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THE RESTATEMENT OF THE CONFLICT OF LAWS

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This latest product of the American Law Institute bears the unmistakable imprimatur of the man who has done most in this country to make popular the teaching of the Conflict of Laws. To Professor Beale more than to any other man is due the credit for the place of prominence that the subject of Conflicts now has in the curricula of American law schools. For more than thirty years he and his students, known collectively as the American territorial or pseudo-territorial "school", have dominated our academic thought on choice-of-law problems. That this group should have a paramount influence in determining the content of the *Restatement* was to be expected;¹ and the completed work does very largely reflect their views.

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1. Throughout the eleven years which the preparation of the Restatement of the Conflict of Laws has taken Professor Beale has been the Reporter of the subject. Associated with him as Advisers have been Harry A. Bigelow of the University of Chicago, Joseph W. Bingham of Stanford University, John G. Buchanan of Pittsburgh, Pennsylvania, Armistead M. Dobie of the University of Virginia, Frederick F. Faville of the Supreme Court of Iowa, Herbert F. Goodrich of the University of Michigan (subsequently of the University of Pennsylvania), Monte M. Lemann of New Orleans, Louisiana, William E. Mikell of the University of Pennsylvania (from 1922 to 1925), William H. Page of the University of Wisconsin, Austin W. Scott of Harvard University (from 1922 to 1925), and William C. Van Vleck of George Washington University.

Dean Goodrich has acted as Special Adviser in charge of the work on the final revision. He also acted as Reporter for the Chapter on Administration. Help was received, also, from others with respect to particular parts of the work and especially in connection with maritime torts, corporations and receiverships, and with those situations in which the Conflict of Laws comes into contact with Constitutional Law and International Law. (Introduction, V.)

Attention is called in the Introduction of the Restatement to the special difficulties presented by this subject. "These difficulties", it is there stated, "are in the main due to the fact that the legal profession has failed until recently to recognize the great practical importance of the subject. Although the Reporter, Mr. Beale, and some of those among his Advisers

Though the fallacies and general insufficiency of the doctrines of the territorial school have already been pointed out by various writers, any adequate evaluation of the *Restatement* must, because of the origin of the work, begin with an examination of the theoretical foundations upon which Professor Beale and his followers have built.

It is in the old rationalistic, absolutist conception of law that the doctrine of the territorial school of conflicts writers finds its roots. That conception has seldom been better put than by Professor Beale in a well known passage:

“What, then, is the common law which is scientifically studied in this country? It is surely a philosophical system, a body of scientific principle which has been adopted in each of the common law jurisdictions in this country, as the basis of its law. Courts of each jurisdiction, in attempting to apply this general body of principles in its own jurisdiction, have sometimes misconceived it and misstated it, and this misstatement is apt to lead to a local peculiarity in the particular common law of the jurisdiction in question. But the general scientific law remains unchanged in spite of these errors; the same throughout all common law jurisdictions. This is the science which we teach, and this is the science which requires systematic statement in order that progress and reform may be possible.”²

From this now generally discredited notion of law a theory of Conflicts emerges. According to this theory the Conflict of Laws is conceived of as dealing with the “application of law in space.” For every Conflicts problem that may be presented to a court for solution, for every “juridical situation” that happens to spread across a state line there is some “proper” law that governs, some one state that has “jurisdiction” over the matter. Only one state³ can have jurisdiction, its domestic rules exclusive of its

have for many years given courses in the Conflict of Laws in their respective law schools, instruction in the subject has been far from universal, and there has been no such general long-continued, critical study of the subject as has been given to Contracts, Property and the other principal subjects of the Common Law. Due to this pedagogical neglect the courts, confronted with questions of Conflict of Laws, have not, in many cases, brought to their solution an adequate background of knowledge. As a consequence, the opinions accompanying their decisions are not, taken as a whole, as helpful as they are in the many other fields of our law”. (Introduction, VI-VII.)

2. 14 PROCEEDINGS ASSOC. OF AM. LAW SCHOOLS (1914) 38.

3. “The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so.” Beale, *What Law Governs Validity of a Contract* (1910) 23 HARV. L. REV. 270-271, quoting Summary of the Conflict of Laws, § 90.

Professor Beale appears to recognize today that more than one state may have “jurisdiction”, for example, where a contract is made by correspondence, or where, in connection with a tort, the actor is in one state and the effect takes place in another. See RESTATEMENT, CONFLICT OF LAWS (1934) §§ 64-66.

Conflict of Laws rules constituting the proper law for the controversy. No distinction is made between cases in which all the facts that gave rise to the controversy (save, of course, the bringing of the suit) occurred in a single state and cases in which facts that could be regarded as operative occurred in two or more states. Even in the latter case a right is said to have been created by some one state—the state having conflict of laws “jurisdiction”—which *must* be recognized by the courts of other states. The state having “jurisdiction” in the case thus has the *power* to impose its domestic rules upon the courts of the state where the suit is brought and the Conflicts question is raised. But this doctrine is not regarded as applying to *procedural* questions and is also expressly limited to the “creation” of rights as distinguished from their “enforcement”. When a right is validly created by the domestic law of one state, its “existence” as a fact cannot, according to this theory, be questioned elsewhere, though its “enforcement” may be refused. Hence, the problem of the Conflict of Laws is posed as “dealing with the recognition and enforcement of foreign-created rights”.⁴ These premises make up the primary notions from which Professor Beale and the other territorialists attempt to deduce fundamental principles that will make up a harmonious body of conflicts doctrine.

The notion that the rules of the Conflict of Laws should be derived from the general postulate of the territoriality of law has not originated with the American school, but goes back to D’Argentré, the celebrated French jurist of Brittany of the sixteenth century.⁵ A more consistent development was undertaken by the Dutch writers (Paul Voet, 1619-1677, John Voet, 1647-1714 and Ulrich Huber, 1636-1694)⁶ and through them the theory found its way into England and the United States. Story approved the Dutch point of view, accepting Huber’s general axioms,⁷ but did not seek to erect thereon a complete “system” of the Conflict of Laws. The English and American decisions, though subscribing to the territoriality of law in general, found no difficulty in escaping its logical implications whenever practical need suggested a different solution. It is interesting to note also that the theory of the territoriality of law found no general acceptance on the continent and is today rejected in all continental countries, including the country of its birth.

The first Anglo-American writer who has attempted to derive his entire “system” of the Conflict of Laws from the theory of the territoriality of law is Professor Beale. His system is an *a priori* system, created by the same processes of reasoning as are used by the writers belonging to the continental

4. 3 BEALE, CASES ON CONFLICT OF LAWS (1902) 501, Summary, § 1; 1 TREATISE ON CONFLICT OF LAWS (1916) § 73.

5. 1 LAINÉ, INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ (1888) 311 *et seq.*

6. 2 LAINÉ, *op. cit. supra* note 5, at 95 *et seq.*

7. STORY, CONFLICT OF LAWS (8th ed. 1883) § 29.

school.⁸ Perhaps the most precise description of this approach has been given by Professor Cook, who has said:

“Such writers begin with reflecting upon and establishing to their own satisfaction the general or essential nature of law and legal rights. This leads them to certain general or fundamental principles, supposed to flow from the nature of law and legal rights as thus established. These fundamental principles take the form of general statements as to what,—in view of the essential nature of law and legal rights,—a state or country ‘can’ and ‘cannot’ do in the way of creating rights, duties, and other legal relations. They thus come to think that the conflict of laws ‘deals with the recognition and enforcement of foreign-created rights,’ or that it has to do with the application of law in space—back of which statements seems to be the assumption (also deduced from the nature of law and legal rights) that for every situation dealt with in the conflict of laws there is always some one and only one ‘law’ which has ‘jurisdiction,’ i. e. power, to determine what legal consequences shall be attached to the given situation.”⁹

Although purporting to be derived from the decisions of Anglo-American courts, Professor Beale’s system actually assumes a more rigid form than that prevailing on the continent or in England, or than that suggested by any other *a priori* writer.¹⁰ From the discussion of the individual

8. The futility of any attempt to derive the rules of the Conflict of Laws from *a priori* premises and to apply them as it were mechanically was fully recognized by Jitta, an eminent Dutch jurist. He agreed that the local law should govern juridical situations that were actually localized there, but he found the prevailing system, which regarded interstate or international juridical situations as belonging likewise exclusively to particular states or countries, to rest upon no rational basis. He contended that “in the nature of things” it is impossible to assign a transaction actually having points of contact with several countries exclusively to a single one of them without creating an artificial and lifeless system of law. JITTA, *THE RENOVATION OF INTERNATIONAL LAW* (1919) 91; *1 LA SUBSTANCE DES OBLIGATIONS DANS LE DROIT INTERNATIONAL PRIVÉ* (1906) 20 *et seq.*; *LA MÉTHODE DE DROIT INTERNATIONAL PRIVÉ* (1890) 45 *et seq.*; *INTERNATIONAAL PRIVAATRECHT* (1916) 74 *et seq.*

A vigorous attack upon all *a priori* systems of the Conflict of Laws has been made in recent times also by a distinguished French writer, M. Arminjon, many years Judge of the Mixed Courts, Cairo, Egypt. Speaking of the theory of the territoriality of law, he says: “To ascertain these rules, it is not sufficient to affirm the territorial sovereignty of states—we must find the reasons of justice and convenience which have inspired the rules of the Conflict of Laws by means of which the solution of certain difficulties is submitted to another law or to another jurisdiction than that of the country in which the litigation arises.” ARMINJON, *ACADÉMIE DE DROIT INTERNATIONAL*, 21 *RECUEIL DES COURS* (1928) 454. And with respect to all *a priori* methods he says, “Notwithstanding the erudition and talent of those who have employed it, the deductive method has yielded no results until now; it has proved more harmful than useful; and it seems to us that it must always remain sterile.” *1 PRÉCIS DE DROIT INTERNATIONAL PRIVÉ* (2d ed. 1927) 39.

9. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 *YALE L. J.* 457, 459.

10. On the continent the rules of the Conflict of Laws provide a certain measure of elasticity. As regards the formal requirements there is frequently an alternative rule, according to which the transaction will be upheld if it satisfies either the law of the place of execution or some other law (for example, the law governing the validity of the transaction in other respects). And in the field of contracts, the most important of all branches of the Conflict of Laws from a business point of view, the continental law subscribes uniformly to the doctrine of autonomy, which enables the court, by invoking the expressed or implied intention of the parties, to reach results that are deemed just in the particular case. According to Professor Beale the law of the place where the contract is treated as technically made under the rules of his system has exclusive power to create the obligation. (Beale, *supra* note 3.)

chapters of the *Restatement*,¹¹ which follows, it will be seen how far Professor Beale's theory of the Conflict of Laws has been accepted by the American Law Institute.

