FROM THE OLD RESTATEMENT OF CONFLICT OF LAWS TO THE NEW.

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Before discussing the essential differences between the old Restatement of Conflict of Laws and the new, it will be well to pay brief attention to how a Restatement is prepared, to what it is and to the status it enjoys in the United States. Restatements are prepared under the auspices of the American Law Institute, which is a private organization to which many of the most important lawyers in the United States belong. The first step in the Restatement process is the appointment of a Reporter or Reporters whose task is to prepare the original and revised drafts and to present them to the Advisers, the American Law Institute Council and the Institute membership. Drafts prepared by the Reporter are initially considered by a group of approximately ten Advisers, who are chosen because of their knowledge of the particular subject matter. Then, after the Reporter has made the revisions suggested by the Advisers, the draft is submitted to the American Law Institute Council which consists of some fourty prominent judges, lawyers, law school deans and law professors. The Council can return a draft to the Reporter and the Advisers for further revision, in which event the draft will be resubmitted to it. Or the Council can give a draft its tentative approval. In that case, the Reporter makes whatever changes in the draft have been

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suggested by the Council and then the draft, as amended, is brought before the entire membership of the Institute at an annual meeting. The membership in turn can give a draft its tentative approval, or it can send it back for reconsideration by the Reporter and his Advisers and by the Council. Finally, after all parts of a proposed Restatement have received the tentative approval of both the Council and the Institute membership, a composite draft, embodying all agreed-upon revisions, is brought before the Council and then before the Institute membership for final approval. The task of preparing a Restatement is time-consuming and arduous. By way of example, twelve years were devoted to the preparation of the old Restatement of Conflict of Laws while eighteen years were required to complete the Restatement Second.

A Restatement consists of several hundred sections, each of which is haded by a black-letter rule followed by explanatory Comments and then by a Reporter's Note which makes reference to some of the relevant authority. In contrast to those in the original Restatement, the Comments in the Restatement Second are often of considerable length in an attempt to explain not only the nature of a rule but also the reasons for the rule's existence. Reference is sometimes made in the Comments to important questions that have not yet come before the courts and to the factors which is believed the courts might consider in reaching their decisions. In general, the attempt was made to make the Restatement Second more informative and more helpful than its predecessor.

It must be emphasized that a Restatement is not a code and does not enjoy the force of law. It is a purely private document which, because of the manner of its preparation and the reputation of the Council and of the Institute membership, enjoys, with perhaps some exceptions, an authority greater than that accorded any legal treatise. The Restatements are frequently cited by the courts and undoubtedly are particularly persuasive in a situation when the point at issue has not been conclusively determined in the state of the forum.

We turn now to a more detailed examination of the differences between the old Restatement and the new. These differences can briefly be described in various ways, depending upon the point of view of the person in question. So a person wedded to the old Restatement might say that the difference between the old and new Restatements is one between order and chaos, or, if he were more charitably inclined, is between simplicity, clarity and precision on the one hand and complexity, vagueness and obscurity on the other. An apologist for the new Restatement might say that the difference is one between a conceptualistic dogmatism, which insisted upon fitting the subject into a preordained mold, and a far-sighted and enlightened flexibility which brings what certainty is possible to a basically uncertain field

while at the same time making allowances for possible future developments. Finally, a member of the «new wave» of conflicts scholars would damn both Restatements, old and new, as disregarding essential policy considerations and as attempting to import rules into an area where decisions should essentially be **ad hoc.**

