

3-1-2007

# The First Restatement of Agency: What Was the Agenda?

Deborah A. DeMott  
*Duke University Law School*

Follow this and additional works at: [http://lsr.nellco.org/duke\\_fs](http://lsr.nellco.org/duke_fs)

---

## Recommended Citation

DeMott, Deborah A., "The First Restatement of Agency: What Was the Agenda?" (2007). *Duke Law School Faculty Scholarship Series*. Paper 86.  
[http://lsr.nellco.org/duke\\_fs/86](http://lsr.nellco.org/duke_fs/86)

This Article is brought to you for free and open access by the Duke Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Duke Law School Faculty Scholarship Series by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact [tracy.thompson@nellco.org](mailto:tracy.thompson@nellco.org).

# The First Restatement of Agency: What Was the Agenda?

By

Deborah A. DeMott\*

*forthcoming in 32 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL (2007)*

## I. INTRODUCTION

A scholarly distillation of the common law of agency may not seem an obvious place to look for manifestations of reformist or progressive impulses, however one defines them. Indeed, one who questions whether agency constitutes an independent subject as opposed to “the sum of a variety of legally regulated relationships”<sup>1</sup> might not bother with further inquiries. Fortunately, the American Law Institute (“ALI”) has never slighted Agency as sufficiently a subject to warrant a Restatement.

The first Restatement of Agency, completed in 1933, furnishes an intriguing test of Professor Natalie Hull’s thesis that the ALI’s founding is best understood as the product of progressive legal academics who strategically allied themselves with members of the practicing

---

\*David F. Cavers Professor of Law, Duke University School of Law. I served as the Reporter for the Restatement (Third) of Agency, published in final form in 2006. An earlier version of this article was the basis of my contribution to a panel, “Did the First Restatements Implement a Reform Agenda?” at the 2007 meeting of the Association of American Law Schools. Many thanks to Pat Kelley for inviting me to participate in the panel and to Elizabeth S. McBrearty for her research assistance. I’m indebted to the Duke Law Library for much help in locating materials and to the Lillian Goldman Library, Yale Law School, for its generous loan of a copy of minutes from meetings of the Agency Restatement’s advisers.

<sup>1</sup>See RESTATEMENT (THIRD) OF AGENCY, Foreword, at xi (2006).

bar and the judiciary to pursue legal reform.<sup>2</sup> In my assessment, the Agency Restatement's signal accomplishment is its coherent articulation of a systematic scheme that governs a complex body of material, which consists of the legal concepts and doctrines applicable to consensual relationships in which one person's actions carry consequences for the legal position of another person. Any society with even a modest degree of complexity requires intellectual and normative structures through which the consequences of a representative's actions or knowledge may be attributed to the person represented. Thus, the first Restatement accomplished something of enduring value, regardless of whether it represented legal reform.

My inquiry into the agenda of the first Agency Restatement begins with the first Restatement's chief personnel, its Reporters. Their professional and personal biographies help understand how they understood and performed the work that the Restatement required. The Reporters confronted and surmounted a fundamental challenge: constructing and defending the identity of Agency itself as a subject of legal scholarship. Against this background I consider salient points in the development of the Restatement's text: the work of the Reporters; their collaborations with the ALI's Director, the project's Advisers, and Reporters for other contemporary Restatement projects; actions taken by the ALI's Council; and the culminating debate by the ALI's members at Annual Meetings.<sup>3</sup> Valuable though the first Agency

---

<sup>2</sup>See N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990).

<sup>3</sup>With one major exception, I rely on published sources. These are richer for part of the relevant time period because in its early days the ALI published minutes taken at meetings of its Council. I also reviewed a set of unpublished minutes from meetings of the Agency Restatement's Advisers spanning May 1927 through March 1933. This set of minutes—carbon copies on onion-skin paper—belonged to Judge John Kimberly Beach, who became an Adviser to the project in 1927. In 1940, the set made its way from Judge Beach's estate into the library

Restatement proved to be, it explicitly adopted—and its Reporters explicitly defended—a number of common-law rules that were characterized as unsound, outdated or, in extreme instances, “barbarous” and “shocking.” I conclude that this outcome is not surprising once it’s assessed against the relevant human and institutional circumstances.

## II. THE REPORTERS: THE “MAN WHO KNEW ALL THE CASES” AND HIS SUCCESSOR, THE MAN ON THE FLYING MERKLE

In 1923, the Executive Committee of the American Law Institute’s Council characterized Floyd Russell Mechem, a law professor at the University of Chicago, as the “one person pre-eminently fitted” to serve as the Reporter for the Agency Restatement.<sup>4</sup> Mechem had taught the subject for over thirty years.<sup>5</sup> His treatise was “accorded an authority by the Courts unequalled, if indeed equalled to that accorded to any other legal treatise.”<sup>6</sup> Indeed, the second edition of Mechem’s treatise on common-law agency, published in 1914, remains the last treatise on the subject in the United States of comparable scope and depth.<sup>7</sup> Mechem’s scholarship was not

---

collection at Yale Law School. *See infra* notes 45-50, 58, and 68.

<sup>4</sup>1 A.L.I. PROC., app. 2, at 97-98 (1923)(May 5, 1923 report of exec. comm., considered by Council May 19, 1923).

<sup>5</sup>*Id.* at 98.

<sup>6</sup>*Id.*

<sup>7</sup>*See* FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY: INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT BUT ALSO SPECIAL CHAPTERS ON ATTORNEYS AUCTIONEERS BROKERS AND FACTORS.”(2d ed. 1914) (hereinafter *MECHEM*, 2<sup>nd</sup> ed.). The work contains a total of 2176 pages in two volumes. Mechem was also the author of a casebook and an outline on agency. *See* FLOYD R. MECHEM, CASES ON THE LAW OF AGENCY (1898); FLOYD R. MECHEM, OUTLINES OF THE LAW OF AGENCY (2D ED. 1903).

As it happens, agency-law scholarship in England has sustained a well-regarded

limited to agency. His published works also include treatises on public offices and public officers,<sup>8</sup> sales of personal property,<sup>9</sup> and the law of carriers,<sup>10</sup> plus casebooks on the law of damages,<sup>11</sup> partnership,<sup>12</sup> and post-mortem succession to property.<sup>13</sup> Despite their vintage, several of Mechem's works continue to be cited as authoritative by contemporary scholars.<sup>14</sup>

---

continuing treatise, presently in its eighteenth edition. *See* FRANCIS M.B. REYNOLDS, BOWSTEAD AND REYNOLDS ON AGENCY (18<sup>th</sup> ed. 2006). The first edition (solely authored by William Bowstead) was published in 1896.

<sup>8</sup>*See* FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICE AND PUBLIC OFFICERS (1890). Mechem also published a law-journal article on primary-election legislation that continues to be influential. *See* Floyd R. Mechem, *Constitutional Limitations on Primary Election Legislation*, 3 MICH. L. REV. (1905), cited in, e.g., Benjamin Handler, *Abandoning the Cause: An Interstate Comparison of Candidate Withdrawal and Replacement Laws*, 37 COLUM. J. L. & SOC. PROBS. 413, 415 n. 12 (2004); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 107 n. 326 (2004)(characterizing Mechem's article as the "classic ... on mandatory primary laws").

<sup>9</sup>*See* FLOYD R. MECHEM, A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY (1901).

<sup>10</sup>*See* ROBERT HUTCHINSON, A TREATISE ON THE LAW OF CARRIERS: AS ADMINISTERED IN THE COURTS OF THE UNITED STATES AND ENGLAND (Floyd R. Mechem, ed.)(2d ed. 1891).

<sup>11</sup>*See* FLOYD R. MECHEM, CASES ON THE LAW OF DAMAGES: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS (1895).

<sup>12</sup>*See* FLOYD R. MECHEM, CASES ON THE LAW OF PARTNERSHIP (1896). Mechem also published a shorter work on partnership. *See* FLOYD R. MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP (1896).