Chapter 1, entitled "Introduction" consists of eight sections dealing with the subject matter and meaning of Conflict of Laws and the rules for the application of the Conflict of Laws. The latest version of section 1¹² indicates a strong effort to emphasize that the state of the forum in a conflict of laws case is not subject to having its disposition of a Conflicts case forced or superimposed upon it from or by another state. At the same time there is a determined endeavor to still retain as fully as the adoption of the view just stated permits statements of "principles" and rules of the subject in the familiar mode of Professor Beale, according to which there exists with reference to each type of Conflict of Laws factual situation some state which has so-called Conflict of Laws "jurisdiction" in the sense that its domestic rule or rules are appropriate, and exclusively so, for the type of case presented. Accordingly, the subject of the Conflict of Laws is defined as "that part of the law" of the state of the forum which determines "whether . . . the law of some other state will be recognized, be given effect or be applied." This is but a variation in phraseology of Professor Beale's view that the Conflict of Laws deals with "the recognition and enforcement of foreign created rights."¹³ For paragraph 1 of section 1 might have been well substituted the clear and accurate explanatory statement contained in the Introductory note to the chapter on Procedure which says:

"While no law is in force in a state except its own law (see § 1), it is one of the functions of that branch of the law known as the Conflict of Laws to furnish a body of rules by which, in a case involving a foreign element, the rule for decision of such case is that furnished by reference to the law of the appropriate foreign state."¹⁴

11. The RESTATEMENT is divided into twelve chapters, entitled, respectively, INTRODUCTION (§§ 1-8), DOMICIL (§§ 9-41), JURISDICTION IN GENERAL (§§ 42-73), JURISDICTION OF COURTS (§§ 74-118), STATUS (§§ 119-151), CORPORATIONS (§§ 152-207), PROPERTY (§§ 208-310), CONTRACTS (§§ 311-376), WRONGS (§§ 377-428), OBLIGATION OF JUDGMENTS AND OTHER IMPOSED DUTIES (§§ 429-464), ADMINISTRATION OF ESTATES (§§ 465-583) and PROCEDURE (§§ 584-625).

12. See also § 42. Section 1 of the PROPOSED FINAL DRAFT NO. 1 stated that "Conflict of Laws deals with the extent to which the law of a state operates and determines whether the law of one or of another state shall be applied to a legal situation." As finally revised Section 1 reads as follows: "(1) No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states.

"(2) That part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognized, be given effect or be applied is called the Conflict of Laws."

13. Beale, Summary, *supra* note 4, § 1.

14. Page 497.

In section 2 the term "state" is defined in a way to exclude the United States. From the comment it appears that the United States is a state in the political sense but not in a legal sense. There would appear to be no sufficient reason for this limitation. The mere fact that any of the individual states of the United States is a sovereign state legally, as regards the Conflict of Laws, with reference to foreign nations in the field which is exclusive of the federal government, should not preclude the recognition that, as between it and other countries, the United States is a state legally in the field of its exclusive or predominant operation. The *Restatement*, in fact, recognizes this in section 45, providing that: ". . . a state has jurisdiction over all vessels flying its flag." The comment to this section states directly that there is no such thing as a "flag of a state of the United States" and that a vessel flying the flag of the United States is subject to the jurisdiction of the United States under the rule stated in the section.

In sections 3 to 5, which define "law" and "common law" and the "legal nature of Conflict of Laws", a definite effort is made to declare unequivocally that the "law" of a particular state is made by what the courts of the state do and yet to adhere to a deductive view of derivation of law from "the common law" as an *a priori* "body of principles, standards and rules" or as a source of them.

Section 6 correctly states that the rules of the Conflict of Laws of a state are not dependent upon principles of reciprocity.

Sections 7 to 8 deal with preliminary questions in the Conflict of Laws and *renvoi*. Although the *renvoi* doctrine is rejected by the *Restatement* on principle,¹⁵ the notion of "enforcement of foreign created rights" and of the so-called Conflict of Laws "jurisdiction" of any state to create "rights" for "recognition" or "enforcement" by another state, is one of *renvoi*, for the conception is that the law of the forum enforces the identical right "created" by the law of the other state, referring to the particular case at hand, including its Conflict of Laws features. In order to have the "right" refer to the particular case, involving a Conflict of Laws problem, the "right" would have to be derived from the law of the foreign state applicable to such problem. The only escape from this is to admit that the state of the forum does not "recognize" or "enforce" a "right" thus derived from the *law of another state* inclusive of its Conflict of Laws, but at most a "right" corresponding to one existing by the *domestic* law of the other state, *i. e.*, a "right" existing not for or with reference to the kind of factual situation presented, which is one involving Conflict of Laws, but one existing only for or with reference to a different kind of situation. It cannot be truthfully said, therefore, that the state of the forum "recognizes" or "enforces" the "right" created by another state for the very case presented. To speak of

15. See *infra* p. 585.

“recognition” or “enforcement” of “foreign created rights” presents the dilemma of either *renvoi* on the one side or misdescription on the other.

The chapter of the *Restatement* on “Domicil” is based on the erroneous assumption that domicil can be stated as something by itself, separate and apart from the particular purpose with reference to which it is employed. Domicil is merely a conceptual device, intermediate in processes of imposing legal consequences of different kinds with reference to particular purposes or ends. It has no meaning without reference to the particular purpose concerned, *e. g.* taxation, distribution of property. Use of “domicil” as an instrumentality might be said to be merely a mode of determining the consequences concerned. It is a medium by or in terms of which the result or consequence decided upon is imposed, or a medium of explanation of the result or consequence attached. Domicil is treated in the *Restatement* as single in reference to all legal purposes. Although the courts frequently say that no person can have more than one domicil at a time, they generally, if not almost invariably, deal with and determine domicil solely with regard to the particular kind of legal consequence or effect involved in each particular case. Thus, for the purpose of succession or distribution at death the domicil of a person might be determined to have been in one state while for the purpose of a particular kind of tax, it might be determined to be in another. Progress in the development of the law would seem to call for treatment of this concept or device in connection with the purpose in regard to which its use is occasioned.

Domicil is identified in the *Restatement* with a particular point in space called a “place”.¹⁶ It would seem, however, that it should be identified neither more narrowly nor more widely than the particular legal unit in regard to which legal consequences or effects are concerned.

Section 18 states that a domicil of choice cannot be acquired “without an intention to make the new dwelling place his home.” The following statement by Mr. Justice Holmes in *Williamson v. Osenton*¹⁷ is deemed to express our law more accurately. He says:

“The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere, Story on Conflict of Laws, § 43—or, as Mr. Dicey puts it in his admirable book, ‘the absence of any present intention of not residing permanently or indefinitely in’ the new abode. Conflict of Laws, 2d ed. 111.”

It is submitted that there is no sufficient reason for the abandonment of the view just quoted. Section 19 provides that “the intention required for the acquisition of a domicil of choice is an intention to make a home in fact, and not an intention to acquire a domicil.” This section is contra-

16. See §§ 9, 12 and comments.

17. 232 U. S. 619, 624 (1914).

dicted by the cases giving effect to "specific intent" where there were physical connections or relationships with different states.¹⁸ The *Restatement* resolves the problem of domicile, when a person has two homes, by holding that the earlier home constitutes his domicile, unless the second home was regarded as his principal home.¹⁹ Whether this solution is preferable to that of allowing a person under these circumstances to choose his "domicil" may be doubtful.

The restatement of the law relating to the domicile of married women was very embarrassing in view of the transitional stage of our law in this regard. Section 28 provides that "If a wife lives apart from her husband without being guilty of desertion according to the law of the state which was their domicile at the time of separation, she can have a separate domicile." It may be asked where in the decisions of our courts the capacity of a married woman to have a separate domicile is referred to the law of the domicile of the spouses at the time of separation. In the final revision of the *Restatement* a *caveat* was added, stating that no opinion is expressed by the Institute whether a wife guilty of desertion according to the law of the state which was her domicile at the time of separation, may not acquire a domicile in another state.

With respect to the domicile of children a most extraordinary statement is to be found in Comment *c* to section 34, dealing with the domicile of an illegitimate child. According to this section an illegitimate child, not emancipated, abandoned, or adopted, has the same domicile as that of its mother. Comment *c* states, however, that if an illegitimate child is legitimized as to the father from birth,²⁰ the child's domicile becomes that of the father as from the time of its birth. According to Professor Beale, the law of the father's domicile does not have the power to legitimize the child unless the law of the child's domicile concurs, for otherwise the child might have the status of a legitimate child in the state of the father's domicile, but would retain its status as an illegitimate child in the state of its mother's domicile, a result which would most likely follow if the local law of the mother's domicile did not recognize legitimation of illegitimate children. Now, such a result would be inconsistent with Professor Beale's "principles" of the common law. But by attributing to the father the power to change the child's domicile from the time of birth by means of an act legitimizing the child, the principle is *saved*, for as a result both father and child will have the same domicile. The question may be asked, however, where would the child's domicile be under the *Restatement* from the time of

18. See Heilman, *Domicil and Specific Intent* (1929) 35 WEST VA. L. Q. 262.

19. § 24.

20. According to the *RESTATEMENT* such legitimation will be governed normally by the law of the father's domicile (§ 139), with a *caveat* regarding the power of the law of the child's domicile at the time of the legitimizing act.

its birth if the father had changed his domicil several times between the date of the birth of the child and the date of the legitimating act.

One section (§ 41) of the *Restatement* is devoted to the domicil of corporations. The comment to this section shows, however, that the meaning and function of *domicil* in connection with corporations is something entirely different from that of the domicil of individuals.

