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PROBLEMS IN CONFLICTS

CHARLES McCAMIC*

"Private International Law" and "Comity" were formerly familiar names in the law schools. All this is now embraced in the term "Conflict of Laws". The first use of this description "Conflict of Laws" in West Virginia seems to have occurred in a decision of the Court of Appeals in 1895. As understood in this paper, Conflict of Laws is part of the common law of West Virginia and as such is as binding upon its courts as any other part of the laws of the state. The case of *Floyd v. National Loan & Investment Company* was decided more than thirty years ago, and it will be noticed that while Judge Poffenbarger in this case used the word "comity," as present understood the word seems misplaced. A Michigan building and loan association admitted to do business in West Virginia, had contracted in Michigan with a West Virginia citizen, the contract to be performed in Michigan. The security was a deed of trust upon real property situate in West Virginia. In enforcing the trust deed the Judge grounded his opinion partly upon the absolute right in the creditor to have the Michigan contract enforced in West Virginia and partly upon the doctrine that "comity" may be enforced. It is submitted that there was no discretion in the West Virginia court in the matter of enforcing the Michigan contract, it not being one opposed to the public policy of the state, or immoral. Modern writers in enforcing the contract would undoubtedly use the term "Conflict of Laws" rather than the archaic term "comity," and would enforce the contract because the common law of West Virginia

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1 Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692 (1895).
recognizes the Michigan contract as one legal and binding, and therefore capable of enforcement. To enforce such foreign right in West Virginia is the law of West Virginia, and West Virginia should do so without regard to any theory of reciprocity or comity.

**Jurisdiction**

On the important subject of jurisdiction, the Conflict of Laws Restatement of the American Law Institute does not define the term in the narrow manner in which it is ordinarily used. Our Supreme Court of Appeals has repeatedly said that jurisdiction is the power to hear and determine. There is scarcely a limit to the cases sustaining this general proposition. While there also seems to be at present a general tendency to enlarge the ordinary definition to include not only the power to hear and determine but to render the particular judgment in the particular case, even this liberalized definition does not present an adequate picture of jurisdiction as defined in the Restatement. The definition in section 43 is this:

"As used in this Subject, the word jurisdiction means the power of a state to create rights which under the principles of the common law will be recognized as valid in other states."

Consequently, when using the word "jurisdiction" in the sense of the Restatement, its use, according to the reporter for the Institute, "is to be sharply distinguished from the other common use of 'Jurisdiction,' as the power of a state to create rights that will be recognized within its own territory."

West Virginia, under the historic Northwest Ordinance cession to the federal government by the Commonwealth of Virginia, has jurisdiction over the Ohio river and also over as much of the Big Sandy river as was formerly included in the Commonwealth of Virginia. The ownership of the Ohio River to the northwest

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2 49 W. Va. 327, 38 S. E. 653 (1901).
3 Simmons v. Simmons, 85 W. Va. 25, 100 S. E. 743 (1919); Sperry v. Sanders, 50 W. Va. 70, 40 S. E. 327 (1901); Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448 (1901).
4 Courts, 7 R. C. L. 1029.
5 Constitution of W. Va., art. II, § 1. But see the Constitution of W. Va. (1863) art. I, § 2, under which the jurisdiction of the state is defined to include "So much of the bed, banks and shores of the Ohio river as heretofore appertained to the state of Virginia," and the cession by the state of Virginia in the northwest ordinance of the territory "situate, lying and being to the Northwest of the river Ohio."
shore is in West Virginia, and the state has jurisdiction over the river. This river flows between West Virginia and other states, and this physical fact presents a situation in which the use of the word "jurisdiction" in the Restatement can be illustrated.

It is made an offense under West Virginia law to operate a ferry over the Ohio river without a permit from the county court of the county in which such ferry is to be operated. This clearly applies to a ferry whose seat is in West Virginia, but as the Ohio river flows between the State of West Virginia and the State of Ohio, it seems manifest that ferries whose seats are in Ohio could operate from the Ohio shore to West Virginia without violating the West Virginia statute. West Virginia has the undoubted right to decide for itself if an offense has been committed under West Virginia statutes. This proposition actually arose in West Virginia in 1903. One Faudre had been convicted in Mason County for ferriage from Ohio to West Virginia, contrary to rates of ferriage fixed by the County Court of Mason County. His defense was an ordinance of Gallipolis, Ohio, establishing the ferry from Ohio, and fixing the rate of ferriage. The conviction was reversed, there being separate opinions by Judges Brannon, Poffenbarger and Dent. Judge Brannon's opinion dodged the question of the extent of the territorial jurisdiction of West Virginia over the Ohio River, and was based upon the proposition that there was "concurrent jurisdiction" between the states of West Virginia and Ohio. Judge Poffenbarger did not agree "to all that is said in the opinion on the subject of concurrent jurisdiction and the character of the ferry franchise." He thought the State of Ohio had a right as sovereign to grant a valid ferry franchise and the owner of such franchise charging the Ohio rate was "innocent of any violation of the West Virginia ferry law in so doing." Judge Dent concurred in the conclusion of Judge Brannon, but with reservations, expressing the views that the title of West Virginia ran "to low water mark on the Ohio side, and Ohio the land between high and low water mark on the same side, which necessarily includes the shore." He concluded, therefore, that "to make a complete ferry from shore to shore, both going and coming, requires the consent of both states", and he also expressed the belief that there should be a mutual compact between Ohio

