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The Restatement of the Law of Contracts

THERE would appear to be but one proper standard by which to judge the Restatement—its utility to the profession. And, of course, it is too early to know what that may be. To base a verdict on the evidence now available would be extremely rash.¹ The better part of wisdom counsels a reservation of judgment until after a period of trial. Those who yield to the temptation prematurely to draw and quarter this work may well take warning that sometimes things that can be shown to be unworkable, actually work. But one of the predilections of a lawyer is to predict, and it takes more than the hazard of an adverse decision to deter him. So it may be expected that the air will be rife with speculations as to the final verdict on the Restatement. I believe that the Restatement will prove extremely valuable. But I can not prove this assertion. It is to be admitted that much can be said against the likelihood of its success. I can only say that the considerations in its favor seem to me the more weighty. Now what are the objections to the Contracts Restatement?

Many of the criticisms that have been directed toward this new *tabula legis* so far seem to me born of a misconception of its purpose. They are like the complaint that a spade is not a shovel, or that a dictionary is a poor encyclopedia. It has been criticized for not citing authorities, for not being an efficient educational tool, for not setting forth the historical, economic or social development of its principles, for not giving the rationale of its statements.² My understanding is that it was never contemplated nor expected that the Restatement should perform any of these functions. Most certainly it is not offered as a text book or an encyclopedia, a jurisprudential dissertation or a student's manual. That it does not perform these numerous functions seems an unfair charge. Our libraries already groan beneath the weight of many hundred tomes that were prepared for the purpose of filling the

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¹ See Clark, *Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643, at 662, n. 45.

² *Ibid.* at 655 and 660.

needs of the profession in these various fields of inquiry. There is no need to disguise the fact that the Restatement is and was intended to be nothing more than a statement of legal rules by men competent to know what such rules are, if there are any. Now for those who say that there are no legal rules, or that a legal rule is a perfectly futile, impotent, inane group of words, a study of the Restatement will be a sheer waste of time.³ Their energies had better be spent along other lines.

But for those who find some utility in such devices, and at the present time most judges and lawyers fall in this class, the Restatement, it is believed, will be of great help. If it be admitted that courts and lawyers do and must use legal rules, it would seem desirable that they be stated with words as accurately and carefully chosen as the ablest of the believers in such rules can agree upon. *Can agree upon* is used advisedly. How else could they be stated? How could the constitution have been adopted except in the words that could be agreed upon by those selected for the purpose? The only alternative is for each to state the law as he thinks it ought to be stated without regard to whether anybody understands him or not. There must be some agreement as to terms, phrases, clauses, sentences, rules that are to be symbolical of conceptions if there is to be an exchange of ideas—a transmission of conceptions from mind to mind.⁴

Opponents of the Restatement say that the general rules do not have sufficient particularity or definiteness to be of any aid in deciding cases, and quite antithetically, at the same time object that the specific rules do not have sufficient elasticity to permit the law to grow. Those sections concerning which there is no conflict of opinion are said to be commonplace, and on the other hand, sections expressing a choice among conflicting and confusing authorities are said to be delusive simplification.⁵ All these objections are then said to show the utter futility of any restatement whatever.⁶ Exactly the same argument could have been used to prove to Samuel Johnson that a dictionary of the English language was an impossibility.

Information as to the content of a conception in one person's mind cannot be imparted to the mind of another by mental telepathy. Words and their combinations, written or spoken, are the most practicable devices yet contrived to accomplish such transference. Yet by reason

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³ See FRANK, *LAW AND THE MODERN MIND* (1931) c. 13.

⁴ "At the basis of all communication are certain postulates or pre-requisites, regulative presumptions without which no system of symbols, no science, not even logic could develop." OGDEN AND RICHARDS, *THE MEANING OF MEANING* (1930) 87. See also Patterson, *Relief for Unilateral Mistake* (1928) 28 COL. L. REV. 859, 867.

