitted to the members, the question of any further work to be done by the committee of experts and the necessity for subsequent resubmission to the larger group depending on circumstances.

(2) Reporters and Committees of Experts.

Applying the ideas just expressed, if the Institute being established desires to undertake the three subjects suggested in the preceding section of this Report it will be necessary for the council to select three committees of experts, one on each subject, and also three reporters, with possibly one or more assistant reporters. The size of a committee of experts will depend somewhat on the subject and also somewhat on the number of suitable persons available. We believe, however, that experience will probably show that these committees should be composed of at least five

but not more than ten persons. There should also be appointed a committee on the Classification of the Law and Legal Terminology. We think that it will be an advantage if this committee is in part composed of those selected to act on the committees for the restatement of the law of torts, business corporations and conflict of laws.

As soon as a reporter is chosen he should, under the general direction of the committee for the topic, assemble the authorities on the subject, and complete a tentative draft of all or a part of the restatement in the form previously suggested. It will then be the duty of the committee to discuss and amend the draft, the reporter being always expected to carry out any amendments and directions adopted by the committee and to submit further tentative drafts until the committee is satisfied with the work and ready to report it to the Council.

During this process the various tentative drafts as prepared by the committee should be printed and distributed for suggestions and criticisms. Though the distribution should not be confined to members of the Institute each draft as printed should be sent to every member.

(3) Criticism by Members.

It is important that the work of the experts, before being adopted by the Institute, should be submitted to a group sufficiently large to insure its criticism from the background of varied experience, as well as to insure that wide and continued interest in the work by the leaders of professional opinion in the different parts of the country which is necessary if the desired results from the restatement are to be attained. Therefore, the Council on receiving the draft from the committee of experts should submit it for full discussion,

either to a meeting of the members of the Institute, or to the members for their several criticisms and expressions of opinion, or both.

(4) Director.

The reporters and experts will be drawn mainly from the faculties of the law schools, though we regard it as most desirable that other branches of the profession should also be represented on the committees. The reporter for a longer or shorter period should devote all or the main part of his time to his work, while the members of the committees should meet not merely for a day or two, but for two or three weeks at a time. But neither reporter nor expert, at least at first, will be as such a part of a permanent force, though a permanent force of able men giving all their time and energy to the work may be developed. Some central permanent executive force, however, is absolutely necessary if the work of restating the law or any other work undertaken by the Institute is to have a reasonable prospect of being well done. Whatever else the central executive force may consist of there should be at its head one person, who to distinguish him from the president of the Institute may be called director. The director should be appointed by the council and be responsible to it for the execution of its plans. The director should be much more than an Executive Secretary. He should be a man of recognized professional standing. He should be expected to formulate plans for the consideration of the council and should be *ex officio* a member of each committee of experts.

(5) Bureau of Research.

In this Report we have emphasized more than once the great volume of the recorded decisions. At the same time we have also said that "the restatement must ac-

tually be done and show on its face that it has been done with a full knowledge and careful consideration of the present sources of the law." Furthermore, in stating our idea of the work of the reporter appointed to prepare a preliminary draft of any topic for a committee of experts we have stated that "he must assemble the authorities on the subject." In some topics where the recorded cases are not very numerous this work of collecting and arranging authorities may not be beyond the power of the reporter to accomplish with some clerical assistance in a reasonable time. But to ask the reporter for such a topic as conflict of laws or torts or business corporations to make any exhaustive collection and arrangement of the recorded cases, not to speak of the statutes in such a subject as Business Corporations, would be to postpone for several years the completion for the committee of experts of the first preliminary draft by the reporter. Indeed if it were not for the existing law encyclopedias, digests and other aids in finding and arranging authorities the task for most topics would be beyond the power of any one person to accomplish, irrespective of the question of time consumed. It is manifest therefore that some method must be devised to give needed assistance to the reporters confronted, as in most topics they will be confronted, by masses of authority.

The reporters will be selected because they already know a great deal concerning their topics. It may therefore be presumed that they have already studied the leading decisions and many of the more important acts. Furthermore, we may assume that they have before beginning their work for the Institute more or less definite ideas of the proper arrangement of their topics, know many of the uncertainties, complexities and other deficiencies of the present law, and have some idea of the lines along which a restatement intended to improve

the law should be drafted. We may also assume that the members of the committees of experts will, as well as the reporters, possess a very considerable fund of special knowledge concerning their respective subjects. It will be for each committee therefore in consultation with the reporter and the director to come to a definite determination concerning the detail of the method by which the work on the particular topic entrusted to them should proceed and the kind of help which it will be necessary for the reporter to have. In this connection the personal equation, more especially of the reporter, but also to some extent of the members of the committee, must be taken into consideration, as well as the nature of the topic and the extent of the authorities. Some persons in doing legal work can use assistants with great advantage; others can use one kind of assistants but not another; while others are so constituted that almost any help offered is useless to them. Nevertheless, as stated, it is clear that the reporters will for the most part need assistance. Therefore, as the work proceeds there will probably be developed a bureau of research, so manned as to be able to supply such trained assistants in the collection and arrangement of authorities and in the preparation of special reports on the authorities bearing on specific questions, as experience shows are essential to the preparation of a work which should be done with a full knowledge of the present sources of the law.

(6) Legal Surveys.

The object of the restatement to be undertaken by the Institute is to improve the law, not merely by clarifying and simplifying it, but also by better adapting it to existing needs. The Institute must not only ascertain what the law is but what it ought to be, bearing in mind that the changes advocated should be

confined to those designed to carry out the policies which are generally admitted to be desirable and which do not touch subjects of general public controversy. (Pages 15 and 16.) In many topics therefore it will be desirable to have a survey made of the practical operation of existing rules of law. In the field of adjective law there are few topics which it would be worth while to restate unless the restatement was preceded by and based on such an investigation. On the other hand, a general survey of the operation a topic of the substantive law will not as a rule be either practicable or desirable. It may often, however, be found advisable to investigate the workings of one or more of the rules of substantive law, especially in connection with topics or parts of topics that affect business or social conditions.

The work of making these legal surveys will, we believe, be an important part of the work of the bureau of research. The determination to make an investigation of the practical operation of a part or the whole of the present law pertaining to a topic will be the result of a request on the part of the committee of experts. The exact object and nature of the survey as well as the detailed plans for its execution will be worked out in a conference between the members of the committee, the reporter and the director of the Institute, the plans adopted being of course subject to the approval of the council. The character of each survey must be adjusted to the nature of the topic and there will be wide differences between different surveys. For those pertaining to the operation of the adjective law much can be learned from the survey of the administration of criminal law in Cleveland, Ohio, and doubtless much more will be earned from somewhat similar investigations about to be made in other places under the direction of the American Institute of Criminal Law and Criminology.

(L) TIME AND COST.

As previously explained it is not practicable to tell how long it will take to cover all the possible topics into which the law may be divided by a restatement such as we have in view. It may probably be unwise to attempt a restatement of some portions of the law for many years, if at all. The Institute is an organization to operate a new force working towards the clarification, simplification and adaptation of the law to present needs. Its method of operation will be the putting forth from time to time of restatements of parts of the law. In this Report we have called these parts topics. When therefore we speak of "time" in connection with the work of restating the law we mean the time it will take to make a restatement of one or more topics designated; and the important immediate question is: How long will it take to produce results in the three subjects which we suggest that the Institute on its organization immediately undertake to restate?

The exact work to be done has never been attempted before; besides which, the very method of work outlined in this Report—a method which we regard as necessary to insure a good result—has as essential elements constructive work by a group of experts, and also thorough criticism by a still larger group. To calculate the approximate time it should take a Reporter with proper assistance to complete the preliminary draft along the general lines mapped out as a result of the first conferences of the committee of experts with the Reporter will be sufficiently difficult, but to say beforehand with exactness how long the draft will be worked over by the Committee and the Reporter before the Committee will feel that they can report a complete and satisfactory draft to the Council, and how long the Mem-

bers of the Institute will take to consider the draft, is manifestly impossible.

While for these reasons it is not possible to estimate how long it will take to produce in the form recommended a complete restatement of the conflict of laws, or torts, or business corporations, there is no reason why the Council should not take the position that they expect the committees of experts in each topic to furnish them with a draft of at least some portion of the topic assigned in a given time, provided the amount of the topic to be completed is approximate rather than definite.

Thus if the work on the first topics is planned in the manner suggested we believe that it is not unreasonable to expect that two years from the appointment of the first committees of experts will be sufficient to complete some portion of each of the three topics selected, and that five years will be sufficient to demonstrate the permanent value of the work.

Just as it is impossible to give an estimate of the time which it will take to complete a restatement of any topic it is impossible to give an estimate of the cost of producing a restatement such as we have in mind of the conflict of laws, torts or business corporations. On the other hand it is possible to give the approximate annual cost of doing the work on three topics provided the work is done in accordance with the method recommended.