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8 In these days it certainly would not be considered proper for a county court to fix rates of ferriage.
PROBLEMS IN CONFLICTS

and West Virginia to fix the boundary line by permanent monuments, "so as not to permit it to be subject to the changes of the bed and shores of the river caused by natural and artificial fluctuations. Wisdom would dictate such a course." The two separate opinions of Judge Poffenbarger and Dent, especially that of the latter, come closer to announcing the definition of jurisdiction as given by the Restatement than does the opinion of Judge Brannon. Instead of being "concurrent" — it seems to the writer to be a created right which is recognized as valid under common law principles in other states. The Ohio river is the boundary between two states in which there is a flowing stream of water. A citizen of either state, or of any state or country, has the right to be on the river for lawful purposes. That right, even though the flowing water is wholly in West Virginia, must be recognized in other states. In this sense is the word "jurisdiction" used in the Restatement.

The ferry franchise granted by the City of Gallipolis, Ohio, to the Ohio citizen would not be enforced in West Virginia. Assume that the attempted landing place in West Virginia of this Ohio ferry is on the wharf of a West Virginia city and a license is required in West Virginia for a ferry to use or land at the wharf. It is not seen how the Ohio ferry franchise would permit such landing at the wharf. This principle is recognized in the Restatement. It seems to have been decided in West Virginia as far back as 1884 in the case of Nimick & Co. v. Mingo Iron Works. A manufacturing corporation had been incorporated in the State of Ohio, under the laws of which state there was an additional 100 per cent liability on shareholders over and above the par value of stock owned by them. A creditor obtained a judgment in Ohio against the corporation, and a suit in equity was brought in Ohio County, West Virginia, against stockholders, residents of Ohio County, to enforce such double liability. A demurrer was sustained. The Supreme Court of Appeals while holding (perhaps obiter) that the shareholders were liable, yet held the remedy was under the Ohio law, where it should be enforced.10

These two cases seem to recognize the rule of the Restatement and its limitation.

9 See discussion under "corporations," infra.

10 See discussion under "corporations," infra.
The Fourteenth Amendment

But the power exercised by the state to create such rights, the Restatement declares, must not be in violation of the Fourteenth Amendment. Vested property rights are protected by this amendment and such rights can be taken away only by due process of law. Property outside the jurisdiction of the state is beyond the state's taxing power, and the execution of a tax upon it is in violation of the Fourteenth Amendment to the Constitution.

Other instances of this principle have arisen in West Virginia. In Harvey v. Dillon, a chattel real had been assessed for taxation under an Act of the Legislature of 1905, and the claim was made that such tax violated the Fourteenth Amendment. But the land and the chattel real were held separate and so taxable. This seems to be correct.

The jurisdiction defined in the Restatement includes persons and things. Things in general include immovables such as land and chattels, both tangible and intangible. As to land, comment is hardly necessary. It is subject to the lex rei sitae. With chattels many questions have arisen and many more can arise. The taxation of moveables, for example, has arisen in various cases of oil in pipe lines.

Titles Merged in Documents

It often arises that the title to a chattel is represented by or merged in a document, such as negotiable bills of lading, ware-

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11 Conflict of Laws Restatement (Am. L. Inst. 1930) § 44. This work will hereinafter be cited as the Restatement.
15 § 47. "Jurisdiction is exercised over a person or a thing by creating rights which affect the person or thing."
16 § 48. A state has jurisdiction over a person:
   (a) If he is within the territory of the state;
   (b) If he is domiciled in the state, although not present in the state; or
   (c) If he has consented or subjected himself to the exercise of jurisdiction over him, either before or after the exercise of jurisdiction.
house receipts, automobile titles and stock certificates. No attempt is made in the Restatement to state the extent to which in various situations property rights are merged in the documents."

Under the West Virginia statute, it is made extremely difficult to attach, suggest, garnish or subject to execution goods delivered to a warehouseman. They cannot be so reached while in the possession of the warehouseman, if a negotiable receipt is issued for them, "unless the receipt be first surrendered to the warehouseman or its negotiation enjoined". Nor can the warehouseman be compelled "to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court." Any other principle would destroy the negotiability of the receipt."

The transfer of a motor vehicle requires an assignment of the certificate of title, and it is unlawful to operate a motor vehicle in West Virginia without "first procuring a certificate of title"."

**Garnishment of Corporate Stock**

The new Code of West Virginia, it is suggested, differs from the Restatement. It is believed that it has also materially changed the law in this state relative to attachment of shares of stock. Such shares are, of course, personal property. In this respect the law is unchanged. As such the intangibles, the certificates, at common

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18 RESTATEMENT, § 53:

"(1) To the extent of which title to a chattel is merged in a document by the law which governed the chattel at the time the document was issued, title to the chattel is (exclusively) subject to the jurisdiction of the state which has jurisdiction over the document, except as stated in Subsection (2).

"(2) The State in which the chattel is may enforce

(a) rights growing out of acts done in the preservation of the property;

(b) rights essential to the exercise of the State's police powers;

(c) rights dependent upon the exercise of the power of eminent domain."