The third chapter of the *Restatement* is devoted to "Jurisdiction in General". Section 42 defines the word "jurisdiction" as used in the *Restatement of the Conflict of Laws* as "the power of a state to create interests which under the principles of the common law will be recognized as valid in other states." This chapter *par excellence* presents Professor Beale's conception of the conflict of laws. It deals with "jurisdiction in general", as contrasted with the "jurisdiction of courts", which is developed in Chapter 4, and gives to it a meaning unfamiliar to lawyers and judges. The definition carries the idea of a supra-state body of law, that is, "the principles of the common law" through and by which (and not by the law of the place of forum as exclusively determining) the "recognition" of foreign created "rights" "as valid" shall be determined. Ordinarily, lawyers confine the term "jurisdiction" to the power of a state within its territory or the power of a particular court or other societal agency within the territory of the state in which such agency operates. Here, however, it seems that jurisdiction "in its broad sense" is treated as including not only the power of a state to determine legal relations for that state and within that state, but also power to do so to any extent, even for other states and universally. According to this chapter, the essential content of the process of Conflict of Laws juridical disposition is treated as consisting of the generating and creating by another state in reference to a Conflict of Laws factual situation, or case, of "law" for that case (constituting a domestic rule) for the state of the forum to use in disposing of a Conflict of Laws problem, treating the process of decision as imposition of foreign (domestic) law upon the state of the forum and acceptance of or submission to it by the latter, instead of treating the process as consisting of the state of the forum making its own law of Conflict of Laws for the case at hand, although in doing so it may employ by incorporation a domestic rule of another state. The process of judicial decision is thus treated as being "in reverse" of the direction and mode of disposition in domestic legal adjudication. It is putting the cart before the horse. Apart from its tendency to induce judicial treatment on the basis that the state of the forum is involuntarily subjected to foreign law, contrary to the first paragraph of section 1 of the *Restatement*—"no state can make a law which by its own force is operative in another state"—it tends to cause courts to regard the decision of Conflict of Laws cases as automatic and to fail to realize their full responsibilities

in the disposition of those cases. Also, it involves the dilemma of the *renvoi*, which has been alluded to above.

Extensive as the chapter is, covering so-called Conflict of Laws jurisdiction over Persons (Title B), Things (Title C), Status (Title D), and over Acts (Title E), it is confusing because of the necessity for keeping constantly in mind that something other than "jurisdiction of courts" (Chapter 4) or "judicial jurisdiction" (Chapter 3, Topic 3, Title 3) is being dealt with. Indeed, it is believed, the *Restatement* would have gained in clarity if the chapter on "Jurisdiction in General" had been omitted and the essential portions thereof dealt with elsewhere. Thus sections 64-70 belong to the chapters on Contracts and Wrongs, and should not have been separated from the sections directed to the specific types of factual situations to which they may pertain. Much of Chapter 3 is also contained in the chapter on Jurisdiction of Courts. The balance is of such general or purely theoretical character as to have no practical value.

According to section 43, "Under the Constitution of the United States, the States cannot create interests if they have no jurisdiction." The rules laid down by the *Restatement* regarding "jurisdiction" are thus made in every particular a part of the constitutional law of the United States. The two illustrations given—one involving a judgment against a non-resident over whom the court had no jurisdiction, and the other a sheriff's sale of property in an adjoining state—are, of course, clearly recognized instances as to which, under the circumstances, the exercise of power by the state would be a violation of the Fourteenth Amendment to the Constitution. But it is going a long way to assert that every exercise of power contrary to the rules of so-called "jurisdiction" laid down by the American Law Institute would constitute a violation of the due process clause. Such a complete identification of the Conflict of Laws with constitutional law would, if it were made at the present time, be most unfortunate, for the subject of the Conflict of Laws is still so inadequately understood by lawyers and judges and its development is in such an early stage with reference to commercial and social conditions that its future growth would be seriously retarded by requiring adherence to presently prevalent notions of Conflict of Laws under a requirement of *due process* or any other possibly utilizable requirement of the Federal Constitution. It will be a long time before there has been a sufficiently realistic general attitude toward the subject developed for its inclusion in federal constitutional law not to be an obstruction to its development in a way well adapted to the social and economic conditions in this country and especially those of interstate character.

Great difficulty was found with respect to jurisdiction over chattels brought into a state without the owner's consent. In Section 52 of *Restate-*

ment No. 2, Professor Beale's view²¹ appears to the effect that "If a chattel belonging to a person who is not a citizen of or domiciled in the state, is brought into the state without his consent, the state has no jurisdiction over his title to the chattel until he has had a reasonable opportunity to remove it or until the period of prescription in the state has run." Proposed Final Draft No. 1 (§ 52) retains Professor Beale's view concerning the jurisdiction of a state over the title to chattels brought into the state without the owner's consent, but contains various additions to or modifications of the original statement. Proposed Final Draft No. 4 suggested that the entire section be omitted and this suggestion was accepted. A *caveat* to section 49 states that the Institute expresses no opinion on the subject, but a comment to the *caveat* adds that even though a state may have jurisdiction over the chattel in the case mentioned it does not at common law exercise such jurisdiction over the title to the chattel.

Walter F. Dodd,²² of the Chicago bar, offers the following comment upon Chapter 3 of the *Restatement*. He says:

"The federal Constitution is the most important instrument with respect to interstate relations, and an attempt to restate the law of Conflict of Laws of the United States is certain to be ineffective if the requirements of the Constitution are 'outside the scope of the Restatement.' Comment *e* to § 46 of the Restatement (page 53) says that it is outside the scope of the Restatement to attempt an exhaustive consideration of the power of states to tax bonds of foreign corporations, and similar statements are made with reference to §§ 50, 51, 52 and 53. See also § 104 (Comment *b*). The comment on § 84, while considering constitutional provisions, makes the qualification that certain things may be done 'unless limited by a constitution.' . . .

"The definitions of executive jurisdictions (§ 56), legislative jurisdictions (§ 59), and judicial jurisdiction (§ 71), are properly based upon the character of the acts done by the several departments rather than upon the body which performs the acts. The Restatement properly takes the view that certain functions performed by an executive department are in fact legislative in character and that certain functions performed by a judicial department are in fact executive in character. A restatement of the law of the Conflict of Laws should not attempt to deal extensively with the difficult subject of the lines drawn by judicial decision as among the three departments of government, and this is expressly recognized in the special note to § 60. Without dealing with such distinctions, however, a restatement can, of necessity, contribute nothing of real value upon this subject. The definition of judicial jurisdiction in § 71 makes it quite clear that little or nothing can be contributed by such a discussion. Judicial jurisdiction is defined as involving 'a formal decision by an officer or body acting

21. Beale, *Jurisdiction Over Title of Absent Owner in a Chattel* (1927) 40 HARV. L. REV. 805.

22. Mr. Dodd has kindly consented to the incorporation in this article of the above comments, which were furnished to the authors at their solicitation.

judicially.' The effort to define a phrase in its own terms can contribute nothing to our knowledge, but perhaps this criticism may be met by the fact that the phrase 'acting judicially' is explained in § 75. Section 75, however, raises some question as to formal decisions by the courts, which are in some cases made without notice and an opportunity to be heard. Perhaps, however, this situation can be met by saying that summary proceedings in a court are not judicial in character, unless there is notice and an opportunity to be heard. This would define as executive functions all exercises of power against an individual which are without notice and hearing, and would run counter to the practical basis upon which powers are divided among the three departments of government, but would probably be in accord with the theoretical definitions adopted by the Restatement."

Taken as a whole, Chapter 4, which deals with the "Jurisdiction of Courts", seems thorough and comprehensive in describing the present effect of the decisions so far as this is possible. As to those matters with respect to which the decisions of the courts are in a more or less unsettled condition the rules adopted seem generally to be well adapted to the subject concerned and desirable from the standpoint of legal development. Special mention may be made of section 94, which recognizes the power of a state to direct a party to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed, thus reversing the statement contained in section 100, Proposed Final Draft No. 1. With respect to chattels brought into a state without the owner's consent there is the same *caveat*²³ as was found under "Jurisdiction in General". Section 84 in its earlier form²⁴ asserted the power of a state (subject to the constitutional limitation contained in the following section) over "an individual who has done an act or caused an event within the state, as to a cause of action arising out of such act or event, if by the law of the state at the time when the act was done a person by doing the act or causing the event subjects himself to the jurisdiction of the state as to such cause of action." In its final form, acts done within the state through an agent were excluded from this section, a *caveat* stating that the Institute expresses no opinion in that regard.²⁵ There is considerable doubt whether such a broad doctrine as the one contained in section 84 should be recognized in our law. It looks like an importation from the continent, there being no present support for the rule stated in the decisions of our courts. In continental law personal actions can be brought at the domicile of the defendant (general forum) and also in the state in which the act out of which the cause of action arose was done (special forum). Our law has grown up along different lines, jurisdiction being based primarily upon personal service or

21. Beale, *Jurisdiction Over Title of Absent Owner in a Chattel* (1927) 40 HARV. L.

24. See § 90, PROPOSED FINAL DRAFT No. 1.

25. § 84, under Comment *d*.

consent. Modern needs have caused other bases of jurisdiction to be added, for example, in the case of the automobile statutes. The *Restatement* admits, in section 85, that the Constitution of the United States restricts the application of section 84 as between the states of the United States. The question is therefore whether the rule laid down should be accepted with respect to acts done in foreign countries. Should the mere fact that a contract is made in Canada or in some other foreign country or a tort is committed there give to such countries the power to enter a judgment against the individual upon constructive service with reference to any cause of action arising out of the act? It would have been better if the *caveat* relating to acts through agents had been extended to cover acts of the principals themselves.

Section 115, dealing with the jurisdiction of courts to nullify a marriage, has adopted a sensible solution, contrary to Professor Beale's theoretical objections which found expression in the earlier versions of this section.²⁶ According to Professor Beale only the state whose law governed the validity of the marriage in respect of which its annulment was sought has jurisdiction to grant an annulment from the beginning.

The section relating to the power of a state to grant a divorce when only one of the spouses is domiciled within the state (§ 113) is still expressed substantially in the form given to it by Professor Beale.²⁷ The question how to restate the law in the light of *Haddock v. Haddock* and the attitude of the New York Court of Appeals raised a difficult problem. The Reporter was opposed to *Haddock v. Haddock*²⁸ but the decision had the support of the New York bar (and presumably of the New York members of the Council of the American Law Institute). The question, therefore, was how to find a formula which would meet with the approval of the American Law Institute. Professor Beale arrived at the formulation of section 113 by way of analogy to the situation where a chattel is brought into a state without the owner's consent.²⁹ According to sections 51-52, Proposed Final Draft No. 1, a state would have jurisdiction over the title to the chattel if it had been brought into the state either with the owner's consent or if some act or omission on his part had rendered it inequitable for him to challenge the jurisdiction of the state. It seemed, therefore, to Professor Beale that where only one spouse is domiciled in the state, such state should be regarded as having jurisdiction for divorce if the other spouse consented to the establishment of a separate home in that state, or by his or her misconduct had ceased to have the power to object effectually to the acquisition of such separate home. By a singular turn of events the

26. § 122, PROPOSED FINAL DRAFT No. 1.

