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The Restatement of Conflict of Laws by the American Law Institute as Affecting West Virginia

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free hand until Congress has seen fit to act.²³ It is doubtful if this would meet the situation. It could at most only eliminate the interstate anarchy at present existing and would not touch the vital economic principle involved of the contest between different modes of travel. Forty-eight states could conceivably have forty-eight different solutions, which could only serve to make the tangle worse.

Economically considered the railroads are national institutions and the ever-increasing net-work of highways is rapidly making the automobile carriers the same and the states in the natural scheme of things can have little to do with their regulation, which must be from a common source in a uniform manner.

The days of free competition in public utilities are over; neither the State nor the Federal government can stand idly by and permit a knock-down-and-drag-out fight between motor transportation and the railroads.

If Congress, profiting by the efforts of the states, would inaugurate a system of Federal Control within the Federal field of jurisdiction, the states could follow this up with legislation by modeling intra-state control along the national lines thus laid down, in the same fashion as the State Public Service Commissions follow the head of the Interstate Commerce Commission in matters jointly affecting state and nation. Unless something is done nationally, the regulation of motor busses is, potentially at least, at a standstill.

—JAY T. McCAMIC.*

²³ See dissenting opinion of Mr. Justice Reynolds, *Bush v. Maloy, Buck v. Kuykendall*, 267 U. S. 325, 45 Sup. Ct. 327 (1925).

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THE RESTATEMENT OF CONFLICT OF LAWS BY THE AMERICAN LAW INSTITUTE AS AFFECTING WEST VIRGINIA*—It is entirely unnecessary to preface this discussion with a statement concerning the work of the American Law Institute or the method by which the work of that distinguished body is carried on. This Association on previous occasions has been quite fully informed on these subjects by two gentlemen preeminently qualified to discuss them—Mr. William Draper Lewis, the able director of the Institute, and Mr. Herbert F. Goodrich, who has recently been made its Adviser on Professional and Public Relations. The creation of this latter office emphasizes the importance that is now conceded to the second

*An address delivered at the last annual meeting of the West Virginia Bar Association held in Fairmont, W. Va.

task before the Institute. The first is to restate the Common Law; the second is to make this restatement known to lawyers and judges throughout the country so that it may be used and relied upon by all the profession.

One of the means employed for accomplishing this latter purpose has been the appointment of committees by State Bar Associations to cooperate with the American Law Institute. Members of these Committees have been asked to study the Tentative Drafts of the Restatement and send in suggestions for their improvement and also to spread information about the Institute and its progress. At a Conference of Bar Association Co-operating Committees held last October "to discuss plans for the widest possible distribution and use of the Tentative and Final Drafts of the Restatements," a definite plan was presented by the Michigan delegates which led to the adoption of the following resolution:

Resolved: (1) That this Conference suggest to state bar associations that they try by way of experiment, the preparation and publication by state bar associations of editions of the Restatements embodying local annotations.

(2) Such annotations should cite all relevant local decisions and statutes and indicate their agreement or disagreement with the rules of law as stated in the Restatement. They should also indicate those instances in which there is no local authority.

(3) It is further recommended that the person or persons to prepare such local annotations be chosen by the respective Committees on Cooperation with the American Law Institute as officers or governing boards of such associations, and that the work done be under the supervision of these committees with the co-operation and advice of the American Law Institute.

(4) We further recommend that annotated editions of the Restatements be published by the state bar associations, and that copies thereof be sent without individual expense to all members of such associations.

"The fundamental idea underlying the plan," Mr. Lewis tells us, "is that the judge or lawyer in his work on the bench or at the bar, with every disposition to use and rely on the Restatement, will not and should not ignore the Statutes of his state nor the decisions of its highest court, and that, therefore, that which will best promote the use of, and reliance upon, the Restatement is anything which will give him with the Restatement authoritative information concerning the pertinent statutes and decisions of his

state." A Supreme Court Judge who attended the Conference put it this way:

"I have sufficient confidence in the way these Restatements are being produced to rely on them as statements of the general common law of the United States. In the absence of local statutes and decisions I am willing to follow the Restatement, but before deciding the instant case I must know if there is any pertinent state statute or whether my court has passed on the question and, if so, what the decision has been."

