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"Lord Ellenborough said, every man who published a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right."¹ Not only does he exercise a right, but, as his lordship goes on to say, the commentator performs a useful public service as well. None of us nowadays comes forth with the written product of his thought backed with the claim that the words were dictated by Jehovah in the fastness of Mount Sinai. If we are honest we believe what we say, or we would not say it. But all of us know that our conclusions may at best be only partly true.

Such a benevolent state of mind toward honest criticism ought in general to be the possession of one who offers a book to the public, and especially so if the work is offered not for commercial profit but as a public service. The writer must take criticism and like it, even though it smarts. In the case of the work of such a body as the American Law Institute, the case for free criticism is even clearer. The Institute was founded, in the words of its incorporating articles, for the "improvement of the law." It speaks with the authority of its eminent membership, backed with the years of labor by acknowledged scholars for every volume of its Restatement of the Law. But the very purpose would be defeated if its pronouncements were to result in shutting off all further discussion, and thus bring improve-

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1. Carr v. Hood, Court of King's Bench at Nisi Prius, 1808; reported in note to Tabart v. Tipper, 1 Camp. 350 (1808).

ment to an end. For law grows by palaver;² palaver between judge and counsel in a court room, between the law professor and the student in his class, in the debates of the American Law Institute. Unless and until we evolve a system of law which is perfectly adapted to society's needs, and then have a social order which no longer is subject to change, the growth must go on.

The first completed subject of the Restatement was contracts, published in 1932. Agency followed the next year; subsequently came two volumes of torts; one of conflict of laws; this fall two volumes of trusts were presented. The books have been given all the different kinds of criticism possible for a published work to receive—enthusiastic and discriminating approval, warm acceptance, perfunctory applause. These have alternated with vigorous denial of the merits of the whole plan, pointed disputes upon specific propositions of law, and strong dissenting views on analysis and arrangement of material in the various subjects. English and Canadian scholars have made the Restatement a basis for highly interesting studies in comparative law.

It has been hoped from the beginning of the Institute's work that one of the collateral benefits derived from it would be the stimulation of American legal scholarship through discussion of the problems met with in the course of restatement. An examination of the pages of our law reviews since the business of restatement started will show that this hope has been realized to the full. The crop is abundant and its quality high.³

2. Discussion ought to be supplemented with observed facts, wherever they are available, clearly. One cannot discuss wisely the best code of rules for responsibility for injuries occurring in automobile operation without a thorough familiarity with the REPORT OF THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Columbia University Council for Research in Social Sciences 1932), which conducted an investigation of 9000 instances. But a similarly adequate factual background for countless other legal questions is not available. (1) Because such investigations cost a lot of money and take a lot of time and the legal questions in individual cases must be answered before all the facts can be learned; (2) many questions of policy are incapable of demonstration by any fact examination which it is possible to make. Instance, the social desirability of a spendthrift trust.

3. Some are analyzing papers about the Restatement. Corbin, *The Restatement of the Law of Contracts* (1928) 14 A. B. A. J. 602; Corbin, *Some Problems in the Restatement of the Law of Contracts* (1928) 14 A. B. A. J. 652; Powell, *Restatement of the Law of Property* (1930) 16 A. B. A. J. 197; Frey, *Restating Law of Business Associations* (1929) 15 A. B. A. J. 503; Scott, *The Restatement of the Law of Trusts* (1930) 16 A. B. A. J. 496; Seavey, *Problems in Restatement of the Law of Agency* (1930) 16 A. B. A. J. 117; Farnum, *Terminology and the American Law Institute* (1933) 13 B. U. L. REV. 203; Goble, *The Restatement of the Law of Contracts* (1933) 21 CALIF. L. REV. 421; Yntema, *The American Law Institute* (1934) 12 CANADIAN BAR REV. 319; Arnold, *The Restatement of the Law of Trusts* (1931) 31 COL. L. REV. 800; Patterson, *The Restatement of the Law of Contracts* (1933) 33 COL. L. REV. 397; Pollitt, *Some Comments on the Restatement of Agency* (1929) 17 GEO. L. J. 177, 283, (1930) 18 GEO. L. J. 327; Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification* (1934) 47 HARV. L. REV. 1367; Corbin, *The Restatement of the Common Law by the American Law Institute* (1929) 15 IOWA L. REV. 19; Winfield, *The Restatement of the Law of Torts: Intentional Harms* (1935) 12 N. Y. U. L. Q. 557, 13 N. Y. U. L. Q. 1; Goodhart, *Restatement of the Law of Torts* (1935) 83 U. OF PA. L. REV. 411, 968; Lorenzen and Heilman, *The Restatement of the Conflict of Laws* (1935) 83 U. OF PA. L. REV. 555; Clark, *The Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643; Pollock, *Restatement of the Law of Contracts*, Book Review (1933) 47

In no cooperative enterprise, including the American Law Institute, do all of those in the undertaking agree with everything that is done or everything that is said. The Institute has made no effort to impose restrictions either upon its staff or its members with regard to conclusions of law upon particular points or wider problems as to form and method of producing a Restatement of the Law. If the methods and the conclusions are right, they will find acceptance in the competition of the market in ideas. To the extent that they are wrong, the Institute can indulge in the hope that its efforts, including its errors, have stimulated others to work out something better.

In all the pages of writing concerning the project as a whole, a particular subject of the law, or an individual point or doctrine, the examination of issues has been on a high plane of impersonal discussion. The one exception seems to me to be that by Professor Edward Stevens Robinson, professor of psychology at Yale University, in his recent book on *Law and the Lawyers*. His interest in the Institute, it should be said, is incidental to a broader consideration of the shortcomings of those who follow the law. But speaking of the Institute and its Restatement he says: "Our main interest, however, is in the general philosophy of the undertaking, which is plainly founded upon the belief that too much truth about the law is

HARV. L. REV. 363; Stallybrass, *Restatement of the Law of Torts*, Book Review (1935) 48 HARV. L. REV. 1444; Read, *Restatement of the Law of Conflict of Laws*, Book Review (1935) 49 HARV. L. REV. 346; Evans, *Restatement of the Law of Conflict of Laws*, Book Review (1935) 24 KY. L. J. 103; Bennett, *Restatement of the Law of Conflict of Laws*, Book Review (1935) 10 TULANE L. REV. 159; Rebmann, *Restatement of the Law of Agency*, Book Review (1934) 82 U. OF PA. L. REV. 672.