The cost may be considered under the following heads:

Council, Executive Force, Committees of Experts on Particular Topics, Committee on the Classification of the Law and Terminology, and Printing.

TABLE A

Council: Estimated Cost for One Year	
21 Members, one meeting, traveling expenses average \$100 per member	\$2,100
7 Members of the Executive Committee, five meetings, traveling expenses, average \$50 per meeting per member	1,250
Total	<u>\$3,350</u>

TABLE B

Executive Force: Estimated Cost for One Year	
Director	\$10,000
Traveling expenses of Director	1,000
Office expenses:	
Rent and telephone	\$1,200
Stenographer (\$30 per week)	1,560
Stationery, stamps and telegrams and incidentals, \$2.50 per day for 300 days	750
	<u>3,510</u>
	<u>\$14,510</u>

TABLE C

Committees of Experts and Reporters: Estimated Costs for One Year	
Each Committee:	
Reporter	\$5,000
Assistants	2,000
Members of Committee of Experts	7,500
Traveling expenses	2,240
Stenographic expenses	2,000
Total	<u>\$18,740</u>
Total for three Committees	\$56,220

The allowance of \$5,000 for the Reporter is based on a rate of \$10,000 for the exclusive time for one year of a person of established legal reputation and special knowledge of the law of the topic. With some persons the best results will be attained by requiring exclusive and continuous work for six months; with others other arrangements will be more advantageous to the Institute. These, however, are details into which we need not enter here.

The allowance of \$2,000 to assistants is based on a rate of compensation sufficient to secure the entire time of a recent graduate of one of our Law Schools, the graduate possessing outstanding ability. In many cases it may be found better to distribute the \$2,000 among two or more assistants, making with each a special arrangement as to time and work.

The allowance of \$7,500 for the members of each committee is based on a compensation amounting to an average of \$1,000 each for seven or eight members. It is also based on the supposition that the meetings of the committee will occupy about four weeks during the year, and that the members will be expected to do some work between the meetings.

We believe that there will usually have to be about four meetings of the committee during the year, and the allowance for traveling expenses is based on an estimate of an average of eighty dollars for each member for each meeting. Items of this kind are hard to estimate beforehand. A reduction of the number of the members of the committee tends to reduce it. On the other hand the Council should not hesitate to employ a desirable person as expert merely because of the expense entailed because he resides at a distance from the place of meeting. Furthermore, the members of the Committee themselves should be free to meet as often as is reasonably necessary.

The item for stenographic expense is based on one stenographer for twelve and one stenographer for eight months at \$100 per month each. Here again, as in the case of the assistants, there may be periods when much more stenographic assistance is needed, and other periods in which the full time of a stenographer will not be required.

TABLE D

Committee on Classification of the Law and Legal Terminology	
Reporter	\$2,000
Assistant	1,000
Members of the Committee of Experts	5,000
Traveling	1,600
Stenographic expenses	500
Total	<hr/> \$10,100

The work of this Committee while necessarily greater during the first years than later will not be in any year as great as the work of a committee appointed to restate the law. The estimates underlying the figures given in Table "D" are made on this assumption. The members must be selected because of the special attention which they have given to the subject of classification, and the membership of the Committee must be sufficiently numerous to make its personnel representative of many different fields of law. We have, therefore, estimated that there will be ten members.

TABLE E

Printing: Cost for One Year	
2000 pages (1000 copies)	\$8,000
Corrections, holding type, etc.	4,000
Distribution	500
	<hr/> \$12,500

When the Reporter completes his preliminary draft it must be put into print for the use of the Committee of Experts, and the type held. The Committee must, of course, distribute printed, not typewritten, copies for criticism and suggestion. As the various tentative drafts are prepared and discussed by the Reporter and the Committee many corrections, often involving complete resettings of type, will be made. The figures given in Table E are given after a consideration of these factors. We have also assumed that when these committees are working the combined product will not exceed and can probably not reach 2,000 pages of 400 words to the page, or 80,000 words. Of course, it will be understood that this is an approximate estimate of a most general kind. Some topics present more difficulties than others, and this is true of different parts of the same topic. It will probably be found that the cost of printing connected with the work on any topic will not be as great the first year or even the second year as it will be in subsequent years, because at the start the authorities have to be collected and basic questions settled in connection with the arrangement of the topic and its more fundamental legal principles. Table E, therefore, should probably be considered as the average cost for the first few years provided only three topics are undertaken at one time.

It will be noted that the estimated cost of publishing the completed volumes and the different parts of the restatement approved by the Institute has not been taken under consideration. We may confidently assume that the receipts from the sale will much more than cover this cost; indeed it is probable that a very large profit on the cost of printing and publishing could be made from the sale, if the Institute desires to make the profit. This, however, is a matter which need

not be gone into here. We are not suggesting the foundation of a commercial enterprise.

The following is a summary of the foregoing tables of estimates of annual cost:

Council	\$3,350
Executive Force	14,510
Committees of Experts and Reporters	56,220
Committee on Classification of the Law and Terminology	10,100
Printing	12,500
	<hr/>
	\$96,680

It should be realized that this estimate includes only the annual cost of carrying on the work on three topics at one time. As a permanent force of able men giving all their time and energy to the work is developed the cost will probably increase. Neither does the estimate include the cost of any surveys undertaken to ascertain the effect of the practical operation of existing rules of law. (See *supra*, page 55.)

(M) CONCLUSION.

We have here presented a definite plan, the execution of which is, we submit, second to none now under consideration in the importance of its contribution to the efficiency of government, the dignity and impressiveness of the law and the stability and progress of our democracy.

The plan is an ambitious one. It is not merely the establishment of a law institute, it is the creation of a new force which will operate to clarify and simplify the law and better adapt it to the needs of life. It contemplates drafting the learning of the schools and the practical experience of the bench and bar for the performance of a greatly needed public service. Its execution will ultimately involve an annual expenditure wholly unjustifiable were it not for the benefit which may reasonably be anticipated.

The defects in the law and its administration cause severe denunciation of the law and of the government not only by the ill-informed of all classes, but by those who are well informed. The times demand more efficient service from the legal profession. The community may rightly look to the lawyer to promote social peace, good order and well-balanced social progress. Peculiarly important is it to undertake now the task of improving the administration of justice, when new world-conditions are destined to give rise to problems of social justice which will surely strain the legal machinery of society and both substantive law and administrative procedure must be defensible in order to withstand the strain.

It is as much the lawyer's duty to organize to promote the improvement of the administration of justice as it is the duty of the doctor of medicine to organize

to increase medical knowledge. The work of the proposed Institute is analogous both in respect to the character of the labor involved and the importance of its results to those institutions founded to investigate the cause of disease. It may justly ask that the public support its work in the same generous spirit that it now supports the work of medical research.

PART II.

THE LAW'S UNCERTAINTY AND COMPLEXITY.

PREFATORY STATEMENT.

It has seemed to us desirable to consider and to state, at greater length than is appropriate for an introduction to our recommendations, the causes of the law's uncertainty and complexity and the forces which are tending to diminish these defects. Though printed as the Second Part of our Report, the analysis herein made is the foundation of our recommendations.

(A) CAUSES OF UNCERTAINTY.

(1) Introductory Statement Concerning the Sources of the Law.

Our law is expressed, changed, developed and more or less adapted to our needs and sense of justice mainly by judicial decision and by statute.

Much of our law is not expressed in statutory form. Important parts of almost all subjects, and all, or nearly all, of the law on many subjects is expressed with binding authority only in the recorded decisions of the courts. When a case is presented to a court for decision, prior decisions in cases involving more or less similar questions are precedents from which rules for the guidance of the court may possibly be derived. A rule thus repeatedly recognized through its frequent application by the courts becomes a principle of the common law. The greater the number, variety and importance of the transactions to which a principle applies, the more fundamental the principle.

The decisions of the courts as a source of law are not confined to subjects on which no legislative provision exists. It is true that a statute may so minutely

describe all the situations to which it applies that the courts have no other duty in connection with its application than to ascertain the facts of the case alleged to come under its provisions. The great bulk of our statutory law, however, is not of this character. Practically all statutes relating to the substantive law contain one or more provisions sufficiently general to raise a doubt as to their proper application in some cases. Such a doubt can be resolved only by the decision of the courts. Many statutory provisions indeed are merely statements of more or less general principles of law, and the major part of the law pertaining to the subject with which such statutes deal consists of rules for the application of these principles developed by the courts by a process similar to that by which common law principles are developed. These rules indeed form the common law pertaining to the statute.

(2) Lack of Agreement on the Fundamental Principles of the Common Law.