Since this Conference the Michigan Bar Association has completed annotations of the first three tentative drafts of the Restatement of Conflict of Laws, and similar annotations are being prepared in Wisconsin, New York, Pennsylvania, Illinois and Iowa, and beginnings have been made in other states.

As a part of the Research program of our law school, we have undertaken during the past summer the annotation of the restatements of two subjects—Conflict of Laws and Agency. The primary purpose of this work is to make the Restatement of greater value to the lawyers and judges of this state. Just as a statute is illumined by reference to the cases in which it has been construed, so should the generalizations of the restatement be more readily understood when compared with our own decisions and statutes. This ought to lead to a more general use of the restatement, which, of course, is essential to the success of the work of the Institute. Incidentally, work of this nature is exceedingly valuable to the man who does it. If he doesn't know his subject after the research and study required in this work he may as well abandon hope of ever knowing it. Also the close study involved may disclose inaccuracies or omissions in the Restatement which may be corrected if called to the attention of the Institute.

This work, of course, is still in the experimental stage. Not only are the form and scope of the annotations determined entirely by the individual annotator, but methods devised for getting his product into the hands of the profession and for keeping the annotations up to date may differ widely. In preparing the West Virginia annotations of the Restatement on Conflict of Laws I have followed the plan adopted in the Michigan Annotated Restatement of that subject. Under each section of the Restatement the pertinent statutes and decisions will be cited and perhaps discussed briefly, indicating their agreement or disagreement with the Restatement. If nothing relevant has been found, that fact will be indicated. In gathering materials it was thought best not to rely

upon the digests. A page by page examination of West Virginia reports disclosed between three and four hundred cases in which Conflict of Laws questions have been decided or at least discussed, as against the thirty cases cited in the only digest of West Virginia reports which group the cases under this general head. This preliminary work consumed so much of the time available that only a small portion of the actual annotating was completed. With the materials gathered, progress should now be fairly rapid. It is expected that the last chapters of the Restatement of Conflict of Laws will be completed before the next meeting of the Institute and that the final draft will be presented for approval in 1930. The West Virginia annotations of the Restatement of Conflict of Laws and perhaps of Agency should be ready for publication within the next year. It is hoped that by that time some plan will have been worked out by the Law School and this Association for their publication and distribution.

It should be evident from what I have stated that I am not at the present time in a position to discuss adequately the topic which your committee has assigned me. Just how the Restatement of Conflict of Laws will affect West Virginia depends on two things: (1) the extent to which its rules differ from those of our own decisions and statutes; and (2) the extent to which our judges use and rely upon it.

Until the work of annotating the entire Restatement of Conflict of Laws is completed it would not be possible for me to point out all the instances of disagreement between it and our own decisions. I shall discuss briefly, however, a few points of difference which a cursory examination of cases for the purpose of classification has revealed.

The introductory chapter of the Restatement contains little except descriptive sections. Section 5 however, may lead to the abandonment of such expressions as "rules of comity" or "law of comity," which we find not infrequently in our decisions. That section says: "The Conflict of Laws is a part of the common law. The Conflict of Laws of a particular state, like other parts of the law, is subject to change by constitutional or statutory provisions or by treaties; but in so far as it has not been changed, it is as binding on the courts as any other parts of its law." Our court meant the same, no doubt, in *Floyd v. Loan & Investment Company*,¹ when it said, "But this rule of comity exists and is enforced by the courts in every nation and every state of the Union, until destroyed by the law making power." The danger in the use of the word "comity" lies in the fact that it may indicate that

¹ 49 W. Va. 327, 38 S. E. 653 (1901).

conflict of laws rules are discretionary with the court. For instance in *Stevens v. Brown*,² our court says: "The courts of this state will not, through respect or comity to a sister state, recognize or enforce the exemption laws of such state." For that reason, apparently, the word "comity" is avoided in the Restatement.