There have been many discussions of particular points. Paton, *The Last Clear Chance* (1935) 9 AUSTRALIAN L. J. 132; Whittier, *The Restatement of Contracts and Mutual Assent* (1929) 17 CALIF. L. REV. 441; Whittier, *The Restatement of Contracts and Consideration* (1930) 18 CALIF. L. REV. 611; Nielson, *The Power of an Agent to Bind his Principal: California and the Restatement* (1934) 22 CALIF. L. REV. 392; Cook, *Tort Liability and the Conflict of Laws* (1935) 35 COL. L. REV. 202; Green, *The Torts Restatement* (1935) 29 ILL. L. REV. 582; McDowell, *Effect of Pre-Existing Legal Duties upon Consideration under Restatement of the Law of Contract* (1928) 16 KY. L. J. 306; McDowell, *Risks of an Assignee under Restatement of the Law of Contracts* (1929) 17 KY. L. J. 339; McClintock, *Conflict of Laws as to Contracts: The Restatement and Minnesota Decisions Compared* (1929) 13 MINN. L. REV. 538; Dwan, *Workmen's Compensation and the Conflict of Laws—The Restatement and Other Recent Developments* (1935) 20 MINN. L. REV. 19; Merrill, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?* (1933) 12 NEB. L. BULL. 100.

Among the best examples are the writings of Professor Bohlen: *Surface Owners and the Right of Flight* (1932) 18 A. B. A. J. 533; *Consent as Affecting Civil Liability for Breaches of the Peace* (1924) 24 COL. L. REV. 819; *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality* (1926) 39 HARV. L. REV. 307; *Misrepresentation as Deceit, Negligence or Warranty* (1929) 42 HARV. L. REV. 733; *Liability of Manufacturers to Persons Other Than Their Immediate Vendees* (1929) 45 LAW Q. REV. 343; *Liability in Tort of Infants and Insane Persons* (1924) 23 MICH. L. REV. 9; *Should Negligent Misrepresentations be Treated as Negligence or Fraud?* (1932) 18 VA. L. REV. 703; Bohlen and Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices* (1926) 35 YALE L. J. 525; Bohlen and Shulman, *Effect of Subsequent Misconduct Upon a Lawful Arrest* (1928) 28 COL. L. REV. 841; *Arrest With and Without a Warrant* (1927) 75 U. OF PA. L. REV. 485; Bohlen and Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance* (1932) 32 COL. L. REV. 409; *Liability in Pennsylvania for Physical Effects of Fright* (1932) 80 U. OF PA. L. REV. 627.

disastrously confusing and that the remedy may be found in an authoritative suppression of the facts rather than in better education of the public and the bar as to the actual psychological and sociological nature of the law.”⁴ These are fighting words, clearly passing the limit of fair comment. If the expression “authoritative suppression of the facts” does not charge intellectual dishonesty against those responsible for the Institute’s Restatement, I can think of no words which will do so. Such vituperations are still bandied about in the political arena, but it is a novel thing to see them appear in the field of scholarship. Whether Professor Robinson likes the American Law Institute and its works or not is a matter with which he is alone concerned. But all of us who have put in a share of the sweat and tears which have gone into the effort thus far, bitterly resent such an attribution of malignancy to our motives as the one quoted above.

That the Institute has the philosophy as stated by Professor Robinson is untrue. The Restatement states conclusions. It gives in elaboration of those conclusions such comment as the individual reporter and his advisers choose to add, with illustrative matter for clarity. If lawyer or judge does not wish to accept the conclusions, he need not do so. If the point is one upon which authorities have been divided, the material on either side is fully as available to anyone seeking it as it was to the Institute staff. The most claimed for the Restatement is that it represents the considered conclusion of those who have for years been interested in a particular branch of the law; that the conclusion has been stated in language which the users have endeavored to make clear and precise (not that they have always succeeded); and that before the conclusion became final, so far as the Institute was concerned, it was submitted for criticism to all the people in the profession who would take an interest in it and make suggestions for its improvement. If in all this there is any philosophy of suppression Professor Robinson is invited to point it out.

The same writer also thoroughly disapproves of the Restatement itself. He says: “Actually the result thus far secured is hideously difficult. There is some reason to believe that it would be easier and more satisfactory to learn law by random sampling of the cases with all their contradictions and complexities than by reading the abstract propositions in the volumes issued by the Institute.”⁵

Whether this criticism is right or wrong, it is not hitting below the belt. If “hideously difficult” is the way the Restatement strikes this professor of psychology he is within the limits of fair comment in saying so. We can submit that issue with confidence to anyone who will take the pains to

4. ROBINSON, LAW AND THE LAWYERS (1935) 36.

5. *Ibid.*

examine the volumes. The notion that one can learn law better by random examination of the cases than by reading the propositions in the Restatement will seem fantastic to lawyers. The proof might make an interesting experiment, although the terms "learn law" and "random sampling" would have to be carefully defined; likewise the basis for evaluation of results reached by each method.

Without taking Professor Robinson seriously, one should not claim that the Restatement is always easy reading. There is a story to the effect that Robert Browning once said he did not write for a reader in the mood of a man with a cigar and a newspaper after dinner. Nor have the scholars who are restating the law. The Restatement is technical material, and one group's technical vocabulary is a stranger's headache, as any lawyer learns when he plows through the writing of astronomers, physicists, medical men, economists or, with due deference, psychologists. Furthermore, those who are writing the Restatement are trying to be precise in their use of words, endeavoring like Humpty Dumpty when they use a word to have it mean what they have agreed it shall mean, no more and no less. Mr. Justice Holmes called a word "the skin of a living thought." We have had in the law great confusion of ideas in allowing the same skin to be transferable among several thoughts, often without realizing the quick change process which was taking place. The effort to express ideas clearly and exactly makes hard writing as well as hard reading. The style is less spontaneous, less facile and free flowing. But the end is worth the effort for both reader and writer. At any rate, the Institute believes it is and is frank to say so.