19 See W. VA. REV. CODE (1931) c. 47, art. 5, § 25; c. 38, art. 7, § 25.

20 See the RESTATEMENT, § 53, set out in n. 18, supra.

21 W. VA. REV. CODE (1931) c. 17, art. 7, § 2.

22 W. VA. REV. CODE (1931) c. 17, art. 7, § 3.

23 W. VA. REV. CODE (1931) c. 17, art. 7, § 3, provides:

"Shares of stock are personal property, and, as such, shall pass to the legal representative of the stockholder, and be subject to legal process. No levy of an execution, attachment, or other process, upon shares of stock for which a certificate is outstanding, shall be valid until such certificate is actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall be required to issue a new certificate for the stock until the outstanding certificate is surrendered to it."
law are not subject to attachment." But the West Virginia Code of 1899 declared such shares to be personal estate and constituted a fieri facias a lien from the time it was delivered to the levying officer "upon the personal estate" of the judgment debtor, and as such it was a lien even upon property "not capable of being levied on." The method of enforcement of such lien was by suit in equity. But under the Lipscomb case, the service of the writ must have been on the corporation in which the stock was issued. Consequently, a service made on a pledgee who was the holder of the certificate of stock pledged was not a good service. One might have had in West Virginia, a case of a debtor owning a large number of shares in a foreign corporation not doing business in West Virginia, with a large equity therein. The shares may have been pledged, and the pledgee served, but no jurisdiction would have been obtained thereby over the shares. This situation was before the Supreme Court of the United States in 1925, and a different result was reached. The Public Trustee of England (an officer corresponding to our Alien Property Custodian) seized in England shares of stock in the United States Steel Corporation, registered on the books of the corporation in the names of persons domiciled in England, and endorsed in blank on the backs of the certificates. The Disconto-Gesellschaft purchased certain of these certificates thus endorsed, which it held in its London branch. Its rights were transferred to the Public Trustee pursuant to the powers under the War Acts, and the certificates were seized. The title was claimed by the Public Trustee pursuant to the Treaty of Berlin and the Treaty of Versailles. Suits filed in New York in the District Court of the United States reached the Supreme Court, and the opinion there was by Mr. Justice Holmes. The Court would not draw "a line of fire" around the boundaries of the State of New Jersey — where the United Steel Corporation was incorporated, and declining to recognize that "nothing concerning the corporation or any interest in it" could happen out-

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26 C. 141, § 2.
27 Union Bank, etc. v. Hutchinson, etc., 161 S. E. 599 (W. Va. 1931); Lambert v. Huff, 82 W. Va. 562, 95 S. E. 1031 (1918).
28 Supra n. 24.
side preferred "to consider itself civilized and to act accordingly." The Court said:

"Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things done being sufficient by the laws of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase. Yazoo & Mississippi Valley R. R. Co. v. Clarksdale, 257 U. S. 10 (42 S. Ct. 27, 66 L. Ed. 104). The things done in England transferred the title to the Public Trustee by English law."

The owner of the paper — the stock certificate — depended in this case upon the law of the place where the paper was. The Restatement declares the law to be that "the share certificate is subject to the jurisdiction of the state within whose territory it is." But the law of West Virginia, by reason of adoption of the Uniform Stock Transfer Act, where certificates of stock have been issued declares no levy

"shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined."32

This statute it seems to the writer is in conflict with the Restatement and is unjustified. It is a backward step from the provisions contained in the old Code, for under it, service could be made on the corporation itself.33 Now, such service even on the corporation issuing the certificates is ineffectual unless the certificates be surrendered to it. This seems to be drawing a "line of fire" around the holders of certificates of stock, which unnecessarily

30 See Restatement, § 57.
impedes a creditor seeking to enforce a claim against the stock, or against any equity remaining over and beyond the amount for which the certificate has been pledged and delivered. The writer can see no reason for such distinctions as to personal property. Personal property in tangibles can be seized and sold, but personal property in intangibles without justification or excuse is, contrary to the Restatement, placed in a class by itself. True, the statute now provides\(^a\) such creditor

"whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunc
tion and otherwise, in attaching such certificate or in satisfy-
ing the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be at-
tached or levied upon by ordinary legal process."

This section does not seem to be adequate in view of the provision requiring the actual seizure of the certificate, or surrender of the same to the corporation.

**Exercise of Jurisdiction**

The Restatement provides that the instrumentalities through which jurisdiction is exercised are executive, administrative, legis-

tive and judicial. The legislative jurisdiction may be exercised by "adopting certain principles of law as part of the common

law of the state, or by an act of a legislative body."\(^b\) This states the law of West Virginia, where both methods have been pursued.\(^a\) The legislature meets biennially and little reference need be made to this familiar method. The Public Service Commission Act has been upheld as creating an agency for carrying out the legislative scheme with respect to public service corporations.\(^a\) The circuit courts have the power to issue certificates of incorporation of towns and villages with populations under 2000.\(^a\) The ordinances of

\(^a\)W. Va. Rev. Code (1931) c. 31, art 1, § 54.  
\(^b\)See Restatement, § 64.  
\(^c\)Constitution of W. Va. (1863) art. XI, § 8; Constitution of W. Va. (1872) art. VIII, § 21; Cunningham v. Dorsey, 3 W. Va. 293, syl. 1 (1869):

"The common law of England, so far as it is not repugnant to the principles of the bill of rights and constitution of the State of Virginia, was in force in that State when the constitution of this State took effect, and is, therefore, the law of the State unless repealed or modified by the general assembly of Virginia or the legislature of this State."

