THE RESTATEMENT AS A SOURCE OF CONFLICTS LAW IN ARIZONA †

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The Supreme Court of Arizona, according to its repeated statement, "has consistently held that it will generally follow the Restatement of Law unless a different rule has been pronounced by the court in prior decisions or by legislative enactment."[1] Fortunately, this statement need not, and indeed cannot, be taken literally. In the first place, the court itself has declared it "unwise to follow this rule blindly," and reserved the right to examine the "merits," wherever proper.[2] Secondly, in a large number of cases, the court has exercised this right and continued its fine tradition of announcing new law, in the absence of primary authority, on the basis of a thorough weighing of conflicting policies. Finally, literal interpretation of this statement would impute to the court an unconstitutional practice. But even if understood as giving the Restatement mere persuasive authority, this statement, coming from the highest court of the State, is, at least in the law of conflict of laws, fraught with danger to the orderly administration of justice.

In this study, I shall first try to show that the court's statement, though referring to "holdings,"[3] would, if taken literally as recognizing the Restatement as a source of law, imply the unconstitutional abdication of the court of its judicial, and its assumption of a legislative function. I shall then attempt to prove that whatever merits it may have in other fields of the law, the Restatement should not be given even per-

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† The author is greatly indebted to Professor William S. Barnes of the University of Arizona College of Law for a compilation of Arizona cases on the law of conflict of laws.

* See Contributors' Section, p. 269, for biographical data.

[1] Irwin v. Murphey, 81 Ariz. 148, 302 P.2d 534, 537 (1956). See also Rodriquez v. Terry, 79 Ariz. 348, 290 P.2d 248 (1955); Bristor v. Cheatham, 75 Ariz. 227, 225 P.2d 173 (1953); Ingalls v. Neidlinger, 70 Ariz. 40, 216 P.2d 387 (1950); Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 160 P.2d 331 (1945); Waddell v. White, 56 Ariz. 525, 109 P.2d 843 (1941); Smith v. Normart, 51 Ariz. 134, 75 P.2d 38, 42 (1938).

[2] Reed v. Real Detective Pub. Co., 63 Ariz. 294, 303, 162 P.2d 133, 138 (1945).

[3] The use of this term in this context does, of course, not follow its ordinary meaning in relation to a decision on particular facts. The court's use is unfortunate since it disguises its legislative function here assumed.

suasive authority in the law of conflict of laws, because (1) the Restatement of this subject is, and is likely to remain, a dogmatic structure frequently lacking contact with the living law; and because (2) reliance on this document in the past has created serious obstacles for Arizona courts in their endeavor to partake in the growth of the law elsewhere.

CONSTITUTIONALITY OF ARIZONA PRACTICE

Article III of the Constitution of the State of Arizona provides that "The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

The scope of the judicial function is not easily defined. But, as the Supreme Court of Arizona has declared repeatedly, this function can never include the announcement of abstract rules to be applied in future cases. Such announcements are the prerogative of the legislature.[4] By "holding" that it will follow the Restatement in future cases, the court, it is submitted, would infringe this prerogative,[5] and, without legislative authority, renounce its constitutional power and duty to exercise its judicial function. Where a case is not covered by statute or precedent, every court has the power and duty to adjudicate the case before it in the light of what it considers just in the particular case.[6] It cannot divest itself of this power and duty by leaving the decision to another governmental body, let alone a private institution like the American Law Institute. Not even the legislature is authorized thus to delegate its authority. *A fortiori* the courts cannot do so. If the highest court of a state were to declare that it will follow a certain set of rules, the citizens of its state would be expected and directed to abide by these rules—and this would be making law.

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[4] See, *e.g.*, Bristor v. Cheatham, 73 Ariz. 228, 240 P.2d 185, 193 (1952); modified on other ground, 75 Ariz. 227, 255 P.2d 173 (1953): "The problem of how and when percolating waters of this state are to be *hereafter* appropriated is a legislative and not a judicial function." (Italics added.)