The principles of the common law are developed by the slow process of judicial decision. The power that makes may modify and hence the common law has a flexibility which the statute law does not possess. A court may always consider all the facts of a case with a view to recognizing in any one or more of them a just cause for an exception to a previously recognized principle. Some uncertainty in the ramifications of the common law is therefore inevitable. It would exist although there was general agreement on clearly expressed fundamental principles, but the possible uncertainty is increased because unfortunately no such general agreement exists. It is not the duty of our courts to set forth the principles of the common law in an orderly manner, or even to express or explain them, except in connection with the application of one or more of them

to the decision of a particular case. To obtain even an approximation to such an agreement on fundamental principles these would have to be set forth by public authority or by an agency commanding the respect and attention of the courts. There is no such agency, and this lack of general agreement on fundamental principles is the most important cause of uncertainty in the law.

(3) Lack of Precision in the Use of Legal Terms.

Certainty in the law presupposes clear thinking on the part of those whose duty it is to know and interpret it. No greater obstacle to clear thinking exists than lack of precision in the use of words.

The effect of loose legal terminology in increasing the law's uncertainty is obvious. The exact principle intended to be expressed by the judge in writing the opinion, by the legislature in adopting the statute, or by the law writer in compiling the treatise, may be misunderstood, and therefore misapplied by the judge who turns to the decision, the statute or the treatise for guidance.

There is no inherent reason why the law, like any other applied science, should not designate by precise terms the things with which it constantly deals. This our law fails to do. Even educated lawyers use many elementary legal terms such as "obligation," "debt," "right," with any one of several different meanings in indiscriminate and confusing manner. When this confusion of terminology is found in contracts, wills, statutes and decisions, doubt and litigation inevitably follow.

The difficulty in obtaining an exact legal terminology is enhanced by two circumstances. First the language of the law must not be too recondite for general understanding. A philosophical terminology, though

exact, may be so difficult to learn or to understand or to apply as to be undesirable. Second, no violent change in methods of expression or terminology from those hitherto in use can be adopted. Old terms in statutes previously enacted, and in former decisions, control the existing law. The whole bench and bar still use those terms instinctively and as a matter of course. Changes can be made and must be made where exactness of expression imperatively requires them, but such changes must be gradual, and there is a limit beyond which they can never go lest the language of the law cease to be plain English.

(4) Conflicting and Badly Drawn Statutory Provisions.

The lack of agreement on, or even clear statement of, the principles of the common law has its analogy in the field of statutory law in conflicting and badly drawn statutory provisions. The collateral effects of the specific provisions, a matter often wholly disregarded in the adoption of a statute, is frequently the source of much uncertainty and confusion. The question whether a prior statute is repealed may be left in doubt. Again the possible application of the provisions of the statute to conditions wholly apart from those which gave rise to the demand for the legislation may be for years a prolific source of uncertainty. Thus, the fourteenth amendment to the Federal Constitution was adopted to protect the rights of the recently freed slaves, but the great volume of litigation resulting from the adoption of the amendment has been over matters having nothing to do with the rights of the negro.

Lack of clarity in the language used is, however, perhaps the cause of the major part of the uncertainty in our statutory law. The poor draftsmanship which mars many of our statutes is not the fault of members

of our legislatures. It is principally due to the erroneous idea, until recently generally prevalent among the members of the legal profession, that any lawyer is competent to draft a statute. The art of good legislative drafting, like any other art, is mastered only by practice under the tutelage of experts.

(5) Attempts to Distinguish Between Two Cases Where the Facts Present No Distinction in the Legal Principles Applicable.

The instinct of the judge trained under our legal system to respect prior decisions sometimes produces unfortunate results. A case is decided. Another case arises not differing in any essential respect, but the court believes that application to it of the principle established in the first case would produce injustice. Confronted with such a situation the court may refuse to follow the prior decision, but so far pay formal respect to it as to write an opinion in which the court instead of frankly overruling the prior case attempts to distinguish the two cases on account of some immaterial difference in their respective facts. The result is that we have no clear statement of any legal principle, the law on the subject being left confused and uncertain.

(6) The Great Volume of Recorded Decisions.

If a judge in deciding a case were without the guidance of a statute, a legal treatise, or the precedent of the action taken by courts in similar cases, the law would be nothing more than the judge's unaided guess. Some guide other than the judge's sense of right or understanding of existing custom is essential to approximate any degree of certainty. The more complex the social and economic conditions the more essential is some external authoritative record of what the law is. The ex-

istence of a record of prior cases, combined with the court's desire to follow precedent is a factor making for the certainty of the law. Thus in England the law of real property as it existed in the seventeenth and eighteenth centuries had been brought in spite of its intricate complexity to a high degree of certainty by the slow process of adding precedent to precedent. To-day with other subjects the same process is going on, but a force increasingly tending to prevent the process from giving us reasonable certainty in the law is the number of the recorded cases which may be cited as precedents.

The modern development of the system of publishing and reporting the decisions of courts and the opinions which support the decisions, combined with the increase in the number of jurisdictions, the creation of new courts in old jurisdictions, and the greater amount of business done to-day than formerly by the average appellate court, has created an enormous mass of recorded cases. A computation in 1917 showed 17,000 volumes of American reports and 7,000 volumes of British reports. Each year witnesses large additions to this mass of cases. During the year 1914-1915 it was estimated that 175,000 pages of American reports and 5,000 pages of British reports had been published.

Furthermore to this monstrous and ever-increasing record of judicial precedent is being added each year not only the record of the opinions of the chief law officers of each state on questions of public law, but also the decisions of public service commissions and other administrative boards.

This was forcibly expressed by a distinguished Australian lawyer in a recent address before the New York Bar Association.

“In England in the old days such literature was a scanty rivulet. In England and her Colonies it has swollen in modern times to a

stately stream. But in America it has become a raging torrent fed by hundreds of tributaries."

Sir John Salmond here refers to the American authorities alone as a raging torrent, but the American lawyer cannot confine his search for authority as to what the law is to the decisions of American courts. English cases are frequently relied on by the appellate courts, and must therefore be searched by counsel. For example, in seven volumes reporting the decisions of the New York Court of Appeals between January, 1919 and October, 1921, the court cites 207 English cases as against 238 Massachusetts cases, 73 Illinois cases, and smaller numbers from other states.

It is of course impossible for any individual lawyer or judge to read, still less by any device to carry in his mind, one one-thousandth part of this mass of case law. The reports as a source of law must long ago have been abandoned or arbitrarily limited to a few hundred designated volumes were it not for the aid given by general digests, digests on particular subjects in the form of treatises and legal encyclopedias. With these aids, in which are cited all, or nearly all of the cases, it is usually still possible to collect and to make some examination of the action taken by the American and English courts in cases whose essential facts present the legal question on which information is desired. The time and labor involved varies. Often, however, the very thoroughness of the work done by those engaged in the compilation of aids in the search for precedents multiplies the cases cited beyond the possibility of careful examination. Moreover the greater the number of previous decisions, even in the jurisdiction where the case in question is pending, the greater the chance that all of them cannot be reconciled in principle; and in cases where

there is no precedent precisely in point in that jurisdiction, and where, therefore, reliance must be placed on the decisions of the courts of other jurisdictions, the probable differences of decision are so great as to be notorious.

The net result therefore is that though the doctrine of *stare decisis* is the foundation stone of such certainty as the common law has, yet their very number and still more their contrariety tend to destroy the value of the principle and to substitute uncertainty for certainty.

(7) Ignorance of Judges and Lawyers.

In view of the nature of the sources of the law it would be unreasonable to expect the records of any court, no matter how learned and able its judges, to show no inconsistency in the statement or application of legal principles. When a case arises, the facts of which are practically identical with those of a prior case, it is not difficult for the court to recognize that the legal principle governing the earlier should be applied in deciding the later case. The task of recognizing the identity of the principle governing the two cases is much more difficult when there are many striking though immaterial differences of fact between them. Yet lack of such recognition is sure to produce uncertainty. Indeed variations in the statement and inconsistency in the application of legal principles cause greater uncertainty than a reversal of a prior decision or an express repudiation of a previously announced principle. When the Supreme Court finally decided the *Legal Tender* cases, the country felt that the law was fixed; it is not so when there is inconsistency in the application of legal principles, or when cases are distinguished upon grounds which do not justify a distinction.