<sup>13</sup>*See* FLOYD R. MECHEM, CASES ON THE LAW OF SUCCESSION TO PROPERTY AFTER THE DEATH OF THE OWNER (1895).

<sup>14</sup>Recent illustrative examples include Jennifer Mullenbach, *Third Party Logistics Companies and Legal Liability for Personal Injuries: Where Does the Injured Motorist's Road to Recovery Lead*, 33 TRANSP. L.J. 145, 150, n. 28 (Fall/Spring 2005-2006)(citing FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 707-708 (2d ed. 1914); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L. J. 72, 127, n. 213 (2006)(citing Floyd R. Mechem, A Treatise on the Law of Public Offices and Public Officers 287 & n. 3)(1890); and Ramon Casadesus-Mansell & Daniel F. Spulber, *Trust and Incentives in Agency*,

Born in 1858, Mechem worked as a practicing lawyer in Detroit until enlisted into service in 1891 as the founding Dean of the Detroit College of Law, an institution that originated with the desire of law “readers” in city firms for a more formal educational experience.<sup>15</sup> Mechem left Detroit College in 1892 to become the Tappan professor of law at the University of Michigan. The University’s Regents approved Mechem’s appointment subject to provisos that he “not practice in the Courts, and that he reside in Ann Arbor.”<sup>16</sup> He departed in 1903 to join the University of Chicago’s newly-established law school.<sup>17</sup> Some of Mechem’s scholarly publications preceded his academic career, in particular the first edition of his treatise on agency.<sup>18</sup>

---

15 S. CAL INTERDISC. L. J. 45, 63, n. 60 (2005)(citing FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY 14 (2d ed. 1914) as “a classic exposition of the various duties and liabilities in agency law”).

<sup>15</sup>See Dorothy E. Finnegan, *Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools*, 55 J. LEGAL EDUC. 208, 215 (2005). Professor Finnegan credits the Detroit College with a credible claim to be the first YMCA law school. *See id.* The College’s institutional history characterizes Mechem, prior to his appointment as the College’s dean, as “an educator for many years at the University of Michigan School of Law.” GWENN BASHARA SAMUEL, *THE FIRST HUNDRED YEARS ARE THE HARDEST: A CENTENNIAL HISTORY OF THE DETROIT COLLEGE OF LAW* 4 (1992). Mechem does not appear on the faculty rolls for Michigan until 1892, which suggests his earlier association did not entail a formal Regents’ appointment. *See* ELIZABETH GASPAR BROWN, *LEGAL EDUCATION AT MICHIGAN 1859-1959*, at 469 (1959). At Detroit College, Mechem taught at night and wrote during the days. His courses included Elementary Law, Real Property, Domestic Relations, Bailments and Sales, and Agency. SAMUEL, *supra* at 12.

<sup>16</sup>See BROWN, *supra* note 15, at 77. Mechem served as the first faculty editor of the Michigan Law Review, founded in 1902, for the one year preceding his departure for Chicago. *Id.* at 330-333.

<sup>17</sup>*Id.* at 469.

<sup>18</sup>See FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY: INCLUDING NOT ONLY A DISCUSSION OF THE GENERAL SUBJECT BUT ALSO SPECIAL CHAPTERS ON ATTORNEYS, AUCTIONEERS, BROKERS AND FACTORS (1<sup>st</sup> ed.1889).

When appointed Reporter, Professor Mechem was sixty-five years old. His age made likely either his complete retirement from teaching or a substantial reduction in that activity.<sup>19</sup> The magnitude and novelty of the projects undertaken by Mechem and his colleagues among the first set of Reporters justified concern about competing claims on a Reporter's time and energies. Even a scholar as knowledgeable as Mechem confronted substantial challenges in formulating a text that stated legal principles concisely and used concepts and terminology consistently, both internally to Agency and across the Restatements as a whole. Mechem's work also required substantial travel and attendance at meetings—each extending over several days—with his project's Advisers and others. Mechem's work on the Restatement was interrupted by eye trouble and the necessity for rest.<sup>20</sup>

Mechem died on December 11, 1928. The Institute's President, George W. Wickersham, eulogized him at the 1929 Annual Meeting as “a man of simple, strong and lovable character ....”<sup>21</sup> At the same meeting, the Institute's Director, William Draper Lewis, stated that despite his age, Mechem “threw himself into his difficult task with that nervous energy which had enabled him to accomplish so much during his professional career.”<sup>22</sup>

---

<sup>19</sup>1 A.L.I. PROC., app. 2, at 98.

<sup>20</sup>2 A.L.I. PROC. 241 (1924)(minutes of A.L.I. Council, Dec. 5-7, 1924)(report of Director Lewis).

<sup>21</sup>7 A.L.I. PROC. 33 (1928-1929).

<sup>22</sup>*Id.* at 43.

Warren Abner Seavey succeeded Mechem as Reporter.<sup>23</sup> He joined the Agency project in 1924 as an adviser to Mechem.<sup>24</sup> Seavey, then a law professor at the University of Nebraska, was forty-four years old. He moved to the Nebraska faculty from Indiana University thanks to the intervention of a mentor at Harvard Law School, Roscoe Pound, who endorsed Seavey to Nebraska's chancellor.<sup>25</sup> Seavey, who had not been Pound's student, joined a network of Pound's protégés, all linked through Pound's sponsorship.<sup>26</sup>

Seavey credited Pound (formerly the law dean at Nebraska), among others, with much help during the early and peripatetic phase of his long academic career. Soon after graduating from Harvard Law School, Seavey began teaching law with three years' service at Pey Yang University, where he taught American law to Chinese students. When he returned to the United States in 1911, Joseph Beale notified him of a one-year opportunity at Harvard Law School to

---

<sup>23</sup>Mechem's death mid-stream may explain why some scholarly accounts misidentify Seavey as the initial Reporter for Agency. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 24 (1995); LAURA KALMAN, LEGAL REALISM AT YALE 14 (1986).

<sup>24</sup>2 A.L.I. PROC. 174 (1923-1924)(minutes of A.L.I. Council, Feb. 22, 1924).

<sup>25</sup> WARREN A. SEAVEY & DONALD B. KING: A HARVARD LAW SCHOOL PROFESSOR: WARREN A. SEAVEY'S LIFE AND THE WORLD OF LEGAL EDUCATION 29 (2005).

<sup>26</sup>SEE N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: IN SEARCH OF AN AMERICAN JURISPRUDENCE 6 (1997)(characterizing Pound as "an intuitive networker" who offered patronage to junior scholars); *id.* at 54 (Pound's recruitment of Walter Wheeler Cook to Nebraska); and *id.* at 99 (Pound's efforts to further the reputation of Wesley Newcomb Hohfeld).

Seavey himself, like many (most?) successful academics, became central to his own network of intellectual influence and personal sponsorship. For an example, see William L. Prosser, *Warren Seavey*, 79 HARV. L. REV. 1338 (1966). Prosser credits Seavey with suggesting his name to the West Publishing Company as an author of a hornbook on torts. Seavey then critiqued each draft, writing "long, detailed, and very astute letters pointing out the errors of innocent ignorance, and suggesting additions, deletions, changes in language and arrangement, objections, theories, ideas, new lines of thought, questions, and gentle and obviously sound criticism." *Id.* Prosser characterizes Seavey as "one of a dynasty of torts men ...." *Id.*

teach Pleading as a replacement for Austin Scott.<sup>27</sup> Seavey, who claims in his memoir to have known little about the subject, reports that he “tried to get help from the faculty, but only one had the knowledge and willingness ... That was Roscoe Pound, a large-bodied Nebraskan ....”<sup>28</sup> Beale next cautioned Seavey against accepting an appointment at the University of Alabama, “where he said I would not get along,” leading Seavey to choose instead the new law school at the University of Oklahoma.<sup>29</sup> He traveled from Cambridge to Norman by motorcycle, a Flying Merkle. A few years later, when Seavey exited Oklahoma after a disagreement with his dean, Pound recommended Seavey for an appointment at Tulane.<sup>30</sup> Seavey joined the Indiana faculty after service in the Army during World War I.<sup>31</sup> After one year at the University of Pennsylvania, he joined Harvard Law School’s faculty in 1928.