\(^e\)Burgess v. McNinch, 104 W. Va. 251, 139 S. E. 743 (1927).
cities are legislative in character. The Workmen’s Compensation Act is another example.

The legislative jurisdiction by section 68 of the Restatement is extended beyond the limits of the state under the doctrine of allegiance owed to the state. The section reads as follows:

"A state which in the law of nations has standing as a nation has jurisdiction over its nationals wherever they may be to the extent of forbidding them to do an act. The exercise of this jurisdiction must not involve a violation of the law or public policy of the state where the national is."

State Line Cases

West Virginia has a series of statutes concerning prosecutions for offenses committed wholly or in part within the state, offenses committed near county boundary lines, and duelling. In the duelling statute we have a direct provision:

"If any person resident in this State, by previous agreement made within the same, fight a duel without the State, and in so doing inflict a mortal wound, he shall be deemed guilty of murder in this State."

And the prosecution may be in the county in this state where death occurs, and if the death occurs outside the state, then the prosecution may be in any county of the state where the offender may be found. This statute does not seem to be based upon the theory of the Restatement in Section 68, but is based rather upon the agreement to fight a duel made in the state by a resident of the state.

One of the cases in the Supreme Court of Appeals arose in 1892 under the boundary statute. In this case the mortal blow was actually struck in Kentucky, but the death occurred in Logan County, West Virginia, where the accused, confined in jail on process from a justice of the peace, applied in the Circuit Court of Logan County, for a habeas corpus. It was denied, and a writ of error was obtained from the Supreme Court of Appeals. Judge Brannon wrote the opinion and inquired: "Can a state punish an act done outside its territory? It seems to be an axiom that a state’s criminal law is of no force beyond its limits." And he inquired if the deceased "had died in Kentucky, could this state have jurisdiction over him?"
try . . . even if she had a statute extending so far?" The statute cited was held valid. Under the Restatement, if the deceased had died in Kentucky, West Virginia could have punished, if it had had a statute forbidding the act to be done. Judge Brannon did not discuss the doctrine of state allegiance in his opinion.

An argument can be made against the rule in Section 68 of the Restatement based upon the following language of Judge Brannon in this case: "Wherein a state assumes criminal jurisdiction over crimes done within another it would seem to be without power." The language is wholly obiter, however, and is to be contrasted to the holding in Weil v. Black. Judge Brannon was not on the Court of Appeals at this time.

Judge Williams wrote the opinion in the latter case, in which it is submitted, the court went farther than the doctrine of the Restatement. It will be noted that Section 68 of the Restatement limits the exercise of jurisdiction by a state to "its nationals wherever they may be to the extent of forbidding them to do an act." In the above case the indictment was based upon an alleged act committed, if at all, in the State of Pennsylvania, by a then national of Pennsylvania who had never been a national of West Virginia. The substance of the argument made by Judge Williams is set out below. It may be argued against this theory that it was a case of an accessory before the fact, but the indictment was sus-

42 Ibid., at 36 W. Va. 95:
"Virginia, as far back as 1840, enacted that if a blow be given in the State, and death result in another State, prosecution might be in Virginia, in the county of the blow, but, though her criminal law has undergone several revisions and though England and several of the States of this Union had legislation punishing as murder cases where the blow was without but death within England or the State, Virginia has never adopted it. Did she doubt it validity? It was inserted in our Code in 1882. But, though I have doubts on the subject, we must not forget that the legislature, composed of many men of legal ability and learning, and vested by the people with the law-making power of the State, has approved this provision. A court must be slow and cautious to overthrow its action. In none but a case of very plain infraction of the constitution, where there is no escape, will or ought a court to do so. To doubt only is to affirm the validity of its action. I resolve my doubt in this way."

76 W. Va. 685, 86 S. E. 666 (1915).
43 See Restatement, § 49.
44 Weil v. Black, Judge, supra n. 43, at 76 W. Va. 694:
"But it is held in all jurisdictions, where the English common law prevails, that, independent of statute, a person without the realm or state who consummates a crime within it, by means of an innocent agent, is a principal in the first degree and punishable where the crime is consummated, such an one being considered, by a fiction of law, as present where the crime is committed. But, of course, that principle could have no application in this case, even in the absence of any statute, because it
tained by reason of the statute of West Virginia and that statute does not limit the jurisdiction to nationals. (It is a pleasure to add here that the party indicted in the above case was later wholly vindicated). The case of Weil v. Black can be reconciled with Section 70 of the Restatement to the effect that "If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may apply its law to the event".

Judicial Exercise

Section 76 of the Restatement reads: "A state exercises judicial jurisdiction by formal decision of an officer or body acting judicially," and Section 78 imposes the limitation that "within the limits of its jurisdiction, but not beyond, a state can exercise judicial jurisdiction".

With these statements the law of West Virginia is in accord. In some instances, the jurisdiction has not been exercised through or by courts, but the acts of the officers or legislative bodies have been held to be judicial. Thus the official act of taking and certifying the acknowledgment and privy examination of a married woman to a deed has been declared judicial. The legislature may in the exercise of its police power prescribe reasonable rules and regulations for admission to the bar which will be followed by the courts, and the courts passing upon the right to be admitted to practice law will treat as prima facie only a certificate of good moral character of the county court. A board of registration acts judicially in determining whether or not a voter is entitled to be registered as such. The same is true of a county court in appointing personal representatives even though an infant is appointed as such, since such infant occupies a de facto position of a board of commissioners acting in lieu of a county court in

appears from the very nature of the transactions alleged that the agent was not ignorant of them.