The chapter on Domicil which follows the Introduction was discussed before this Association two years ago by Mr. Goodrich. He found in that Chapter only one West Virginia case flatly contrary to the Restatement. In *Mears v. Sinclair*,³ our court held that a mother during coverture with a second husband could not change the domicile of a child by a former husband so as to alter the succession of its estate. The comment following Sec. 39 of the Restatement says: "Even if the mother remarries, the child's domicile follows that of the mother, if the child continues to make its home with the mother; if not, it remains during minority, domiciled in the place of the mother's domicile immediately before her marriage." *Mears v. Sinclair* as Mr. Goodrich pointed out is a decision of a former generation. In view of the present condition of married women it is not likely that our court would take the same view today.

In one instance in this same chapter it appears that the Restatement goes beyond what our Court has been asked to decide. In the case of a married woman living apart from her husband, the Restatement provides in Sec. 30 that if she is not guilty of desertion, she may acquire a separate domicile. In *Carty v. Carty*,⁴ our court recognized that a wife may acquire a separate domicile for the purpose of suing for a divorce. The Restatement would give her a separate domicile for all purposes if she is not guilty of desertion. This, of course, is not contrary to *Carty v. Carty*, but merely goes beyond it.

Chapters 3 and 4 deal with Jurisdiction in General and Jurisdiction of Courts. Cases involving the rules laid down in these chapters are quite numerous. Nearly half of all the West Virginia cases, in fact, fall within the scope of this topic, Jurisdiction. A few points only will be noted.

Section 86 of the Restatement provides that a state can exercise through its courts jurisdiction over an individual who consents to such exercise of jurisdiction. By Comment (b), thereunder, "Consent may be given with respect to a particular action either after the action has been brought or before the action has been brought;

² 20 W. Va. 450 (1882).

³ 1 W. Va. 185 (1865).

⁴ 70 W. Va. 146, 73 S. E. 310 (1911).

or it may be given generally with respect to actions which may thereafter be brought." This clearly includes a note containing a warrant of attorney to enter an appearance in an action upon the note and to confess judgment, and such a case is given in the Restatement by way of illustration. In *Farquhar & Company v. DeHaven*,⁵ a majority of our court, President Brannon and Judge Robinson dissenting, declared a judgment entered on such a note to be "illegal and void on its face," even though the note had been made in Pennsylvania where it was valid, and agreed that such notes "are iniquitous to the uttermost and should be promptly condemned by the courts." The court justified its refusal to enforce a contract valid where made on the ground that "a confession of judgment pertains to the remedy and that parties cannot by contract made in another state engraft upon our procedure here remedies which our laws do not contemplate nor authorize." In many states such warrants of attorney to confess judgment are authorized by statute; in others they have been held valid without such authority. West Virginia has considerable support in her view that they are contrary to public policy. The division of our court on the question would indicate that the Restatement might be followed if the question should be presented again.

In the matter of jurisdiction for garnishment of a non-resident debtor temporarily within the state, the Restatement again goes beyond our decisions. In *Pennsylvania Railway Company v. Rogers*,⁶ our court held that a non-resident debtor could not be garnished in West Virginia unless he have in the state of West Virginia property of the defendant, or be bound to pay the defendant money or deliver to him property within the state. The theory of the court apparently is that if the non-resident debtor, casually in the state, has no property of the defendant in his possession within the state, does not owe him any debt within the state, or is not bound by any contract to deliver him property within the state, there is no *res* within the state over which the court has jurisdiction, although there is jurisdiction of the person of the garnishee. A different view was taken by the United States Supreme Court in *Harris v. Balk*.⁷ It came up on a question of what faith and credit the court of the domicile of the principal debtor was compelled to give to a judgment of another state against the garnishee which had been paid by the latter. The court in holding that full faith and credit must be given, went to the full extent stated in Sec. 114 of the Restatement, which pro-

⁵ 70 W. Va. 738, 75 S. E. 65 (1912).

⁶ 52 W. Va. 450, 44 S. E. 300 (1902).