27. § 118, RESTATEMENT No. 2; § 119, PROPOSED FINAL DRAFT No. 1.

28. Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586.

29. Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

section of the Restatement (§ 52) upon which Professor Beale relied for his analogy was dropped at the final revision, a *caveat* indicating that the Institute wished to express no opinion on the point. However, section 113 remained unchanged. In the light of the above facts the question is whether the courts of New York and the other courts taking a similar view, and for that matter the courts of all other states, should accept the *Restatement* as a basis for their future decisions. Under section 113 the existence of fraud becomes a jurisdictional fact³⁰ which leaves the status of divorce decrees uncertain. They may be recognized by some courts and not by others because of differences in their conclusions regarding the question of fraud. Differences of view may arise also with respect to the legal question by what rule such fraud is to be decided. With respect to the acquisition of a separate domicile by a married woman section 28 of the *Restatement* specifically provides that the question of desertion shall be determined with reference to the law of the state which was the domicile of the spouses at the time of separation but there is no corresponding provision in section 113 relative to the question by the rules of what state the misconduct of the spouses is to be ascertained. It would seem therefore that the adoption by our courts of the views expressed in section 113 of the *Restatement* would lead to greater uncertainty in the matter of foreign divorces rather than to greater uniformity.

Chapter 5, entitled "Status", deals with marriage, legitimacy, adoption and custodianship and states the law relating to these topics in a comprehensive and, on the whole, satisfactory manner. In the matter of marriage greater emphasis is placed in the final revision upon the rules of the state of domicile as determining the validity of marriage than was the case in the earlier drafts.³¹ Proposed Final Draft No. 1 (§ 140) applies the rules of the place of celebration except as to very limited classes of cases. The only exception to the general rule stated of any practical importance related to "marriages between persons of different races, where such marriages are at the domicile regarded as odious," such marriage being held invalid everywhere. The *Restatement* in its final form (§ 132) extends this exception to (1) incestuous marriages "between persons so closely related that their marriage is contrary to a strong public policy of the domicile," and (2) to marriages "of a domiciliary which a statute at the domicile makes void even though celebrated in another state."

The sections relating to legitimacy show a much greater spirit of liberality than the proposed sections advocated by Professor Beale.³² For

30. McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564.

31. See GOODRICH, *CONFLICT OF LAWS* (1927) 256 *et seq.*; Beale, Laughlin, Guthrie and Sandomire, *Marriage and Domicil* (1931) 44 HARV. L. REV. 501.

32. §§ 142-143, RESTATEMENT NO. 3; §§ 147-148, PROPOSED FINAL DRAFT NO. 1.

example, a *caveat* under comment *c* to section 137 leaves it open for the courts to allow the domicile of the *child* to create the status of legitimacy. In regard to legitimation from birth, the domicile of the parent with reference to whom the status of legitimacy was claimed, at the time of the birth of the child, was said in the earlier drafts to have "exclusive jurisdiction."³³ This question also is now left open by a *caveat* under comment (*b*) to section 139. The *caveat* also leaves open the question whether a child may not be legitimized from birth by an act or event if the law of the state of the *child's* domicile at the time of the act or event so provides, although the law of the parent's domicile at the time of birth or at the time of the legitimating act does not so provide. A *caveat* to section 140 referring to legitimation after birth likewise reserves the question whether such legitimation may not take place by virtue of the law of the state of the *child's* domicile at the time of the act.

Chapter 6 is devoted to the rules of the Conflict of Laws relating to "Corporations". This chapter as a whole deserves commendation. It deals with corporations from a realistic standpoint. Thus, in comment *a* to section 152 the following declaration is made: "Throughout this Restatement where it is stated that the 'corporation can act,' the meaning is that the incorporated members can act in no other than a corporate capacity." However, speaking of the constitutional aspects of the subject, Walter F. Dodd says:³⁴ "Sections 168-177 go more fully into the constitutional problems respecting foreign corporations [than is done generally in the Restatement], but the Restatement and comments in these sections would not be a satisfactory guide to any one seeking to determine the law with respect to foreign corporations." The same criticism may be made also of Topic 6 dealing with cases of multiple incorporation. According to section 154 "The fact of incorporation by one state will be recognized in every other state." The comment adds that this rule enables a corporation to sue or be sued as a corporation when the state in which the suit is brought has jurisdiction and properly exercises it. Also, that any state will "recognize" the limitation of the individual responsibility of the members of the corporation to their interest in the corporation. Also, that so far as the corporation "is permitted to act as such within the state, its right to sue and its liability to be sued in the corporate name . . . will be recognized in respect to all questions arising out of such acts." In the instances mentioned the word *recognize* apparently has the meaning of *enforcing*, at least to a certain extent. The word *recognize* appears to be used in the *Restatement* sometimes as signifying no enforcement at all or no effectuation by legal means. Sometimes it means something somewhere between no enforcement and full

33. § 142, RESTATEMENT No. 3; § 147, PROPOSED FINAL DRAFT No. 1.

34. See *supra* note 22.

enforcement and at other times full or entire enforcement.³⁵ Because of the variable meanings attached to the word "recognize" its elimination, so far as possible, from discussions of the Conflict of Laws would be desirable. The comment to section 154 shows that the section as stated is meaningless.

Chapter 7, entitled "Property", deals in Topic 1 with Property in General, in Topic 2 with Immovables, and in Topic 3 with Movables. Topics 2 and 3 are each subdivided into conveyances, transfers by operation of law, incumbrances, powers, marital property, equitable interests and succession on death. The Introductory Note describes carefully the meaning with which the terms "property" and "interest" are sought to be used. Also, it is explained that certain words are used factually and without technical significance, that is, "land," "chattel," "things"—"tangible and intangible." This is advantageous for the sake of clarity—to know whether terms are used exclusively factually, exclusively in a technical sense, or otherwise. "Interest" is used to mean "the normally beneficial side of a legal relation, as a right, power, privilege, or immunity," employing Hohfeld's terms. "Property" is used synonymously both with "interest" as above defined and with any aggregate of "interests."³⁶

Section 208 adopts the view that the rule "of the state where the thing is" shall determine its classification as "real" or "personal" property. The civil law classification between "movables" and "immovables" is explained in a special note to the comment under this section. The remaining sections of Topic 1 pertain to "equitable conversion" and "original creation of property." In regard to the latter the rules of the state of the situs or of original existence is adopted. In regard to "equitable conversion" of interests in land, section 209 applies the rule of the situs of the land to determine whether or not there has been such equitable conversion. Section 210, pertaining to the question whether or not interests in "chattels" or "intangible things" are to be treated as having been equitably converted into real property by "dealings" with such chattels or intangible things, adopts the rule or rules of the state applied to determine the effect of such dealings.

Topic 2 contains 41 sections relating to immovables, and adopts the rule of the situs as determining every question of legal effect covered therein, including "capacity" to convey or to take or to hold (§§ 216, 219). However, section 340 in the Chapter on Contracts provides that the rules of the

35. In connection with § 161 the phrase "recognized and given effect" appears, in which the words "recognized and" seem entirely superfluous; § 260 dealing with the effect on title where chattels are moved into another state uses the word "recognized". But in all seven "Illustrations" given "enforcement" takes place.

36. Consistently with the explanations of the Introductory Note above referred to, would not an aggregate of legal relations, the net total of which are beneficial in reference to a particular person, be treated as "property" with respect to that person, although the aggregate includes some legal relations disadvantageous in addition to some which are advantageous to him? If not, many aggregates of legal relations, as considered in reference to a particular person, which are generally regarded as "property" would be excluded, and very impracticably.

“place of contracting” shall determine the validity of a promise to convey land, and section 341, that the rules of the place of delivery of a deed of conveyance of an interest in land shall determine “the contractual duties of the grantor.” The latter section also provides that “those duties of the grantor with respect to the land which are not contractual in character” (covenants running with the land) shall be determined by the rules of the situs. Sections 373-374 of *Restatement No. 4* provided that “the law of the place where a deed is delivered determines whether a covenant of title is contained in the deed and whether it is valid,” and the law of the situs whether the covenant runs with the land. Proposed Final Draft No. 4 (§ 373) suggested the formulation which was adopted by the Institute in section 341. It is submitted, however, that neither the rules provided in the earlier drafts nor those contained in section 341 are satisfactory so far as covenants for title are concerned. With respect to them the only acceptable Conflict of Laws rule is that the rules of the situs should be applied, without regard to the question whether the particular covenant may be deemed contractual or non-contractual.

In section 214 (par. 3) a rule of construction employing the “usage” of the state of the conveyor’s domicile is adopted, based presumably upon an assumption of probability that the conveyor intended to convey in accordance with the legal rules, conditions and usages of the state of his domicile. This rule should be approved where there is substantial ground for such assumption, but if there is not, or if it be doubtful, a rule of construction employing the usages or legal rules of the state of the situs would be better because consistent with the general application of the rule of the situs.³⁷ In paragraphs (1) and (2) of section 214 rules of construction employing the rule of the state of the situs are adopted. Similar rules to those of section 214 may be found in section 251 with reference to devises of land.

With respect to movables (Topic 3), the rule of the situs is generally applied, with a *caveat* regarding the formalities of the conveyance where an aggregate unit of movables is involved, such as the various items used in carrying on a business—stock in trade, good will, furniture and fixtures, bills receivable, and cash (§ 256). The subject of assignment for the benefit of creditors is disposed of in two sections (§§ 263, 264). The section relating to voluntary assignments (§ 263) adopts the rule of the place where the assignment is made and provides that a state in which any chattel of the debtor is may accord a preference with regard to it to local creditors. An assignment for the benefit of creditors made in accordance with an insolvency or bankruptcy act of a state, whether made by the debtor himself or by operation of law, is said to be ineffective as to chattels

37. See Heilman, *Conflict of Laws Treatment of Interpretation and Construction of Deeds in Reference to Covenants* (1931) 29 MICH. L. REV. 277.

in another state, a rule which is true only when there is a conflict between the foreign assignee and domestic creditors.³⁸ No reference is made anywhere in the *Restatement* to assignments for the benefit of creditors involving immovables. In view of the growing importance in recent times of voluntary assignments for the benefit of creditors in this country and the general interest attached to the subject of international bankruptcy, it is difficult to understand why these subjects were accorded such negligible treatment.