⁵ See Clark, *op. cit. supra* note 1, at 654, 655.

⁶ Arnold, *The Restatement of the Law of Trusts* (1931) 31 COL. L. REV. 800, 823.

of the varying inherited and environmental influences⁷ of different people these word devices, though indispensable, are in many instances feeble vehicles for thought transference.⁸ Hence we have many misunderstandings and debates about words. Among those who would study deeply the etymology and meaning of words there would be increased power in the accurate transmission of thought. But for most people the dictionary—even an abridged one—must suffice. The dictionary strikes a convenient compromise between a thorough etymological work, to the study of which a lifetime might be devoted, and the slippery and unstable vocabulary of the street. There are concentrated in the dictionary years of linguistic history and etymological research.

The verbal formula which we call a legal rule is likewise no more than a symbol of a concept. Its function in the form of speech or writing is to enable the mind entertaining the concept to create an identical or similar concept in the mind of another person. Only to the extent that it succeeds in this function is expression about legal phenomena possible. Some rules of law are general and some are definite. Both kinds are indispensable. A road sign that points the direction of a town is useful though it does not show the exact spot on which the town is located. An artist must necessarily paint a general outline of his subject before he puts in the detail. A sculptor makes a rough model before executing the delineations that give character and individuality. Words of generality are as indispensable in adequate expression as words of particularity. We need "man" sometimes as well as "that man" to express precisely an idea.⁹ A rule is but an elaboration of a word. A criticism that a rule of law is useless because it does not tell how a case should be decided is like saying that the word "dog" is a futile term because it does not tell what dog is meant. But it is clear that when one says "dog" he does not usually mean "man." Many rules of law do not precisely point out the decision in a particular case.

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⁷ "The effects upon the organism due to any sign, which may be stimulus from without, or any process taking place within, depend upon the past history of the organism both generally and in a more precise fashion." OGDEN AND RICHARDS, *op. cit. supra* note 4, at 52.

⁸ "But if our linguistic outfit is treacherous it nevertheless is indispensable." *Ibid.* at 19.

⁹ The language of the savage is extremely complex and singularly free from words of generality. He has no word for man, but a different word for every man, no word for moon, but a different word for every phase of the moon, no word for fish, but distinct and unrelated words for different kinds of fish. He has different counting words for different objects, *e.g.*, for men, flat objects, round objects, long objects, boats, units of measure, etc. On the other hand the language of civilized man generalizes, classifies, organizes and by reason thereof is a more powerful device for interpreting and comprehending phenomena. Has not law followed a similar line of development? See Fuller, *Legal Fictions* (1931) 25 ILL. L. REV. 877, at 889.

They serve only the purpose of clearing the ground of irrelevant facts, of eliminating possible solutions, or narrowing the considerations that bear upon the decision. That opposite decisions are frequently reached by application of the same rule does not mean that the rule may not be useful when applied to other situations. Many rules of law serve only the function of making possible the comprehension of decisions after they are rendered.¹⁰ Thinking about legal problems would be impossible but for the aid of such tools. Were this not admitted, a novice in law could solve legal problems with results as satisfactory as the experienced lawyer. Put a man uneducated and inexperienced in the law in a busy law office for a week and imagine his bewilderment and helplessness at the tales of woe he would hear.

The Restatement bears to the field of law a relation analogous to that borne by the dictionary to the field of language. They are both indispensable short cuts. In brief, the Restatement is a device for the expeditious acquisition of a modicum of legal learning of the past and an attempt to organize and classify legal phenomena so as to make the field of law comprehensible to the craftsmen who are engaged in the very practical and time-consuming trade of settling and preventing disputes.

It makes no difference how loud or long we protest, lawyers and judges will continue to read rules, talk rules, and write rules when they are about their work-a-day business of solving controversies. So the choice is not between the Institute's statement of the law and none at all, but between its statement and that made by thousands of judges, lawyers and professors scattered throughout a hundred thousand books. Who will say that the statement of Professor Williston and his able advisers is not superior?¹¹ This does not mean that he who would understand the Restatement need not read cases, history, economics,

¹⁰ "It is most important that rules of law should form as coherent generalized logical systems as possible." Dewey, *Logical Method and Law* (1924) 10 CORN. L. Q. 17, 19.