The amount of uncertainty in the law at any time therefore depends to no small extent on the legal learning and ability of the bench and bar. Our legal system probably throws a greater responsibility on the courts and practising lawyers than any other. The common law is what the judges make it. They alone can give an authoritative interpretation of the statute law. Nevertheless, in the investigation of every legal question they are largely dependent upon the briefs and arguments of counsel. The community possesses a force tending towards the certainty of the law as well as its adaptation to the needs of life in proportion as our judges and lawyers have that grasp of legal principles which enables them to see the real issues presented by the facts of a case, and the skill to apply consistently the proper principles to its solution. Even well-drawn statutes require for their proper and consistent interpretation well-trained mental faculties, and often a knowledge of the history and development of the law on the subject to which the statutes relate. The defects also in our statutory law, to which reference has been made, makes the task of statutory interpretation harder and increases the desirability of a well-trained bar and experienced bench. Not a little of the existing uncertainty in the law is the price we are paying for low requirements of legal education preparatory to admission to the bar and for judges often elected for short terms and chosen for reasons unrelated to their legal capacity.

(8) The Number and Nature of Novel Legal Questions.

Our recent social and economic development has been of a character constantly to increase both the number and difficulty of novel legal questions on which the community desires information. Thus the growth

in the variety and in the relative and absolute amount of business carried on by private corporations has thrown on the courts in the past fifty years the task of developing, with occasional direction from legislative action, a large and important part of our commercial law.

The growing dependence of the individual on public service utilities is another noticeable change within the last half century. Those who live under urban or suburban conditions secure their local transportation, light, water, and to a great extent their heat, not by their own efforts or the efforts of those in their employ, but from public facilities owned and operated by public service companies or by the government. From similar sources all the inhabitants of the country secure their means of communication and transportation. These changes have brought with them many novel legal questions; while the endeavor to secure through public commissions adequate services at reasonable rates has given rise to other questions of constitutional and statutory interpretation. Efforts by combination to control production and prices have involved new questions in the law of fair trade and have also led to attempts on the part of the public to restore competitive conditions or through administrative action to control prices—attempts which are apparently destined in the immediate future to raise new, difficult and most important legal questions. These things and the growth of trade unions and employers' associations, and the efforts on the part of the public to obtain relief from the unfortunate results of industrial conflict are but some manifestations of that readjustment of social and economic conditions now going forward which inevitably brings in its train, not only difficult problems which have to be decided by public discussion and political action, but also an increasing volume of important

and difficult legal questions with which the courts in the administration of the law have to deal without the direct guidance of statutes or precedents.

**(9) The Action of These Causes of Uncertainty
on Each Other.**

While it is clear from the foregoing analysis that the evil of uncertainty in the law is not due to one but to many causes, these causes act on one another. Thus the lack of agreement on fundamental principles is greatly increased by the want of precision in the use of legal terms, by the bulk of our legal reports, and by the ignorance of judges and lawyers. Again the degree of uncertainty due to novel cases is increased by confused and poorly drawn statutes and by lack of agreement on, or a knowledge of the fundamental principles of, the common law.

(B) CAUSES OF COMPLEXITY.**(1) Introductory.**

The statement that the law on any subject is complex may denote one of two things. It may mean that a number of rules of law apply to a given situation, or it may mean that in order to ascertain the law applicable thereto many elements of fact have to be considered.

When used in the first sense the degree of complexity is determined by the number of legal regulations affecting the class of transactions under consideration. If the only rule of law relating to the care which a railway company should exercise towards a passenger is the rule of reasonable care under all the circumstances, the law of negligence, so far as it relates to common carriers and their duties to their passengers, is, in the first meaning of the term, is not complex. If by statute or by court decisions a number of rules regarding the kind of rails, signals, cars, etc., which those operating a railroad should use attain the force of law, the law in this first meaning of the term has become more complex, because the rules of law affecting the carriage of passengers are more numerous.

In the second meaning of the term the degree of complexity in the law is measured by the number of questions of fact that must be taken into consideration. Thus in the illustration just given if the rule of reasonable care under all the circumstances is the only rule of law affecting the duties of a railroad company in carrying passengers, this branch of the law of negligence, though simple in the first meaning of the word complexity, may be very complex in the second; because to determine whether the company has used due care when a passenger has been injured, many things connected with the complicated physical process

by which a modern train is operated may have to be taken into consideration.

At present the general tendency of the law of negligence is to become more complex, if complexity is measured by the number of rules applicable to the normal transaction. Take a person traveling on an urban trolley car. When this mode of conveyance was first established the law in the first sense of the term was simple: The passenger could not recover for an accident caused by the negligence of the company if he himself was not at the time exercising due care to avoid injury. The test of this due care was the care required under all the circumstances of the particular case. These circumstances might be very numerous. Owing partly to the tendency of the courts to be governed by previous similar cases, and partly to the fact that certain acts, as getting off or on a moving car, are ordinarily dangerous, this general rule of law has been almost buried in many jurisdictions under numerous special rules as to the care which should be exercised by a person boarding, traveling on and alighting from an urban trolley car. These rules are more than rebuttable presumptions that the person violating them is careless—they have become principles of law. Thus in the first sense of the term the law is becoming more complex. On the other hand when an accident occurs the application of the law to the situation tends to become comparatively simple. All the facts of the case need not be considered if the person harmed at the time of the accident was violating one of the rules of law conclusively prescribing the proper conduct under the circumstances.

(2) The Complexity of the Conditions of Life.

Life is complex when it is full of situations in which many things have to be taken into consideration to determine conduct. Thus the life of the pioneer may

be hard but it is not complex. True the physical factors which he must consider may narrow his actions to a struggle for existence, but they are not complicated, and the social factors, his business transactions and his personal relations with others, are few and simple.

Among the forces tending to increase the complexity of life are distinctions of legal status, inventions and discoveries, the growth of commerce, and the capacity to act in association with others. The development of the modern state has on the whole tended to decrease distinctions of legal status. The feudal system with its intricate provisions respecting the tenure of land has disappeared, as well as the special legal privileges of nobles and the special legal disabilities of Jews. The disabilities of married women have been more recently almost wholly removed. Life is, however, apparently becoming for the average person more complex because the other forces referred to, inventions and discoveries, which increase man's power over nature, man's disposition to engage in commerce, and his capacity to associate himself with others to attain economic ends, are increasing the number and variety of situations in which many factors, physical and social, have to be taken into consideration to determine propriety of conduct.

The forces referred to as making for greater complications in the conditions of life also tend to increase the complexity of law. This is true whether we use the term "greater complexity of the law" as denoting an increase in the number of rules of law applicable to the transactions of man, or as denoting the necessity to take into consideration a greater number of factors in order to ascertain the law in a given situation. A nation engaged in commerce obviously enters into a greater number and variety of transactions than an agricultural people, not only because sales of existing goods are more numerous, but because methods of con-

tracting for future supplies and of dealing by bills of lading and warehouse receipts with goods at a distance must be found. Elaborate machinery for credit and for security also forms a necessary part of commercial life.

The effect of inventions and discoveries may be illustrated by the consequences of the introduction of the automobile. The number of facts to be taken into consideration in determining what is due care in the use of the highways has been increased. This may either increase the number of the rules of law applicable to traveling on the highway, or the number of factors which must be taken into consideration to determine the legal responsibility for an accident. Indeed, both of these things have resulted from this new mode of travel. While the number of rules of law have increased, the number of facts which must be taken into consideration in the average accident in order to determine legal responsibility have also increased. From either point of view therefore the law has become more complicated.

A similar result follows an increase in the number of social relations involved in a business transaction. The employment of agents, the formation of partnerships, the carrying on of business by corporations which often have hundreds and sometimes thousands of stockholders, all increase not only the number of persons affected by the average business transaction but the number of groups of persons having distinct interests. The law must either take into consideration each new social relation as it arises, and by that fact become more complicated, or to the extent of its neglect fail as an instrument for the administration of justice. Thus the early English courts, by refusing to recognize any right in land except that of the person holding the formal or legal title, maintained the law in

its simplicity at the expense of doing justice to those for whom the owner of the legal title had agreed to hold. The establishment of the Court of Chancery was due to a desire to do justice in cases where the ordinary rules of the existing procedural and substantive law were deficient by reason of their universality. The system of equity which that court first developed has rarely tended to simplify the law, but it has tended to adapt the law to the needs of life.

(3) Lack of Systematic Development of the Law.

The growth of the common law from precedents not infrequently results in illogical distinctions, sometimes due to failure to follow a sound principle, but more frequently to the adoption of a rule which violates general principles established in other cases. Thus it is universally recognized that unilateral contracts are as valid as bilateral. Any act or forbearance by one not bound so to act or forbear should be and generally is held a sufficient consideration for a promise made by one who requests the act or forbearance. Yet in several cases it has been held that there can be no valid unilateral contract with forbearance as the consideration. These cases cite and follow one another oblivious of the general principle.