Only the rule-making power as to procedural matters is shared by the courts. State v. Superior Court, 60 Ariz. 69, 131 P.2d 983 (1942). Courts ". . . of course have inherent power to promulgate procedural rules, but it is equally well settled that such is not the case with reference to substantive law." Eastman v. State, 131 Ohio St. 1, 1 N.E.2d 140, 145 (1936).

[5] In Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), the United States Supreme Court, speaking through Mr. Justice Cardozo, seems to have approved the practice of "prospective overruling." See PATTERSON, JURISPRUDENCE 577 (1953) and, on the effect of overruling decisions in general, *e.g.*, O'Malley v. Sims, 51 Ariz. 155, 75 P.2d 50 (1938). But this practice is a far cry from establishing as binding a body of rules not previously examined by the court. See also Eastman v. State, *supra* note 4.

[6] See PATTERSON, JURISPRUDENCE 585 (1953).

THE RESTATEMENT OF THE LAW OF CONFLICT OF LAWS

The American Law Institute itself has never aspired to having its Restatements treated as sources of law. Even benevolent writers have warned the judiciary not to treat its propositions "as sacred oracles,"[7] if for no other reason than that "the representative form of government and the principle of legislative supremacy demand that the choice and formulation of important policies shall be made by elected officials," and that the aims of the Restatement "precluded any discussion of conflicting views and of the arguments of each."[8]

In most Restatements individual biased opinions have been largely avoided "by bringing together a group of legal experts . . . whose peculiar slants were minimized by arduous criticism and discussion of proposed texts," and "by regularly, though not uniformly adhering to the rule that the text must state the preponderant view of the American case law."[9] That these safeguards have been largely dispensed with in the *Restatement of Conflict of Laws,* is a matter of general knowledge. Its reporter, Professor Beale, however admirable his motives, has presented to the profession what is virtually his own most personal views.

Professor Yntema shortly after the publication of the Restatement found the following deviations from existing law: "(1) Non-statement of relevant, substantiated doctrine; (2) Non-statement of relevant legislative trends; (3) Statement of non-substantiated doctrine; (4) Statement of existing law of doctrine repealed by the majority of American jurisdictions; (5) Inaccurate statement of existing precedents; (6) Acceptance of inappropriate and questionable English precedents as authority."[10] Beginning with this condemnation and that by such scholars as Walter Wheeler Cook[11] and Ernest Lorenzen,[12] writers in this field, with few exceptions, have in painstaking and elaborate studies on specific subjects, shown that the law is otherwise and has always been otherwise.[13] In this field, then, the Supreme Court of Arizona could not, as it did in others, justify its reliance on the Restatement as coming "from an authority which the bench and bar of the country regard as the highest."[14]

It cannot be said in rebuttal that the American Law Institute itself has since rejected Professor Beale's views, by engaging in the compilation of a Second Restatement. Those drafts of this revision which have so far been published, have retained the general theory and organi-

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7 *Id.* at 223.
8 *Id.* at 222.
9 *Id.* at 222.
10 Yntema, *The Restatement of the Law of Conflict of Laws,* 36 COLUM. L. REV. 183, 222 (1936).
11 COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).
12 LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947).
13 See generally EHRENZWEIG, CONFLICT OF LAWS 16 (1959).
14 Lightning Delivery Co. v. Matteson, 45 Ariz. 92, 39 P.2d 938 (1935).

zation of Beale's Restatement.[15] Even assuming that the American Law Institute will nevertheless succeed in compiling a set of "rules" more responsive to the practice of the courts than its predecessor, the Arizona Supreme Court will be faced with a dilemma to which there is no satisfactory answer. Obviously acceptance of any future changes of the Restatement would constitute unconstitutional delegation of a private institution to make law. If, on the other hand, the court were to continue to defer to the (First) Restatement, the court would have deprived the law of Arizona of any later improvements by the Institute.