"There is no lack of jurisdiction in the intermediate court of Kanawha county because the offense which the indictments purport to charge is alleged to have been committed in the state of Pennsylvania, when other averments show that the acts of the principal were consummated in Kanawha County, West Virginia."

46 W. Va. Rev. Code (1931) c. 61, art. 11, §§ 6, 7.
49 In re Application for License to Practice Law, 67 W. Va. 213, 67 S. E. 597 (1910) (3 to 2 decision).
hearing and determining charges of misconduct of a justice of the peace, and of a county court in laying a special levy to build bridges, and mandamus will lie to compel an assessor to extend such levy. A reassessment of property for taxation purposes made by the commissioner of reassessment under the former policy of the state requiring such to be made every ten years and the valuation made by an assessor of property for purposes of taxation have been considered judicial determinations.

A decision holding judicial the determining of what property is liable for taxation has been questioned by Judge Poffenbarger in Webb v. Ritter. But, so far as the writer can determine, the decision has not been overruled. Proceedings by a town council to abate a nuisance may be judicial.

Legislative Exercise

While these decisions seem clear, others equally clear make rulings that certain other officers do not act judicially.

A special tribunal acting under the provisions of the Code of West Virginia in hearing a contest over the election of the Treasurer, Auditor, State Superintendent of Free Schools, Attorney General and Circuit Judges, is a subordinate legislative tribunal and not a court. The reasoning of this case appears unsatisfactory. It seems largely an ipse dixit. The Code names the special tribunal "a special court", but because the Legislature

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52 Arkle v. Board of Com'rs., 41 W. Va. 471, 23 S. E. 804 (1895).
54 State v. South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688 (1896).
57 60 W. Va. 193, 211, 54 S. E. 484 (1906).
58 "After having thoroughly considered this question, in the light of what is said in the opinion of Stockton v. Craig, and the briefs submitted in this case, I am thoroughly convinced that the duties of assessors and clerks of the county courts, concerning the entry of land in the land books, for the purposes of taxation, are purely ministerial. And I do not think Judge Derr, by what he said in the opinion in that case, concerning judicial and quasi-judicial functions, performed by such officers, in determining what to enter and what not to enter, for such purposes, intended to be understood as asserting that their decisions had the force and effect of judicial determinations . . . ."
decides the election of a contest over the Governor’s office and a circuit court in incorporating a city, town or village has been held to act as a subordinate tribunal of the Legislature, the court concludes “a special court” is also such subordinate tribunal.

**Corporations**

The subject of corporations, as is to be expected, is one of the most important topics in the Restatement. The Restatement recognizes the well grounded principles derived from the Roman law that a corporation is a juristic person distinct from the natural persons who compose and manage it; that its creation is by the power of the state, which also has the power of visitation over the creature; that the title to corporate property is recognized as distinct from that of any of its shareholders; and that the shareholders are exempt from the debts of the juridical entity. These principles came into Britain and to England from the classical writers.

**Visitatory Powers**

West Virginia has declared the law to be that a corporation is a resident of the state by which it is incorporated, and that too, independent of the places where the stockholders reside. In this respect it recognizes the principle of the Roman law, that the state and the state only has the power to create corporations. The visitatory power of West Virginia over corporations is retained in the statutes of the state. An example of this power is found in the law creating the auditor attorney in fact for all domestic corporations and for every foreign corporation doing business within the state, with power to accept service of process and notice on behalf of every such corporation and each corporation is required to pay the state an annual fee of ten dollars for such service. The extent of the exercise of these powers has not been

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1. *In re Town of Union Mines,* 39 W. Va. 179, 19 S. E. 398 (1894). This holding has been upheld on the doctrine of *stare decisis* in *Hodges v. Public Service Com’n,* 110 W. Va. 649, 159 S. E. 834 (1931).

2. 1 *Pollock & Maitland, History of English Law* (2d ed. 1911) 488 et seq.: “... lawyers from the thirteenth century onwards have been wont to attribute to the corporation a ‘personality’ that is ‘fictitious’ or ‘artificial’.” Also *Howe Studies in Civil Law,* p. 50.


4. For provision for winding up the business of a corporation, domestic or foreign, see *W. Va. Rev. Code* (1931) c. 31, art. 1, §§ 82, 83.


exhausted. It may well be that the state would have power to provide that service could be made on the state auditor on behalf of all shareholders comprising the corporation doing business in the state. In this event, if suit had to be brought to enforce a statutory liability against any such shareholder even though he were a non-resident such jurisdiction would be had.

**Shareholders' Liability**

The Restatement in Sections 203 and 204 provides:

"The existence and extent of the liability of a shareholder for assessments or to contribute to the corporation for the payment of debts of the corporation is determined by the law of the state of incorporation.

"The liability of a shareholder to contribute to the corporation can be enforced in any state which provides a remedy adapted to the purpose."