An even more glaring illustration is afforded by a case in Massachusetts—*Malardy v. McHugh* (202 Mass., 148). The court there following earlier decisions held the defendant not liable for fraudulent misrepresentation of the area of land sold where the boundaries of the tract were pointed out. The court expressly recognized that the representation was one of fact and that therefore it was within the general rule that false and fraudulent representations upon which a plaintiff has relied to his injury are actionable, yet because of the earlier decisions on identical particular facts gave

judgment for the defendant. Such following of an earlier decision on its precise facts in spite of a violation of principle in so doing may be justified where vested property interests have been acquired in reliance on the earlier decision; but in the illustrations given there can be no such defense. Every time one who has received requested forbearance in return for a promise is allowed to break his promise without liability, the result is nothing but injustice, and to recognize a vested right of persons who sell land in Massachusetts to lie about the area of the land if they point out the boundaries is almost grotesque.

The lack of systematic development of the law as a cause of its complexity applies to the statute as well as to the common law. While in practically all our states some portions both of the substantive and the adjective law have been dealt with as a whole by statute, and while in a few states codes purporting to cover the whole law have been adopted, it is nevertheless true that American legislation ordinarily affects not the whole of the subject with which it deals but only some part of it. The result may be that rules of law which never rested on sound principles or which have become obsolete are wiped out, but on the other hand such statutes may and frequently do, like a wrongly decided case, induce unnecessary legal complications and establish illogical exceptions to sound legal principles.

(4) The Unnecessary Multiplication of Administrative Provisions.

The purpose of adjective law is to provide a method by which disputed legal rights may be determined and as determined enforced. The rules which make up the law of pleading have as their special end the presentation of the issues of law and fact to the trial court. The rules that relate to appeal not only have the

similar object of a clear presentation of the issues of law, but also the discouragement of frivolous appeals and the due expedition of the business of the appellate court. A rule of procedure may fail to allow its object because it does not give adequate guidance. For instance, to substitute for the present rules of evidence the rule that any evidence could be admitted which had a connection, however remote, with the question at issue would so encumber the record with gossip and other hearsay that even an intelligent jury would tend to become confused. Again, the business of an appellate court could hardly be conducted if its only rule in regard to appeals was that they should be presented within a given time. Some regulations as to what should be set forth to indicate the issue on which the court is to pass are necessary.

Rules of procedure which thus fail because of lack of sufficient detailed regulation cannot be said to complicate the law, even though delay and confusion in its administration is the natural result. On the other hand procedural provisions may fail because of overelaboration of regulation. This is to-day the defect of many of the statutes governing procedure in more than one of our states. Such statutes which unnecessarily multiply distinctions complicate the law. They tend to turn its remedial processes into a game in which the correct handling of complicated rules becomes an end in itself.

One of the causes of this last defect is the conservatism of lawyers. This conservatism delayed for years conferring upon our courts equity jurisdiction, and even after the jurisdiction was conferred prevented for a long time much practical use of its more mobile remedial processes. To-day the same conservatism tends to raise objection to the abolition of rules of procedure perhaps well

adapted to earlier conditions which no longer serve any useful purpose. Lawyers are not singular in exhibiting dislike to alter the tools of their trade. When one has learned how to do a thing with the expenditure of much time and labor it is natural that he should not welcome the reformer who proposes to change the rules and indicates the uselessness of the intricate technical learning on which their application depends.

In view of this natural conservatism it is a matter of commendation that so much has been done in recent years by bar associations and committees to simplify procedure; for if the art of procedure is to be improved it will be only by those who know the art.

The conservatism of the bar is not the only cause of the time now spent over procedural questions. State legislatures instead of placing on the judges the responsibility of moulding procedure so that certainty and celerity may mark the administration of justice, have largely contributed to the complexity of the adjective law by adopting elaborate procedural codes containing a multitude of minute regulations, and have shown an indisposition to allow courts full control of proceedings before them. Appropriate judicial procedure can be better determined by the judges who use and guide it than by legislative bodies, and tying the hands of judges by elaborate statutory rules complicates the law and often prevents just conclusions. Thus the statutory restrictions on the powers of a trial judge in charging a jury which prevail in a number of states can be productive only of evil. The Mississippi statute, for instance, which forbids the judge to "sum up or comment on the testimony, or charge the jury as to the weight of evidence" is scarcely calculated to simplify the law or to increase the probability that justice will be done.

(C) UNCERTAINTY AND COMPLEXITY DUE TO VARYING LAW IN DIFFERENT JURISDICTIONS.

(1) The Nation and Each State an Independent Source of Law.

American law is made, expounded and administered by forty-eight states and by the Federal government. Each state legislature and each state court of last resort is an independent source of law. A state legislature may be and often is influenced by a statute in force in another state relating to a subject on which legislation is desired, but it is not bound to follow all the provisions of the other statute or the exact wording in which any one of the provisions which it does adopt is expressed. To a much greater extent the courts in one state in determining the law applicable to a case they are called on to decide are influenced by the decisions of the courts of another state or of the Federal courts in similar cases, but as in the case of laws adopted by the legislatures of other states, the decisions of the courts of other states are persuasive, not binding.

In view of the fact that uniformity in the statutes and decisions of the several states is not compelled by constitutional mandate it is perhaps a subject for remark that so much similarity exists. Nevertheless the variations in the law are many. These variations are due to several distinct causes.

(2) Variations Due to Differences in Economic and Social Conditions or in Inherited Legal Systems.

Although we are, in spite of our varied origin and the wide area of our continental domain, a wonderfully homogeneous people, many examples of variations in

law due to differences in economic and social conditions might be mentioned. Thus the different social experiences and theories of the people of different states lead some to recognize many causes for divorce, others only one cause, and the State of South Carolina does not recognize any cause. Again, the mining laws of Pennsylvania are adapted to operations where shafts must be sunk, tunnels run and roads blasted, but the laws of California must also provide for hydraulic mining.

While the great majority of our states originally derived their law from England, those sections of the country included in the Louisiana Purchase and the later acquisitions from Mexico derive some or, as in the case of the State of Louisiana, much of their private law from the civil law of Europe. Many of the resulting differences in law do not reflect existing or even past differences in economic or social conditions, but are merely the outcome of different theories of what the law ought to be. Thus there is not to-day and never was any difference between the economic and social conditions of England and France requiring in England but not in France a consideration to support a contract. This notable difference, like many others, has its origin in the far greater influence of the Roman law on the continent of Europe than in England. On the other hand many of the differences in the law of persons, such as that affecting the legal status of husband and wife, and their respective relations to each other's property, are due in part at least to past social differences between England and France. While these differences have largely disappeared they still exist to some extent, because when once a social condition has been reflected in the formal rules of law, the law itself becomes a factor tending to perpetuate that social condition.

(3) Accidental Variations.

(a) IN STATUTE LAW.

Many variations of the law in different jurisdictions are due merely to accident.

One state will adopt a novel statute, such as a workmen's compensation act; similar legislation will be adopted in another state; and in time this type of legislation becomes general. The practical result of each state adopting its own statute is that two states rarely have identical statutes, while in many states the differences though not perhaps radical are numerous. The fact that under our system of state governments we are not obliged to adopt a novel experiment in statutory law in all parts of the country at one time may sometimes be an advantage when novel public administrative or social legislation is under public consideration. The state whose people are not averse to trying the new statutory provision becomes a laboratory in which the people of the other states can observe the practical effects of the various provisions of the statute. When, however, legislation of a given type on a specific subject has become general in all the states, and there is necessity for varying provisions, merely accidental differences are always unfortunate.

(b) ACCIDENTAL VARIATIONS IN COURT DECISIONS.

I. *Extent of These Variations.*

Most accidental variations in the law of different jurisdictions is due to differences in the statement and in the application of the non-statutory rules of the common law. There is also a very considerable number of conflicting decisions relating to the interpretation of similar or identical statutory provisions. Even what are known as uniform state laws, that is, statutes drafted by the National Conference of Commissioners

on Uniform State Laws and adopted by state legislatures with the express object of making uniform the law of all states adopting the statute, have in several instances received conflicting judicial interpretation. Such conflicts are most unfortunate. Conflicting judicial interpretation of like statutory provisions has rarely any compensating good effect to offset the resulting uncertainty and complexity.

II. *Ignorance as a Cause of These Variations.*

A conflict between the decisions in two or more jurisdictions, not due to differences in economic or social conditions or to historical origin, may be due to one of several causes. In the first place it may be due to ignorance. The court may not know of the prior pertinent decisions in other states, and the reasoning on which those decisions are based. Such knowledge might have altered the court's conclusion. In spite of the diligence of the modern attorney in his search for cases analogous to his own, a diligence often involving an amount of labor which interferes with adequate consideration of underlying legal principles courts frequently have their attention drawn to decisions of like cases in other jurisdictions.

III. *Differences in Legal Theory as a Cause of These Variations.*

Again, a court knowing and considering a decision in another jurisdiction may refuse to follow it, not because of differences in conditions between the two jurisdictions, but because the court believes the other decision is wrong as a matter of legal theory, the principles of law expressed or their application to the issue raised by the case being incorrect.