One may also admit that there are difficulties about the form in which the Restatement is cast.⁶ A writer is in danger of making his generalizations so broad that they are meaningless on the one hand, or, on the other, setting out his blackletter rules with such particularity that the user becomes immersed in a flood of detail. Instances probably can be found of both faults by even a friendly critic of any one of the portions of the Restatement which have appeared. Perhaps some of our difficulty may be due to the fact that lawyers are, on the whole, diffuse. One can see it in judges' opinions, counsels' briefs, law professors' essays. Many legal documents seem to be built on the motto not to use one word if a dozen will do, as though we were still scribes paid by the word. The result is sometimes a composition which sounds like a musician's variation on a theme. There will be less trouble in writing the Restatement, and therefore in reading it understandingly, when we get ourselves more and more accustomed to expressing ideas in compact form.

6. Clark, *The Restatement of the Law of Contracts* (1933) 42 YALE L. J. 643; Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 YALE L. J. 468, 469. See also the discussion of the Lorenzen-Heilman article, occurring subsequently in this paper.

Lorenzen on the Conflict of Laws

It is a relief to turn from the patronizing loftiness of Professor Robinson to the vigorous and sturdy forthrightness of Professor Ernest G. Lorenzen. He and Mr. Raymond J. Heilman wrote a critique of the Conflict of Laws Restatement⁷ for this REVIEW last spring.⁸ It was, as anyone who knew him would expect of Mr. Lorenzen,⁹ scholarly, impersonal, good tempered; the kind of controversial writing which stimulates thinking and is a contribution to the literature of this important subject of our law. With the substance of a very considerable portion of the Restatement of Conflict of Laws the critics agree.¹⁰ As to several other chapters, while one finds no general phrase indicating acceptance or approval, objections are directed to specific points. I do not want to claim unfair significance for these many points of agreement, but I submit that they are important. That Professor Beale and Professor Lorenzen have had many sharp differences of opinion on points in conflict of laws is well known to everyone who at any time in a considerable number of years has elected that course in law school or done reading upon the subject elsewhere. The highly interesting controversies developing about their differences must not cause us to overlook the far greater number of their agreements. A portion of the Restatement bearing "the unmistakable imprimatur"¹¹ of Beale can be accepted in large part by Lorenzen. Disagreements there are, however, and to some of them we pass.

Is This the Time for Restatement?

Messrs. Lorenzen and Heilman believe that a restatement of conflict of laws should not have been undertaken at the present time. This presents a question of policy not necessarily connected with the views of the subject expressed by the Reporter and his group, although discussion of the point unavoidably gets into that consideration also.

On certain facts about the conflict of laws all of us who work in the field would agree. The subject is of comparatively recent importance in Anglo-American law. It is growing law, not matured and settled law. Its rapid growth has been recent, largely brought about by increased facilities

7. RESTATEMENT, CONFLICT OF LAWS (1934). Further references thereto will be as RESTATEMENT.

8. Lorenzen and Heilman, *The Restatement of the Conflict of Laws* (1935) 83 U. OF PA. L. REV. 555. Further reference to this article will be without title.

9. In using language of approbation concerning one co-author, I would not by any means want to leave a negative inference about the other. In the case of Mr. Lorenzen I have the advantage of speaking from personal knowledge gained in many years of very pleasant acquaintance.

10. Chapters 4, 5, 6, 10, 11 and 12. Not that they accept all the conclusions of law stated therein. Some of the individual points of disagreement in these chapters, which seem of general interest are discussed subsequently in this paper.

11. The phrase is taken from Lorenzen and Heilman. (1935) 83 U. OF PA. L. REV. at 555.

for easy international and interstate communications. We do not have the wealth of legal literature here which is available in many other subjects of the law, although we are fast acquiring it. All these statements are true, but must we conclude from them that this is not the time for restatement? Is the decision not rather that this is an excellent opportunity to give, in this developing branch of law, the help which the conclusions of a group of thoughtful scholars can afford? The Restatement should not be an epitaph for a life that has run its course, but a practical help in the solution of current problems. If we now see as in a glass darkly, the results of our partial vision can at least be set down for the benefit of others. If subsequently another generation writes a superior Restatement, so much the better.

The Lorenzen-Heilman article calls attention to an important matter when it notes "a tendency on the part of the Supreme Court of the United States to extend the application of various provisions of the Federal Constitution to matters of Conflict of Laws."¹² The statement could be broadened, as doubtless its authors would agree. Full faith and credit, also due process, have been the actors in a great many conflict of laws dramas by the Supreme Court, with privileges and immunities and interstate commerce playing important though less conspicuous roles. It is agreed that the tendency has been one which has increased in late years. Whether the trend is desirable or not is a matter of opinion: I believe that it is. At any rate, it is exceedingly interesting and highly important.

All this being true, is it a factor which should have contributed to a decision to postpone restatement? If so, for how long? Not, surely, until the Supreme Court has given a final answer on every possible question, unless one takes the position that an attempt at restatement should never be made. That is a possible position to take, but Professor Lorenzen and Mr. Heilman did not take it. If not to that indefinite time, how long?

Obviously, a statement of a rule by the Institute would not be worth much if the Supreme Court of the United States should subsequently come forth with a decision that its view of the Constitution of the United States demanded the opposite.¹³ But the danger is not a great one. For the most part the conflict of laws decisions of the Supreme Court provide federal sanctions, under the Constitution, for what both Professor Beale and Professor Lorenzen would agree to be desirable rules of conflict of laws. The Supreme Court decisions, in other words, make obligatory what most enlightened state courts would do without compulsion. These decisions were,

12. (1935) 83 U. OF PA. L. REV. at 588.