Much confusion exists in our law regarding chattel mortgages and conditional sales. The *Restatement*, purporting as it does to state only the common law principles, ignores naturally the statutory provisions relating to these subjects, without which, however, the presentation of the subject is wholly inadequate. Section 268 (1) provides that "If, after a chattel is validly mortgaged, it is taken into another state without the consent of the mortgagee, the interest of the mortgagee is not divested as a result of any dealings with the chattel in the second state." As a general statement the rule given may be unobjectionable, but it needs qualification where the dealings occur after the mortgagee knew of the removal and had a reasonable time for the assertion of his rights. However, this criticism is without foundation if under the *Restatement* this situation may be regarded as the equivalent of consent. The same observations are applicable to conditional sales (see § 275).

Regarding marital property, it is interesting to note that Professor Beale's contention in favor of the rule of the state of the situs as governing the rights of the spouses in movables acquired during marriage, accepted as late as Proposed Final Draft No. 2 (§ 311), was eliminated in the final revision and the rule of the state of domicile of the spouses, or, where they have separate domicils, of that spouse who acquires the movables, substituted (§ 290 and comment c).

In the matter of trusts of movables a distinction is made between trusts *inter vivos* and trusts created by will. The validity of a trust of movables by will is determined by the rules of the place of the testator's domicile at the time of his death (§ 295). In the case of a trust *inter vivos* a distinction is made between a trust of chattels and a trust of choses in action (§ 294). The validity of the former is determined as to each item with reference to the rules of the state in which the particular chattel was at the time of the creation of the trust.³⁹ Assignments for the benefit of creditors are expressly excepted from this section [§ 294 (1)] and a *caveat* (§ 294, comment g) reserves the question with respect to the validity of a trust in an aggregate unit of movables. The validity of a trust *inter vivos* of choses

38. See *In re Waite*, 99 N. Y. 433, 2 N. E. 440 (1885).

39. See Beale, *Living Trusts of Movables in the Conflict of Laws* (1932) 45 HARV. L. REV. 969.

in action is determined by the rules of the state in which the trust was sought to be created. If a chose in action is evidenced by a document in which, by the rules of the place where it was issued, "title" to the obligation is embodied, a transaction purporting to create a trust therein is controlled by the rules of the state in which the document is at the time of the transaction (§ 294, comment *f*). In the decisions of the courts, the rules of the state of the settlor's domicile, as well as the settlor's intention, have been considered in the determination of the validity of trusts *inter vivos* of movables.⁴⁰ The flexibility that thus existed in our law has been sacrificed by the *Restatement* for the sake of certainty. It is submitted that with a little effort and good will both objectives—that of flexibility and certainty—could have been attained and a way provided calculated to sustain the validity of trusts to a fuller degree than is possible under the *Restatement*. The rules laid down concerning the administration of trusts of movables (§ 299), though not clearly supported by convincing authority, would appear to be commendable.

Succession on death, both in case of testamentary and intestate succession, is properly said to be determined by the rule of the state of decedent's domicile at the time of his death, even in the case of the direction in the will to convert personalty into land (§ 306, comment *f*). Attention might have been called, however, to the many statutes modifying this rule as regards the formal requisites for wills.

Chapter 8, devoted to the subject of "Contracts", is one of the most important chapters, and yet, perhaps, the least satisfactory. From beginning to end it accepts Professor Beale's theory of the Conflict of Laws. According to this view only the state "where a contract is made" has jurisdiction, *i. e.*, the power to attach legal consequences to the operative facts. If it does not do so, no other state can.⁴¹ In recent times this view has been modified by admitting that when a contractual agreement is concluded by correspondence both the states of the offeror and of the offeree have "jurisdiction".⁴² So far as the validity of contracts is concerned, the sole question considered is, therefore, where is the contract, if any, to be treated as technically "made". The fact that the final act took place in a particular state by mere accident, perhaps because the acceptor forgot to mail a letter in the state

40. Cavers, *Trust Inter Vivos and the Conflict of Laws* (1930) 44 HARV. L. REV. 161.

41. See *supra* note 3.

42. § 66 of the RESTATEMENT reads as follows: "When a communication is sent from one state to another, each state has jurisdiction over the communication." The full import of this rule does not appear from the Comments and Illustrations under § 66 nor from the rules relating to contracts. If an offer is sent from state *A* to state *B* where it is accepted, and suit is brought in state *C*, § 66 apparently permits the courts of state *C* to look either to the rules of state *A* or to those of state *B* to ascertain whether a contract was formed and the extent of the obligation. See Comment *c*. But what is the significance of such a general statement in the light of the specific sections relating to contracts, according to which the law of the state of contracting governs (§ 332), and the place of contracting is said to be where the letter of acceptance is mailed, where the message of acceptance is received by the telegraph company for transmission, and where the acceptor speaks his acceptance into the telephone? (§ 326 and comments).

of his business location, and thought of it only upon his arrival in the state of his residence, is absolutely immaterial. The contract, if any, being treated as concluded by the posting of the letter of acceptance,⁴³ the rule of the state of his residence will determine the validity and obligation of the contract. This narrow viewpoint is opposed to the enlightened thought of the entire world. It is not supported by the English decisions,⁴⁴ nor by any means clearly by the decisions of the Supreme Court of the United States,⁴⁵ nor by those of the state courts.⁴⁶ There are many *statements* in our decisions to the effect that "the law of the place of contracting" is appropriate but in the majority of the cases the place of contracting and the place of performance coincided, so that the term *lex loci contractus* was used in the wider sense. If all the operative facts take place in the same state, and no intention is expressed that the rule of some other state is to be applied, the rule of the "place of contracting" should, of course, be adopted, but where the operative facts are not localized within some one state, a question of extraordinary difficulty arises, which certainly should not be settled in the way of the *Restatement*. Some suggestions have been made by writers in this country⁴⁷ in opposition to the mechanical mode of approach advocated by Professor Beale and now sanctioned by the American Law Institute, and in the direction of determining the problem in the light of the social and economic factors involved. More effort along these lines is needed before a satisfactory way of dealing with questions of the Conflict of Laws relating to contracts can be found. It was most unfortunate, therefore, that the American Law Institute committed itself to a view utterly opposed to any socializing of our law in this important field.

One of the questions is whether there should be different Conflict of Laws rules with respect to the different kinds of problems arising in connection with a particular type of contract or whether the same Conflict of Laws rule should govern all. Should a "contract" be split into pieces, as in the *Restatement*, and each piece dealt with by a separate Conflict of Laws rule, *e. g.*, as to "validity", "performance", "discharge otherwise than by performance", "assignability"; or would it be preferable if the same Conflict of Laws rule were adopted, so far as practicable, with reference to every possible phase of a particular transaction in order that the treatment of every phase should be as consistent as possible with the treatment or possible treatment of every other phase? If different Conflict of Laws

43. § 326.

44. DICEY, *CONFLICT OF LAWS* (Keith's ed. 1932) 647-663.

45. Beale, *What Law Governs the Validity of a Contract* (1909) 23 HARV. L. REV. 79, 82 *et seq.*

46. *Id.* at 85 *et seq.*

47. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565; Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173; Heilman, *Judicial Method and Economic Objectives in Conflict of Laws* (1934) 43 YALE L. J. 1082.

rules are applied to different phases, so that as to these the domestic rules of different states are employed which may have quite dissimilar rules of contract law, incongruities, undesirable or even irreconcilable, may result. Again, should there be the same treatment of all contracts or should different types of contracts be subjected to different treatment? Should a distinction be made between the rules applicable to Conflict of Laws situations relating to contracts arising between the states of the United States and those arising between this country and foreign countries or between foreign countries? ⁴⁸

The *Restatement* deals with the subject of contracts under the following topics: (1) place of contracting, (2) creation of a contract, (3) transfer of contractual rights, (4) performance of contract, and (5) discharge of a contract without performance. The greatest variety of contracts are dealt with in the same manner (*e. g.*, bills and notes, insurance, contracts, contracts of guaranty, carriers' contracts, partnership contracts, and contracts relating to land), as if the problem were always identical. As regards the "creation" of any of these contracts the only inquiry is—where was the contract, if any, made? The "law" of the state of "contracting" determines both the validity and the nature of the obligation of the alleged contract. But the performance is subjected to the rule of the place of performance. Such a general treatment simplifies the Conflict of Laws relating to contracts, but it does so in a formalistic manner which is absolutely out of line with any rational approach toward the subject. In order to be of real service the individual types of contract should have been dealt with in detail. Bills and notes, insurance contracts, sales contracts, carriers' contracts, contracts for arbitration and the like present different types of problems which should have been considered in the light of their particular requirements. Instead we find the subject of bills and notes disposed of in a few sections relating to the place of contracting (§§ 312-316, 320), one section relating to the creation of contracts (§ 336) and one section relating to the performance of contracts (§ 369). We are told in section 336 that the "law of the place of contracting" determines whether a mercantile instrument is negotiable and valid, and in section 369 that the "law of the place of payment" determines the necessity and sufficiency of presentment for payment, of demand, of protest, and of notice of dishonor. Not only are these sections insufficient, but they falsify the existing law. Comment *a* under section 369 states that "The drawer of a negotiable bill of exchange or the endorser of a negotiable bill or note, in the absence of circumstances indicating a contrary intent, agree to pay the instrument in the event of dishonor at the place where the instrument is payable." *Daniel on Negotiable Instruments* states that this view is opposed to an "overwhelming current of author-

48. Heilman, *supra* note 47, at 1098 *et seq.*

ities.”⁴⁹ In case of dishonor drawer and endorser agree to pay in the state where they entered into their respective contracts, and it is the rule or rules of that state which should be applied to determine the conditions upon which they are to be liable.⁵⁰ It is worth noticing also that apart from questions affecting the validity of bills and notes, in regard to which there are some differences of view, our courts hold practically unanimously—contrary to the *Restatement*—that the rules of the place or places of performance of the individual contracts shall determine the rights and duties of the parties, and even the question of negotiability, and not the rule of the place or places of contracting.