As would be expected, both Restatements are the product of their times. The old Restatement, on which work was commenced in 1923 and completed in 1934, was prepared during a time when it seemed both possible and desirable to regulate the entire field of choice of law by a relatively few hard-and-fast rules. One doctrine embodied in the Restatement was that of vested rights, according to which the governing law is that of the state where occurred the last event necessary to bring a legal obligation into existence. Or, as stated by Justice Holmes, one of the foremost exponents of the doctrine, «(the) theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an **obligatio,** which, like other obligations, follows the person, and may be enforced wherever the person may be found». (1) Thus, the old Restatement provided that the law governing the parties' rights and liabilities in tort is that of the state where the defendant's act first caused injury to the plaintiff, (2) since injury is the last event necessary to bring a tort obligation into existence. Similarly, the law governing the validity of a contract was said to be that of the state where the last act necessary to create the contract, usually the acceptance of the offer, had occurred (3) while matters of performance were subjected to the law of the place of performance (4). The vested rights doctrine was not, however, applied with complete fidelity. So, for example, a marriage which complied with the requirements of the state of celebration was said nevertheless to be invalid if it would so be held by the courts of the state where either party was domiciled at the time of the celebration. And the effect of an attempted transfer of interests in land was subjected to the law of the situs irrespective of where the attempted transfer had taken place (6).

The old Restatement found it necessary to state only a relatively few choice-of-law rules. So, for example, one rule - application of the law of the place of injury - was applied to the entire field of torts (7). Two rules were applied to contracts, namely application of the law of the place of making to issues of validity and

(1) Slater v. Mexican National R. Co., 194 U.S. 120, 126 (1904).
(2) Restatement, Conflict of Laws § § 377-379 (1934).
(3) *Id.* § 332.
(4) *Id.* § 358.
(5) *Id.* § 132.
(6) *Id.* § 215.
(7) See note 2, *supra.*

application of the law of the place of performance to issues of performance (8). The law of the situs was made applicable in all cases involving land (9) and in most cases involving the inter state transfer of movables (10). And the validity of a marriage was subjected to the law of the place of celebration, (11) except where the state of domicile of either party would insist upon holding the marriage invalid (12).

With the exception of contracts, these rules were consistent with the results reached in a substantial majority of the cases that had been decided up to the time of the old Restatement's completion in 1934. There had, however, been ever-increasing rumblings of discontent in the scholarly writings which came increasingly to be shared by the courts. As might be expected, this discontent on the part of the courts did not originally take the form of a frontal attack upon the rules of the Restatement. Rather, the courts developed a variety of devices for evading these rules while continuing to pay them lip-service. The most frequently used device was that of characterization whereby the court would place an issue within an unusual category in order to escape an unwelcome rule. So, for example, the courts evinced considerable flexibility in characterizing a particular issue as one of substance or procedure (13). Sometimes issues that were essentially tort would be placed within the category of contract (14) or family law (15), and issues affecting interests in land would be considered contractual rather than as falling within the property area (16). Renvoi was another escape device (17) and so too was the notion of public policy (18). In short, choice of law in the United States was never as simple or as hard-and-fast as a reader of the old Restatement might have supposed. The courts enjoyed considerable flexibility, but the existence of this flexibility was not frankly recognized in the opinions. Contracts was the one area where it was clear almost from the ontset that the rule of the old Restatement would not do. To be sure, the courts did on occasion apply the law of the place of contracting to determine the validity of a contract, and when they did so, they normally wrote their opinions as if this was the only proper

(8) See notes 3-4, *supra.*
(9) See note 6, *supra.*
(10) Restatement, Conflict of Laws § § 255-258 (1934).
(11) *Id.* § § 121-122.
(12) See note 5, *supra.*
(13) See, *e.g.,* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) ; Kilberg v. Northeast Airlines, Inc., 9 N.Y. 2d 34, 172 N.E. 2d 526 (1961).
(14) See, *e.g.,* Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W. 2d 814 (1959).
(16) See, *e.g.,* Polson v. Stewart, 167 Mass. 211 (1897).
(17) See, *e.g.,* University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936).
(18) See, *e.g.,* Kilberg v. Northeast Airlines, Inc., 9 N.Y. 2d 34, 172 N.E. 2d 526 (1961).

choice-of-law rule (19). But on other occasions, the same court would frequently employ some other choice-of-law rule, such as one calling for the application of the law of the place of performance, or of the law of the state with the greatest number of contacts, or of the law intended to be applied by the parties, and again would write its opinion in terms suggesting that the rule stood alone without rivals (20). It was obvious to a reader of the cases that there was no one simple choice-of-law rule in the area of contracts but rather that the courts had a number of choice-of-law rules in their arsenal and in a given case would frequently feel free to use whichever rule would permit them to reach the desired result.