13. If the decision is not on a constitutional basis, the same would not be true. As to the matter of foreign judgments, the RESTATEMENT, § 434, follows *Johnston v. Compagnie Générale Transatlantique*, 242 N. Y. 381, 152 N. E. 121 (1926), rather than *Hilton v. Guyot*, 159 U. S. 113 (1895).

of course, known to and followed by the writers of the Restatement. In other places, where constitutional doctrine was uncertain, or where its elaboration was felt to lead too far afield from the conflict of laws, a warning flag was posted to the effect that a statement was made subject to the possibility of constitutional limitations. To the extent that the proposition is thus qualified, it is obviously made less exact and forthright. But surely this makes the Restatement not less but more reliable.

The issue whether now is the accepted time to restate conflict of laws is a debatable one. One hundred years from now our successors will know more about the subject than we do at present. But nothing urged by Messrs. Lorenzen and Heilman leads me to think that those same successors will not be better off for having had the result of twelve years of very hard work on the subject by a large number of people in the American Law Institute.

Will Courts Accept the Restatement?

Will courts accept the Restatement of Conflict of Laws as authoritative? Messrs. Lorenzen and Heilman believe not. It is not clear to me how the same critic can consistently argue that it is undesirable to attempt to formulate a Restatement of the subject at this time, and then take the position that courts will not accept it. If it is not accepted as authority, surely it performs a useful function in setting up a mark for its critics to shoot at. The only thing undesirable about the venture in such case is the time and money which has gone into it, a matter to worry the Institute, but surely no one else. But whether the critics are inconsistent is a minor point, for both sides are discussing the merits; lesser tactical successes for either are of little importance.

One reason suggested by our critics for the prediction that courts will not accept the Restatement as authoritative in conflict of laws is that the positions set out in the first drafts were on many points changed in the final draft. That criticism would have been more expectable coming from Professor Beale, the reporter. For Mr. Beale had a Restatement that was intellectually a unified whole. His theories were clear cut; his development moved from premises to conclusion without a break. Of course there was controversy at many points; Mr. Lorenzen had a part in some of it and waged his share of the battle with a royal good will. Sometimes the attack was on the premises of the reporter; sometimes a refusal to accept the logic of the conclusion because it was felt the result was bad policy even if good logic; "carrying a good joke too far", to borrow from Professor Bohlen. From first draft to last revision many changes were made, some radical, some minor. The exact number does not matter. To the extent that these changes are contrary to the position taken by the reporter, the symmetry

of the Restatement is marred. To some of us it seemed that they made the Restatement better; others may not agree. It is true, as our critics say, that there is nothing in the finished Restatement to indicate the spots where the critical engagements during the twelve year campaign occurred; much less a headstone, "Here brave Buchanan lies", or "Here the noble Bingham bit the dust." I doubt whether anyone cares.

This piece of work took plenty of time. If changes came in the last revision which had not come before, it was not that the issues had not been drawn earlier and discussed to exhaustion by those participating. When as a result of further consideration, extended debate and reexamination of decisions, a conclusion tentatively reached earlier is changed, surely such fact is a sign of strength not weakness in both method and product. I doubt the conclusion, therefore, that the shifts in position between preliminary draft and final draft will weaken the authority of the Restatement.

A judge for whom we all have great admiration (Learned Hand) has expressed the apprehension that this volume will have too much authority, rather than too little. He feels that judges under pressure of much work and in the confusion of thought in this difficult part of the law will be inclined to grab the Restatement as *tabula in naufragio* and ride it to shore. Who can tell? The Restatement of Conflict of Laws has been used by the courts a good many times already, both in tentative and final form.¹⁴ That

14. See for example: *Yarborough v. Yarborough*, 290 U. S. 202 (1933); *In re Barron*, 26 F. (2d) 106 (E. D. Mich. 1928); *Brocalsa Chemical Co. v. Langsenkamp*, 32 F. (2d) 725 (C. C. A. 6th, 1929); *Louis-Dreyfus v. Paterson Steamships*, 43 F. (2d) 824 (C. C. A. 2d, 1930); *Burrowes v. Goodman*, 50 F. (2d) 92 (C. C. A. 2d, 1931); *Crampton v. Frione Co.*, 1 F. Supp. 989 (D. Conn. 1932); *Cosulich Societa Triestina Di Navigazione v. Elting*, 66 F. (2d) 534 (C. C. A. 2d, 1933); *Jerrell v. N. Y. Central R. R.*, 68 F. (2d) 856 (C. C. A. 2d, 1934); *Grinnell v. Commissioner of Internal Revenue*, 70 F. (2d) 705 (C. C. A. 2d, 1934); *Coppedge v. Clinton*, 72 F. (2d) 531 (C. C. A. 10th, 1934); *Reed & Barton Corp. v. Maas*, 73 F. (2d) 359 (C. C. A. 1st, 1934); *Sanders v. Standish Hall*, 74 F. (2d) 399 (C. C. A. 10th, 1934); *In re L. Van Bokkelen, Inc.*, 7 F. Supp. 639 (D. C. D. Md. 1934); *Curtis v. Campbell*, 76 F. (2d) 84 (C. C. A. 3d, 1935); *Royal Baking Powder Co. v. Hessey*, 76 F. (2d) 645 (C. C. A. 4th, 1935); *Société Vinicole de Champagne v. Mumm Champagne & Importation Co.*, 10 F. Supp. 289 (S. D. N. Y. 1935); *Davis v. Standard Accident Insurance Co.*, 35 Ariz. 392, 278 Pac. 384 (1929); *Delanoy v. Delanoy*, 216 Cal. 27, 13 P. (2d) 719 (1932); *Alaska Packers' Association v. Industrial Accident Comm. of Cal.*, 1 Cal. (2d) 250, 34 P. (2d) 716 (1934), *aff'd*, 294 U. S. 532 (1935); *Union & New Haven Trust Co. v. Watrous*, 109 Conn. 268, 146 Atl. 727 (1929); *Davis v. Davis*, 175 Atl. 574 (Conn. 1934); *Lams v. F. H. Smith Co.*, 178 Atl. 651 (Del. 1935); *Hall v. Slaton*, 40 Ga. App. 288, 149 S. E. 306 (1929); *In re McCormick's Estate*, 260 Ill. App. 36 (1931); *First Title & Securities Co. v. Gypsum Co.*, 211 Iowa 1019, 233 N. W. 137 (1930); *Davidson v. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700 (1932); *Swift v. Clay*, 127 Kan. 148, 272 Pac. 170 (1928); *Wear v. Wear*, 130 Kan. 205, 285 Pac. 606 (1930); *Tramwell v. Kansas Comp. Board*, 142 Kan. 329, 46 P. (2d) 867 (1935); *Twentieth St. Bank v. Diehl*, 85 S. W. (2d) 865 (Ky. 1935); *Selser v. Bragmans Bluff Lumber Co.*, 146 So. 690 (La. App. 1933); *Bates v. Decree of Judge of Probate*, 131 Me. 176, 160 Atl. 22 (1932); *Northern Aluminum Co. v. Law*, 157 Md. 641, 147 Atl. 715 (1929); *Sun Ins. Office, Ltd. v. Mallick*, 160 Md. 71, 153 Atl. 35 (1930); *Liggett & Myers Tobacco Co. v. Goslin*, 163 Md. 74, 160 Atl. 804 (1932); *Universal Credit Co. v. Marks*, 164 Md. 130, 163 Atl. 810 (1933); *Holbrook v. Industrial Tractor & Equipment Co.*, 178 Atl. 236 (Md. 1935); *Palmer Nat. Bank v. Van Doren*, 260 Mich. 310, 244 N. W. 485 (1932); *Barrett v. Smith*, 183 Minn. 431, 237 N. W. 15 (1931); *First Trust Co. v. Matheson*, 187 Minn. 468, 246 N. W. 1 (1932); *State v. Hedberg*, 192 Minn. 193, 256 N. W. 91 (1934); *Illinois Fuel Co. v. Mobile & O. R. R. Co.*, 319 Mo. 899, 8 S. W. (2d)

