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Conflict of Laws—Stipulation for Attorney's Fees

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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).

to enforce such provisions in West Virginia notes. One ground assigned for this refusal was that our statute fixed the legal costs and therefore no more could be recovered; another, and the principal one, that such stipulations were against the policy of our law.³ Either of these reasons would justify a refusal to allow attorney's fees in a suit on a foreign note. If such a stipulation pertains to remedy, then the *lex fori* should govern under the well settled rule of conflict of laws;⁴ if contrary to the public policy of the forum, that policy should not "be relaxed on the ground of comity to enforce contracts which, though valid where made, contravene such policy."⁵ In fact, not a single case could be found in which a court had allowed such fees in a suit on a foreign note when a provision for attorney's fees was contrary to the declared public policy of the state. The allowance of such fees in the case of *People's State Bank v. Jeffries*,⁶ therefore, was sufficiently indicative of a change of attitude to raise strong hopes that our court no longer regarded such provisions as contrary to public policy. The decision in the case of *Campen Brothers v. Stewart*,⁷ recently reported, effectively ends all speculation on the subject. It involved a promise for attorney's fees in a note made in West Virginia, payable in Virginia, where such a provision is valid and enforceable. The court declares all such stipulations void as against public policy; holds the principle to apply to foreign notes sued on in this state; and expressly disapproves the case of *People's State Bank v. Jeffries*.⁸

Granting that stipulations for attorney's fees in promissory notes are contrary to the policy of our law, no fault can be found with the decision. The few courts asserting the same policy have uniformly refused to enforce such provisions in foreign notes.⁹ The writer wishes simply to express his disappointment that the court did not seize the opportunity, as the Virginia court did in the case of *R. S. Oglesby Company v. Bank of New York*,¹⁰ to get in line with the great majority of the states,¹¹ by declaring that such provisions are not contrary to the public policy of the state.

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³ See note in 32 W. VA. L. QUAR. 147.

⁴ *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245 (1875).

⁵ R. C. L. 944.

⁶ *Supra*, n. 1.

⁷ 145 S. E. 381 (1928).

⁸ *Supra*, n. 1.

⁹ *Clark v. Tanner*, 100 Ky. 275, 38 S. W. 11 (1896); *Continental Supply Co. v. Syndicate Trust Co.*, 52 N. D. 209, 202 N. W. 404 (1925); *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S. W. 208 (1910).

¹⁰ 114 Va. 663, 77 S. E. 468 (1913).

¹¹ See note in L. R. A. 1915B, 928.