"The generalizations and definitions used are only mental implements manufactured by the mind and senses to aid in acquiring, retaining, and communicating knowledge of the objective phenomena within the scope of the science." Bingham, *What is the Law* (1912) 11 MICH. L. REV. 1, 9.

"But it is equally illusory to suppose that a humanly desirable life can be lived without rules to regulate it or without the recognition of invariant laws or relations on which these rules must be based. Changing conditions are not inconsistent with the possibility and serviceableness of a rule of conduct, any more than physical changes preclude the possibility of an invariant law of constant elements or proportions." COHEN, REASON AND NATURE (1931) 437.

¹¹ E.g., compare §§ 267 and 270 of the Restatement with Sgt. Williams' rules on independent and dependent covenants (originally appended as a note to *Portage v. Cole* (1669) 1 Wms. Saunders 319, and quoted over and over again by decisions since then).

jurisprudence, for of course that is necessary—but that he who is daily faced with the practical problem of ironing out the troubles of numerous clients, or of deciding many difficult cases, will be saved the necessity of reading as much historical and jurisprudential material as would otherwise be necessary in order to do a good job.

I agree with Dean Clark when he says:

"And without interpretation, or *background* against which meaning can be discovered, the black letter statements are not understandable. The idea that words speak for themselves, without interpretation in the light of the circumstance under which they were composed or arranged, has been too often exploded with reference to wills, contracts and written instruments generally, to be believed again with respect to the restatements."¹²

For this reason I want to subscribe to the suggestion of Dean Clark and Professor Patterson¹³ as to the desirability of publishing the commentaries, explanatory notes and the discussion of the reporter and his advisers, whether contained in letters or in other form, on all matters considered by them. These more than anything else give content to the words and phrases actually used in the Restatement. Such material made available to the profession will do much to clear up ambiguities and uncertainties. However, this material need not be made a part of the Restatement. It would be most convenient to publish it in a supplementary volume.

But for the practicing lawyer and the judge it must be remembered that there is a limit beyond which they do not have the time to go for acquiring interpretative background. After all, the difference between the terse expression, the comment, the explanation, the illustration, the historical development is but a difference in degree. The question is how much of an explanation is necessary to give a reasonable degree of understanding of what is in the minds of the authors. For many of the sections of the Restatement, the black letter rule, the comment and the illustration are sufficient. But the supplementary volume mentioned above ought to be available for those who feel the need of further elucidation.

This is not to say that there are not many vital influences other than rules in the decisional process and that they do not deserve careful and analytical study.¹⁴ It is but to say that rules are *one* of many influences. A discussion of other factors or even their importance in relation to rules is entirely irrelevant to the matter in hand. The ques-

¹² Clark, *op. cit. supra* note 1, at 655.

¹³ Patterson, *The Restatement of the Law of Contracts* (1933) 33 COL. L. REV. 397, 402.

¹⁴ FRANK, *op. cit. supra* note 3.

tion is how well does the Restatement serve the purpose it was intended to serve, *viz.*, furnish the lawyer with a scholarly compilation of legal rules?

Now it may be that these rules are not accurately descriptive of what courts in fact do, as Professor Arnold has said of the Trusts Restatement.¹⁵ If not, then let it be our task to suggest revisions that will make them descriptive. No restatement, however omniscient its authors, can ever be a finality. Change, growth, modification are inevitable.

It is believed that the most helpful criticism will be that which meets the Restatement on its own ground, that indicates the social or economic undesirability of particular sections, points out ambiguities, inconsistencies, misdescriptions of judicial conduct, overlappings, etc., and suggests the additions or omissions necessary for the desired changes. The short space allotted to a review does not admit of any extended study or criticism along such lines. I must be content at this time to point out only a few places where, in my judgment, the Restatement could be improved.