fact does not prove that courts will take it as conclusive on doubtful points, although some of the decisions have been rendered on points which I am sure Professor Lorenzen would regard as doubtful.¹⁵ Time alone will determine the question. In the meantime, if the teachers of Conflict of Laws in our law schools disagree with conclusions reached in the Restatement, they know that the editors of our many law reviews are clamoring for copy and everyone has full opportunity to obtain a medium of expression for what is on his mind.

Specific and General Criticisms

Thus far the discussion has been on general points made about the Restatement rather than specific propositions of law stated therein. The Lorenzen-Heilman article develops *in extenso* both general and specific points. Some of the latter are repetitions of well known differences of opinion in the conflict of laws field. If Mr. Lorenzen has one view and the Restatement has taken another, it is not to be expected that the former will remain silent, nor is there any reason why he should. But the discussion of many of these situations has reached the "'tis so", "'tis not" stage. "The question concerned is clearly substantive", say the authors discussing a proposition found under "presumptions" in the Restatement.¹⁶ An interesting question, it took a whole evening at a Round Table at a Law School Association meeting one year. Each side championed its own views vio-

834 (1928); *In re Hauge's Estate*, 92 Mont. 36, 9 P. (2d) 1065 (1932); *Butler v. Butler*, 83 N. H. 413, 143 Atl. 471 (1928); *Ghilain v. Couture*, 84 N. H. 48, 146 Atl. 395 (1929); *Pre-court v. Driscoll*, 85 N. H. 280, 157 Atl. 525 (1931); *Barbin v. Moore*, 85 N. H. 362, 159 Atl. 409 (1932); *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 Atl. 50 (1930); *In re Dorrance's Estate*, 115 N. J. Eq. 268, 170 Atl. 601 (1934); *In re Freeholders of Hudson County*, 105 N. J. L. 57, 143 Atl. 536 (1928); *Estate of Packard*, 223 App. Div. 491, 228 N. Y. Supp. 591 (1928); *Tatum v. Maloney*, 226 App. Div. 62, 234 N. Y. Supp. 614 (1929); *McDonald v. McDonald*, 228 App. Div. 341, 239 N. Y. Supp. 533 (1930); *Benton v. Safe Deposit Bank*, 255 N. Y. 260, 174 N. E. 648 (1931); *Ebsary Gypsum Co. v. Ruby*, 256 N. Y. 406, 176 N. E. 820 (1931); *Parker v. Hoppe*, 257 N. Y. 333, 178 N. E. 550 (1931); *Wikoff v. Hirschel*, 258 N. Y. 28, 179 N. E. 249 (1932); *Domres v. Storms*, 236 App. Div. 630, 260 N. Y. Supp. 335 (4th Dep't 1932); *Estate of Wendel*, 144 Misc. 467, 259 N. Y. Supp. 260 (Surr. Ct. 1932); *Hutchison v. Ross*, 262 N. Y. 381, 187 N. E. 65 (1933); *Herzog v. Stern*, 264 N. Y. 379, 191 N. E. 23 (1934); *Dougherty v. Equitable Life Assurance Soc.*, 266 N. Y. 71, 193 N. E. 897 (1934); *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N. Y. 244, 194 N. E. 692 (1935); *Simons v. Inecto, Inc.*, 242 App. Div. 275, 275 N. Y. Supp. 501 (3d Dep't 1934); *Cohen v. Delaware, L. & W. R. R.*, 150 Misc. 450, 269 N. Y. Supp. 667 (Sup. Ct. 1934); *Wishnick v. Preserves & Honey, Inc.*, 153 Misc. 596, 275 N. Y. Supp. 420 (Sup. Ct. 1934); *Zuhlke v. Prudential Life Ins. Co.*, 244 App. Div. 549, 279 N. Y. Supp. 833 (4th Dep't 1935); *Morek v. Smolak*, 245 App. Div. 355, 282 N. Y. Supp. 418 (4th Dep't 1935); *Estate of Poulson*, 155 Misc. 625, 280 N. Y. Supp. 350 (Surr. Ct. 1935); *Bentley v. Calabrese*, 155 Misc. 843, 280 N. Y. Supp. 454 (Sup. Ct. 1935); *Indemnity Ins. Co. v. Stamberger Co.*, 37 Ohio App. 236, 174 N. E. 629 (1930); *Winslow Lumber Co. v. Hines Lumber Co.*, 125 Ore. 63, 266 Pac. 248 (1928); *Rosenzweig v. Heller*, 302 Pa. 279, 153 Atl. 346 (1931); *Katakura & Co. v. Vogue Hosiery Co.*, 15 D. & C. 389 (Pa. 1931); *Dodds v. Pittsburgh, M. & B. Rys.*, 107 Pa. Super. 20, 162 Atl. 486 (1932); *In re Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932); *Dickinson v. Jones*, 309 Pa. 256, 163 Atl. 516 (1932); *Mazzoleni v. Transamerica Corp.*, 313 Pa. 317, 169 Atl. 127 (1933); *Broderick v. Stephano*, 314 Pa. 408, 171 Atl. 582 (1934); *Windt v. Lindy*, 84 S. W. (2d) 99 (Tenn. 1935); *Fitzgerald v. Fitzgerald*, 210 Wis. 543, 246 N. W. 680 (1933).