His relative youth was not the sole characteristic that differentiated Seavey from

---

<sup>27</sup>A colleague of Seavey, Louis Loss, reports that Scott was Seavey’s closest friend on the Harvard faculty. *See* LOUIS LOSS, ANECDOTES OF A SECURITIES LAWYER 76 (1995). For more on the relationship between Scott and Seavey, see *infra* note 32.

<sup>28</sup>SEAVEY & KING, *supra* note 25, at 29.

<sup>29</sup>SEAVEY & KING, *supra* note 25, at 30.

<sup>30</sup>*Id.* at 33.

<sup>31</sup>Seavey’s Army service led to his appointment as “Advisor for Veterans” at Harvard Law School during and in the aftermath of World War II. Seavey wrote individual responses, “usually in longhand,” to inquiries from men in military service, replying that “[y]ou are just the sort of man we are looking for. When you are released from the service, come to Cambridge and we will admit you.” ERWIN N. GRISWOLD, OLD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER 156 n. 6 (1992). Harvard’s dean at the time reports that “[t]here were several hundred letters of this generous tone. We honored all of them. We called them “Seavey estoppels.”” *Id.*

Mechem. Unlike Mechem, Seavey published no comprehensive treatise.<sup>32</sup> His books on agency consisted of casebooks, a hornbook,<sup>33</sup> and a collection of his law-journal articles.<sup>34</sup> Moreover, the two Reporters had intriguingly different sets of professional experiences. Seavey's time in law practice was very brief—in contrast to Mechem's<sup>35</sup>—and not happy. As Seavey recounted his experiences following his second year in law school:

I got a job with a two-man firm, Joslin and Mendrum, whose office was in Scollay Square, Boston. I got \$10 a week and learned a little about where to file papers. The following year they needed to save money and I was dropped.

I retired to a little office suite next door with its window on the air shaft....There I picked up a scanty living by collecting bills with some help from my father, but had little success in picking up clients. I refused to be again a clerk in a law office, but I had doubts as to how long I could keep going.<sup>36</sup>

---

<sup>32</sup>Seavey spoke of his treatise-free state as a blessing, telling his colleague Louis Loss—author of a magisterial treatise on securities regulation— that “[o]nce you produce a treatise, you are a slave to it for the rest of your life. That’s why I have never written a treatise.” LOSS, *supra* note 27, at 76. What prompted Seavey’s assertion was Loss’s complaint about the burdens of updating and revising his treatise. Seavey told Loss he’d made “the same mistake Scott made.” *Id.* Seavey’s colleague—and co-Reporter for the Restatement of Restitution—Austin W. Scott was the author of the multi-volume Scott on Trusts, as well as the Reporter for the Restatement of Trusts. When Loss next had a conversation with Scott that turned to Seavey, Scott said: “Seavey is very good. But, you know, he’s not first-rate; he has never produced a treatise.” *Id.*

<sup>33</sup>*See* WARREN A. SEAVEY, CASES ON AGENCY (1945); LIVINGSTON HALL, HAROLD GILL REUSCHLEIN & WARREN A. SEAVEY, CASES ON AGENCY AND PARTNERSHIP (1962); WARREN A. SEAVEY, AGENCY (1964). Seavey also published on Torts. *See* WARREN A. SEAVEY & EDWARD S. THURSTON, CASES ON TORTS (1942); WARREN A. SEAVEY, COGITATIONS ON TORTS (1954).

<sup>34</sup>*See* WARREN A. SEAVEY, STUDIES IN AGENCY (1949). Seavey’s Studies also includes otherwise-unpublished note material from four tentative drafts (nos. 4 - 7) of the first Restatement, written by Seavey after he became Reporter. *See id.* at *iii*, 203-414.

<sup>35</sup>*See supra* text accompanying note 15.

<sup>36</sup>*See* Seavey & King, *supra* note 25, at 9-10. *Id.* Seavey’s father worked in Boston as a teamster. *Id.* at 1. As a teenager, during summers Seavey drove one of his father’s market wagons, delivering produce for a commission merchant from the Faneuil Hall market, a business activity that constituted his father’s principal source of income. *Id.* at 2.

Seavey's professional life centered on work within law schools, as he moved from one to another early on and then returned to Harvard for a long run. He thrived as a teacher of the law; his colleague Louis Loss characterized him as "probably the country's greatest master of the Socratic dialog."<sup>37</sup> He was supportive of his colleagues, including junior members of the faculty, like Loss, who were assigned to teach sections of the required first-year course on Agency.<sup>38</sup> And Seavey, blessed with a long life, recounted it in a posthumously-published memoir, a happy coincidence of circumstances that inevitably makes him a more vivid character than Mechem.<sup>39</sup>

Seavey's role in the Agency Restatement project expanded with time. Although no Assistant to the Reporter was believed necessary in 1924,<sup>40</sup> by 1927 Seavey had been designated Mechem's Assistant.<sup>41</sup> That formality appears to have acknowledged the dominant role that Seavey occupied among Mechem's advisers as well as the substantiality of his contributions to the project. For example, although both Seavey and Richard R. Powell were asked to prepare commentary and Illustrations for Mechem's first draft (consisting of 115 sections),<sup>42</sup> Seavey

---

<sup>37</sup>See LOSS, *supra* note 27, at 69.

<sup>38</sup>*Id.* at 19. Loss reports that Archibald Cox was also especially fond of Seavey, with Loss and Cox "repairing to [Seavey's] office quite often for discussions not only of Agency and the problems to be considered in the next class, but also of life." *Id.* Seavey's generosity to colleagues extended to finances. When Seavey first met Loss, he lent him the money he needed for a down payment on a house and then refused to accept interest on the amount when Loss repaid it. *See id.* at 19-20. Seavey also lent money to Erwin Griswold to enable him to buy the lot adjoining his house and again refused to take interest. *See* GRISWOLD, *supra* note 31, at 131.

<sup>39</sup>See SEAVEY & KING, *supra* note 25.

<sup>40</sup>2 A.L.I. PROC. 243 (1923-1924)(minutes of Council meeting, Dec. 507, 1924).

<sup>41</sup>5 A.L.I. PROC. 43 (1927)(minutes of Council meeting, May 11, 1927).

<sup>42</sup>2 A.L.I. PROC. 200 (1923-1924)(minutes of Council's Executive Committee, June 20, 1924).

reports that Mechem took his Illustrations “exclusively.”<sup>43</sup>

Despite their centrality as Reporters, Mechem and Seavey were not solely responsible for the work required to produce the Restatement. Their Advisers, who reviewed successive drafts as the project progressed, contributed extensive comments on substantive points, often proposing revisions to the Reporter’s formulations. Advisers’ meetings progressed section-by-section, each specifically approved or returned to the Reporter for revisions. The Director, William Draper Lewis, occupied many roles in these meetings, focusing more than any other participant on maintaining overall coherence among the various Restatements.<sup>44</sup> Lewis participated actively, sometimes instructing the Reporter to consult another project to confirm or co-ordinate how a substantive issue or a question of terminology would be resolved or otherwise expressing concern

---

<sup>43</sup>SEAVEY & KING, *supra* note 25, at 55. Powell was later to criticize Tentative Draft No. 1 at the 1926 Annual Meeting (“there are some matters in this Restatement which need change ...”). 4 A.L.I. PROC. 145 (1926)(app. vol.). The immediate focus of Powell’s criticism was a definition of “independent contractor” that differentiated an independent contractor from a “servant” on the basis of possession of the right to control the actor’s work. Instead, Powell argued, the correct test was broader: “whose business was being done,” a determination that required assessing “all the circumstances of the case.” *Id.* at 146. In 1927, Powell became an Adviser to the Property Restatement. 5 A.L.I. PROC. 7 (1927)(minutes of Council’s Executive Committee, Feb. 24, 1927). Powell succeeded Harry Bigelow as the Reporter for Property in 1929 when Bigelow became Dean of the University of Chicago’s Law School. *See* AMERICAN LAW INSTITUTE, THE AMERICAN LAW INSTITUTE 50<sup>TH</sup> ANNIVERSARY 125 (1973).

<sup>44</sup>Reliable secondary authority reports that it was Seavey’s habit to address Lewis as “Dear Commander” in letters to him. *See* Michael Traynor, *The President’s Letter*, 29 ALI REPORTER 1, 2 (Winter 2007). Lewis’s successor as Director, Herbert Goodrich, characterized Lewis as “a hard worker, partly because he did everything the hard way. Sometimes he would write two or three longhand drafts before he tried a typewritten copy. All his procedures were elaborate, accurate and slow.” Herbert F. Goodrich, *The Story of the American Law Institute 1923-1961*, 1951 WASH. U. L. Q. 283, 285 (1951). Goodrich also credits Lewis with “one of the warmest personalities that anyone could have the privilege to work with.” *Id.*

for co-ordination among projects.<sup>45</sup> The Agency meetings identified specific questions for referral to Reporters from other projects.<sup>46</sup> Other projects' Reporters occasionally attended Agency meetings.<sup>47</sup> Toward the Agency project's end, Lewis undertook primary responsibility for drafting the commentary addressing a principal's power to control the agent, one of the defining elements

---

<sup>45</sup>For example, reacting to a draft Agency provision on integrated contracts, Lewis stated that "if in the comment or black letter we are going to deal here with substantially the same problem that is being dealt with by the contract group, ... in re-writing this you, the Reporter, consider what has been done or is being done by the contract group so that we will avoid any slightly different way of putting the matter." See American Law Institute, Restatement of the Law of Agency, Minutes of Meetings of Conferences of Reporters and Advisers, Oct. 30, 1927, at 9 (hereinafter *Advisers' Minutes*). Lewis suggested co-ordinating Agency's definition of "interests" with usage in Torts and Property Restatements, *id.*, July 18, 1929, at 46-47. At the same meeting, he noted that compared to other Restatement projects, Agency's usage of "notice" "had produced considerable heaviness...because it forced a repetition of the expression 'knowledge, reason to know and notice', and he, therefore, had felt for some time that there would be an advantage in having one word which would mean any or all of those things ...."*Id.*, July 19, 1927, at 55-56.

<sup>46</sup>See, e.g. *Advisers' Minutes*, Oct. 10, 1930, at 15 (Reporter will see Samuel Williston concerning provision on liability of obligor on negotiable instrument in action brought by agent); Mar. 20, 1931, at 6 (Adviser suggests Reporter question Austin Scott concerning trustee liability when trustee accepts a bribe from a brokerage firm); Sept. 1, 1931, at 26 (Reporter to see Williston concerning statements about bilateral and unilateral contracts); June 9, 1932, at 6 (Lewis to write to Harry Bigelow, Reporter for Property, "and get his written reaction on taking out from the definition of 'power' the words 'on the part', 'to produce', and the word 'given' before 'legal relations'"). Other Reporters' reactions were reported back to the Agency group. For example, Lewis relayed Williston's opposition to substituting "unless otherwise understood" for "unless otherwise agreed" in the Agency Draft. *Id.*, Aug. 31, 1931, at 1.

<sup>47</sup>For examples of substantive contributions by Reporters for other projects, see, e.g., *Advisers' Minutes*, Apr. 28, 1928, at 2 (Francis Bohlen, Reporter for Torts, questions whether entrusting instrumentalities to a servant warrants treatment as a separate basis for master's liability); June 9, 1932, at 14 (Austin Scott, Reporter for Trusts, proposes definition of "notice" with which Lewis agrees; under Scott's definition, "a person has notice of a fact if he has knowledge of it, reason to know of it, or a situation exists in which he should know of it, or if notification has been given him"). The substance of Scott's suggested definition of "notice" was subsequently adopted. See *id.*, Sept. 4, 1932, at 26.

of an agency relationship.<sup>48</sup>

Moments of apparent levity punctuated the seriousness of the Advisers' meetings. Consider the following hypothetical, it would seem extemporaneously posed by Mechem to illustrate the difficulties in determining when an agent's disloyal motive should terminate the agent's power to bind the principal:

If I say to Mr. Lewis "Seavey is my agent to borrow money" and Seavey goes to Mr. Lewis and borrows money, having made up his mind beforehand that he is going to borrow the money on his own account and not on mine at all, there I think I am liable. The second case is this. I tell Seavey, and I never tell Mr. Lewis, that Seavey is my agent and Seavey goes to Lewis. Lewis has had no communication with me and I have had no communication with him. Seavey goes to him and he says falsely: "I am coming to you as Mechem's agent. He wants to borrow \$10,000." The fact is that he is acting as a wrongdoer taking advantage of the situation to fleece somebody out of \$10,000. Mr. Lewis lets him have the \$10,000 relying on what he says about the situation .... Seavey goes off with the money. May Lewis recover of me?<sup>49</sup>

The consensus answer to Mechem's question was no, one Adviser observing: "[i]f in fact the agent was not acting for his principal, I do not see that it is essentially different from any other case of a crook going into a bank and falsely representing that he is the agent of John D. Rockefeller."<sup>50</sup>

In his first appearance before an Annual Meeting as the new Reporter for Agency, Seavey lauded Mechem as "a man who knew all the cases ...."<sup>51</sup> What Seavey knew—or soon learned—was

---

<sup>48</sup>See *Advisers' Minutes*, June 9, 1932, at 2 (Lewis to write comment "stating that the control of the principal is implicit in the understanding of the parties regardless of what they may verbally manifest to each other; that where this implicit understanding does not exist it is not an agency relationship, but something else"). Seavey was to write a comment on the other defining element, that an agent assents to "act on behalf of the other." *Id.* at 3.

<sup>49</sup>*Advisers' Minutes*, Oct. 21, 1928, at 27.

<sup>50</sup>*Id.* at 28-29 (statement of Calvert Magruder).

<sup>51</sup>7 A.L.I. PROC. 233 (1929).

how to draft black-letter formulations in a simplified and clarified fashion, in contrast with Mechem's more diffuse and general style. Mechem's style may have stemmed from his comprehensive knowledge of the cases and his life's work detailing them in his treatise. Mechem himself acknowledged to the 1926 Annual Meeting that his work had been criticized for "too many words."<sup>52</sup> The formulation that evoked this admission was section 3:

When the person acting is to represent the other in contractual negotiations, bargainings or transactions involved in business dealings with third persons, or is to appear for or represent the other in hearings or proceedings in which he may be interested, he is termed an 'agent,' and the person for whom he is to act is termed the 'principal.'<sup>53</sup>

Mechem's diffuse formulations were misleading. A member noted that "business dealings" in section 3 appeared to require a series of transactions or dealings, and that "business" appeared too narrow, given the breadth of actions an agent might take on behalf of a principal.<sup>54</sup>

Moreover, some of Mechem's formulations were conclusory. For example, Mechem's drafting in Tentative Draft No. 1 defined "the relation of Agency" as "the consensual relation existing between two persons, by virtue of which one of them is to act for and on behalf of the other and subject to his control."<sup>55</sup> This formulation does not state the mechanism through which such a "relation" comes into existence. By 1933, the counterpart language in the final Restatement's first section made the mechanism explicit: "the manifestation of consent by one person to another that he shall act on his behalf and subject to his control, and consent by the other so to act."<sup>56</sup>

---

<sup>52</sup> 4 A.L.I. Proc. 142 (app. vol.)(1926).

<sup>53</sup>*Id.* at 141.

<sup>54</sup>*Id.* at 143-44.

<sup>55</sup>4 A.L.I. PROC. 139 (app. vol.)(1926)(Section 2 in Tentative Draft No. 1).

<sup>56</sup>RESTATEMENT OF AGENCY § 1(1).

Inconsistencies in Mechem’s drafting style—in particular, in usage of “power” and authority”—provoked an extensive dissection from the floor of the 1926 Annual Meeting by Arthur L. Corbin.<sup>57</sup> Mechem had also used the word “ability” at points, thereby, as Corbin pointed out, implying a conclusion about the impact of an agent’s actions on the principal that might or might not stem from authority granted by the principal through an expression to the agent.<sup>58</sup>

At the 1933 Annual Meeting, Director William Draper Lewis characterized the work required to prepare the Proposed Final Draft of the Agency Restatement as “in truth a labor of Hercules,” impossible without boundless work by Seavey and his advisers.<sup>59</sup> Seavey acknowledged the transition in style that followed Mechem’s death— “[w]e departed very largely from the way in which Mr. Mechem had expressed himself” – while we “departed scarcely ever

---

<sup>57</sup>4 A.L.I. PROC. 150-52 (app. vol.)(1926).

<sup>58</sup>*Id.* at 151. Discussion at a later Advisers’ meeting focused on difficulties created by “ability.” In the context of how “authority” should be defined and how manifestations from principal to agent should be interpreted, Lewis pressed Mechem on whether “ability” and “power” were synonyms. *See Advisers’ Minutes, supra* note 45, May 27, 1927, at 2-3. Seavey professed not to understand Mechem’s draft—“I don’t understand that at all”—prompting Mechem to rejoin— “I don’t believe you.” *Id.* at 2. The basic drafting challenges stemmed from acknowledging that a principal’s manifestation may not be fully detailed and that circumstances may change between the time of the principal’s manifestation and the time the agent determines how to act. Seavey advocated distinguishing between “finding out what the manifestation means” and “the legal effects of that ...”*Id.* at 11-12. Mechem, who preferred not to draw this distinction, instead proposed to solve the problem by deeming the requisite specifics to have been present in the principal’s mind: “I read those back into the mind of the principal at the time of the act. At the time he manifests his consent, he manifested consent to do all those usual and ordinary things connected with the doing of the act.” *Id.* at 10. Seavey noted that Mechem was using the word “manifestation” in “two different senses. We have got to get a different word to describe the doing of the first act which gives the general authority to which we attach these incidents.” *Id.* at 13. Seavey urged the group to acknowledge (as the draft eventually did) that “[w]e are dealing with interpretation,” *id.* at 17, a process not entirely captured by Mechem’s subjective conception of the deemed contents of a principal’s mind.

<sup>59</sup>11 A.L.I. PROC. 40 (1932-1934). Powell, *see supra* notes 42-43, is not listed as an Adviser in the final published volume.

from the result which Mr. Mechem reached.”<sup>60</sup>

At points, though, Mechem’s formulations required later departures by Seavey and his team as a consequence of the substantive implications of earlier formulations for questions addressed downstream as the project progressed. For example, Mechem defined apparent authority as an agent’s power to affect the principal’s legal relations only when the principal’s manifestations to a third party concerning the agent’s authority differed from those made to the agent.<sup>61</sup> But when Seavey and his team reached the consequences of a principal’s termination of an agent’s authority, it became evident that Mechem’s requirement of divergent manifestations to agent and third party excluded the well-known possibility that an agent might appear to continue to have authority following the principal’s manifestation of termination to the agent when the third party lacked notice of it.<sup>62</sup> Acknowledging the possibility of lingering apparent authority then necessitated revising Mechem’s much earlier definition of apparent authority and making clear that actual and apparent authority may often co-exist.<sup>63</sup>

More generally, Seavey appears to have tackled the challenges of drafting having asked broader questions than Mechem tended to do. The consequences of this difference extended well

---

<sup>60</sup>*Id.* at 78.

<sup>61</sup>*Id.* at 79.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* Section 8 defines “apparent authority” as “the power of an apparent agent to affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal’s manifestations of consent to the third party that such agent shall act as his agent.” Comment *a* acknowledges that authority may or may not be co-extensive with apparent authority. Seavey characterized apparent authority as analogous to “an offer made by the principal to a third person ....” 11 A.L.I. PROC. 80. This is potentially a much narrower definition than might follow from a “manifestation” made by the principal to a third party.

beyond drafting itself. Seavey and Mechem differed on how Agency itself should best be defined as a subject. Seavey, according to Lewis, drew lines of demarcation by asking a general question regardless of the specific topic or issue:

Supposing that in the chain of circumstances an agency did not exist, would the law be as it is? Would the result in a concrete case be as it is? Whenever Agency is one of the operative facts which lead to the legal result, then it is part of the law of Agency.<sup>64</sup>

Lewis reported that Mechem “has a somewhat narrower conception” but did not state its content.<sup>65</sup>

### III. ANSWERING POUND’S QUESTION AND HOLMES’S CHALLENGE

Floyd Mechem introduced Tentative Draft No. 1 to the 1926 Annual Meeting on a note that may seem incongruously diffident, given Mechem’s unquestioned preeminence as an authoritative scholar. Mechem’s diffidence concerned the subject, not his mastery of it. Said Mechem: “I suppose that when the Council decided to try to make a Restatement of the law of Agency, there was some implicit assumption that there is a law of Agency. I know that some people deny it, and say there is no law of Agency at all ....”<sup>66</sup> Mechem characterized the law of agency as a residuum, its content consisting of something of a negative space: “Whether there is a

---

<sup>64</sup>See *Advisers’ Minutes*, *supra* note 45, Oct. 21, 1928, at 45.

<sup>65</sup>*Id.* What provoked this statement was a group of cases subjecting a principal to liability on an instrument when making the contract was not within the agent’s actual or apparent authority. Mechem believed the principle supported by the cases was “not a statement of the law of Agency ... even though it might be expressed somewhere in the Restatement of the Law of Agency.” *Id.* at 44. An Adviser, Calvert Magruder, replied that failing to treat the cases as an agency-law exception to a more general rule would make the statement of the general rule misleading: “It does not seem sufficient to say that the liability is based on a principle of the law of bills and notes. If you subtract from the operative facts of the relationship the existence of the Agency relationship, the defendant would not be liable.” *Id.* Magruder acknowledged that “considerations of policy as to the free negotiability of these instruments are taken into account” in determining liability. *Id.*

<sup>66</sup>4 A.L.I. PROC. 134 (app. vol.) (1926).

law of Agency or not ... depends on the question whether there are, on the whole, some things which you cannot dispose of with the ordinary rules of Contracts and Torts, and such work as I have done in the field of Agency has led me to believe this was the case.”<sup>67</sup>

Mechem’s diffidence is readily understandable. Agency’s status had been questioned by both Roscoe Pound and Oliver Wendell Holmes, presenting a formidable challenge to the intellectual worth of Mechem’s work in his treatise as well as his work as Reporter.

Pound’s challenge was milder than Holmes’s. The Institute’s Council had earlier commissioned a report from Roscoe Pound on “Classification of the Law.”<sup>68</sup> Agency appeared only at the end of Pound’s report under “Specific Questions of Classification.” The question? “The place of Agency?”<sup>69</sup> Pound ventured no answer. It’s not surprising that Mechem, at his first meeting with the Council in 1924, said he found Pound’s question “disquieting.”<sup>70</sup>

Holmes, in contrast, claimed that agency-law doctrine rested on nothing more than a fiction identifying principal and agent, plus common sense.<sup>71</sup> Prior to their work on the

---

<sup>67</sup>*Id.*

<sup>68</sup>*See* 2 A.L.I. PROC. 379-425 (1923-1924)(app. 2). A portion of Pound’s scheme, not including his question concerning Agency, was published as Roscoe Pound, *A Classification of Law*, 37 HARV. L. REV. 933 (1924).

<sup>69</sup>2 A.L.I. PROC. at 423.

<sup>70</sup>*Id.* at 86 (minutes of Council meeting, Feb. 23, 1924). The Council’s earlier application for funding to the Carnegie Corporation characterized Agency as “a fundamental legal relation” that “if a suitable Reporter can be found” ... “should be undertaken at an early stage of our work.” 1 A.L.I. PROC. 97 (1923)(app. 2). The application noted the practical advantage of proceeding with work on Contracts, Torts, and Agency at the same time so that the Reporters could confer with each other. *Id.*

<sup>71</sup>*See* OLIVER WENDELL HOLMES, THE COMMON LAW 180-83 (1923); Oliver Wendell Holmes, *Agency, I*, 4 Harv. L. Rev. 345, 350-51 (1891); *Agency, II*, 5 Harv. L. Rev. 1, 14 (1891).

Restatement, both Mechem and Seavey took on Holmes, each responding in characteristic fashion. Mechem's treatise contains an early section captioned "Is there a law of agency."<sup>72</sup> Mechem's prolix (but unsurprising) answer is yes: "If ... there should be found to exist a respectable body of rules peculiar to this situation, without which its phenomena could not be satisfactorily explained, then it might fairly be said that there is a law of agency."<sup>73</sup> Seavey's more aggressive reply came in an article published in 1920 in the Yale Law Journal. In Seavey's view, if correct Holmes's assertion meant that "[w]e are ... denied by our belief the ability to rationalize the subject and relying only on intuition to determine when and to what extent common sense is to be applied."<sup>74</sup> But such pessimism is unwarranted: "Justice Holmes overestimates the effect of the fictions. On the contrary, I believe that the results reached by the courts can be explained without using legal presumptions as axioms and that individual cases may be tested by the use of judicial sense (rather than common sense) and the needs of commerce."<sup>75</sup> Using this base, a scholar may reduce agency-law doctrines to their operative elements and proceed with analysis, thereby "finding the rhyme and reason of the law which has grown on the fertile soil of a three party relationship."<sup>76</sup>

---

<sup>72</sup>See *MECHEM, TREATISE 2<sup>nd</sup> ed.*, *supra* note 7, § 9.

<sup>73</sup>*Id.* Mechem continued: "That there are some unique cases,—like the rules respecting the undisclosed principal, for example—cannot be denied; although some have preferred to treat these merely as anomalies rather than as the subject of a distinct system of rules." *Id.*

<sup>74</sup>Warren A. Seavey, *The Rationale of Agency*, 29 *YALE L. J.* 859, 859 (1920). At the time, Seavey was a faculty member at Indiana University. His memoir reports that the Harvard Law Review rejected his article and that it was the basis for his invitation to work on the Restatement. See *SEAVEY & KING*, *supra* note 25, at 51.

<sup>75</sup>Seavey, *supra* note 61, at 859.

<sup>76</sup>*Id.*

Seavey's answer to Holmes was an optimistic assessment of both the intellectual and the practical merit of legal scholarship focused on agency. Seavey's answer also emphasizes the value of inductive methodology in legal scholarship even when a scholar's materials consist solely of reported opinions from appellate courts. To a contemporary reader, what Seavey advocates is using an empiricist methodology unconstrained by prior abstract formulations to generate an organized system of norms that guides the resolution of disputes toward acceptable conclusions. Although Seavey's perspective is not wholly unrelated to the soon-to-come challenges posed by Legal Realism to orthodox legal scholarship, he does not appear to have self-identified with scholars associated with Legal Realism (and neither they nor their chroniclers claim Seavey as a Realist).

#### IV. RESTATING "THE LAW AS WE FIND IT" AND NOT "WHAT THE LAW OUGHT TO BE"

Overall, the accomplishment represented by the first Restatement of Agency is the rationalization and clarification of legal doctrine in a systematic fashion, not the fulfilment of a reformist agenda in a more conventional sense. Whatever Mechem's and Seavey's underlying impulses may have been, their capacity to achieve reform was constrained by the institution of the Restatement itself. On the one hand, that institution promised that their work would carry legitimacy and thus impact but, on the other hand, it circumscribed what could be done. This circumscription was enforced by the Institute itself through its Council and members, as well as through the Reporters' own understanding of their project and how it might proceed.

More specifically, Mechem and Seavey were loathe to generalize without explicit support drawn from specific cases. Their lack of boldness may have set them apart from at least some of

their fellow Reporters. At the 1932 Annual Meeting, a member noted the relative modesty of Mechem and Seavey, in contrast to their colleagues, encouraging Seavey and his advisers to “lay down the rule which he thinks the courts should adopt rather than try to derive a rule from the decisions which is not fully developed.”<sup>77</sup> The member’s comment concerned the rule that became section 396, on an agent’s use of confidential information following termination. As formulated, the rule incorporated the “memory rule,” which protected an agent’s post-termination use of the principal’s confidential information so long as the agent extracted it solely through memory. The member objected that this seemed unprincipled: “The point seems to me to be that if the agent did acquire the information in the course of his employment and would not have acquired it otherwise, he should not be permitted to use it merely by retaining [it] in his memory.”<sup>78</sup> The member also noted that courts expressed doubt about the soundness of the rule. Seavey replied that he had two options: “To recite what the courts have decided or to say nothing.”<sup>79</sup>

Seavey’s reply is consistent—but only in part—with what a later ALI Director, Herbert Wechsler, characterized as the then-prevailing “dogma that a rule we restate, because we think it would be followed by the courts, may not be criticized by caveat or comment, however strong the

---

<sup>77</sup>10 A.L.I. PROC. 318 (1931-1932).

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* The “memory rule,” which survived into Restatement (Second) of Agency, was jettisoned in Restatement (Third). See RESTATEMENT (THIRD) OF AGENCY § 8.05, cmt. c (2006) (“[a]n agent is not free to use or disclose a principal’s trade secrets or other confidential information whether the agent retains a physical record of them or retains them in the agent’s memory. If information is otherwise a trade secret or confidential, the means by which an agent appropriates it for later use or disclosure should be irrelevant.”).

arguments against it are.”<sup>80</sup> But did Seavey think a court would *follow* the “memory rule”? If not, his understanding of his options as Reporter seems unduly constrained because it ignores any element of prediction, itself a function of how and whether the rule may be justified.<sup>81</sup> Thus, even among the first Restatements, Agency’s style and texture were narrowly-cast and cautious, not bold.

To be sure, many of the points covered by the first Restatement were seen as reflecting no material disagreement among relevant cases.<sup>82</sup> Other topics were acknowledged to be more difficult.<sup>83</sup> On points at which the cases disagreed, the drafts chose one position over another, often<sup>84</sup> but not always<sup>85</sup> in line with the weight of authority. And when many cases supported

---

<sup>80</sup>Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A.J. 147, 150 (1969).

<sup>81</sup>As Director Wechsler wrote in response to an attack in 1965 by the defense bar on Restatement (Second) of Torts § 402A:

I asked ... if the statement of a rule does not involve something more than the conclusion that it is supported by the past decisions, for this is an implicit judgment that our courts today would not perceive a change in situation calling for the adaptation of the rule or even for a new departure. And if we ask ourselves what courts will do within an area, can we divorce our answers wholly from our view of what they ought to do, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?

*Id.* at 149

<sup>82</sup>*See, e.g.*, 4 A.L.I. PROC. 18 (1926)(minutes of Council meeting, Feb. 26, 1926)(Lewis reports that matters to be covered by Tentative Draft No. 1 “present subjects on which there is comparatively little conflict and rarely any dearth of authority”).