This was essentially the situation when work on the new Restatement was commenced in 1952. It was clear that the Contracts Chapter would have to be rewritten completely. It was also clear that the dogmatic quality of many of the rules in the other chapters would have to be toned down, that more room would have to be provided for flexibility and that the Comments would have to be expanded considerably. But is was not at all clear how these various goals should be accomplished. The courts were clearly becoming increasingly restive with the old rules, but there was no unanimity among them as to what new rules or what new approach should be adopted. The writers, as might be expected were vocal in their suggestions but were by no means agreed on a solution. Then, after work on the new Restatement had been in progress for more than ten years, the underpinings of the subject were overturned by the decision of the New York Court of Appeals in **Babcock v. Jackson** (21). Up to the time of this decision, torts, in contrast to contracts, had remained a fairly stable field and it was possible to say, as did the earlier tentative drafts of the new Restatement, that the law of the place of injury would be applied in all but exceptional cases. Since the time of **Babcock,** by way of contrast, the most striking developments have taken place in the torts area. But more than that, **Babcock** started a revolution in choice-of-law thinking which is still very much in progress and whose outcome is still uncertain. This revolution delayed the completion of the new Restatement for several years. Any of the existing tentative drafts had to be substantially rewritten, and the uncertainties hat are implicit in the **Babcock** decision presented considerable difficulties in formulating the various choice-of-law sections.

In **Babcock,** a New York driver was alleged to have negligently injured his New York guest in an acident which occurred in the Province of Ontario, Canada, during the course of an automobile

(19) See, *e.g.,* Milliken v. Pratt, 125 Mass. 374 (1878).
(20) See Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1954).
(21) 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963).

trip which started in Rochester, New York and was expected to end there. Under the then-existing guest-passenger statute of Ontario, a guest could not recover against the driver for negligently inflicted injuries. The New York rule was otherwise. By a divided vote, the New York Court of Appeals held on two grounds that the New York rule should be applied. One ground was that «controling effect» should be given to the law of the state which has «the greatest concern with the specific issue raised in the litigation» (22). This, it will be noted, would call for decision of each on an **ad hoc** basis, since the interest of a state in having a particular local law rule applied would depend upon the content of that rule and upon the policy underlying it. On the other hand, the Court also said in a later part of its opinion that «the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place.» (23). This statement clearly calls for a choice-of-law rule which would provide for the application throughout the entire trip of the relevant local law rule of a particular state. **Babcock** v. **Jackson** thus left open the most important question of all, namely whether one should seek to develop rules of choice of law or rather should give the courts no guidance other than that they should consider a number of factors in arriving at their decisions. This basic question remains unanswered in the United States today.

The uncertainty or ambiguity of **Babcock** is reflected in the new Restatement. Section 6, the basic section on choice of law, does no more than list the factors which it is believed the courts should consider in arriving at a choice-of-law decision. And later sections of the Restatement make clear that the frequently used term «state of most significant relationship» is a short-hand expression for the state selected after appropriate consideration has been given to the factors listed in Section 6. These factors are : the needs of the interstate and international systems ; the relevant policies of the forum ; the relevant policies of other interested states and the relative interests of those states in the determinaion of the particular issue ; the protection of justified expectations ; the basic policies underlying the particular field of law ; certainly, predictability and uniformity of result ; and ease in the determination and application of the law to be applied. Section 6 sets the Restatement well apart from the position of certain American scholars, notably the late Professor Brainerd Currie, who are devotees of the so-called «governmental interest analysis» and who believe (1) that the only factors which should be consi-

(22) *Id.* at 481, 191 N.E. 2d at 283.
(23) *Id.* at 483, 191 N.E. 2d at 284-285.

dered in choice of law are the policies underlying the relevant local law rules of the forum and of other potentially interested states and (2) that the forum rule should be applied, irrespective of the interests of other states, if its underlying purpose would be furthered by such application. (24) To be sure, the policies underlying the relevant rules of the potentially interested states are among the factors mentioned in Section 6, but they are by no means the only factors.