IV. *Conflicting Decisions in a Single Jurisdiction as a Cause of These Variations.*

A frequent cause of varying decisions in different jurisdictions, of which many examples might be given, is divergent decisions in a single jurisdiction, to which other jurisdictions look for precedent. This occurs both in the realm of the common law and in statutory construction. An earlier case may state the common law rule or announce the construction of a statute. A later case in the same jurisdiction may overrule the first. A case presenting similar facts may arise in a second jurisdiction subsequent to the first and prior to the second decision in the first jurisdiction. The very desire of the judges in the second jurisdiction to preserve the general uniformity of the law will lead them to follow the then announced rule of construction of the first jurisdiction. The courts of a third jurisdiction, if a similar question arises thereafter, will follow the latest precedent. These conflicting views of the law will become the established rule of law in these jurisdictions or even become points of departure for further variations in the jurisprudence of different jurisdictions. Decisions as to what are "goods, wares and merchandise" under the Statute of Frauds afford an illustration.

Decisions as to what are contracts for the sale of goods, wares, and merchandise, under the Statute of Frauds, afford an illustration. The early English case of *Rondeau v. Wyatt*, 2 H. Black. 63 (1792) decided that an agreement for the construction of a chattel from materials to be furnished by the seller was not a contract for sale, but for work and labor, and was therefore not within the statute. Later an English court, in *Clay v. Yates*, 1 H. & N. 73 (1856), holding a contract for printing certain books not a contract for sale but for work and labor, made the distinction that only

where the application of skill and labor was the principal part of the performance and the value of the materials was of comparatively slight importance, would the contract be one for work and labor and not for sale. Still later, however, an English court went to the full extent of holding that wherever the performance of the agreement would result in the transfer of ownership in a completed chattel, the contract was one for sale and was within the statute. *Lee v. Giffin*, 1 B. & S. 272 (1861). This has been carried to the logical limit of holding that a contract to paint a portrait is a contract for the sale of goods. *Isaacs v Hardy*, 1 Cab. & E. 287 (1884).

Jurisdictions in the United States have followed each of these successive conclusions of the English courts. In New York it was early held in *Crookshank v. Burrell*, 18 Johns. 58 (1820), that any contract by which the seller agreed to manufacture goods was a contract for work and labor, and this rule was consistently followed in that state until the adoption of the Uniform Sales Act, and has been followed in a number of other American states. In Massachusetts the rule was so far qualified as to confine contracts for work and labor to cases where the goods manufactured were made to a special order and were therefore different (and presumably involved more special labor) from those ordinarily made by the seller. *Mixer v. Howarth*, 21 Pick. 205 (1839). This rule has been continuously followed in Massachusetts to the present day, and has been adopted by many other states, and often the value or importance of the skill and labor going into the chattel as compared with the value or importance of the materials is emphasized. The Massachusetts rule is enacted as statutory law by the Uniform Sales Act in twenty-five jurisdictions. Finally, in Missouri, where the question was not set-

tled until after the English court had taken its last step, the rule is laid down as it now is in England, that if the agreement contemplates the transfer of ownership of a completed chattel the Statute of Frauds is applicable, without regard to the amount of labor involved in making or preparing the chattel. *Pratt v. Miller*, 109 Mo. 78 (1891).

In each of these American cases the latest English authority was cited and relied on.

(4) Effect of Varying Law in Different Jurisdictions.

(a) INJURY DEPENDENT ON AMOUNT AND CHARACTER OF INTERCOURSE.

Variations in the law between peoples having any contact with each other are always at least a potential source either of uncertainty or of complexity or of both.

The amount of uncertainty and complexity depends, not merely on the extent of the business and social intercourse between the two peoples and on the number of variations between their respective laws, but also on how far the variations relate to matters on which the two peoples come in contact with each other. If the commercial law of two countries whose people have considerable business but no social contacts is the same, variations in the marriage laws or other laws affecting persons create few difficulties. Such considerations, however, do not apply to conditions in the United States. Each part of our country has business and social intercourse with every other part, and this intercourse is carried on without regard to State lines. Variations in law between two nations often cause many difficulties and inconveniences, but these are not considerable when compared with the serious injury done by the existing amount of varying law in the United States.

(b) INJURY WHERE TRANSACTIONS ARE CARRIED ON IN TWO OR MORE STATES—CONFLICTS IN CONFLICT OF LAWS.

There are two types of transactions between peoples of two or more states. Some transactions are carried on in two or more states; others are begun and completed in the territory of a single state. An example of the first type is a contract made in one state to be executed partly or wholly in another state; an example of the second is a contract to be wholly executed in the state where it is made, but entered into by a person coming from another state.

Whenever a contract is made in one state to be carried out wholly or partly in another state, and the law affecting any part of the transaction is not the same in both states, in order to determine the resulting rights and obligations of the parties it is first necessary to decide which law shall be applied. The body of laws by which a question of this kind is decided constitutes the subject ordinarily called Conflict of Laws.

If the law pertaining to this topic were clear and certain much of the inconvenience due to varying law in different jurisdictions would be avoided. Unfortunately no legal topic presents more complicated and difficult problems and in none is there greater uncertainty and conflict of decisions, so that not infrequently to a variance in the law between two jurisdictions there will be added as a further complication, a conflict in the rules governing the law to be applied.

An illustration of this confusion may be found in a conflict between the decision of the Supreme Court of the United States and the Chancery Division of the Supreme Court of Judicature in England as to whether a clause in a bill of lading in the English form containing an exemption from liability for loss due to negligence of master and crew, the ship-

ment being from a United States port where the bill was issued to an English port, should be governed by the law of the place of the making of the bill or by the law intended by the parties, presumably the place of performance. The Supreme Court of the United States in *Liverpool & G. W. Steamship Co. v. Phoenix Insurance Co.*, 129 U. S. 397, applied the law of the place of making; the English court in the case of *In re Missouri S. S. Co.*, 42 Ch. D. 321, on an identical bill of lading applied the law of the jurisdiction intended by the parties, presumably the place of performance. Consequently there is not only a conflict in the law of different jurisdictions regarding the effect of such exceptions in bills of lading, but there is a further conflict in the decisions of courts of high authority as to which law should be applied in a situation where a bill of lading containing this exception is employed in a shipment between two jurisdictions.

This example illustrates the confusion in the commercial law resulting from a conflict in the conflict of laws. The following illustration shows a still more unfortunate confusion in the law of persons.

In *Haddock v. Haddock*, 201 U. S. 562, a husband whose matrimonial domicile was New York left his wife in New York and acquired a domicile in Connecticut, and was granted a divorce by the Connecticut court, the wife not having been personally served with process or entering an appearance in the suit. Subsequently the New York court refused to recognize the validity of the Connecticut decree, and the husband sought the aid of the Supreme Court of the United States to compel the New York court to give "full faith and credit" to the decree of the Connecticut court. The Supreme Court, while assuming that the divorce was valid in Connecticut, by the rule of law there prevailing, decided that its validity was determinable in New York,

the domicile of the wife, by a different rule existing there. In short, the couple were married in New York, but divorced in Connecticut. What a third and a fourth state might declare to be their relations to each other, could only be matters of conjecture.

(c) INJURY WHERE TRANSACTIONS ARE CARRIED ON
WHOLLY WITHIN ONE STATE.

Injuries wrought by varying laws in different states are by no means confined to transactions carried on in two or more states. In the first place problems of the conflict of laws are not confined to such transactions. An attempt to enforce in one jurisdiction rights acquired wholly within another may raise questions as to which law is applicable, and considerable injustice may be inflicted if the law of the forum is applied as it is in a few jurisdictions, in suits for torts and in questions involving the measure of damages.

Furthermore, the injury resulting from varying law in different jurisdictions is not confined to cases where the conflict of laws is involved. A large business usually operates in a number of states. Not a few manufacturing corporations sell their goods directly in every state. The fact that the laws of the different states vary is a serious difficulty in transacting such a business, even though the law in each state may be neither uncertain nor complicated. For instance, in one state goods may safely be consigned on certain terms to a commission merchant, and in that state the right of the consignor will be protected as against creditors of the consignee. In another state the creditors of the consignee can seize goods similarly consigned. The law governing conditional sales presents another illustration of the same sort. Such corporations as the Underwood Typewriter Co. and the National Cash Register Co. wish to sell

their goods to purchasers in every state on conditional sale. The requisites for a valid conditional sale vary widely, and in a few states no conditional sale can be made which is effective against the conditional buyer's creditors, or against a purchaser for value from him. A heavy burden is thus cast upon the seller to ascertain separately the law of each state with which he deals, although each transaction may be made in a single state and no possible question can arise as to what law governs the validity of the transaction. Boiler manufacturers have made similar complaints with reference to the great variety of inspection laws and similar regulations in different states. The manufacturer of boilers wishes to sell his product as widely as possible, but what is permissible in one state may not be permissible in another. Even if the manufacturer is aware of the separate requirements of the various states, or acquires information from local lawyers, he is put to inconvenience and expense in meeting the various requirements. Frequently, moreover, he has no complete knowledge though he may have made some effort to acquire it.