One finds here and there obvious inconsistencies, *e.g.*, section 19 in prescribing the requirement of an informal contract says that there must be a "manifestation of assent . . . by every promisor to the consideration for his promise", yet by section 45 if the offer is for a unilateral contract a promisor is bound by contract where only "part of the consideration requested in the offer is given or tendered."¹⁶ And in section 63 an offeror is bound when he receives *performance* from an offeree, though he requests and assents to a *promise of performance* as consideration. The promisor is thus held in these two instances to have contracted for a consideration different from that to which he has assented. I have pointed out other objections to section 63 elsewhere.¹⁷

Section 318 involves a "contract originally bilateral that has become unilateral . . . by full performance," but by section 12 a unilateral contract is said to be one in which "no promisor receives a promise as consideration for his promise." But since in a bilateral contract each promisor receives a promise as consideration for his promise, a bilateral contract can never become unilateral by performance or in any other way.

Section 72 makes requested silence of an offeree an acceptance when

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¹⁵ Arnold, *op. cit. supra* note 6.

¹⁶ Professor Willis' view would avoid this difficulty. See Willis, *Restatement of the Law of Contracts of the American Law Institute* (1932) 7 *IND. L. J.* 429, 432.

¹⁷ See Goble, *Is Performance Always as Desirable as a Promise to Perform?* (1928) 22 *ILL. L. REV.* 789.

intended as such. The wisdom of this rule is doubtful since by remaining silent under such circumstances an offeree may affirm or deny an acceptance as seems most advantageous in the light of subsequent events.

Section 55 says: "If an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given with the intent of accepting the offer." This section should have been made broad enough to cover bilateral contracts in which the requested acceptance is an act other than express assent. Otherwise an offeree by doing a privileged act which he desires to do may find himself bound by contract though he had no such intention, simply because the act happened to have been requested by some one as an acceptance of an offer. (This is true by the objective test set out in section 20.) Suppose *A* receives by post an offer of a bilateral contract with a request that his acceptance shall consist in his hanging the American flag in front of his house the next day. The next day *A*, with no intention of accepting the offer, but to satisfy the demands of his son, aged three, hangs out the flag. The offeror sees the flag and in good faith interprets it as an acceptance. By the Restatement *A* has contracted. The result seems unjust.

I regret that the Restatement does not give an offeree power to withdraw a mailed acceptance if exercised by notice given to the offeror prior to the actual communication of the acceptance. There is no possibility of injury to the offeror by such a rule and it may frequently save the offeree a loss. There is as much reason and authority for this position as for the very commendable position taken by the Restatement in granting the offeree power to nullify his rejection by overtaking it with an acceptance, but denying effectiveness to the acceptance unless it overtakes the rejection.¹⁸

Equally regrettable is it that the view is not adopted that performance of a pre-existing legal duty that has become more difficult or expensive than anticipated by reason of unforeseen events, is sufficient consideration for a promise of additional compensation. That a court should refuse to support such a promise would shock a person with only ordinary moral sensibilities and the rule is not open to the objection that it would encourage blackmailing on the part of a contractor since only unfortunate fortuitous events would make it applicable.¹⁹

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¹⁸ §39.

¹⁹ See Professor Whittier's criticism of the Restatement on this same point and cases cited in support of his view, Whittier, *The Restatement of Contracts and Consideration* (1930) 18 CALIF. L. REV. 611, 620. This article contains other valuable criticisms and suggestions.