⁷ 198 U. S. 215 (1905).

vides: "A state can exercise through its courts jurisdiction to compel payment by a person who is subject to the jurisdiction of the state, of the amount of an obligation owed by him to another person and to apply the proceeds to the satisfaction of an obligation of that other person, although the state has no jurisdiction over that other person."

So, under *Harris v. Balk*, the courts of West Virginia must recognize the validity of a garnishment in another state of the Union under the conditions stated in the Restatement. We can of course if we wish, by statute or court decision, limit garnishment proceedings more narrowly. The Restatement merely declares what a state may do, and does not purport to say what an individual state does do within those limits.

Several years ago General Riley read a very valuable paper before this body on the subject of Marriage and Divorce in which he called attention to the varying views as to jurisdiction for divorce as one of the causes of present day evils. It may be of interest to see whether the Restatement has a solution of this problem to offer.

Section 116 says "a state can exercise through its courts jurisdiction to dissolve the marriage of spouses both domiciled in the state; Sec. 117 that "a state cannot exercise through its courts jurisdiction to dissolve a marriage where neither spouse is domiciled within the state;" and Sec. 118 provides: "A state cannot exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, unless the spouse who is not domiciled in the state

- (a) Has permitted the other spouse to acquire a separate home; or
- (b) By his conduct has ceased to have the right to object to the acquisition of such separate home; or
- (c) Is personally subject to the jurisdiction of the state which grants the divorce."

This is substantially the rule of *Haddock v. Haddock*.⁸ That was a suit in New York in which it appeared that the parties had been domiciled in New York; that the husband abandoned the wife, went to Connecticut and there obtained a divorce. The New York court in a subsequent suit by the wife refused to recognize the validity of this divorce and on appeal to the Supreme Court of the United States it was held that the New York court was not bound to give full faith and credit to the decree.

⁸ 201 U. S. 562 (1905).

The chief objection to this rule is that in cases where the misconduct of one spouse is necessary to give jurisdiction, such misconduct becomes a jurisdictional fact, and another court, finding the fact otherwise, will hold that the court granting the divorce had no jurisdiction and therefore refuse to give effect to its judgment. In spite of the general adverse criticism the rule of *Haddock v. Haddock* was followed by the Supreme Court in *Thompson v. Thompson*.⁹

In restating the law, the Institute probably felt that it could not ignore the rule of our highest court. If a remedy is to be found, apparently we must look elsewhere than to the courts.

Our own cases are not inconsistent with the rule of the Restatement. In *Boos v. Boos*,¹⁰ our court recognized the right of a wife deserted by her husband or given other cause for divorce by him, to remain at the matrimonial domicile, and get a divorce there, though he becomes domiciled in another state. *Carty v. Carty*, *supra*, is likewise in point.

Time will not permit a further discussion of possible inconsistencies arising under the rules relating to status, foreign corporations and property. It may be worth while however to call attention to an instance wherein our own rule has been followed in the Restatement although clearly against the weight of authority.

On the troublesome question of what law governs the essential validity of a contract most of our state courts have inclined to the English view that it is governed by the law of the place of making, or the place of performance, according to which the parties intended, as the law to govern their contract. A few states have adopted the rule that the law of the place of performance governs. Our own court, together with some six or seven others have more or less definitely adopted the law of the place of contracting as the law to govern the validity of a contract. This is the rule laid down in *Stevens v. Brown*,¹¹ and the only doubt raised in later decisions apparently is the statement in the syllabus of *Wick v. Dawson*,¹² to the effect that "a contract is made where it is delivered and the law of the state where it is made generally controls in respect to its validity," but if it appears that it was made to be performed in some other state, then its validity is to be governed by the law of the place of performance." As the contract involved in the suit was made and to be performed in the same state, the statement in the syllabus is plainly dictum. The rule of *Stevens v. Brown* is the one adopted in the Restatement and the

⁹ 226 U. S. 551 (1912).

¹⁰ 93 W. Va. 727, 117 S. E. 616 (1903).

¹¹ 20 W. Va. 450 (1802).

¹² 42 W. Va. 53, 24 S. E. 587 (1896).