15. See, for instance, *Coxe v. Coxe*, 180 Atl. 612 (Del. Ch. 1935).

16. See (1935) 83 U. OF PA. L. REV. at 584; RESTATEMENT, § 595.

lently, and demonstrated their correctness to its own satisfaction. No heathen were converted. Points which seem to have reached such an impasse stage of controversy will be passed over here. They are interesting, at least to us who enjoy conflict of laws problems. But each one of them is a paper in itself. It was entirely proper for Messrs. Lorenzen and Heilman to record their dissent without a long and elaborate discussion. To check through and record a dissent from such dissent would be neither important nor interesting.

Domicil Disagreements

Close to this dissent-recording series of points, but involving somewhat wider considerations are several disagreements of which the basis of domicil is one. Our authors say:

"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."¹⁷

Of course it is true that domicil questions usually come up one at a time. The problem in any one piece of litigation turning on domicil may be a divorce, a tax, a decedent's estate, or any one of a number of others. But that there exists any substantial number of decisions which make a different test for domicil according to whether one of these problems rather than another is involved is a proposition for which I find no support. How is it going to be proved? Mr. Lorenzen has read a large number of judicial decisions concerning domicil. So, certainly, has Mr. Beale, and so have all the group of lawyers on Mr. Beale's Advisory Committee. The view taken by the latter having failed to convince Mr. Lorenzen, he would not, I take it, expect his view to prevail with them. So there we stand. If civilization crumbles it will not be because of this disagreement.

Jurisdiction Based on Acts Within State

I was surprised to see Messrs. Lorenzen and Heilman shy away from the propositions concerning judicial jurisdiction based upon the doing of an act within a state, expressed in Sections 84 and 85 of the *Restatement*. A set of facts to raise the question would be as follows: *A* goes on a canoe trip in Quebec. He has an accident there in which he smashes the canoe of *B*, a local man; then *A* returns home. *A* is sued in Quebec, under a statute permitting suits in the courts there against any person for acts done in Quebec. Notice is mailed to *A* at his home in Pennsylvania. He does not

17. (1935) 83 U. OF PA. L. REV. at 561.

appear. Judgment is given against him. Subsequently, *B* sues *A* upon the judgment in Pennsylvania. Can he recover?

It is granted that "the foundation of jurisdiction is physical power." But we have gone beyond that in cases of appearance, consent in advance, domicile and nationality. As Mr. Dodd has said about foreign judgments: ". . . the problem whether such a judgment is entitled to extraterritorial recognition as a valid judicial act is not a problem with respect to jurisdiction to enforce personal rights but a problem of the requisites of jurisdiction to establish the existence and scope of rights."¹⁸ Notwithstanding the fact that earlier authorities decided that at common law jurisdiction is not based upon doing acts within a state,¹⁹ such an extension seemed a reasonable one in these days of easy and extensive interstate travel. The large number of states which have made provisions for suits against non-resident motorists in a set of facts like that stated, substituting an automobile for a canoe, shows the popularity of the attempt in the legislative mind.²⁰ While the subject was being discussed in the course of preparation of the Restatement, the Supreme Court upheld the Massachusetts statute providing for suit against non-resident motorists.²¹ This was highly important; the question now became, how far does the principle go?

It was stated broadly enough in Section 84 to give an affirmative answer to the hypothetical case stated above. But as among the states of the Union, qualifications were suggested in Section 85 as follows:

"If a State cannot, without violating the Constitution of the United States, make the doing of certain kinds of acts within the State illegal unless and until the person doing the acts or causing them to be done has consented to the jurisdiction of the courts of the State as to causes of action arising out of such acts, the State cannot validly provide that the doing of the acts shall subject him to the jurisdiction of the courts of the State."

The recent Supreme Court decision in *Henry L. Doherty & Co. v. Goodman*²² has affirmed the decision of the Supreme Court of Iowa²³ upholding the constitutionality of an Iowa statute under which judgment was obtained in Iowa against a non-consenting absentee principal, on a claim arising out of business (selling of securities) done there. We certainly have enough data, legislative and judicial, to show that here is a developing principle of law. I should have expected it to be one to which

18. E. Merrick Dodd, Jr., *Jurisdiction in Personal Actions* (1929) 23 ILL. L. REV. 427, 428.

19. *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670.

20. See Culp, *Process in Actions against Non-Residents Doing Business within a State* (1934) 32 MICH. L. REV. 909.

21. *Hess v. Pawloski*, 274 U. S. 352 (1927).

22. 294 U. S. 623 (1935), 83 U. OF PA. L. REV. 921.

23. *Goodman v. Henry L. Doherty & Co.*, 218 Iowa 529, 255 N. W. 667 (1934), following *Davidson v. Doherty*, 214 Iowa 739, 241 N. W. 700 (1932).

Mr. Lorenzen would have given enthusiastic approval. If the approval is not forthcoming, the development will have to proceed without it.