Section 6 is clearly not a rule since it only tells the court what factors to consider, rather than what conclusion to reach, in deciding a choice-of-law question. This, fortunately or unfortunately, comes close to being the best that can presently be done in major portions of such important areas as torts, contracts and movable property. It has now become clear that all aspects of these areas cannot satisfactorily be handled by one or two broad choice-of-law rules calling, for example, for application of the law of the place of injury, or of the place of contracting or of the situs of the chattel in question. Many narrower rules will have to be developed to take their place, if indeed we are to have rules at all. But present-day knowledge will not permit the statement at this time of many rules of this new sort. All that can frequently now be done is for the courts to decide cases essentially on an **ad hoc** basis with whatever guidance they can derive from the basic factors that underlie choice of law. These, it is thought, are the factors listed in Section 6. Those who desire rules can hope that, in applying the factors listed in Section 6 on a case-to-case basis, the courts will eventually obtain the requisite knowledge to enable them to state rules concerning at least most areas of choice of law. Those who favor **ad hoc** decisions can take solace in the fact that decisions of this sort are all that are called for by Section 6. In other words, Section 6 does not resolve the question posed bij **Baccock**, namely whether we should strive for rules or favor **ad hoc** decisions.

A reading of the new Restatement will reveal, however, that the American Law Institute is clearly in favor of rules. In the relatively few instances where present knowledge was thought to permit, hard-and-fast rules have been stated. So, for example, the Restatement retains the rule that the law that would be applied by the courts of the situs determines questions involving interests in land (25) and that the law that would be applied by the courts of the state of decedent's domicile at death determines questions of succession to movables. (26) Hard-and-fast rules are likewise stated in the case of negotiable instruments (27) and in the case of ordinary

(24) See statement by Professor Currie in Reese and Rosenberg, Cases and Materials on Conflict of Laws 523-524 (6th ed. 1971).
(25) Restatement (Second), Conflict of Laws § 223 (1971).
(26) *Id.* § § 260-263.
(27) *Id.* § § 214-217.

contracts it is stated dogmatically that «issues relating to details of performance of a contract are determined by the local law of the place of performance.» (28)

In most areas of choice of law it was felt necessary to state rules that in varying degrees are open-ended. In all instances, however, an earnest effort was made to give the courts whatever guidance was possible on the basis of existing knowledge. Sometimes, it was felt that nothing more could be done than to tell the courts to consider certain contacts, such as the domicile of the parties and the place of injury or of conduct in tort, and the place of contracting, or of performance or of negotiation in contract, in addition to the factors listed in Section 6. This is true, for example, of Section 145, which deals with the field of torts in general, and of other sections which deal with particular issues in tort. This is also true of Section 188, which is concerned with the entire field of contracts in the absence of a choice of law by the parties, except that it is here stated that «(if) the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied.» Likewise, in the case of certain issues in contract, no more is said than that the applicable law will be that selected by application of the rules of Sections 187 and 188.

In other instances, the guidance given takes the form of a presumption or principle of preference. Examples are Sections 146 and 147 which provide that in actions to recover for personal injuries or of damage to tangible property, the applicable law shall be that of the state where the injury occurred unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Section 6 to the occurrence, the thing (in a case where damage to a thing is involved) and the parties. Similar presumptions are to be found in sections dealing with other kinds of torts, such as misrepresentation, (29) defamation, (30) invasion of the right of privacy (31) and malicious prosecution (32) and with particular kinds of contracts, such as those involving land, (33) chattels, (34) insurance, (35) loans (36) and the rendition of services. (37) In all of these sections ,it is said that the local law of a state with a particular contact, which contact varies from situation to situation, should be applied unless the factors listed in Section 6 point to a different result. These sections

(28) *Id.* § 206.
(29) *Id.* § 148.
(30) *Id.* § § 149-150.
(31) *Id.* § § 152-153.
(32) *Id.* § 155.
(33) *Id.* § § 189-190.
(34) *Id.* § 191.
(35) *Id.* § § 192-193.
(36) *Id.* § 195.
(37) *Id.* § 196.