Institute's refusal to follow the majority rule is justified on the ground that the one adopted is theoretically defensible, is the natural rule and the practicable one.

Enough has been said, perhaps, to indicate the nature and scope of the annotations which are being prepared. If the points discussed have given the impression that the law of Conflicts as set out in the Restatement differs radically from the law of Conflicts in West Virginia I wish to correct that impression at once. The difficulty I have experienced in discovering even a few inconsistencies for use in this paper convinces me that the contrary is true. I shall be surprised if the work of annotating this Restatement reveals half a dozen cases flatly contrary to its provisions. Where differences appear they will likely be the result of changing social conditions which make a rule of fifty years ago unsuited to present day life.

How generally the restatement will be used and relied upon by the courts no one can say. Whether they will follow the restatement in the few cases of disagreement with local decisions, is not, it seems to me, of primary importance. We hope they will. But as regards the very numerous questions that have not yet been presented to our courts it is of the greatest importance to the success of the Institute's work that the courts avail themselves of its labors. If that work is well done, then the court that relies upon it will not only be more likely to decide its case correctly, but it will be deciding it as other courts are deciding theirs, and much of the present inconsistency and conflict between the common law of the states will disappear.

Two years ago a case from McDowell County raised in our Supreme Court of Appeals a question never before passed upon by that body. If two men fight by mutual consent, can one recover from the other for injuries received? The court found an extended note in 17 American and English Annotated Cases from which it deduced a general rule that "where two persons voluntarily or mutually consent to fight, such agreement will not avail as defense in an action by either party to recover damages." A Nebraska Case to the same effect is cited. No other authority is given.

Had the court's attention been called to the Restatement they would have found a contrary rule laid down. The rule of the Restatement is unquestionably the minority view and our court followed the majority view. But where the Restatement adopts a minority view there must be good reason for so doing. The reasons, as summed up by Mr. Bohlen are these. (1) The majority American view is based upon an acceptance without investigation or analysis, of a dictum in an English case decided

in 1693, which, if intended to apply to civil actions, was justified, if at all, by the nature and function of the action of trespass at that time. Whatever authority this dictum may have had when pronounced was destroyed by the change wrought in the action of trespass by the Statute of William and Mary,¹³ which abolished the fine payable to the Crown and so removed both the last vestige of the criminal function of the action and the Crown's interest in the result.

It is not justified by public policy. It is not likely to deter the commission of breaches of the peace. The State has ample machinery by which to punish such breaches of the peace as it regards as sufficiently important to require punishment. It puts a premium upon criminality by giving to one who has joined in a breach of the peace a remedy for injuries for which he could not recover were he innocent. It is inconsistent with the policy of the law which leaves parties to an illegal transaction where their conduct places them and refuses to enforce obligations arising out of it or to give redress for harm inseparable from it.

Had this rule of the Restatement with the reasons for it fully set out been called to the court's attention, is it unreasonable to suppose that they would have accepted and followed it rather than the note in *American & English Annotated Cases*? Are we likely to get better results when a court depends on *Corpus Juris* for its law or when it takes the carefully reached results of the work of the *American Law Institute*?

If the work of annotating these restatements aids even slightly in giving them wider distribution and use, through making them of more value to the lawyers and judges of the state, then it would seem to be a worth while task.

—EDMUND C. DICKINSON.**

CONFLICT OF LAWS—STIPULATION FOR ATTORNEY'S FEES.—The hope, engendered by the decision in *People's State Bank v. Jeffries*,¹ of a new rule in West Virginia as to stipulations for attorneys' fees in promissory notes, has been dispelled. In that case, our Supreme Court of Appeals allowed reasonable attorney's fees in a suit on a note made and payable in Indiana, the laws of that state permitting the recovery of such fees where the promise to pay them is unconditional. By a line of decisions beginning with *Raleigh County Bank v. Poteet*,² the court had steadfastly refused

¹³ Stat. of 5 & 6 Wm. and Mary, c. 12.

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¹ 99 W. Va. 399, 129 S. E. 462 (1925).

² 74 W. Va. 511, 82 S. E. 332 (1914).