Divorce Jurisdiction

Passing to quite a different point, our critics make some objections to Section 113,²⁴ which deals with granting of divorces at the domicile of one of the parties only. This section seems to add more uncertainties to the interstate divorce situation, in making misconduct of one spouse an element to be re-examined when a divorce decree comes up for extra-territorial recognition. That is unfortunate, for the subject is confused enough now. But everyone ought to be sympathetic with the effort made in Section 113. The uncertainty in the recognition of sister state divorces is a scandal; the Supreme Court made confusion worse confounded by the well intentioned mistake in *Haddock v. Haddock*²⁵ and the meaningless distinction between it and *Atherton v. Atherton*.²⁶ Pennsylvania, under its statutes, grants divorces under circumstances in which decrees from sister states, rendered under identical conditions, are refused recognition. Section 113 was an effort to state the law in a way which would not be contrary to the law in that strong group of states which insist on going as far as *Haddock v. Haddock* will let them, in refusal to recognize a foreign decree at the domicile of one party only, and, at the same time, get as much and as uniform interstate recognition as possible. The effort was and is worth making.

Statutory Modifications of Common Law

The problem of statutory modification of the common law is a difficult one to handle by any legal writer, even more so in a Restatement than in a text-book of the usual type. The Lorenzen-Heilman paper calls attention correctly to several places where the rules stated are frequently modified by statute. How should the Restatement handle such modifications? The statutes cannot all be set out, classified and summarized, if the purpose of restating common law is to be followed. Nor would such lists, even with individual state references, be particularly valuable to the user. The problem varies in intensity with the different subjects in the course of restatement.

24. Which reads as follows: "STATE OF DOMICIL OF ONE SPOUSE.

"A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state

(i) has consented that the other spouse acquire a separate home; or

(ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or

(iii) is personally subject to the jurisdiction of the state which grants the divorce; or

(b) the state is the last state in which the spouses were domiciled together as man and wife."

25. 201 U. S. 562 (1906).

26. 181 U. S. 155 (1901).

In Conflict of Laws the effort was made to call attention to the fact of statutory modification where it was frequent and important. Whether the statutes were to be noted in a particular instance therefore became a matter of judgment and obviously open to difference of opinion. If a more satisfactory method of dealing with statutory material could be found, it would be welcomed.

Judgments

The chapter on Judgments finds general acceptance by Professor Lorenzen and Mr. Heilman. Objection is made to but one section, and ordinarily the attenuation of a controversy upon a narrow point is of no interest except to the disputants. But upon this point we had so many spirited arguments and then reached what seemed so satisfactory a solution that I am greatly disappointed that our critics failed to join in the rejoicing.

Here is the problem: *A* sues *B* in New York, asking an order that *B* shall convey to *A* certain land in Ohio. *A* wins. *B* escapes from New York to Ohio, before obeying the order. *A* then sues *B* in Ohio, asking that *B* be compelled to convey the land to him. Note now the rules as they appear in the Restatement, Section 449:

"(1) 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.

"(2) In an action on the original claim, the effect of *res judicata* will be given to findings of fact in a prior suit between the parties in which a valid judgment was rendered requiring the defendant to do or refrain from doing an act other than the payment of money."

The Lorenzen-Heilman paper cites the first sub-section but not the second. Then it comments:

"This expresses Professor Beale's view, which he has defended 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 . . . The rule adopted by the *Restatement* thus expresses the reactionary and unprogressive point of view."²⁷

I have no quarrel with the Lorenzen view of the law on the point, if I understand his view correctly. But surely, in the case above supposed, if the second forum was Pennsylvania instead of Ohio, and Pennsylvania knew no such thing as specific performance, the most *A* could expect in Pennsyl-

27. (1935) 83 U. OF PA. L. REV. at 581, 582.

vania would be that the decree from New York be treated as conclusive of the rights and liabilities of the parties. As comment *a* to the Section says:

"The ordinary relief for an invasion of one's interest, whether a breach of contract or a tort, is compensation measured in money. If any other form of relief is given, it is because the court in the exercise of its discretion finds that an action for damages in money affords inadequate relief and that justice, therefore, requires an extraordinary remedy. Each court will decide for itself whether to leave the plaintiff to his ordinary remedy or to give him the extraordinary alternative relief. The decision by one court to give specific relief rather than the alternative will not bind another court and thus exclude the use of the discretion of the second court."

Has the Restatement failed to make its point clearly; has Mr. Lorenzen knowing Mr. Beale's original view and opposing it, failed to note carefully the very great modification made in this statement; or has the present writer failed to understand Mr. Lorenzen?

Contracts

In no other place in conflict of laws, except on general questions of theory, has there been sharper difference of opinion between Professor Beale and Professor Lorenzen than upon the contracts in their two-state aspect. The difference is long standing. Professor Beale's views appeared in print in 1909,²⁸ Professor Lorenzen's in 1921.²⁹ It is a fair statement to say, as Professor Lorenzen does, that Chapter 8 of the Restatement pretty closely follows the Beale view. Obviously a writer who had previously been opposed to that analysis and settlement of the problem would not be expected to approve it in the Restatement unless something happened to make him change his mind. And evidently nothing has.

Doubt is expressed upon the wisdom of splitting up the problems concerning contracts into "validity", "performance", "assignability" and so on. If the critics mean that the same choice of law rule should be applicable to the formation of a contract and assignment thereof, it seems to me that the answer must be no, both on reason and authority. When Professor Lorenzen speaks, as he does in the articles just referred to, about the difficulty of separating "obligation" and "performance" he has a point that makes a defender squirm somewhat when he gets a border line case. That was frankly recognized in the Restatement. Perhaps a quotation will best show how. It is from comment *c* to Section 332 of the Restatement.

28. In a series of papers beginning with *What Law Governs the Validity of a Contract* (1909) 23 HARV. L. REV. 1, 79; (1910) *id.* 194, 260.