The doctrine of *Foakes v. Beer*²⁰ which denies the power of a creditor to discharge a liquidated debt by the payment of a smaller sum than the amount due, should have been repudiated. Policy, reason and authority are ample for such a position.²¹

And too, the time has come when a promise to pay for a benefit previously conferred upon the promisor by the promisee should be held binding, when, though the benefit was conferred without request, the promisee expected to pay. There is every reason, apart from that found in the history of consideration, why a promisor should be held to his promise when at the time of promising he has received everything for which he makes the promise. Many of the cases usually cited against this rule are cases in which the benefit was conferred without expectation of pay. The authorities for the rule are amply sufficient to justify this position by the Restatement.²²

Though section 158 dealing with gratuitous assignments is admirably drawn, and is on the whole a material improvement over previous statements, there should have been some explanation as to how it was intended, if at all, to apply to gifts of choses in action *causa mortis*. It seems contrary to judicial statement to say that certain gifts *causa mortis* are revocable by the death of the donor. Yet that is the effect of this section. Possibly the restaters had some other explanation in mind. Clarification is needed here.

It is also to be regretted that the useful term "promissory condition" is not used or defined in the Restatement. This term has filled a very definite need to describe a condition that is promised as distinguished from a bare condition (one that is not promised) on the one hand, and a bare promise (one whose performance is not a condition) on the other hand. The Restatement should have perpetuated this term.²³

Section 318 makes a promise which is not conditional upon performance by the promisee incapable of anticipatory breach. The comment says: "There must be some dependency of performances in order to make anticipatory breach possible." This seems to me erroneous. If *A* pays *B* \$100 for *B*'s promise to transfer to *A* title to a horse six months later, by this section *B*'s unequivocal repudiation or sale of the horse to a third party 30 days after the contract is not immediately

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²⁰ (1884) 9 App. Cas. 605.

²¹ See Whittier, *op. cit. supra* note 19, at 616-618, in accord. For an extended argument against *Foakes v. Beer*, see Ferson, *The Rule in Foakes v. Beer* (1921) 31 YALE L. J. 15, reprinted in SELECTED READINGS ON CONTRACTS (1931) 1205.

²² See *Edson v. Poppe* (1910) 24 S. D. 466, 124 N. W. 441; 1 WILLISTON, CONTRACTS (1920) §150 and cases cited.

²³ Willis, *op. cit. supra* note 16, at 436, would also retain this expression.

actionable. But why shouldn't it be? There is every reason for the expeditious settlement of this controversy that exists in any other case. Section 323 properly justifies a change in position by *A* in reliance upon *B*'s repudiation (*e.g.*, buying a horse from a third party). This being so, if *A* does not want to wait on *B*'s uncertain performance, he should be permitted also to change his position by bringing an immediate action.²⁴

This section is further objectionable in its attempt to distinguish between contracts in which there is an implied-in-fact and an implied-in-law promise of non-repudiation and then making inapplicable the doctrine of anticipatory breach to the former type of contract. In the first place it is next to impossible to determine when a promise of non-repudiation is to be implied-in-fact and when not. For example, the Restatement says that in a contract to marry there is an implied-in-fact promise not to marry another, whereas in a contract to sell a tract of land there is no such promise not to sell the tract to another. It is submitted that there is no ground for this distinction. Repudiation in either of these cases ought to be regarded as an anticipatory breach. The reporter and his advisers probably made this distinction in order to deny a power of retraction to the repudiator of a contract to marry. If so this result could more directly and clearly have been accomplished by specially exempting contracts to marry from section 319 which provides for such power in all cases of anticipatory breach provided the injured party has not changed his position.²⁵

In conclusion, the Restatement of Contracts is an outstanding production. It is a milestone, a new point of departure. It is to be commended for its purpose, its compass, its sanity and for its potential utility to society, but it is not a finality. It must yield at every point where it does not harmonize with the *mores* of the time.

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²⁴ Patterson, *op. cit. supra* note 13, at 420.

²⁵ In addition to the articles referred to above, see the valuable comments of Professors Havighurst, *The Restatement of Contracts* (1933) 27 ILL. L. REV. 910, and Whittier, *The Restatement of the Law of Contracts and Mutual Assent* (1929) 17 CALIF. L. REV. 441.