THE CONFLICTS RESTATEMENT IN ARIZONA

The number of cases in which the Arizona Supreme Court has followed its own "holding" is small.[16] But this fact does not exclude the possibility, and indeed probability, that numerous lower courts may have been and may yet be induced by this "holding" to apply initially erroneous or long obsolete "rules" of the Restatement which the supreme court itself would reject. The following analysis is necessarily limited to the reported cases. But even this inconclusive analysis reveals the great danger of the present practice.[17] Most of the cases concern the law of jurisdiction and judgments with only a few cases bearing on choice of law.

a. *Jurisdiction*

In *In re Hindi*[18] an Arizona domiciliary had obtained a decree against a New Mexico resident declaring the latter to be the father of petitioner's child. The Supreme Court of the State reversed on the ground that the action was not one in rem and that, therefore, in accordance with the "concise" statement of the bases of jurisdiction in Section 77 of the Restatement, Arizona could not "exercise jurisdiction" upon personal service effected in New Mexico. Much has happened since the case of

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[15] See, *e.g.*, as to the fundamental pseudo-concept of "legislative jurisdiction," EHRENZWEIG, CONFLICT OF LAWS 12 (1959); and for a study in a particular field, Ehrenzweig, *Miscegenation in the Conflict of Laws: Law and Reason versus the Restatement Second*, 45 CORNELL L. Q. 659 (1960).

[16] For cases from fields other than conflict of laws, see, *e.g.*, Condon v. Arizona Housing Corp., 63 Ariz. 125, 132, 160 P.2d 342, 346 (1945); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Waddell v. White, 56 Ariz. 420, 108 P.2d 565 (1940); Cole v. Arizona Edison Co., 53 Ariz. 141, 144, 86 P.2d 946 (1939); Lightning Delivery Co. v. Matteson, 45 Ariz. 92, 99, 39 P.2d 938 (1935). In the first two cases the court expressly referred to its "rule" of following the *Restatement*, and in the *Condon* case declared itself "impelled" to follow this rule. In Western Coal & Mining Co. v. Hilvert, *supra* note 1, at 334, the court accepts its "commitment" to the *Restatement* "rules."

[17] Occasionally the court's reliance on Professor Beale's treatise and *Restatement* was merely unnecessary. See, *e.g.*, Smith v. Normart, 51 Ariz. 134, 143, 75 P.2d 38, 41 (1938). The case concerned the right of a foreign administrator to sue on a negotiable instrument, a right virtually beyond doubt. See EHRENZWEIG, CONFLICT OF LAWS 52 (1959).

[18] *In re* Hindi, 71 Ariz. 17, 222 P.2d 991 (1950). Reliance on this case and the *Restatement* was unnecessary and potentially misleading in Schuster v. Schuster, 75 Ariz. 20, 251 P.2d 631, 635 (1952).

Pennoyer v. Neff whose ruling the Court, in accordance with the Restatement, still treated as "axiomatic."[19] Even if paternity suits should continue to be treated as in personam,[20] ever since *International Shoe, McGee and Hanson,*[21] personal jurisdiction has been extended to cover many new cases where a close contact with the forum and proper notice may secure "fair play and substantial justice" through constructive service.[22] By relying on the Restatement's adages, initially incorrect at worst, and obsolete at best, the court may have secluded itself from the rest of the nation which is well on the way to a rational law of forum conveniens.[23]

Equally regrettable is the court's adherence, in *Farnsworth v. Hubbard,*[24] to the Restatement's view that "no action can be maintained against any administrator outside the state of his appointment upon a claim against the estate of the decedent."[25] At least twelve states have rejected this "rule" by statute, at least six states have done so with regard to the probably most important case of the defendant non-resident motorist, and at least twelve other states have a common law recognizing general personal jurisdiction over the foreign administrator either upon mere service within the state or consent. What appears to be the majority of the remaining jurisdictions will permit the foreign administrator to be sued if he is domiciled in the forum state or if the suit concerns assets brought into the state. It may be hoped that Arizona courts will join the general trend and discard the rationally indefensible dogma of the Restatement.[26] That they may be willing to do so can, perhaps, be assumed in view of *Valley Nat. Bank of Phoenix v. Siebrand,*[27] where the Supreme Court of Arizona, in obvious disregard of this dogma, gave effect to a sale of forum assets by a foreign administrator.[28]

The greatest single group of jurisdictional conflicts cases in Ari-

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[19] *In re* Hindi, *supra* note 18, 222 P.2d 993, quoting from Blair v. Blair, 48 Ariz. 501, 62 P.2d 1321, 1323 (1936). In D. W. Onan v. Superior Court, 65 Ariz. 255, 179 P.2d 243, 248 (1947), the court conceded that the United States Supreme Court has "receded from some of the implications" of the *Pennoyer* case. On a new facet of the problem, see 2 ARIZ. L. REV. 143 (1960).

