INTRODUCTION

These volumes embody the Official Draft of Restatement Second of the Law of Conflict of Laws, approved for publication by the American Law Institute at the Annual Meeting of 1969. They supersede entirely the original Restatement of this subject published by the Institute in 1934. As those who followed the tentative drafts (1953 to 1965) and the three installments of the proposed official draft (1967 to 1969) will readily confirm, the new work is far more than a current version of the old. In basic analysis and technique, in the position taken on a host of issues, in the elaboration of the commentary and addition of Reporter's Notes, what is presented here is a fresh treatment of the subject.

It is a treatment that takes full account of the enormous change in dominant judicial thought respecting conflicts problems that has taken place in relatively recent years. The essence of that change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored. Such a transformation in the corpus of the law reduces certitude as well as certainty, posing a special problem in the process of restatement. Its solution lies in candid recognition that black-letter formulations often must consist of open-ended standards, gaining further content from reasoned elaboration in the comments and specific instances of application given there or in the notes of the Reporter. That technique is not unique to Conflicts but the situation here has called for its employment quite pervasively throughout these volumes. The result presents a striking contrast to the first Restatement in which dogma was so thoroughly enshrined.

One illustration will suffice to make the point. The earlier Restatement treated choice of law in torts and contracts by articulating a closed set of rules derived from vested-rights analysis. The governing law in torts was determined by the place in which the injury occurred; that in contracts by the place in which the contract became binding or, when performance was in issue, where the contract was to be performed. Restatement Second supplants these rules by the broad principle that rights and liabilities with respect to a particular issue are determined by the local law of the State which, as to that issue, has "the most

significant relationship" to the occurrence and the parties. The "factors relevant" to that appraisal, absent a binding statutory mandate, are enumerated generally (§ 6) to "include":

> "(a) the needs of the interstate and international systems,
>
> "(b) the relevant policies of the forum,
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> "(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> "(d) the protection of justified expectations,
>
> "(e) the basic policies underlying the particular field of law,
>
> "(f) certainty, predictability and uniformity of result, and
>
> "(g) ease in the determination and application of the law to be applied."

To be sure, this mode of treatment leaves the answer to specific problems very much at large. There is, therefore, wherever possible, a secondary statement in black letter setting forth the choice of law the courts will "usually" make in given situations. These formulations are cast as empirical appraisals rather than purported rules to indicate how far the statements may be subject to revaluation in a concrete instance in light of the more general and open-ended norm. The reader is thus alerted to the dynamic element in choice of law adjudication, without losing the degree of guidance past decisions may afford. That guidance is enhanced, moreover, by the further exposition in the comments and Reporter's Notes. The comments, it should be noted, no less than the black letter carry the approval of the Institute. The Notes, however, rest on the authority of the Reporter only, though they too have been before the Advisers and the Institute, whose criticism and suggestions the Reporter has invited and considered.

The retreat from dogma that is so pervasive a feature of this work has called for an important change in the form of many illustrations in the comments. When basic norms consist of standards so largely open-ended in their content, illustrations limited to situations where all courts would clearly reach the same result have little practical or pedagogical significance. It was therefore thought useful to encompass in the illustrations some of the more complicated problems, focusing upon the issues to be faced and factors to be weighed, while recognizing that there may be room for different resolutions. What is exemplified is thus the analysis and method of inquiry that the Institute approves, rather

than the simple answers to simplistic questions. This is a technique that should be useful in restatement work in general, since it surmounts a difficulty hardly confined to this field.

The first restatement of Conflict of Laws took the Institute eleven years (1923 to 1934); the second, which more than doubles the length of the original, has taken more than seventeen. This is an enormous effort in what many lawyers still regard as an abstruse, elusive subject. The Institute is confident, however, that the product justifies the undertaking. Conflicts problems have a special urgency and difficulty in a federated nation and the point of view developed in Restatement Second has already had constructive influence on their solution by our courts. That influence will surely grow in coming years.

Though I have emphasized the differences between these volumes and the work that they supplant, I should make clear that there are elements of continuity as well. The continuity would be more visible had it been feasible to maintain the old section numbers for the treatment of equivalent material. It will, however, be discernible with the aid of the parallel tables in the Appendix volume, listing corresponding sections in Restatements First and Second, as well as corresponding sections in the present volumes and the earlier tentative drafts of Restatement Second. The Appendix also contains all of the material on Conflicts in succeeding volumes of Restatement in the Courts. The digests of opinions of appellate courts citing the first Restatement are classified under the section numbers of that work. The digests of citations of the tentative and proposed official drafts of Restatement Second are classified under the Section numbers of the present volumes, even when the present number differs from that earlier employed. It should be simple, therefore, to make a quick comparison of the old work and the new, to trace the new through its entire process of development and to appraise the support each formulation thus far has received in the decisions of the higher courts.

The Institute is grateful to Professor Willis L. M. Reese of Columbia University School of Law, who served as Reporter for this project, and to Professor Austin W. Scott of Harvard Law School, who added to his many contributions to restatement work by serving as Associate Reporter. Professor Scott prepared Chapter 10 on Trusts and participated as consultant and adviser with respect to other topics.

The Institute is also grateful to the able and industrious Committee of Advisers, whose help, creative as well as critical, was

indispensable. Those who served in this capacity were: Edgar H. Ailes, Esq., of Detroit, Michigan; John G. Buchanan, Esq., of Pittsburgh, Pennsylvania, until 1957; Professor Elliott E. Cheatham of Columbia and later Vanderbilt University Law School; Professor Edwin D. Dickinson until his death in 1961; Professor Paul A. Freund of Harvard Law School; H. Eastman Hackney, Esq., of Pittsburgh, Pennsylvania, until his death in 1967; Judge William H. Hastie of Philadelphia, Pennsylvania; Peter H. Kaminer, Esq., of New York City; Judge Albert B. Maris of Philadelphia, Pennsylvania; Israel Packel, Esq., also of Philadelphia; Professor Clive Parry of Cambridge, England; Professor Monrad G. Paulsen, then of Columbia, until 1964; Professor Maurice Rosenberg of Columbia from 1964; Professor Donald T. Trautman of Harvard Law School; and in the special capacity of Advisers to the Council, the late Howard F. Burns, Esq., of Cleveland, Ohio, and Mr. Justice R. Ammi Cutter of the Supreme Judicial Court of Massachusetts. When the final process of revision was begun in 1966, Professor Robert A. Leflar of the University of Arkansas School of Law and New York University and Chief Justice Roger J. Traynor of the Supreme Court of California (now retired) also participated as Advisers. Professor David F. Cavers of Harvard Law School, though unwilling to assume the commitment of an Adviser, attended three of the Advisory Committee meetings and made helpful contributions to the revision. Moreover, as Director of the Institute until his death in 1962, Judge Herbert F. Goodrich of Philadelphia, Pennsylvania, a renowned student of the law of conflicts, played an active part in the conception and development of the entire project.

The Reporter had the benefit of the research assistance of Mrs. Alma Flesch from 1958 to 1962 and Mrs. Virginia Duncombe from 1962 to 1969. The Institute shares his appreciation for their help.

Finally, I wish to acknowledge the abiding debt of the American Law Institute to the A. W. Mellon Educational and Charitable Trust of Pittsburgh, Pennsylvania, whose benefaction, which we have called the Judge Thomas Mellon Endowment, makes Restatement Second possible.

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