Insurance contracts are mentioned specifically only in connection with the place of contracting (§§ 317-319), and sales contracts, only so far as they relate to land, which contracts are dealt with in two sections (§§ 340-341). The subject of carriers' contracts is disposed of in sections 337-338. We are told that the “law of the place of contracting” determines the duties of the carrier with respect to passengers or goods (§ 337) and the validity of a stipulation limiting the carriers' liability (§ 338). Comments on the sections inform us that in the case of interstate and foreign commerce, federal legislation controls so far as it is applicable, and that the effect of the Interstate Commerce Act in changing the obligations of the parties is not within the scope of the *Restatement*. Arbitration agreements are passed over in complete silence.

Much may be said by way of criticism of the individual sections contained in the *Restatement*, but one or two observations of a general nature must suffice. Most noticeable of all is the fact that the problem involving the effect of an express declaration of the parties in a contractual agreement that the “law” of a particular state shall govern or that its rules shall be applied to disputes arising out of such agreement is not even mentioned in the *Restatement*. Again, the *Restatement* makes a fundamental difference between the “nature and extent” of duty [§ 332 (f)], which is to be determined by the rules of the place of contracting, and the discharge of duty by performance, which is to be determined by the rules of the place of performance (§ 358). Although these sections are verbally consistent with each other, juristically they are mutually inconsistent, for nature and extent of duty can only be described in terms of the nature or kind of performance required for the fulfillment of duty. Nature and extent mean nothing else than what is required to be done in order to avoid the secondary liability which non-performance will create. Section 370 provides that “the law of the place of performance determines whether a breach has occurred.” This amounts to saying that “the law of

49. I DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 1054; see also LORENZEN, CONFLICT OF LAWS RELATING TO BILLS AND NOTES (1919) 122.

50. LORENZEN, *op. cit.* *supra* note 49, at 122.

the place of performance" determines what has to be done to fulfil the duty undertaken, *i. e.*, what has to be done not to breach the duty. A determination of the scope of the primary duty of performance is necessary in order to determine whether or not a secondary duty to pay damages has arisen. The two are inseparable. There is the same inseparability between the existence and scope of primary duty and existence and scope of secondary duty to pay damages, and yet section 372 provides that "the law of the place of performance determines the right to damages for a breach of a contract and the measure of damages." The fault is not with sections 358, 370, and 372, but with section 332 (f).

Chapter 9 is entitled "Wrongs", of which the first five topics deal, respectively, with torts, actions for death, workmen's compensation, maritime torts, and damages, and the last topic, with crimes. In the matter of torts "the law of the place of wrong" is said to govern. According to section 377, "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." The language implies that in reference to a particular occasion there can be but "one place of wrong" and that under section 377 imposition of Conflict of Laws liability can be made but once, and with reference to the domestic rules of one and only one state. Sections 64 and 65 would appear to contradict this statement, for, according to these sections, each state in which any event in the series of act and consequences occurs may exercise "jurisdiction" to "create" rights or other interests as a result thereof.⁵¹ By way of explanation, comment *a* to section 377 says: "Although by statute, the state in which any event in the train of consequences, starting with the act of the wrongdoer and continuing until the final legal consequences thereof, may make the event a wrong, the situation is, in most states, governed by the common law. The common law selects some particular point in the train of events as the place of wrong." Assuming that an actor in state *A* causes injury to a party in state *B* as a result whereof such party dies in state *C*, the place of the wrong, according to the *Restatement*, would be by common law principles in state *B*,⁵² but by statute it could be located likewise in states *A* and *C*. If such statutes existed in states *A* and *C*, it would seem clear from the Scope Note to Topic 1, Chapter 9, that the plaintiff could base his claim for damages either upon the rules of state *A*, or upon those of state *B*, or upon those of state *C*. Part of the Scope Note reads: "A court in which the question is raised, whether a tort has been committed, will make reference to the law of the place where the duty to pay for an injury is alleged

51. § 64 reads: "A state can provide for the creation of interests as a result of acts done in the state or of events which happen there."

§ 65 reads as follows: "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 exercise legislative jurisdiction to create rights or other interests as a result thereof."

52. § 391, Comment *b*.

to have been imposed." A more difficult question, which is not answered by the *Restatement*, would be whether the plaintiff would be obliged to elect between the causes of action which have arisen under the respective rules of the three states or whether a judgment for or against him under one of them would necessarily bar an action under the others.

Section 380 states that "where by the law of the place of wrong, the liability-creating character of the actor's conduct depends upon the application of a standard of care, the application of such standard will be made by the forum in accordance with its own rules of evidence, inference and judgment," but where such standard "has been defined in particular situations by statute or judicial decision of the law of the place of the actor's conduct, such application of the standard will be made by the forum." Here it may be asked—in view of the fact that the state of the place of the wrong, having under the *Restatement* exclusive "jurisdiction" with respect to common law torts, has imposed the duty of due care, how does the state in which the actor's conduct has taken place get "jurisdiction" to narrow the general standard of due care in the particular situation? Again, how is section 382 to be reconciled with the fundamental thesis of the *Restatement* in the matter of torts? This section allows two exceptions to the adopted general rule that "the law of the place of the wrong" controls. One applies to the person "who is required by law to act or not to act in one state in a certain manner." Such person is not to be held for the consequences in another state resulting from his action or failure to act. The second exception provides for immunity from liability for consequences in a second state resulting from the exercise of a so-called privilege conferred by a rule of the place of acting. Under this section the legal effects of the behavior concerned are determined by a Conflict of Laws rule employing the domestic rule of the place of conduct or behavior of the actor. The basis supporting the rule of this section would support application of the domestic rules of the place of the actor's behavior generally. The problem whether the rule of the state of the actor's conduct should control in the field of torts or that of the state in which the consequences of the actor's conduct manifest themselves has been considered elsewhere, and in at least one foreign country (Germany) the question has been resolved by giving to the plaintiff the choice of basing his claim upon the domestic rule of any of the states concerned.⁵³

Section 390 applies the rule of the place of the wrong to the question of survival of tort. But nothing is said in the *Restatement* concerning the rule applicable in case of a "revival" of an action where the tortfeasor or the injured person dies during the pendency of the action.⁵⁴ With respect

53. LORENZEN, *CASES ON CONFLICT OF LAWS* (3d ed. 1932) 215, n. 4.

54. *Martin's Adm. v. Baltimore & O. R. R.*, 151 U. S. 673 (1894); *Baltimore & O. R. R. v. Joy*, 173 U. S. 226 (1899). See also *Ormsby v. Chase*, 290 U. S. 387 (1933).

to limitation of actions for death, section 397 provides that no action can be brought anywhere after the expiration of a time limit fixed in the death statute, but it adds in comment *b* that the limits of time in the death statute of the forum may be interpreted as a statute of limitations applicable to all actions for death irrespective of the place of wrong, as well as a statute limiting the existence of rights created by the statute. In such event, suit must be brought within the time limited in the statute, as well as within the time limited in the statute of the place of injury. Section 605 deals with the same matter, but omits the qualification which allows the application of the rule of the forum to causes of action arising in another state. As regards the amount of recovery for the death of a human being, comment *a* to section 417 refers to the rule of the place of the wrong but adds in a comment that "a statutory limit by the law of the forum on the amount that can be recovered in a court of that state for death, irrespective of the place of wrong will, however, be enforced." This is repeated in substance in section 606, comment *a* and illustrations. The *Restatement* studiously avoids in both connections any mention of the "public policy doctrine" of the forum and prefers to say in effect that the time limitation and limitation on the amount of recovery of the forum are "substantive" or "conditions" with reference to local causes of action but "procedural" with respect to foreign causes of action. The public policy doctrine in the Conflict of Laws may be vague and its application frequently indefensible but resort to it within proper limits is preferable to the expedient of regarding the same rule as "substantive" for domestic situations and "procedural" for Conflict of Laws situations. In the case of the time limitation or limitation on the amount of recovery above mentioned, there is no sufficient reason for the application of the provisions of the forum to foreign causes of action and the *Restatement* might well have taken that position.

The attempt to state the rules of the Conflict of Laws applicable to Workmen's Compensation Acts in terms of "common law principles" rather than deal with the subject in a realistic manner deprives this part of the *Restatement* of any practical value. Here we find a few general statements which describe neither the decisions of the state courts nor the limitation upon the powers of the states imposed by the Federal Constitution. Where the contract of employment is made in one state and the injury takes place in another, the rules of jurisdiction laid down in Chapter 3 of the *Restatement* would confer jurisdiction upon both states, and this is the basic attitude of sections 398-400.

The jurisdiction of the state in which the workman sustained the harm is asserted in section 399, which is subject, however, to section 401, providing that "if a cause of action in tort or an action for wrongful death either

against the employer or against a third person has been abolished by a Workmen's Compensation Act of the place where the contract of employment was made or of the place of wrong, no action can be maintained for such tort or wrongful death in any state."

No statement corresponding in substance to section 401 was contained in Proposed Final Draft No. 3.⁵⁵ Section 401 was inserted on the final revision in consequence of the decision of the Supreme Court in *Bradford Electric Light Co. v. Clapper*.⁵⁶ Comment *b* to section 401 reads as follows:

"b. EFFECT OF CONSTITUTION OF UNITED STATES. If the Compensation Act of the state where the contract of employment is made abolishes the common law or statutory right of action either as a result of the fact that the employment was entered into in that state or by reason of the election of the parties to come within the operation of that Act, no action can be maintained in any state irrespective of where the workman was injured or killed. This result is required as between States of the United States under the full faith and credit clause of the Constitution."

This comment apparently was intended to state the effect of the decision of the *Bradford* case, which is interpreted as making compulsory one aspect of the "common law principle" set forth in section 401. In reality the decisions of our courts prior to the *Bradford* case did not support without qualification the broad principle announced in that section, nor can it be said definitely that the *Bradford* case has imposed the result stated in comment *b*. In the *Bradford* case Mr. Justice Brandeis said:⁵⁷ "It clearly was the purpose of the Vermont Act to preclude any recovery by proceedings brought in another State for injuries received in the course of a Vermont employment." In a later case a different result was reached by the Supreme Court because the Tennessee act, as interpreted by the courts of Tennessee, did not "preclude recovery under the law of another state."⁵⁸ There is a suggestion also in the opinion of the *Bradford* case that a different result might be permitted if New Hampshire's interest in the application of its law had been greater.⁵⁹ Without additional decisions clarifying the subject, it is impossible to know where the Supreme Court will draw the exact line. Any statements made at the present juncture concerning

55. See § 436, Proposed Final Draft No. 3.

56. 286 U. S. 145 (1932).