[20] Hartford v. Superior Court, 47 Cal. 2d 447, 304 P.2d 1 (1956). See EHRENZWEIG, CONFLICT OF LAWS 81 (1959).

[21] Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[22] Assumption of personal jurisdiction in a trust case would as such not exclude constructive service. Mackey v. Spangler, 81 Ariz. 113, 301 P.2d 1026 (1956) (effect of special appearance) was based on statutory interpretation.

[23] EHRENZWEIG, CONFLICT OF LAWS 112 (1959).

[24] Farnsworth v. Hubbard, 78 Ariz. 160, 277 P.2d 252, 255 (1955).

[25] RESTATEMENT, CONFLICT OF LAWS § 512 (1934).

[26] For documentation see EHRENZWEIG, CONFLICT OF LAWS 63 (1959).

[27] Valley Nat'l Bank of Phoenix v. Siebrand, 74 Ariz. 54, 243 P.2d 771 (1952), merely citing an inconclusive passage from 3 BEALE, CONFLICT OF LAWS § 471.1 (1935).

[28] See EHRENZWEIG, CONFLICT OF LAWS 50 (1959).

zona have been those dealing with the concept of domicile. Even where the court merely applied well-accepted doctrine, reliance on the Restatement as a source of law is likely to create serious problems in view of gross over-generalizations thus given the dignity of judicial rulings. There can be little quarrel with *Hiatt v. Lee*,[29] where, for the purpose of an administrator's appointment, the decedent was held not to have been a domiciliary of Arizona, having lived there only for reasons of his health for an extended period. But reliance on the Restatement "rule" to this effect[30] is misleading since this rule assumes a unitary domicile for all purposes. The American Law Institute itself has not adhered to this concept,[31] so that reliance on its earlier announcements puts an unnecessary hurdle in the way of a further growth of the common law.

Uncritical reliance on these announcements in other domicile cases may cause similar difficulties. Thus, in *McIntosh v. Maricopa County*,[32] plaintiff sought a declaratory judgment to the effect that he was entitled to a serviceman's property tax exemption, having been a resident of the state prior to September 1, 1945. While plaintiff had been overseas, he had decided to make his home in Arizona after the war. He had, therefore, had his wife and child move to the state, and his wife's mother had bought a home for them, where he in fact had joined his family on his discharge after September 1, 1945. Both equitable considerations and authority[33] could have supported a decision for the plaintiff. But the court decided to the contrary in primary reliance on the Restatement[34] and its author, Joseph Beale.[35]

The draftsmen of the Second Restatement find "good reason for saying that [particularly in the case of a military man] . . . his domicile should be in the place to which he has sent his wife to prepare a home pending his arrival there."[36] If this view should be embodied in the final text, would the Supreme Court of Arizona feel itself bound by *McIntosh*, which is based on the (First) Restatement, or overrule that case on the "authority" of the Second Restatement?

Similarly, the court seems to have tied its hands by defining its

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[29] Hiatt v. Lee, 48 Ariz. 320, 61 P.2d 401 (1936).

[30] *Id.* at 61 P.2d 403, citing RESTATEMENT, CONFLICT OF LAWS § 22 (1934).

[31] *Cf.* RESTATEMENT CONTINUED, CONFLICT OF LAWS § 9 (Tent. Draft No. 2, 1954): "Domicile is the place, generally the home, which the law assigns a person *for certain legal purposes.*" (Italics added.)

[32] McIntosh v. Maricopa County, 73 Ariz. 366, 241 P.2d 801 (1952).