29. Beginning in his *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565.

"A difficult problem is presented in deciding whether a question in a dispute concerning a contract is one involving the creation of an obligation or performance thereof. There is no distinction based on logic alone between determining the creation of the contract and the rights and duties thereunder on the one hand, and its performance on the other. All questions which may arise in the interpretation or performance of a contract are logically implicit in the will of the parties as expressed in their contract. Given the language of the contract, interpretation makes the language, as language, clear. Construction at this point determines the legal effect of the language in terms of obligation. When the obligation comes to be performed, a continuation of the same process determines whether the performance required by the contract is to be in one form or another form. There is no logical stopping place from beginning to end of this process. Regardless of the lack of logic, however, problems arising out of disputes upon contracts are settled as if certain acts pertained to the making of the contract and other acts to its performance. The applicability of the rule that the complete control of all questions is determined by the law of the place of contracting is therefore modified upon practical considerations. One law is applied to what is regarded as the initiation of a contract and another to what is regarded as its final performance. The point at which initiation ceases and performance begins is not a point which can be fixed by any rule of law of universal application to all cases. Like all questions of degree, the solution must depend upon the circumstances of each case and must be governed by the exercise of judgment."

A counter-suggestion for classification of the problems here is made by the critics. To be of real service, they suggest, the different types of contracts should have been treated in detail: a factual rather than analytical classification. One does not disprove the correctness of this statement by denying it; on the other hand, I submit that it is not a self-proving proposition. If different kinds of contracts should have different treatment in the choice of law rules applicable to them, it would be a service to all of us interested in conflict of laws, and to every judge and lawyer who must, perforce, occasionally become interested in conflict of laws, to give the question a thorough discussion. I have read Professor Lorenzen's valuable and scholarly discussion of the conflict of laws relating to bills and notes.³⁰ The impression it left on me was that, in general, the rules of conflict of laws covering bills and notes were those applicable to other contracts; that where courts had departed from those, they had not furthered social and economic interests, but had only made the law more confused than it was before. Perhaps this impression is wrong; I do not want to press the point. But a general discussion of why the choice of law rule should be different

30. Lorenzen, *The Rules of the Conflict of Laws Applicable to Bills and Notes* (1917) 1 MINN. L. REV. 10, 117, 239, 320, 401; *Moratory Legislation Relating to Bills and Notes and the Conflict of Laws* (1919) 28 YALE L. J. 324.

with regard to a surety's contract than a personal service contract would be interesting and helpful.

All parties would agree, I think, that in the field of rules relating to contracts, confusion in conflict of laws is at its worst. For nearly every view there are dicta, sometimes decision. The varying points of view appear from time to time in the same court, frequently without noting the variation. A blush of embarrassment need not mount to the cheek of either author of Restatement or critic thereof, if judicial opinion can be found against him. But what is to be done in writing a Restatement under those circumstances? Obviously not to set out the obvious fact that courts are in disagreement upon the point, and stop there.

The chapter on Contracts takes a view supported by authority and develops it. Probably one might claim it to be the weight of authority if privileged to count dicta in taking the census. Whether that be so or not does not greatly matter. The development is, I hope and pray, consistent. It is the fashion to pooh-pooh the part of logic in the law, doubtless a reaction against the notion that this element was the sole one. Few of us would nowadays quarrel with the famous Holmes' dictum that the life of the law is not logic but experience. Nevertheless, it is something to have rules for human transactions develop in accordance with the process of human reason; all of which has been set out so well by Mr. Justice Cardozo in *The Nature of the Judicial Process*³¹ that there is not much to be added by anyone else.

It seemed to those of us who worked with Professor Beale on the Restatement that his way was the best that could be devised. The choice of law rules there set out seemed to the group to be desirable. Granted that an extreme case, whether thought up by a law professor or springing up in an actual transaction will make one gulp to swallow it, the same is true whether you are dealing with common law or statute in any type of legal problem you want to put. The age old question of the application of a rule of law to a border-line set of facts is as hard here as anywhere else, and no harder.

It seemed also, that a Restatement could perform a most useful service by helping to bring some degree of clarity and certainty to this confused point. Commercial transactions by the thousands are involved. Definiteness is certainly a strong social consideration. That the Restatement has gained. Whether you call the rules set out "rigid" and "mechanical" or "clear" and "logical", seems to depend upon whether you are cheering for the home team or the visitors. We shall, obviously, have to wait and see what the courts will do. In the recent Delaware case of *Coxe v. Coxe*³² the Chancellor relied upon the Restatement as his exclusive authority. No

31. (1921).

32. 180 Atl. 612 (Del. Ch. 1935).

one could fairly claim to know what the extent of such reliance will be until close and complicated cases have arisen in a good many instances.

There are a large number of individual sections of the Restatement commented upon in the Lorenzen-Heilman paper. It runs thirty-four pages in length and in it, the critics did what they were asked to do: made their comments upon the Restatement. Obviously this paper has passed over many statements raising many points. One reason is that many of them are matters for each of which an adequate discussion would require a law journal essay of ordinary length. To give a slap-dash statement of the point would be neither useful nor interesting. On some matters, especially those that have to do with basic assumptions, or fundamental point of view, the differences, at least in words, between Professors Beale and Lorenzen are so pronounced, that further controversy is useless.³³ On the other hand, on an immense number of statements of legal rules of conflict of laws, Restatement and critics agree. It is not material, on this point, whether the individual statements on which there is agreement represent Professor Beale's view or its modifications by the group. The important thing is that this agreement exists. Restatement of the law was never intended to reduce us all to a common denominator in legal thinking. It was (and is) to aid courts and lawyers in the settlement of legal controversies, a pragmatic undertaking thoroughly in accordance with the traditions of the common law. If Professor Beale can write a Restatement and Professor Lorenzen can agree with most of the legal rules it states, that Restatement is going to be of great practical value, even though the two never do agree upon "territoriality."

33. A quotation from one of Judge Jeremiah Smith's articles, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 253, 255, in which he in turn quotes Cardinal Newman, is in point:

"Half the controversies in the world are verbal ones, and, could they be brought to a plain issue, they would be brought to a prompt termination. Parties engaged in them would then perceive, either that in substance they agreed together, or that their difference was one of first principles. . . . When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless."