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West Virginia Annotations to the Restatement of the Law of Conflict of Laws

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BOOK REVIEWS

WEST VIRGINIA ANNOTATIONS TO THE RESTATEMENT OF THE LAW OF CONFLICT OF LAWS. By Edmund C. Dickinson. St. Paul, Minn. American Law Institute Publishers, 1937. Pp. 182.

The American Law Institute was organized on February 23, 1923. The objective of the Institute is to present an orderly statement of the general common law of the United States, and as well a uniform interpretation of certain statutes that have been generally enacted, and have been in force for many years. In June of 1923, the Institute began work on the restatement of three subjects: Conflict of Laws, Contracts, and Torts. The work proceeded promptly, and without cessation. At the end of eleven years, the restatement of the subject "Conflict of Laws" was completed. This work met with many difficulties, and as illustrating the difficulties present and the care and attention devoted to the work, attention is invited to the fact that the chapter on "Administration" as contained within the work was developed after the consideration of some sixteen successive preliminary drafts and an equal number of conferences. As part of the work in connection with the Institute, many of the states have undertaken annotations of the state law into the restatements prepared by the Institute. West Virginia has completed up to the decisions of January 1, 1936 (116 W. Va., 181 S. E.), an annotation on the "Restatement of Conflict of Laws." These annotations have been prepared by Professor Edmund C. Dickinson of the Law Department of the West Virginia University. Mr. Dickinson deserves the appreciative vote of thanks of all members of the profession of the state for the scholarly work that has been presented, and the patience, care and skill with which the difficulties and discouragements attendant upon the task have been met and conquered. The work of Professor Dickinson and his committee of the West Virginia Bar Association was in progress nine years. In his annotations an attempt has been made to cite under each section of the Restatement all pertinent West Virginia decisions.

It would be impossible to review the West Virginia Annotations without reference to the Restatement on the subject adopted and promulgated by the Institute. The Institute Restatement after consideration of the subject-matter and the rules of the application of Conflict of Laws consists of twelve chapters subdivided into six hundred and twenty-five sections. The following general topics

are treated: Domicil; Jurisdiction over persons and things; Executive, legislative, and judicial jurisdiction; Jurisdiction of courts; Jurisdiction over status on the subjects of marriage, legitimacy, adoption, custodianship, and guardianship; Corporations, embracing the creation, recognition and dissolution, action, doing business, shareholders and directors, interference with internal affairs, association incorporated by more than one state; Property, consisting of immovables and movables, transfers by operation of law, incumbrances, powers, marital property, equitable interests, succession on death; Contracts, including place of contracting, creation, transfer of contractual rights, performance and discharge; Wrongs, consisting of torts, actions for death, workmen's compensation, maritime torts, damages and crimes; Obligation of judgments and other imposed duties with the recognition and enforcement of foreign judgments and effect of valid foreign judgments as *res judicata*; Quasi-contractual obligations, including right and duty resulting from conferring benefit and unjust enrichment; Alimentary duties with filiation orders and support, including widow's allowance and alimony; Administration of decedents' estates, comprising appointment of administrator and probate of will, collection of chattels and claims and the transfer of chattels and claims by administrator, administration relating to land, proof and payment of claims, suits by and against administrators, accountability of administrator, and disposition of balance; Receiverships. The last topic in the book is that of Procedure, including distinction between substance and procedure, proceedings in court, conditions of maintaining suit, access to courts, and foreign law. Of the six hundred and twenty-five sections contained within the Institute Restatement about three hundred and twenty-five are treated in the West Virginia Annotations under the comment "no case found"; of the remaining three hundred sections annotated, except as applied to about fifteen sections, the Annotations show that the West Virginia decisions are in accord with the Institute Restatement.

On the important subject of "Domicil," the general rule in West Virginia is as stated in the Restatement,¹ namely, that domicil is the place with which a person has a settled connection for certain legal purposes. Of course, this meaning of domicil could not be ap-

¹ *White v. Tennant*, 31 W. Va. 790, 791, 8 S. E. 596, 13 Am. St. Rep. 896 (1888); *Dean v. Cannon*, 37 W. Va. 123, 127, 16 S. E. 444 (1892).

plied with reference to settlements under the poor laws,² nor with the meaning of "residence" in the divorce statutes as both domicil and residence must concur,³ nonresidence under the attachment laws is not synonymous with domicil.⁴ The same is true with respect to the exemption laws,⁵ and for security of costs, residence means a dwelling place without regard to domicil.⁶

With reference to the service of process, it would seem that the word "residence" is ordinarily interpreted as meaning "domicil," which is also the actual dwelling place if the process is to be valid in another state. However, a different view has been taken.⁷ On the right to attend free schools and receive instruction therein, the residence necessarily is something different from what would be required to establish a right to vote or which would fix the liability for the support of a pauper, or for the purpose of determining the right of administration of an estate, but a residence, even for a temporary purpose, not solely to enjoy the benefits of the free schools, and with the intention of removal as soon as this purpose is accomplished is sufficient.⁸

On the "Statute of Limitations" and the obstruction of prosecution, temporary residence in the state is insufficient to bring one within the provisions of the statute.⁹

On the question of jurisdiction over one who acts within the state, the law has undergone a change since the completion of the Annotations. As shown by the annotation, the former nonresident motorist statute¹⁰ was declared unconstitutional,¹¹ but in 1937 another statute dealing with this subject was enacted.¹²

² W. VA. REV. CODE (1931) c. 9, art. 1, § 7.

³ *Vachikinas v. Vachikinas*, 91 W. Va. 181, syl. 2, 112 S. E. 316 (1922).

⁴ *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414 (1892).

⁵ *Stein v. Staats*, 74 W. Va. 357, 81 S. E. 1132 (1914).

⁶ *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. 444 (1892).

⁷ *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253 (1903).

⁸ *Grand Lodge, I. O. O. F. v. Board of Education*, 90 W. Va. 8, syl. 4, 110 S. E. 440, 48 A. L. R. 1092 (1922).

⁹ "Where any such right as is mentioned in this article shall accrue against a person who had before resided in this State, if such person shall, by departing without the same, . . . obstruct the prosecution of such right, . . . the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted." W. VA. REV. CODE (1931) c. 55, art. 2, § 17.

¹⁰ W. Va. Acts 1935, c. 61, § 15.

¹¹ *Elliott v. Hudson*, 117 W. Va. 345, 185 S. E. 465 (1936).

¹² W. Va. Acts 1937, c. 47.

The West Virginia courts have limited the application of the garnishment statutes more narrowly than is stated in the Restatement.¹³ "On principles of public policy, municipal or other public corporations are not liable to garnishee process."¹⁴ Neither are personal representatives of a deceased debtor within the sense of the statutes for the reason that the personal estate in their hands is to be administered according to law, and is therefore not subject to garnishment by the creditors of the estate of the debtor.¹⁵ Neither can contingent debts be garnisheed.¹⁶

Chapter 5 on "Status" treats the subject of marriages declared void by the law of domicile of the parties. West Virginia apparently is not in accord, as polygamous and incestuous marriages by statute are void only from the time they are so declared by a decree of nullity.¹⁷ Neither is a marriage void if a person, a resident of this state, in order to evade the provisions of law¹⁸ intermarries in another state and returns to this state, as such marriages are only voidable and remain valid to some extent at least until annulled by a decree of court.¹⁹

On the laws governing the nullification of marriages, the annotation shows that again West Virginia is not in accord with the Restatement. The general rule doubtless is that the law governing the right to a decree of nullity is the law which determines the validity of marriage with respect to the matter on account of which the marriage is declared to be null.²⁰ But no provision is found in the West Virginia statutes for nullifying the marriage from its beginning. This is true even in cases of miscegenation.²¹ A suit to affirm or annul a marriage may be maintained under our statute²² as to a marriage "that was performed in this state" without the necessity of one of the parties being a *bona fide* resident of the state.

¹³ "A state can exercise through its courts jurisdiction to compel payment by a debtor who is subject to the jurisdiction of the state of a claim against him in favor of his creditor and to apply the proceeds to the satisfaction of a claim asserted by a third person, as plaintiff, against the creditor, although the state has no jurisdiction over the creditor." § 108.

¹⁴ *Leiter v. American-La France Fire Engine Co.*, 86 W. Va. 599, 104 S. E. 56 (1920).

¹⁵ *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804 (1898).

¹⁶ *Minotti v. Brune & Dunbar Land Co.*, 94 W. Va. 181, 118 S. E. 149 (1923).

¹⁷ W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

¹⁸ *Ibid.*

¹⁹ *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120, 1 Ann. Cas. 612 (1903).

²⁰ RESTATEMENT, CONFLICT OF LAWS (1934) § 136.

²¹ W. VA. REV. CODE (1931) c. 48, art. 2, § 1.

²² *Ibid.* c. 48, art. 2, § 7.

Chapter 9 of the Restatement deals with the general subject of "Wrongs." The general rule as stated²³ is that "the measure of damages for a wrong is determined by the law of the place of wrong" and comment "b" of the Restatement is "where action is brought on a Federal Employers' Liability Act, the rule determining the measure of damages adopted in the federal courts will be followed in the State courts." No case directly in point is found in West Virginia, but in an action brought under the Federal Employers' Liability Act, the West Virginia law allowing interest from the date of the verdict was followed although no such provision was made in the act.²⁴ This seems to be contrary to Comment "b" above quoted.

Chapter 10 deals with the subject of "Judgments," which includes the effect of a valid foreign judgment. The rule is as announced in section 450 of the Restatement.²⁵ Our court is in accord with subsection 1,²⁶ but whether the law of the state where the judgment was rendered, if differing from the West Virginia law on this question, would be applied, as stated in subsection 2, does not seem to have been passed upon by our court.

One of the most important subjects in the Restatement is Chapter 11 devoted to the administration of estates. This chapter has been subjected to a criticism that it lacks direct case authority, but as pointed out,²⁷ it seems probable that it will be largely accepted and followed for the problems therein dealt with "are for the most part administrative and the rules adopted tend to facilitate administration through their recognition of the unitary character of estates. The employment of these rules will work for the elimination of hard cases, not invite them."

In examining the subjects of the Annotations, we find with reference to the powers of foreign executors exercising powers of sale of land,²⁸ that while there is no case directly in point, our

²³ RESTATEMENT, CONFLICT OF LAWS § 412.

²⁴ *Leitch v. C. & O. R. Co.*, 97 W. Va. 498, 125 S. E. 370 (1924).

²⁵ "(1) The effect of a valid judgment upon the rights or other interests of the parties and persons in privity with them is determined by the law of the state where the judgment was rendered.

"(2) The effect of a valid judgment as a conclusive adjudication between the parties and persons in privity with them of facts which were or might have been put in issue in the proceedings is determined by the law of the state where the judgment was rendered."

²⁶ *Roller v. Murray*, 71 W. Va. 161, 163, 76 S. E. 172, L. R. A. 1915F 984, Ann. Cas. 1914B 1139 (1912).

²⁷ Book Review (1935) 44 YALE L. J. 1478.

²⁸ RESTATEMENT, CONFLICT OF LAWS § 491.

court by way of dictum²⁹ says, "but if he is more than a foreign executor, if the will makes him also a trustee, he could sue without having been appointed as an executor in this state." It is to be noted, however, that in the cited case, the suit was for the recovery of rentals due from gas well production, and not for the sale of land.

West Virginia is not in accord with the Restatement on the subject of proof of a foreign law. Our Code³⁰ provides "whenever in any case it becomes material to ascertain what the law, statutory or other, of another state or country, or of the United States, is, or was at any time, the court, judge, or magistrate, shall take judicial notice thereof . . ." As laid down in the Restatement,³¹ it is stated that "except as stated in § 622, foreign law must be alleged in pleading and proved by evidence," and the exception in § 622 is that "in the absence of evidence, the common law of another common-law state is presumed to be the same as the common law of the forum."

It is recognized that an attempted review of a subject of the magnitude of the Annotations to Conflicts is not within the limits of an ordinary review published in a law journal. The effort here made has been to state in general language the contents of the main subject, and as far as possible briefly to invite attention to two main propositions shown by the annotations: first, the fact that in practically one-half of the subjects treated by sections, no corresponding approval or disapproval has been found in West Virginia; and, second, that in a few instances, our court is not in accord.

The work Professor Dickinson has fathered reveals more than painstaking efforts and ability. It was not done by examination of headnotes or of digests or of textbooks, but was made possible only through the careful page-by-page search of all the reports that have preceded the publication of his annotations.

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²⁹ *Winning v. Silver Hill Oil Co.*, 89 W. Va. 70, 76, 108 S. E. 593, 595 (1921).

³⁰ W. VA. REV. CODE (1931) c. 57, art. 1, § 4.

³¹ RESTATEMENT, CONFLICT OF LAWS § 621.