In accordance with Section 203, we find that the Revised Code of West Virginia does define in part the liability of a shareholder. Such liability is briefly, except in case of banking institutions, limited to the amount of the price of the stock subscribed for by him and unpaid. This seems clear enough. But suppose we have a foreign corporation — not a banking institution — admitted to do business in the state, where by the laws of the foreign state in which it is incorporated, the shareholders are liable for an additional amount over the price of the subscribed stock. We will again suppose we have residents of West Virginia as shareholders in such foreign corporation. It becomes insolvent and a receiver is appointed in the state of its incorporation. A call is made on the shareholders to pay such additional amount. A shareholder in West Virginia declines to pay, and the receiver sues, we will assume, in a West Virginia Court. Under the law of West Virginia such liability does not exist. The statute provides that foreign corporations admitted to do business in West Virginia

"shall have the rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities conferred and imposed on corporations chartered under the laws of this State."

Can the suit be maintained? The statute provides

"... No person or corporation shall institute or prosecute any suit in any court in this State to enforce any lia-

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bility against the subscriber to, or purchaser of the shares of stock of, any corporation chartered under the laws of another state in excess of what the liability of such subscriber or purchaser would have been if such corporation had been chartered under this chapter".  

While the Code revisers express some doubt of the constitutionality of this section, no opinion is expressed herein, but the question is treated merely as a problem in conflicts. The Restatement declares that the liability of the shareholder is determined by the law of the state of incorporation. In West Virginia, at least, the public policy of the state is declared to be that as to domestic corporations (banking institutions excepted) no such liability exists. But the contract of the shareholder is a valid one in the state of incorporation. Prima facie, therefore, it is valid in West Virginia under the Restatement, for as we have seen, the rules governing conflict of laws are, by the Restatement, parts of the common law of the state and binding and as such a foreign right should not be refused enforcement here, for the reason that the contract is valid in the state where made and should be governed by that law. The problem, however, is not solved by this apparently simple statement. Is there a public policy in West Virginia against such claimed liability? If so the Restatement expressly recognizes the public policy as binding on the courts of West Virginia.  

Public Policy and Enforcement  

Is there a public policy in West Virginia against the enforcement of such liabilities? The present Code provides that receivers of corporations, appointed by the circuit courts, for corporations  

"heretofore or hereafter chartered by another state which may have done business, or acquired property or contracted debts in this State, and any of whose creditors or stockholders  

69 W. VA. REV. CODE (1931) c. 31, art. 1, § 36.  
70 § 5. "Conflict of Laws is a part of the common law, and as such is as binding upon the courts as any other parts of the law of the state."  
71 RESTATEMENT, § 7:  
"Except as stated in Section 8, if the existence of a right alleged to have been created in one state is brought in question in a court of another state, the question will be determined by that court, applying only such part of the law of the first state as determines in that state the creation of like rights involving no question of foreign law."  
72 RESTATEMENT, § 176:  
"No power given to a foreign corporation by the law of the state of incorporation can give it a right to do any act which a corporation as such is forbidden to do by the law of the state in which the act is done."
or their personal representatives, or debtors, reside in this State; and the circuit court of any county wherein such creditor, stockholder or their personal representatives, or person indebted to the corporation, may reside, or wherein such assets or property or any part thereof may be, shall afford such relief as is appropriate under this and the preceding section.

These sections are substantially the sections of the former Code. The statute seems to have been passed originally to meet the decision in the case of Nimick v. Iron Works. In this case decided in 1884, an Ohio manufacturing corporation was named defendant with others at the suit of a judgment creditor of the corporation. Under the laws of Ohio the shareholders of the Iron Works were liable for an additional sum equal to the amount of the subscription. A number of the shareholders resided in West Virginia. A judgment having been obtained in Ohio against the corporation, the judgment creditor sued the resident West Virginia shareholders in West Virginia to enforce an extra liability on the stock subscription. On demurrer the bill was dismissed, the Supreme Court of Appeals affirmed the decree, and the plaintiff was remitted to the State of Ohio for enforcement of the remedy

"where the corporation was created, organized and located; where its business was transacted, and by the local statutes of which State alone, this individual liability exists.

This conclusion renders it unnecessary to consider the question, whether the statute of Ohio, which imposes upon the stockholders of said corporation this individual personal liability, is in conflict with the policy and legislation of this State on the same subject, upon which no opinion is intended to be expressed."

When the subsequent cases of Swing v. Bentley and Swing v. Parkersburg were decided in 1897, we had the statute law found in the West Virginia Code of 1923, which expressly gave leave to the receiver or a creditor to sue. Judge Dent for the court treated the law as announced in the Nimick case superseded by an act of 1895. These decisions, while apparently in point, are not entirely satisfactory, and it is not believed the question

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73 W. Va. Rev. Code (1931) c. 31, art. 1, § 82.
75 Supra n. 9.
76 45 W. Va. 283, 31 S. E. 925 (1898).
77 45 W. Va. 288, 31 S. E. 926 (1898).
78 C. 53, §§ 58, 59.
is fully and emphatically decided. On the facts as stated there
appears to be no question of the liability of a shareholder for any
additional amount. The suits were in assumpsit by the trustee of
the creditors of stockholders of a mutual fire insurance company
of Ohio against the maker of a note on a special assessment for the
"balance on said note made by him (the trustee) by virtue of the
laws of Ohio." The cases reached the Supreme Court on sustained
demurrers, which rulings were reversed. Judge Dent said:

"the law is now settled by an irresistible preponderance
of authority that a receiver, trustee, or assignee of a foreign
corporation, with general powers over the property of such
corporation, has the right, by virtue of the comity existing
between the various states of this Union, to sue for any debt,
claim or property owing to or belonging to such corporation."