<sup>83</sup>These included termination of an agent’s authority, *see* 4 A.L.I. PROC. 69 (1926)(minutes of Council’s Executive Committee, Oct. 22, 1926), and liability, *see* 6 A.L.I. PROC. 226-227 (1927-1928)(minutes of Council meeting, Apr. 25, 1928)(characterizing difficulties as “as great as any we have had or are likely to have on any subject”).

<sup>84</sup>*See* 4 A.L.I. PROC. 183 (weight of authority supports rule that undisclosed principal may not ratify an agent’s act; rule in Massachusetts to contrary in some circumstances); 7 A.L.I.

opposing positions, the drafts might choose on the basis of the recency of decisions or the identity of the court.<sup>86</sup> The Restatement also did what it could to correct the erroneous impression created by Chief Justice Marshall that a power held as security did not differ from an ordinary agency power and was thus just as fragile, terminable on all the bases applicable to ordinary agency relationships, including the grantor's death.<sup>87</sup>

That the Agency Restatement would not serve as an engine of broader-reaching reform became most sharply evident at the 1933 Annual Meeting. The Proposed Final Draft (Seavey's "labor of Hercules") called the members' specific attention to particular sections. Among these was § 120, dealing with the impact of a principal's death. As stated in section 120, "[t]he death of the principal terminates the authority of the agent." Seavey acknowledged that the rule meant that

---

PROC. 237 (1928-1929)(overwhelming weight of authority supports rule that principal is not subject to liability on negotiable or sealed instrument unless principal appears to be a promisor by terms of instrument)

<sup>85</sup>See 9 A.L.I. PROC. 219-21 (1930-1931)(adopting view, consistent with position in Restatement of Contracts but contrary to "the majority of decisions," that bona fide purchaser should be protected as against undisclosed principal when agent assigns a contract made in the agent's own name but for the benefit of principal).

<sup>86</sup>See, e.g., 4 A.L.I. PROC. 168-69 (1926)(app. vol)(rule binding principal to notice received by subagent); 7 A.L.I. Proc. 255-56 (1928-1929)(undisclosed principal's payment to or settlement with agent discharges liability when done in reliance on conduct of third party)

<sup>87</sup>11 A.L.I. PROC. 96. The doctrine of powers given as security, stated in section 138, enables a grantor to create an irrevocable power when the power holder does not have a proprietary interest in the subject matter of the agency and when the power and the proprietary interest are not united in the same person. In contrast, under Chief Justice Marshall's opinion in *Hunt v. Rousmanier's Administrators*, a power of sale does not survive the death of its grantor unless the power holder is vested with an interest or estate that accompanies the power. See 21 U.S. (8 Wheat.) 174 (1823). For Seavey's early critique of *Hunt*, see Warren A. Seavey, *Termination By Death of Proprietary Powers of Attorney*, 31 YALE L. J. 283 (1922).

following the principal's death, the agent has a duty not to act on the principal's behalf.<sup>88</sup> If the fact of the principal's death is notorious, the agent (and third parties with whom the agent deals) will be aware of it. But suppose neither the agent nor the third party with whom the agent deals has notice of the principal's death. Said Seavey: "The agent is in a dilemma—to act or not to act. If he acts and his principal is dead, he is liable."<sup>89</sup> That is, the agent is liable to the third party because the agent has breached the agent's implied warranty of authority that his actions will bind the principal. The agent, having acted without actual authority, will also jeopardize rights to compensation and indemnity otherwise owed by the principal. And, continued Seavey: "If he does not act and his principal is alive, he is liable."<sup>90</sup> That's because the agent's duty is to act for the principal during the principal's lifetime.

Seavey said the agent's resulting dilemma was "to many of us, a very shocking result."<sup>91</sup> One member characterized the black letter as "a relic of remote barbarism"<sup>92</sup> and argued that the absoluteness with which the black letter was formulated represented "an impediment on the course of the progress of jurisprudence," urging that the black letter be followed by a comment of disapproval by the Institute.<sup>93</sup> Instead, the draft before the meeting attached a caveat to section

---

<sup>88</sup>11 A.L.I. PROC. 86 (1932-1934).

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 79.

<sup>92</sup>*Id.* at 90.

<sup>93</sup>*Id.* at 91. Two decades later, Seavey's colleagues Henry Hart and Albert Sacks cited this incident as establishing the ALI's deference to the "'necessary' implications of existing decisions," thereby casting itself in the "role of only a follower in the statement of the law and of a follower, moreover, willing to join the parade only after it was well underway." HENRY M.

120, noting existing exceptions to the rule (i.e. in dealings involving negotiable instruments) and stating that “[n]o inference is to be drawn ... that an agent does not have power to bind the estate of a deceased principal” in such instances.<sup>94</sup> The house voted to approve the section as drafted with the caveat upon the motion of a member who said: “We ought to state and our object is to state the law the law as we find it....there is no justification for our attempt to depart in any manner from the law as we find it or to speculate what the law ought to be.”<sup>95</sup>

As it happens, Director Lewis’s work two decades earlier in codifying and reforming partnership law provides an interesting counterpoint on the same question. Under the common law of partnership, a partner’s death automatically terminated the relationship of mutual agency that partnership created among partners. This meant that if a partner, unaware of a fellow

---

HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 761 (Tent. ed. 1958)

<sup>94</sup>The Caveat read: “No inference is to be drawn from the rule stated in this section that an agent does not have power to bind the estate of a deceased principal in transactions dependent upon a special relationship between the agent and the principal, such as that of banker and depositor, or trustee and cestui que trust, or in transactions in which special rules are applicable, as in dealings with negotiable instruments.”

<sup>95</sup>*Id.* at 94. When the question first came to the Council, Mechem acknowledged the absence of cases contrary to the rule. *Id.* at 88. This is consistent with the conclusion Mechem reached in his treatise that “[t]he overwhelming weight of authority is to the effect that the death of the principal operates as an instantaneous revocation of the agency when it is a naked power unaccompanied with an interest ....” *MECHEM, TREATISE 2nd ed., supra* note 7, § 665, at 474. At the 1933 Annual Meeting, Director Lewis stated that “[t]hat did not represent at the time the view of many of those who believed that in restating the law as it is we should not state it in the archaic way.” 11 A.L.I. Proc. at 94. Lewis noted that Seavey would have preferred to formulate the black letter so that the principal’s death terminates the agent’s authority when the agent has notice of it and urged the members to consider this possibility. *Id.* at 88-89. Seavey’s position is consistent with Restatement (Third) of Agency § 3.07(2)(2006), under which, as against an agent, the principal’s death is effective to terminate the agent’s actual authority when the agent has notice of the death. Seavey’s preferred rule was also consistent with statutes in some states *See infra* note 86 and with a small number of cases, noted in Mechem’s treatise, *see MECHEM, TREATISE 2<sup>nd</sup> ed., supra* note 7, § 664 n. 69.

partner's death, continued to carry on partnership business, the active partner had no right to ask the other surviving partners to contribute to any liability, even though all were ignorant of their fellow partner's death.<sup>96</sup> The Uniform Partnership Act, drafted by Lewis as its Reporter, changed this rule because its consequences were "unjust to the acting partner or partners."<sup>97</sup> Section 34 of the Act gives the active partner a right to contribution from fellow co-partners unless the active partner has knowledge or notice that a partner has died. Asked about the implications of the Partnership Act at the 1933 Annual Meeting, Lewis characterized section 34 as "a deliberate modification of what I then assumed was general agency law as it had been stated here and the general agency law which had been worked into the partnership decisions."<sup>98</sup>

What's intriguing is the failure of the Institute to generalize, either from the existing exceptions to the general agency rule reflected in the caveat to section 120 or from the policy reflected in the Partnership Act. The Uniform Partnership Act – eventually adopted by almost all U.S. jurisdictions – was completed in 1914 after twelve-plus years' work on behalf of the Conference of Commissioners on Uniform State Laws.<sup>99</sup> By 1933, nineteen states had adopted it.<sup>100</sup> No one—not even Lewis—appears to have treated the Act as a basis on which to draw general

---

<sup>96</sup>See William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L. J. 617, 638 (1915).