57. 286 U. S. 145, at 153.

58. *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439 (1933).

59. "Moreover, there is no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire. . . . The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as appears, he had no dependent there. It is difficult to see how the State's interest would be subserved, under the circumstances, by burdening its courts with this litigation." 286 U. S. 145, at 161-162.

the respective powers of the state in which the employment took place and of the state in which the harm occurred can be merely conjectural.

Comment *c* to section 401 states that where a case falls within the scope of admiralty jurisdiction the remedy under a state's Workmen's Compensation Act cannot be constitutionally allowed in any state of the United States. This is true as a general rule but with an important exception, viz. where "the matter is of mere local concern."⁶⁰ In the cases falling within the exception state Workmen's Compensation Acts may apply.

Section 400 states directly that no recovery can be had under the Workmen's Compensation Act of any state if neither the harm has occurred within the state nor the contract of employment was made in such state. The *Restatement* recognizes, however, that if the employment takes place through an employment agency in one state and the entire business is carried on in another state, the Workmen's Compensation Act of the latter state may be applied. This case apparently can be brought within the "principles" of the *Restatement* only if the hiring was not definitive until the workman reported at the principal office of the business.⁶¹

Sections 404-411 deal with Maritime Torts. Section 410 (b) states that liability for an alleged tort caused by collision on the high seas outside the territorial waters of any state is governed "by the law of the forum if the laws of the states whose flags the vessels fly are not the same." This rule is supported by *dicta* of the Supreme Court of the United States⁶² which are regarded by the admiralty bar as settling the law. Professor Beale and his regular body of Advisers had advocated "the law of the flag of the vessel harmed, or of the vessel on which the person or thing harmed is carried at the time of the wrong."⁶³

Chapter 10, entitled "Obligation of Judgments and Other Imposed Duties" includes besides the subject of judgments, quasi-contractual obligations, alimentary duties and alimony. The rules stated in this chapter do not call for any fundamental criticism. Only individual sections can be fairly objected to. One of these is section 449 (1), which provides "A valid foreign judgment that the defendant do or refrain from doing an act other than the payment of money will not be enforced by an action on the judgment." This expresses Professor Beale's view, which he has defended

60. *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59 (1926); *Alaska Packers Assoc. v. Industrial Accident Commission*, 276 U. S. 467 (1928); *Sultan Ry. & Timber Co. v. Dept. of Labor*, 277 U. S. 135 (1928).

61. Comment *a* under § 398 reads as follows: "The case of employment through an employment agency in one state, where the entire business is carried on in another state, and the applicant is merely sent to the principal office to report, is specially treated. In such a case, the relation is regarded as established not by the action of the agency, but by the workman reporting for work at the principal office of the business, the transaction at the employment office not being regarded as definitive hiring. In that case, the Compensation Act of the state where the workman reports for duty governs compensation."

62. *The Scotland*, 105 U. S. 24 (1881); *The Belgenland*, 114 U. S. 355 (1885).

63. § 446, Proposed Final Draft No. 3.

for many years, according to which an equitable decree that the defendant convey to plaintiff land in another state is not enforceable in the state of the situs. This is contrary to the most recent decisions which hold that an action in equity will lie, the former decree being regarded as a conclusive determination of the rights of the parties.⁶⁴ Mr. Justice Holmes has expressed the view that such a decree is entitled as between the parties to "full faith and credit".⁶⁵ The rule adopted by the *Restatement* thus expresses the reactionary and unprogressive point of view.

Chapter 11 deals with the administration of estates, and is divided into two topics—the administration of decedents' estates and receiverships. We are told in the Introduction that the chapter presented more difficulties than any other and that it was "developed from the consideration of some sixteen successive preliminary drafts at an equal number of conferences." So far as the administration of decedents' estates is concerned, the *Restatement* deserves the highest praise. It constitutes a piece of constructive work which ought to influence most favorably the development of this branch of the Conflict of Laws. The *Restatement* lays down reasonable rules with respect to many points which were left uncertain by the decisions or regarding which there were no decisions. In other respects it restated the law in a way to avoid needless obstacles to a prompt settlement of decedents' estates.⁶⁶ Attention may be called by way of illustration to sections 474-475 and 481-482, which make the rightfulness of the collection of chattels and debts in another state than that of the appointment of an administrator dependent upon the existence of a local administrator or knowledge thereof, rather than upon the existence of local creditors.

The rules developed under administration of decedents' estates with respect to the collection of chattels and claims, the transfer of chattels and claims, the administration relating to land, the proof and payment of claims, suits by and against administrators, accountability of administrator and disposition of balance have been adopted substantially with respect to receiverships.

Section 525, relating to the place where the principal receiver may be appointed, provides in subdivision (b) that such receiver may be appointed "in the case of an action instituted by a creditor, by a competent court of any state in which a substantial portion of the assets and the principal operating offices of the association are located; or if there is no such state, by a competent court of any state in which a substantial portion of the assets is located." This rule ought to be followed. So far as the federal courts

64. *Redwood Investment Co. v. Exley*, 64 Cal. App. 455, 221 Pac. 973 (1923); *Matson v. Matson*, 186 Iowa 607, 173 N. W. 127 (1919).

65. *Fall v. Eastin*, 215 U. S. 1 (1909).

66. Cf. *Beale, Voluntary Payment to a Foreign Administrator* (1929) 42 HARV. L. REV. 597.

are concerned, section 525 (b) does not take account of section 51 of the Judicial Code,⁶⁷ providing that where the sole ground of federal jurisdiction is diversity of citizenship, suit must be brought in the district of residence of either the complainant or the defendant. It seems, however, that if no objection is raised under section 51, a federal court will entertain and grant an application by a creditor for the appointment of a receiver if the defendant corporation, though incorporated in another state than that in which the federal court's district is located, has its principal office and a substantial⁶⁸ amount of its property in the district.⁶⁹

Section 526, which declares that "the commencement of an action involving the appointment of a principal receiver in a competent court in accordance with the rule stated in section 525 will be recognized as precluding the subsequent appointment of a principal receiver by the court of any other state, provided that in the first action the receiver is seasonably appointed," also states a desirable rule which, however, has been frequently disregarded by the state courts.⁷⁰

Section 77-B of the Bankruptcy Act (approved June 7, 1934) abolishes ancillary receiverships with respect to corporate reorganizations under the supervision of the federal bankruptcy court. The section applies to all corporations other than insurance and banking corporations, and building and loan associations.⁷¹ As equity receiverships will be largely superseded by the statutory reorganization proceedings referred to, the rules of the *Restatement* with respect to receiverships will have only a limited field for application.

Under the title of "Procedure," which constitutes the last chapter of the *Restatement*, Topic 1 deals with distinction between substance and procedure, Topic 2, with proceedings in court, Topic 3, with conditions of maintaining suit, Topic 4, with access to courts, and Topic 5, with foreign law. Most of the sections are based upon settled rules of our law which it would be difficult to disregard. The statute of limitations may be taken as an example (§§ 603-604). Sections 614-615 relating to actions for trespass upon foreign land and to acts in one state causing injury to land in another state, perhaps also belong to this category, although in this instance the indefensibility of the rule might well have justified greater boldness on the

67. 42 STAT. 849 (1922), 28 U. S. C. A. § 112 (1927).

68. See *Burnite Coal Co. v. Riggs*, 274 U. S. 208 (1926); Billig, *Corporate Reorganization: Equity vs. Bankruptcy* (1933) 17 MINN. L. REV. 237, 253-254.

69. There is much variation in the holding of the federal courts concerning the amount of assets or property requisite to be located within the district of the court before any application for a receivership will be granted. Billig, *supra* note 68, at 248-249.

70. *Frankland v. Remington Phonograph Corp.*, 13 Del. Ch. 312, 119 Atl. 127 (1922); *Michel v. Necker, Inc.*, 90 N. J. Eq. 171, 106 Atl. 449 (1919); *Universal Stamp and Stationery Co. v. Garod Corp.*, 100 N. J. Eq. 453, 136 Atl. 329 (1927).

71. Friendly, *Some Comments on the Corporation Reorganizations Act* (1934) 48 HARV. L. REV. 39; Weiner, *Corporate Reorganization: Section 77-B of the Bankruptcy Act* (1934) 34 COL. L. REV. 1173.

part of the Institute, and to have warranted the statement that such actions should be treated as transitory.⁷² Other sections are not so well supported and there was here opportunity to do some constructive engineering for law improvement,⁷³ which opportunity, however, was not taken advantage of. For example, the statute of frauds, whether stated in terms of prescribing a rule of procedure or not, is substantive, for regardless of phraseology it states a requirement of an operative fact necessary for enforcement of a promise.⁷⁴ This might well have been recognized by the *Restatement* instead of admitting (§ 598, comment *a*) that it may prescribe a rule of procedure for the courts of a state or it may affect the formal validity of contracts. Nor was it well to suggest that the statute of frauds of the forum, which is regarded as affecting the formal validity of contracts made there, might be regarded as of such importance as to be applicable to contracts made elsewhere.

It is submitted that not all presumptions, other than conclusive presumptions, are "procedural" so as to be controlled by the rules of the forum. The illustration given under comment *c* of section 595 may serve as an example. When by the rule of the state in which the transaction in question took place a stipulation in a bill of lading limiting the carrier's liability for the negligence of his servants is not binding without proof of assent to the terms of the bill, whereas by the rule of the forum "an inference is drawn from the receipt of the bill without dissent that the shipper assented to the terms of the bill", the assent or non-assent is one of the operative facts necessary to create a binding contract and as such should be determined by the rule of the state of the transaction. The question concerned is clearly substantive.⁷⁵

The burden of proof also, so far as it involves the question of which party bears the risk of non-persuasion of the trier of the fact, should have been regarded as substantive for the reason that where the evidence is evenly balanced the decision will be against the party having the burden of proof. The *Restatement* holds that it is procedural but admits that the rule of the state where the cause of action arises may make it a "condition of the cause of action itself," in which event the rule of such state should be applied (§ 595, comment *a*, § 601).

It is the expectation of the American Law Institute that the restatements will be accepted by our courts as authoritative. In view of the fore-

72. *Little v. Chicago, St. Paul, M. & O. Ry. Co.*, 65 Minn. 48, 67 N. W. 846 (1896).

73. See Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 YALE L. J. 333.

74. Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311.