Referring to the 
Nimick
 case it is said:

"The decision which was rendered November 29, 1884,
was superseded by chapter 39, Acts 1885, which gave the cir-
cuit courts of this State jurisdiction to appoint receivers for
and wind up the affairs, in proper cases therein set forth, of
foreign corporations who have done business, acquired prop-
erty, and contracted debts in this State. See sections 58, 59,
c. 53, Code. By virtue of these sections suits may be brought
in the name of dissolved corporations, foreign and domestic,
so far as necessary or proper, 'for collecting the debts and
claims due to the corporation, converting its property and
assets into money, prosecuting and protecting its rights, en-
forcing its liabilities and paying over and distributing its
property and assets, or the proceeds thereof, to those entitled
thereto.'"

and then the court itself expressed the doubt raised in this
paper:

".... This is not a general assessment upon unpaid stock
on all stockholders, as in the case of Hawkins v. Glenn, 131 U.
S., 319 (9 Sup. Ct., 739), and other cases of similar character
relied on by plaintiff, but it is a specific assessment on a note
limited by express agreement to the 'losses and expenses in-
curred by the company.' If the company itself had made the
assessment, although the same rules so far as applicable gov-
ern in both characters of cases, it would have been bound to
show, on resistance of payment thereof, that it was within the
liability covered by the note, as the proof of the same is
wholly within its power. Such being the case as to the com-
pany, its trustee could have no greater power. Nor does it
entail any hardship upon him, as all the proofs are in his
hands and under his control. This, however, is a question of proof, and does not arise on demurrer, which admits the truth of the allegations contained in the declaration. These appear to be sufficient to justify a recovery, if sustained by proof.

Powers of Foreign Corporations in the State

The Restatement declares that except as forbidden by the Constitution of the United States, a state may refuse to allow a foreign corporation to do business in the state. The carrying on of interstate and foreign commerce cannot be interfered with by a state. The law of West Virginia seems to be the same. A foreign corporation may hold property and transact business in West Virginia upon complying with the required provisions "and not otherwise". Such corporations so complying have all the rights, powers and privileges subject to the same regulations, restrictions and liabilities conferred and imposed upon local chartered corporations. This is carried to the extent that a foreign corporation, entering West Virginia, may have the power of eminent domain in West Virginia even when such corporation does not possess such power in the state of its incorporation.

So far as foreign corporations are concerned transacting business in West Virginia, the general law which Judge Poffenbarger had described as "comity", are governed by the provisions of the Revised Code. Consequently, a foreign corporation coming into West Virginia to transact business does so by virtue of the authority of the Legislature. It would seem that such foreign corporation so entering West Virginia should have no powers therein beyond those granted by the state of incorporation and authorized in West Virginia except, of course, any such foreign corporation carrying on interstate or foreign commerce, and this distinction is recognized in the case of Floyd v. National Loan and Investment Co.

§ 180. "A state can refuse to allow a foreign corporation to do business within the state."
§ 181: "A state can impose any terms upon a foreign corporation doing business within the State, unless it is forbidden to do so by the Constitution of the United States."

W. VA. REV. CODE (1931) c. 31, art. 1, § 79; c. 31, art. 8, § 5 (banking institutions); c. 33, art. 8, § 16 (fraternal societies); c. 33, art. 3, § 12 (foreign insurance companies).


C. 31, art. 1, § 79.

Supra n. 2.
The Restatement recognizes that states cannot constitutionally compel foreign corporations to relinquish any right secured by the Constitution of the United States, as a condition of doing or continuing to do business in the state. Neither can a state constitutionally provide that a foreign corporation may do or continue to do business in the state only upon condition that it agrees not to remove or attempt to remove any case to the federal courts or does not bring its suit therein. No West Virginia decisions have been found on this proposition, but none are deemed necessary, as it is believed the Restatement states merely the general law in this respect.

The Restatement provides in Section 186 that

"Where a foreign corporation desires to carry on both interstate and intrastate commerce within a State, terms imposed for the doing of intrastate commerce are unconstitutional if they unduly burden the interstate commerce of the corporation."

The decision of the Supreme Court of Appeals in the case of *Eureka Pipe Line Co. v. Hallanan* arose under chapter 5 of the Acts of the Special Session of the Legislature of 1919. This Act was one providing for the levy of a privilege tax of two cents per barrel on oil and one-third of one cent per thousand cubic feet of natural gas on the transportation of oil and gas by means of pipe lines. It was contended by the plaintiff that the Act imposed a tax upon the privilege of carrying on interstate commerce within the State of West Virginia, and on an application for an injunction against the State Tax Commissioner of West Virginia, it was held by the Supreme Court of Appeals that the Act being susceptible of two constructions, one of which was that it did not impose a tax upon the privilege of engaging in interstate commerce but "only upon the privilege of engaging in transporting in intrastate commerce within the confines of the State of West Virginia" was valid "and so long as they did not engage in intrastate business penalties prescribed by the Act would not apply to them." On a writ of error obtained from the Supreme Court of the United States in a decision voiced by Mr. Justice Holmes (Mr. Justice Clark, Mr. Justice Pitney and Mr. Justice Brandeis,

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65 Restatement, § 182.
66 Restatement, § 183.
67 Supra n. 17.
68 Eureka Pipe Line Co. v. Hallanan, supra n. 17.
dissenting) the decision was reversed. This case is cited because it is believed the decision recognizes the principle stated in Section 186 of the Restatement.