This last illustration also indicates that if it be true, as it probably is, that varying law in different states on matters of private substantive law is more likely to increase the uncertainty and complexity of the law than variations in adjective and administrative and other public law, nevertheless variations in administrative regulations are an increasing burden on industry and therefore on progress.

(D) FACTORS TENDING TO UNIFY THE LAW.**(1) Influence of the Decisions of One State on the
Common Law of Other States.**

In view of the fact that each of our states is an independent source of law, jurisprudence in the different states would present fundamental differences, rather than as at present multitudinous lesser variations, were it not for the essential similarity of our social and economic conditions. These variations are a serious injury, but the variations and the resulting burden on our business and social intercourse would be infinitely greater than they were it not for our common language, our common heritage of English law and the fact that the courts in each state have a respect for and an inclination to follow the decisions of courts of other jurisdictions. The assertion sometimes made that this mutual respect no longer exists is incorrect. It does exist and is still a real and potent force tending towards the unification of law among the several states. Whether the courts in most of our states are paying less attention than formerly to the decisions in other jurisdictions is doubtful. On the one hand it is certain that in earlier times when there were fewer decisions or precedents in each state the necessity for frequent reliance on the decisions of other jurisdictions was greater than it is to-day when the majority of our states have a more complete body of law. Furthermore, the increase in the number of states and the present great volume of recorded decisions with the appalling annual additions thereto are making it more and more difficult for the judge to know and consider the opposite decisions of other jurisdictions. Circumstances beyond the control of the courts are thus tending to make constantly less operative that natural respect of one

appellate court for the decisions of the highest court in another jurisdiction as tends to hold in check such variations in law among the several states as are due merely to accident, without basis in differences in social or economic conditions or in political history.

On the other hand, there is an increasing tendency towards the citation by counsel and courts of decisions from other jurisdictions. This is largely due to the modern books devoted to assisting counsel to find such cases, which bring to the attention of counsel decisions from many states. The very multiplication of authorities published and cited in these books tends to lead courts to give less attention to a single decision and to be guided by general principles and by the weight of authority rather than by the authority of a single precedent. This tendency is in the direction of unity in the law. Such publications moreover act as influences towards the unification of law for another reason, that is, because their general use as sources of the law by persons in all parts of the country give a general familiarity with the statements of the law made in the text. Treatises written in a more scientific spirit, though less regardful of the binding force of precedent, may go even farther than the bulk of legal publications in common use in leading the bar and the courts to accentuate general principles.

(2) Uniform State Laws.

The economic and social conditions of different parts of the United States are so nearly alike that it is natural that the desire for legislation on a particular subject should make itself felt at one or about the same time in several States. Prior to the formation of the body known as the National Conference of Commissioners on Uniform State Laws this influence towards uni-

formity in statute law had no organized direction. Many of the important statutory modifications of our private law were copies of English statutes. Thus statutes of frauds and of limitations, Lord Campbell's Act imposing liability for death by wrongful act, and the feme sole-trader-acts were copied from earlier English legislation. There was indeed at least one instance in which we turned not to England but to the Continent of Europe. In 1822 the State of New York passed a Limited Partnership Act based on the provisions of the French law, and the Act has been very generally copied by other states.

The Conference of Commissioners on Uniform State Laws is a body meeting for about a week before the annual meeting of the American Bar Association. The commissioners are appointed by the governors of the states. Usually from thirty-five to forty states are represented at an annual meeting. In some states the action of the Governor in appointing commissioners is voluntary. In others, however, the commissioners are appointed under authority of a statute and a number of the states make appropriations to defray expenses, though all commissioners serve without compensation. Among the first uniform acts recommended by the commissioners were the Negotiable Instruments Law and the Sales Act, both based on English statutes on the same subjects. Other acts have been drafted with little or no reference to foreign models. Indeed in more than one instance no corresponding English or other European legislation exists. Acts drafted and adopted by the Conference are recommended by it to the legislatures of the several states. It takes at least ten years from the time of the publication of an act on a commercial subject by the Conference before it is generally adopted in the leading commercial states, and approximately twenty years before it is likely to be adopted

throughout the country, even when it is generally received with favor. Uniform acts prepared by the Conference not relating to commercial law has not been generally adopted by state legislatures.

(3) The Increasing Exercise of Legislative Power by the Federal Government.

The increasing exercise of legislative power by the Federal Government during the past thirty-five years has been noteworthy. Until 1887 Congress had not undertaken to regulate interstate commerce. The Sherman Anti-Trust Act, the Clayton Act, the Interstate Commerce Acts, the Pure Food Act, the Mann Act, and the more recent post-war enactments under this power have drawn into the Federal courts a large volume of important business. Furthermore not only are long dormant Federal powers being utilized, but two constitutional amendments, the Prohibition Amendment and the Woman's Suffrage Amendment, have been recently adopted and the possibility of adopting others is under discussion. The amendments already adopted not only practically increase Federal power, but the Prohibition Amendment also greatly increases the work of the Federal courts.

The result of this Federal legislation and Constitutional amendment is in the direction of greater uniformity of the law. Whereas some states permitted women to vote and others did not, now all must grant this right equally to men and women; where each state made its own laws relating to the manufacture and sale of intoxicating liquors, now all are subject to Prohibition by reason of the constitutional amendment and the Act of Congress adopted to enforce it. While Federal legislation regulating interstate transportation and Federal anti-trust acts does not necessarily abrogate state legislation on these subjects, nevertheless the

effect of the Federal legislation is greatly to restrain the practical scope of the state laws, so that the Federal law with its uniform operation in all parts of the country becomes more important than all the diversified state enactments.

(4) Application of Uniform Law by the Federal Courts.

Another force leading to uniform law is the application of uniform law by the Federal courts. By this we mean not merely the application of the statutes adopted by Congress, but also the application of the principles of the common law in the decision of cases over which the Federal courts have jurisdiction because the controversy is between citizens of two or more states.

Under our system of Federal and State courts the Federal courts in a state as well as the state courts are charged with the duty of declaring what the law of the state is in any case coming before them over which they have jurisdiction, and in so doing are not bound to follow the decisions of the courts of the state. In the interpretation of statutes, it is true, the Federal courts do act on the theory that they are practically bound by the interpretation which has been given to a statute by the highest court of the state, instances in which the Federal courts have refused to follow the state court's interpretation of the state statutes being confined to cases where the Federal courts, after once following a particular interpretation of a state statute by the highest court of a state, have refused to adopt a later and conflicting interpretation by the state court.

The common law, however, is the common heritage of most of our states. True there is no Federal common law. The common law is the customary law of each state considered separately. Theoretically there is no reason why it should not vary among the states,

and as a matter of fact there is considerable variation. Nevertheless when a state court makes an application of common law principles the judges of the court usually regard themselves as applying principles which prevail very generally in all states, and indeed among almost all English-speaking peoples. If a similar case arises in the Federal courts of the state and the Federal judges believe that the state decision is wrong, their tendency to regard the common law as a general system of jurisprudence, makes it difficult for them to follow the state decision. In matters of general commercial law the United States Supreme Court has refused to do so. Even in matters pertaining to real property, torts and personal relations, where the Federal courts ordinarily follow the common law as declared by the court of the state, there are many cases where the particular questions raised in the Federal courts have not been decided by the state courts of that state. The Federal courts in such cases naturally turn for guidance to the decisions of other Federal courts, and especially to those of the Supreme Court of the United States. Thus even in non-commercial matters the very existence of a system of Federal courts operating in all parts of the country having equal power with the state courts to declare the law of each state is a potent force tending towards uniform law.

(5) National Law Schools.

A school which draws its students from all parts of the country may rightly be termed a national school. The name also applies to any school the aim of which is to give to its students such a knowledge of the origin, growth and existing conditions of law in the United States, and such a mastery of the fundamental principles of our legal system, that on graduation they will be fitted to perform effectually the services of a lawyer

in any state. A school which is not a national law school in the second sense would not be a national law school in the first. Students do not flock from all parts of the country to a school the principal aim of which is to prepare its graduates for practice in some one jurisdiction.

On the other hand the principal aim of the faculty may be to give their students a knowledge of American law and an ability to handle as trained lawyers legal questions, even though the great majority of the students may expect to practice in a particular state. There are only a few law schools which are national schools from both points of view, but in almost all parts of the country there are schools which, although their students generally remain on graduation in the jurisdiction in which the school is located, are nevertheless national because of the nature of the legal training which they aim to give. Indeed, nearly all the law schools belonging to the Association of American Law Schools, even those that do not draw their students from a large number of states, are in this second sense national law schools.