75. In support of the RESTATEMENT see *Hoadley v. Northern Transp. Co.*, 115 Mass. 304 (1874). *Contra*: *Michigan Central R. R. v. Boyd*, 91 Ill. 268 (1878); *Coats v. Chicago, Rock Island & P. Ry.*, 239 Ill. 154, 87 N. E. 929 (1909); *Hartman v. Louisville & Nashville Ry.*, 39 Mo. App. 88 (1890); *Valk v. Erie Ry.*, 130 App. Div. 446, 114 N. Y. Supp. 964 (1st Dep't 1909); *Frasier v. Charleston & W. Ry.*, 73 S. C. 140, 52 S. E. 964 (1905).

going discussion it would seem, however, that so far as the *Restatement of the Conflict of Laws* is concerned, such expectation is not well founded. A concrete example may serve perhaps to give further point to this allegation. Let us suppose that the question before the court is whether the *renvoi* doctrine shall be accepted in a particular situation. Would the court be justified in basing its conclusion upon the *Restatement*? The earliest drafts rejected the doctrine except in one or two classes of cases. In *Restatement No. 2* the exception reads as follows:

“If a question of status or of title to land is to be determined, the court first decides in accordance with its own Conflict of Laws, by the Law of what state the existence of the status or of the title is to be determined and it then decides the question as it would be decided by a court of that state.” (Section 8.)

In the Proposed Final Draft No. 1 the *renvoi* is limited in Section 8 to *marital* status and title to land. It reads:

“If a question of marital status or of title to land is to be determined, the court first decides, in accordance with its own Conflict of Laws, by the law of what state the existence of the status or of the title is to be determined; and it then determines the existence of the alleged status or title as its existence would be determined on the same facts by a court of the latter state.”

In the Proposed Final Draft No. 4 the application of *renvoi* is extended so as to include title of *chattels* and, on the other hand, is still further limited, as regards status, being now confined to the validity of a decree of divorce. Section 8 reads as follows:

“All questions of title of land or of chattels or as to the validity of a decree of divorce are decided in accordance with the law including the rules of Conflict of Laws of the situs or of the domicile respectively.”

In the Final Restatement the application of *renvoi* to questions of title to chattels is dropped. Section 8 now reads:

“(1) All questions of title to land are decided in accordance with the law of the state where the land is, including the Conflict of Laws rules of that state.

“(2) All questions concerning the validity of a decree of divorce are decided in accordance with the laws of the domicile of the parties, including the Conflict of Laws rules of that state.”

If the authorities had been given, it would have appeared that there is no support for section 8 in any decision rendered by an American court. It has support in England,⁷⁶ but the English courts have adopted the *renvoi*

76. *Armitage v. Attorney General*, [1906] P. 135; *In re Baines* (unreported), *DICEY, op. cit. supra* note 44, at 596.

doctrine also in other situations than those within section 8.⁷⁷ The question naturally arising is why was the *renvoi* doctrine adopted in the two cases mentioned and not in the others? If the choice was made on the basis of practical expediency, the question might be raised why, in the matter of status, the *renvoi* was retained with respect to divorce.⁷⁸

In view of its history section 8 is not calculated to inspire confidence in its soundness. And what is true of section 8 applies with equal force to many other sections of the Restatement dealing with doubtful points. In some cases they may reflect the ideas of Professor Beale and in others those of Dean Goodrich, who was in charge of the final revision of the *Restatement*. In some instances the section in question may have had the benefit of a thorough discussion on the part of all Advisers and in others it may have had only their formal approval. With no means of information regarding the arguments in support of any particular section and with no assurance that the final conclusion represents the mature judgment⁷⁹ of the experts working on the *Restatement*, our courts would not be justified in basing their decisions upon any of the rules announced in the *Restatement* regarding which there is serious doubt.

The objections to the use of black letter texts in treatises on the Conflict of Laws have been set forth fully by Professor Yntema⁸⁰ in an article in which he reviewed a handbook appearing in the Hornbook Series, which had reduced the subject to 207 black letter texts. The criticisms thus made would appear to be applicable with even greater force to the *Restatement of the Conflict of Laws*, containing, as it does, 625 black letter texts, for, the more detailed the provisions the greater the likelihood that they will be regarded as constituting the law itself rather than as being merely shorthand descriptions of attempted modes of solution of problems involving complicated social experiences. The American Law Institute having been organized for the purpose of promoting "certainty and simplicity"⁸¹ in the statement of rules, it naturally chose a method which at least gave the appearance of simplicity. The classification of completely dissimilar situations under a general abstract principle can, of course, never lead to certainty. It will inevitably create exceptions and refinements and a general repetition of the wilderness of single instances and precedent which it was the purpose

77. DICEY, *op. cit. supra* note 44, at 863 *et seq.*

78. There would appear to be no room under the provisions of the RESTATEMENT relating to divorce for any *renvoi* doctrine as between the states of the United States. If it was felt that it would be of use with reference to foreign countries having different rules of the conflict of laws the RESTATEMENT should have indicated the circumstances under which this would be so.

79. Lack of time must have prevented the many sections in Proposed Final Draft No. 4, making vital changes in the earlier drafts from receiving the same consideration on the part of the Advisers as those contained in the earlier drafts.

80. *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468.

81. I PROCEEDINGS AMER. LAW INSTITUTE (1923) 6 *et seq.*

of the *Restatement* to avoid. The only way in which this can be obviated is by giving greater discretion to the courts to handle the cases on their merits rather than by the application of a rigid rule. If it had been the desire to increase the discretion of the courts, general principles capable of an elastic application might have been formulated, which would have at least enabled the courts to get rid of artificial rules. However, instead of general directions we find in the *Restatement* a vast number of specific rules conforming largely to the rigid pattern suggested by Professor Beale. The Institute thus failed to avail itself of the only effective means at its command to bring about in reality greater simplicity in the law.

In the opinion of the writers, the *Restatement of the Conflict of Laws* should not have been undertaken at the present time. In recent years strong protests have been made against the territorial or pseudo-territorial viewpoint of the Conflict of Laws expressed by Professor Beale and his "school", the demand being insistent that the fundamental bases of the subject be re-examined.⁸² Much of the work so far done has been of a critical and exploratory character. Substantial constructive work has been accomplished and more time should have been allowed for further efforts in the new direction. Many problems of a fundamental character required further illumination before a restatement of the Conflict of Laws should have been undertaken. Should the Conflict of Laws continue to be regarded as having nothing to do with the merits of the dispute between the parties and as being confined solely to the role of designating the state or country whose "law" is to control? Has the Conflict of Laws merely the formal task of pointing out whether the *lex loci*, the *lex rei sitae*, the *lex domicilii* or the *lex fori* is to control? Even if it be assumed that international amity is not as yet such that any other than a formal attitude in the solution of Conflicts problems is practicable, it does not follow that the same attitude is necessarily justifiable between the different states of our country. Why should the legal relations between residents of the different states of this country arising out of interstate transactions be determined by such an accidental consideration as that of where the last act occurred which would be necessary to make a transaction contractually binding according to the rules adhered to by the different states or by the rules of some state arbitrarily selected? Should not interests arising out of interstate contractual transactions be controlled by economic and social objectives rather than technical and arbitrary rules relating to the place where, if at all, the alleged contract is deemed to have been made?⁸³

82. Cook, *supra* note 9; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736; Yntema, *supra* note 80; Cavers, *supra* note 47; Heilman, *supra* note 47.

83. See Cavers, *supra* note 47; Heilman, *supra* note 47.

Another question worthy of the most thoughtful consideration before any attempt to restate our law along traditional lines was undertaken was whether, in the interests of the administration of justice, the rules of the Conflict of Laws should allow some room for choice or discretion. Professor Beale's system, as stated above,⁸⁴ is more rigid in theory than that of any foreign country. It is also more rigid than the Anglo-American decisions upon which it is supposed to rest. Why is it that the English and American courts have refused to subscribe more uniformly to the Conflict of Laws rule that the rules of the state where an alleged contract, if any, is treated as technically made shall be applied in regard to contractual questions? Why do they say with such frequency that the rule of the place of performance or that of the intention of the parties shall control? Is it not because of an instinctive feeling that justice can best be promoted in that manner rather than by accepting a rule which may make the legal relations of the parties depend exclusively upon accidental circumstances?

Other problems of a fundamental character in the Conflict of Laws require further study before they can be understood in their full implications. One of these is the *renvoi* doctrine, involving the question to what extent, if any, the rules of the Conflict of Laws should be deemed to refer to the domestic rules of foreign states or countries rather than to their law inclusive of the Conflict of Laws rules. Only a few articles have been devoted to this subject in the United States,⁸⁵ whereas a considerable literature has appeared in the other countries since the writing of these articles. Another problem has to do with the rules applicable to the "preliminary questions" in the Conflict of Laws. Only one article has been published on the subject in the United States⁸⁶ and much more might be said. In the recent continental literature the question has received much attention.

Before an authoritative restatement of the Conflict of Laws was undertaken, which might determine the course of the Conflict of Laws during many years to come, a study ought to have been made also of the possibility of bringing our rules of the Conflict of Laws—at least so far as they relate to foreign countries—into greater harmony with those existing elsewhere.

Another reason why the *Restatement of the Conflict of Laws* at the present time was premature is due to the connection of the Conflict of Laws with Constitutional Law. There has been a tendency on the part of the Supreme Court of the United States in late years to extend the application of various provisions of the Federal Constitution to matters of Conflict of

84. *Supra*.

85. Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COL. L. REV. 190, 327; *The Renvoi Doctrine in the Conflict of Laws* (1918) 27 YALE L. J. 509; Schreiber, *The Doctrine of the Renvoi in Anglo-American Law* (1918) 31 HARV. L. REV. 523.

86. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247.

Laws, and there is as yet no certainty as to how far this process of absorption will go.⁸⁷ It would have been better, therefore, if the *Restatement of the Conflict of Laws* had been postponed until the attitude of the Supreme Court had become more clearly defined.

In the light of the above observations, it is submitted that the American Law Institute was ill advised in selecting the Conflict of Laws as one of the first subjects for restatement.

87. See *Supreme Council of Royal Arcanum v. Green*, 237 U. S. 531 (1915); *Aetna Life Insurance Company v. Dunken*, 266 U. S. 389 (1924); *Modern Woodman of America v. Mixer*, 267 U. S. 544 (1925); *Hartford Accident and Indemnity Co. v. Delta and Pine Land Company*, 292 U. S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U. S. 397 (1930); *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145 (1932); *State of Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439 (1933).