<sup>97</sup>*Id.* See UNIFORM PARTNERSHIP ACT § 34, 7 UNIF. LAWS ANN. 190 (1949).

<sup>98</sup>11 A.L.I. PROC. 90.

<sup>99</sup>Lewis, *supra* note 96, at 620.

<sup>100</sup>See UNIF. PARTNERSHIP ACT, 7 UNIF. LAWS ANN. xv (1949).

principles that might mitigate the impact or reduce the authority of common-law rules.<sup>101</sup>

More generally, the Restatement did not treat statutes as sources of authority with which to counter or reshape common-law rules, even in the face of a widely-adopted statutory provision. Thus, the Comment to section 122 preserved the common-law rule that a woman's marriage destroyed her capacity to contract and thus to be bound by an agent's transactions. Discussion of this point at the 1927 Annual Meeting acknowledged that many states had abolished the common-law rule, with Mechem noting that several still followed it.<sup>102</sup> A member had asked whether any state still followed the common-law rule (which he termed "barbarous") and urged that if none did, the rule should be omitted.<sup>103</sup> This recommendation was not followed.

---

<sup>101</sup>The Commissioner's Note to section 34 may reflect confusion about the then-current state of common-law agency doctrine. The Note states that the common-law rule has been modified in some states in the agency context. Four of the domestic statutes cited as authority for this proposition support it while one does not. Cal. Civ. Code § 2356 as it stood in 1914 (and 1933, for that matter, provided that when an agent's power was not coupled with an interest, a set of events, including the principal's death, would terminate the power. Cal. Civ. Code § 2356 (Deering 1886). Section 2356 was amended in 1943 to add what's now subsection (b). It provides that "any bona fide transaction entered into with an agent by any person acting without actual knowledge of the revocation, death or incapacity [of the principal] shall be binding on the principal, his or her heirs, devisees, legatees, and other successors in interest." Other statutes cited in the Commissioners' Note state a notice or knowledge rule. *See* La. Civ. Code § 3032 (transactions are valid when agent who is ignorant of principal's death who continues to act under power of attorney)(2d ed. 1913); Md. Rev. Code art. 44, § 31(1879)(dealings by agent acting under power of attorney or other agency binding notwithstanding death of principal when person who dealt with agent lacked notice of death); N.D. Civ. Code § 1150 (1899)(employment in which power not coupled with an interest terminated upon notice to employee of, *inter alia*, employer's death); S.C. Gen. Stat. § 1302 1882)(act by agent under power of attorney or other authority that would bind principal if alive binds principal's estate so long as person who dealt with agent dealt bona fide not knowing of principal's death). In any event, the Note's general assertion that "[t]he rule of the common law has been modified with regard to the law of agency" conflicts with Mechem's uncontested account of common-law agency doctrine. *See supra* note 95.

<sup>102</sup>*See* 5 A.L.I. PROC. 324-25 (1927).

<sup>103</sup>*Id.*

To be sure, the exclusion of statutes as principled sources of authority is compatible with statement in the Institute’s 1923 founding document that focused its work on stating “the existing law as found in the decisions and scattered statutes.”<sup>104</sup> However, the Uniform Partnership Act was internally coherent, not “scattered,” and the rate by which states had adopted it by 1933 implies that its assessment of how the underlying problem should be resolved might better reflect contemporary judgment than the rule of automatic termination upon death stated in the Restatement’s section 120.<sup>105</sup>

---

<sup>104</sup>See 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, *reprinted in* AMERICAN LAW INSTITUTE, THE AMERICAN LAW INSTITUTE 50<sup>TH</sup> ANNIVERSARY 27 (1973). Writing in 1969, Director Wechsler associated the first generation of Restatements with “magisterial pronouncements, limited commentary, taboo on the citation of decisions, exclusion or subordination of all statutory matter and elimination of the reporter’s explanatory notes from the official text ....” Wechsler, *supra* note 80, at 150. Wechsler credits Herbert Goodrich, who succeeded Lewis as Director, with the “benign but forthright aegis” under which “steady progress” occurred in Restatement methodology:

As the work proceeds today, the emphasis has shifted from dogmatic affirmation to, as near as may be, reasoned exposition. The black letter is accompanied by an extensive set of comments submitted to the institute for its consideration and approval. There are no artificial rules as to the content of the comments. They are meant to be explanatory and expositive of the black letter; often, the main content will be there. When statutory developments have been important in a field, the statutes will be analyzed and noted: witness the important change in this respect in the current revision of the *Restatement of Contracts*.

*Id.* On Goodrich’s reflections on Lewis, see *supra* note 44.

<sup>105</sup>The Institute subsequently recognized that a statute may state an approach that’s preferable to a common-law rule and that a Restatement may properly adopt and endorse the statute’s approach as “much like a newer line of cases announcing a better rule.” AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 8 (2005). For discussion of the range of relationships between common-law doctrines and statutes in the agency context, see RESTATEMENT (THIRD) OF AGENCY, Introduction 6-10; Deborah A. DeMott, *Statutory Ingredients in Common Law Change: Issues in the Development of Agency Doctrine*, in COMMERCIAL LAW AND COMMERCIAL PRACTICE 57 (Sarah Worthington ed., 2003).

## V. CONCLUSION

An unquestioned and narrow understanding of what counted as “the law” that the Reporters and the Institute might “find” reduced the prospect that the Agency Restatement would generate wider-ranging substantive reform. Mechem, who “knew all the cases,” proved unable to distill what he knew with sufficient clarity and parsimony to meet the Institute’s needs. Although Seavey’s intellectual acuteness and drafting skill suited him well to an enterprise for which internal coherence and brevity were crucial,<sup>106</sup> these are not traits that necessarily expand or deepen an understanding of what should count as “the law” or the directions in which law will or should evolve.<sup>107</sup> Moreover, Seavey’s role as Mechem’s successor may itself have inhibited temptations toward greater boldness, given the difficulty of extensively redrafting the profuse statements of a predecessor so knowledgeable about cases on the micro-level. Although these limitations do not diminish the value of what the first Restatement accomplished, they cabined its impact to a world in which proper placement within a taxonomic scheme was in itself assumed to do much of the work requisite to justifying the outcome reached by application of legal doctrine.<sup>108</sup> Nonetheless, by demonstrating that a coherent account could be given of agency law,

---

<sup>106</sup>See Livingston Hall, *Warren Seavey and the Age of the Restatement*, 79 HARV. L. REV. 1329, 1331 (1966). Professor Hall, Seavey’s colleague, wrote of him: “I have always believed that he thought in Restatement terms. Logical order, internal consistency, completeness, clear illustrative cases, brevity—these were his intellectual goals.”

<sup>107</sup>On Seavey’s intellectual style and contribution through the Restatements to law reform, see Robert E. Keeton, *Warren Abner Seavey – Teacher*, 79 HARV. L. REV. 1333, 1335 (1966). Judge (then Professor Keeton) wrote that Seavey’s work “reflected a profound respect for judges and their judicial labors.” *Id.* at 1335. Seavey thus did not focus on legislation as the preferred institution for legal reform. And his contributions “were primarily aimed at organizing and clarifying the valid and at pruning away the fallacious.” *Id.*

<sup>108</sup>Although Professor Seavey’s colleague, Louis Loss, gives him sole credit for making “a coherent subject out of Agency,” surely Mechem, Lewis, and their colleagues within the ALI

Mechem and Seavey secured the subject's independent place within the family of foundational legal doctrine.

---

deserve credit as well! *See* Loss, *supra* note 27, at 76.