In Section 187 of the Restatement it is provided

"A State cannot constitutionally require that a foreign corporation as a condition of engaging within the State solely in interstate commerce designate a principal place of business or file an annual statement of condition or satisfy certain standards in respect to its financial structure or condition."

The Supreme Court of West Virginia has decided in accord with this section.\(^{30}\)

The Underwood Typewriter Company case\(^{31}\) was one in which a demurrer to a plea in abatement was sustained. A plea in abatement averred that the Typewriter Company had not complied with the provisions of the Code,\(^{32}\) but it was held that a foreign corporation which sells and delivers its goods, wares and merchandise or other articles of trade and commerce in this state upon orders taken by its agents and traveling salesmen and forwarded to it and not otherwise and transacts no other business in the state is not required to comply with the provisions of said statute and cannot be denied the power to bring and maintain suits and actions for the enforcement of such contracts because such corporation does not transact or carry on business within the State of West Virginia.

Where a foreign corporation has been admitted to do business in the state and the right to do such business is subsequently taken away in a quo warranto action, such corporation having made contracts within the state during the period when it was lawfully admitted to do business has the right to prosecute actions in the state to enforce its contract rights so obtained.\(^{30}\) This is in accord with Section 189 of the Restatement.\(^{34}\)

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\(^{31}\) Supra n. 90.

\(^{32}\) Now W. VA. REV. CODE (1931) c. 31, art. 1, § 79.


\(^{34}\) "After a foreign corporation has been permitted to do business in a State, and the corporation in pursuance of the permission has made contracts and acquired property in the State, the State cannot constitutionally forbid the corporation to continue to do business or own property in the State if the effect of such action would be to impair the obligation
The transacting of business by a foreign corporation in the State of West Virginia without having complied with the requirements of the Revised Code is made a misdemeanor. The Restatement in Section 192 provides as follows:

"Where doing business in a state by a foreign corporation which has not complied with the requirements of the law of the state is prohibited or is declared unlawful (whether or not a penalty is imposed on the corporation or its officers or shareholders),

(a) no rights will arise in favor of the corporation on a contract made in the state in doing business therein prior to compliance;

(b) an assignee of the rights of the corporation will be barred from recovery on the contract to the same extent that the corporation is barred, unless the assignee is a holder in due course of a negotiable instrument received by the corporation in the carrying on of its business;

(c) compliance by the corporation with the terms for doing business by it within the state will not give to the corporation rights upon a contract entered into in the state while engaged in business in the state prior to such compliance."

These provisions of the Restatement seem to be contrary to the decisions of the Supreme Court of Appeals of West Virginia.

In Toledo Tie & Lumber Co. v. Thomas, a foreign corporation created and organized under the laws of the State of Ohio, without complying with the then requirements of the Code, entered into a contract with the defendant for professional services and for personal property to be delivered in Pleasants County. The defendant becoming financially embarrassed made an assignment for the benefit of his creditors, and an application was made for an injunction against the trustees in the deed of assignment from taking possession of the personal property. Two special pleas were filed, the second of which was to the effect that plaintiff being a foreign corporation under the laws of Ohio, doing business of the contracts of the corporation, to deprive it of the property so acquired without due process of law, or to deny it the equal protection of the laws."

C. 31, art. 1, § 79.


Supra n. 96.
in this state without having complied with the provisions of the Code prayed for abatement of the suit. The Code section then required a foreign corporation to file a copy of its charter with the Secretary of State and also to file in each county in which it did business a certificate of the Secretary of State that it had so filed such copy of its charter in his office, and it made the violation of the statute a misdemeanor punishable by a fine of $500 to $1,000 for each month's failure to comply. There being no public policy of West Virginia, which was contravened by permitting such corporations as the plaintiff to do business in this state without complying with the section of the Code and the Legislature not having expressly declared such result should follow from a failure to comply with the statute, the court held that such contract was not to be held absolutely void and unenforceable in the State of West Virginia.

The present Code now provides as to foreign corporations:

"... No corporation chartered under the laws of any other state or jurisdiction shall hold any property or transact any business or bring or maintain any action, suit or proceeding in this State without having complied with the requirements hereinbefore stated, ... and its failure so to do may be pleaded in abatement of any action, suit or proceeding instituted by it; but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section upon any contract or for any wrong. No such corporation shall hold any property or transact any business, or bring or maintain any action, suit or proceeding in this State, where the cause of action arises out of the holding of property or doing business therein, without first complying with the provisions hereof. ..."

It would seem, therefore, that under the present Code, a different result might be obtained than was obtained in the case of Toledo Tie & Lumber Co. v. Thomas. Notwithstanding the inhibition against bringing suits, our Code expressly provides

"'but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section upon any contract or for any wrong.'"

This provision of the Code by implication at least recognizes the

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19 W. VA. REV. CODE (1931) c. 31, art. 1, § 79.
20 Idem.
statement of Section 197 of the Restatement as follows: "A foreign corporation, by doing business in a state without complying with terms imposed by the state, is not prevented from defending actions brought against it in the courts of the state." It is believed, however, that the case of Toledo Tie & Lumber Co. v. Thomas is in accord with Section 198 of the Restatement, which provides:

"A foreign corporation, doing business in a state without complying with the terms imposed by the state, can acquire and transfer property situated there even though such acquisition or transfer is made in pursuance of a contract entered into within the state."