are each directed to a relatively narrow situation, namely to a particular kind of tort or a particular kind of contract and hence are at least a start in the direction which it is hoped further developments will take, namely the construction of a considerable number of choice-of-law rules of limited scope. Likewise, it is felt that these sections provide worthwhile guidance. Each states that the law of a state with a designated contact is presumptively applicable unless this presumption is overcome by a consideration of the factors listed in Section 6. To be sure, the stated exception is of uncertain dimension, but is was not felt possible to be more precise at this time.

In the case of other sections, present-day knowledge was thought sufficient to justify business guidance while allowing room at the same time for possible exceptions. This firmer guidance is provided in one of two ways. Sometimes a black-letter rule will explicitely indicate that it is only on rare occasions that the factors listed in Section 6 will call for application of a law other than the state with the designated contact. So, for example, it is said in Section 283 that a marriage that is good under the law of the state where it was contracted, will be held valide verywhere unless it violates the «strong public policy» of the state selected by application of the factors listed in Section 6. Similarly, the law of the state of incorporation is said to govern the rights and liabilities of shareholders, except in the «unusual case» where the Section 6 factors require application of some other law. (38)

Likewise, in the case of certain issues, it is said that the law of a given state will «usually» be applied. And «usually» is used in the Restatement to denote a narrower exception than that involved when it is said that the presumtively applicable law may be discasded whenever this seems required after a consideration of the factors listed in Section 6. So, for example, it is said that whenever one member of a family is immune from tort liability to another member of the family will «usually» be determined by the local law of their domicile ; (39) that the capacity of a part to contract will «usually» be upheld if he has such capacity under the local law of his domicile, (40) and that formalities which meet the requirements of the state where the parties execute their contract will «usually» be acceptable. (41) All in all, an earnest effort was made throughout the Restatement to provide as much guidance and precision as the state of the law believed to permit.

Two further things about the new Restatement should here be mentioned. The first is that the applicable law is said throughout to depend upon the particular issue. No longer, as the old Restatement

(38) *Id.* § § 303-304.
(39) *Id.* § 169.
(40) *Id.* § 198.
(41) *Id.* § 199.

would suggest, can one safely assume that the local law of a single state will govern all substantive issues in a case. Rather one must determine in the case of each issue which law can most appropriately be applied to determine that particular issue. This change was mandated by **Babcock** v. **Jackson** and its progeny and is clearly in line with the current trend of the law in the United States. Secondly, the new Restatement, in contrast to the old, recognizes that the parties do have some power to choose the law that will govern their contract. (42) A major distribution is here made between matters that lie within the parties' contractual capacity and those that do not. As to matters of the first sort, the parties are said to have an unlimited power of choice. Restrictions are, however, imposed upon the parties' power to choose the law to govern issues that do not fall within their contractual capacity to regulate. Almost certainly there must be some restrictions, but neither the case law nor the doctrinal writings cast much light upon what the nature of these restrictions should be. Accordingly, in preparing the Restatement rule on this point, it was found necessary to write upon what was essentially a clean slate. The rule states that the chosen law will not be applied to govern an issue that does not fall within the contractual capacity of the parties if either (a) the chosen state has no substantial relationship to the parties or the transaction and there was no other reasonable basis for the parties' choice or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and would be the state of the applicable law if the law of the parties' choice were to be disregarded. It is as yet too early to tell whether this rule will prove acceptable to the courts. It should, in any event, prove significant as an attempt to enter virgin territory.

In conclusion, no one would be so bold to suggest that the new Restatement is the final word on the subject. It was prepared during a period of violent change in choice of law when no one could accurately foretell what the future would bring. Accordingly, all that the new Restatement could do, and what hopefully it actually does do, is to brush aside the errors of the past and to provide as precise guidelines as possible for the further development of the law. Sometime in the future, it should be possible to make more definite statements than now on choice of law. That will be the task of the next Restatement.

(42) *Id.* § 187.