The faculties of our national law schools are composed of lawyers who for the most part have devoted their lives to the study and exposition of law. Among them will be found specialists on specific legal topics. The work done by one specialist in his subject is known to all those teaching the subject. Moreover, in many of these schools the instruction is based on the same collections of selected cases. There is thus an inevitable trend in each school towards the discussion of similar questions in the teaching of any one topic. Year by year therefore the national law schools are sending into the profession highly trained men who have passed through a more or less uniform legal educational system, and in the more important legal subjects have come under the influence of the same ideas.

As the lawyer and the judge, as well as the legislator, develop and mould the law, this unity of legal ideas is an important factor tending to make law uniform.

In this connection we may also mention a matter to which we shall have occasion to refer again, namely, the direct influence of the writings of leading professors of law. This influence makes itself felt not only through the collections of cases referred to above, but through the publication of learned articles, monographs and larger treatises. In the ever-growing mass of decisions and opinions the profession is becoming more and more inclined to turn to the product of the schools for the critical analysis of legal questions and for informed legal opinion.

**(E) FACTORS PROMOTING GREATER CERTAINTY
AND SIMPLICITY IN THE LAW AND ITS BET-
TER ADAPTATION TO THE NEEDS OF LIFE.**

(1) Effect of Influences Tending to Unify the Law.

As varying law in different jurisdictions is a cause of uncertainty and also of complexity, every influence tending to unify the law usually tends at least indirectly to produce greater certainty and simplicity. It is true that a Federal statute dealing with a subject which has previously been dealt with by varying laws in different states, if its provisions are complicated and its sections badly drafted creates many new uncertainties. Nevertheless, even in an instance of this character the action of Congress provides one system instead of many, and in time by amendment and court decision the number of uncertain legal questions will be reduced.

Apart from this indirect influence, some factors tending towards the unification of law also directly operate to produce greater certainty in the law of each state.

Thus the influence of the decisions in one state on the common law of other states not only tends to unify the law of the different states, but also tends to make law in each state more certain. In spite of the great number of reported decisions in each state, even the reports of the courts of the older states, though containing a much larger body of common law than the reports of the newer states, are never in themselves the source of a complete body of law. In each jurisdiction there is always at any one time a large number of legal questions which have been passed on by the courts of other states but not by the courts in that jurisdiction. But since courts, when confronted by a legal question novel to them, pay attention to the action taken

by the courts of other states in similar cases, a lawyer may often give a competent opinion on a matter as to which the courts of his state have made no pronouncement.

Again, the principal value of some of the acts drafted by the National Conference of Commissioners on Uniform State Laws, as the Partnership Act and the Fraudulent Conveyance Act, is that they make certain the law of each state which adopts them, rather than that their general adoption makes the law uniform, though this of course is an important and desirable result. Where, as in the common law of partnership and in the interpretations of the statute of the Thirteenth of Elizabeth on conveyances in fraud of creditors, there exists very great uncertainty in all jurisdictions, greater certainty is more important than uniformity.

In the same way the work of our national law schools not only tends, as we have seen, to unify law; it also tends to render more certain and clear the law of each jurisdiction. This result is produced in the same manner as greater uniformity in law is produced by the character of the legal education given the students in these schools and through the writings of the members of their faculties. One cause of the uncertainty of the law is, as we have noted, a lack of agreement on the fundamental principles of the common law. Another cause is lack of precision in the use of legal terms. These defects are increased by loose and uninformed legal thinking. Now, since it is true that within limits marked by general public policy our private law is largely what the members of the legal profession make it, and since their capacity for good is dependent on their training, the education given in our national schools of law, using that term as previously defined, coupled with the constantly widening influence

of the writings of distinguished professors of law, is making for better trained lawyers and for clearer and better-informed legal reasoning, and therefore is helping to lay the necessary foundation for greater certainty and clarity in the law itself.

(2) The Recognition of the Necessity for the Employment of Trained Legislative Draftsmen in the Preparation of Legislation.

Another influence operating to produce greater certainty and clarity in our law is the growing recognition of the necessity of securing the services of expert draftsmen in preparing statutes. Congress and many of the state legislatures now have official draftsmen to assist legislative committees, and in some states more or less highly organized legislative bureaus have been established. As a result of the operation of these agencies, and still more as a result of the general recognition of the fact that legislation drafted by those not experienced in such work frequently fails to operate in the manner intended, there has been considerable improvement in recent years in the acts adopted by our legislatures, although further improvement is both possible and desirable.

(3) The Activity of Legal, Scientific and Civic Bodies.

Because of the defects of particular branches of the law, for instance, criminal law or court organization, or because of the wide interest in those branches, bar associations or scientific legal associations, like the American Institute of Criminal Law and Criminology and the American Judicature Society, have undertaken scientific studies, which frequently result in the formation and advocacy of definite plans for specific improvements. The American Judicature Society, for example,

after long study in which much valuable information has been gathered, has published an extensive plan for the organization of state courts.

Many bar associations, taking their right place as civic bodies, have drafted and urged the adoption, with more or less success, of specific legislation and rules of court. The work of this character done by bar associations sometimes relates to matters of substantive law, especially private law; but the most important work of these associations is being done in the field of procedure either through the revision or amendment of procedural statutes or codes or the formation of rules of court.

(4) Net Results of Forces Making for Certainty and Simplicity.

We know that on the whole the law is becoming more complicated because life is becoming more complex by reason of inventions and discoveries, commerce, and men's capacity to act in association with each other. Complications in law due to these factors, as we have already stated, are necessary in that they can be avoided only at a sacrifice of justice. We have not sufficient data to determine whether unnecessary complications in the law are or are not on the increase, although, as we have seen, the recent efforts of courts and bar associations to simplify procedure have met with considerable success.

At any one time the net result of the forces making for or against uniformity or certainty or simplicity is not the same in different branches of the law or in different parts of the same branch of law.

Legal history clearly discloses the fact that the method by which both the common law and the law interpreting statutory provisions develops through the decisions of the courts cannot be said to tend uniformly

either to greater certainty and to greater simplicity or to greater uncertainty and to greater complexity. Sometimes this common law process of legal development produces certainty but not simplicity. In the interpretation of statutes there is usually a steady advance to greater certainty. Take, for example, the seventeenth section of the Statute of Frauds relating to the goods, wares and merchandise, which seems when first read a clear and simple provision which may be easily applied to such sales. Nevertheless innumerable disputes over the exact meaning and proper application of the provisions of the section are found in the records of English and American courts during the last two and a half centuries. The net result, however, is that whatever may be said of the complexity of the results achieved, there is greater certainty now than formerly in the law affected by the statute. This is due to the fact that modern changes in business conditions have not added to the number of novel legal questions arising under the section, and most possible questions as to its application, though once doubtful, are now certain.

On the other hand, there are whole branches of the law in which uncertainty is on the increase. This is apparently true, for instance, of the law relating to business corporations. The inherent difficulty of many of the legal questions in that branch of the law, due principally to the number of interests that must be considered, has apparently prevented any agreement upon the fundamental legal principles applicable to their solution; while the rapid increase in the number of such corporations and the relative and absolute amount of business carried on in corporate form constantly tends to present novel questions. These questions, because of the lack of agreement on fundamental legal principles just referred to, are subject to conflicting

solutions in different jurisdictions or even in the same jurisdiction.

What is true of corporations is also true of the subject of conflict of laws. The chaotic condition of that branch of the law shows no sign of improvement. So too, from the days of Lord Mansfield in the last half of the eighteenth century, an increasing confusion surrounded the nature of common law partnership and the rights of the partner in specific partnership property. Both the English Partnership Act and the American Uniform Partnership Act were drafted primarily to end, if possible, these uncertainties which repeated court decisions were not tending to settle.

It is thus not possible to assert with positiveness that our law is growing daily more uncertain or daily more certain. We can, however, affirm that, measured by the actual injuries resulting, the law's uncertainties are very great, forming as they do a great obstacle to the administration of justice. Furthermore, when we compare the causes tending to produce uncertainty with those at present working towards greater certainty, it appears at least probable that the forces tending towards uncertainty are destined to increase steadily unless checked by some new influence. The rapid changes in social and economic conditions make increasingly operative those two great sources of uncertainty—the lack of fundamental agreement in the principles of the common law and the number and importance of novel legal questions. Furthermore, the vast increase in the number of cases decided each year tends to bring about a condition where the very number of the authorities that have to be consulted in order accurately to ascertain the law is so great that careful consideration of them is practically impossible. The system of developing law by the application of prior precedent in later similar cases thus tends to become more and more difficult to operate.