[33] Bangs v. Inhabitants of Brewster, 111 Mass. 382 (1873). *Cf.* Anderson v. Anderson's Estate, 42 Vt. 350 (1869). See also Clark v. Clark, 71 Ariz. 194, 225 P.2d 486 (1950); Grimditch v. Grimditch, 71 Ariz. 198, 225 P.2d 489 (1950), *modified*, 71 Ariz. 237, 226 P.2d 142 (1951); Ryland v. Ryland, 65 Ariz. 97, 174 P.2d 741 (1946).

[34] RESTATEMENT, CONFLICT OF LAWS § 16, comment *a*, illus. 2 (1934).

[35] 1 BEALE, CONFLICT OF LAWS 139 (1935).

[36] RESTATEMENT CONTINUED, CONFLICT OF LAWS § 68 (Tent. Draft No. 2, (1954).

local jurisdiction in custody cases in reliance on secondary authority,[37] contrary to modern liberal trends, though impliedly rejecting the Restatement view.[38] It now seems clear in other states that this local jurisdiction is primarily based on considerations of the child's welfare.[39]

In *In re Graham's Estate*[40] the court denied a widow's petition for the setting aside of a homestead on the ground that she was not an Arizona resident, having declared under oath in probate proceedings in Washington that both her deceased husband and she were residents of that state. The court also stressed the fact, however, that she had limited herself in her petition to claiming her husband's Arizona residence. The dissent designated the latter argument as "puerile" in view of the Restatement rule that "except where a wife is living apart from her husband, she has the same domicile as that of her husband.[41] That this is not necessarily so has now been conceded in the Second Restatement.[42]

A similar shift in the Institute's teaching finally casts doubt on the authority of *In re Lawrence's Estate.*[43] A foreign corporation had been denied appointment as an executor, although it had concededly complied with the licensing requirements of Arizona, in reliance on a statute requiring an executor to be "a bona fide resident of this state." The Arizona Supreme Court reversed, declaring this provision inapplicable: "To say that a foreign corporation by complying with certain requirements may enjoy the rights and privileges of a like domestic corporation, but that it may not enjoy such rights and privileges unless it is a (bona fide) resident of the state . . . is contradictory and confusing, to say the least. A foreign corporation in such case would have two (bona fide) residences, one where created and the other in the state where it seeks to do business."[44] This the court found "impossible" under Section 41 of the Restatement. But even the Second Restatement has virtually abandoned the conception of a unitary corporate domicile.[45]

b. *Judgments*

The law of divorce recognition is in continuous flux. The attempt

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[37] See Byers v. Superior Court, 61 Ariz. 284, 148 P.2d 999 (1944), relying on *Corpus Juris* for the proposition that the divorce court lacked jurisdiction over the custody of absent children of Arizona domiciliaries. *But cf.* Wilson v. Wilson, 66 Nev. 405, 212 P.2d 1066, 1071 (1949), in effect repudiating the Byers case.

[38] RESTATEMENT, CONFLICT OF LAWS § 117 (1934).

[39] Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948). See in general EHRENZWEIG, CONFLICT OF LAWS 276 (1959).

[40] *In re* Graham's Estate, 73 Ariz. 179, 239 P.2d 365 (1951).

[41] *Id.* at 239 P.2d 368.

[42] RESTATEMENT CONTINUED, CONFLICT OF LAWS at 100 (Tent. Draft No. 2, 1954). For a decision resisting modern trends as to the wife's separate domicile, see Carlson v. Carlson, 75 Ariz. 308, 256 P.2d 249 (1953).

[43] *In re* Lawrence's Estate, 53 Ariz. 1, 85 P.2d 45 (1938).

[44] *Id.* at 85 P.2d 47.

[45] RESTATEMENT CONTINUED, CONFLICT OF LAWS at 125 (Tent. Draft No. 2, 1954).

in the (First) Restatement to freeze this law has been totally unsuccessful, and repeated amendments have proved necessary. In Arizona such amendments are bound to cause grievous confusion so long as the highest court continues to treat the Restaters' announcements as even tentatively binding. Thus, in *Brandt v. Brandt*[46] and *Unruh v. Industrial Commission*,[47] the court has approved the American Law Institute's 1948 version of insterstate divorce law with regard to estoppel against the attack of foreign divorces.[48] Are further developments in this highly uncertain area[49] now precluded until the Institute sees fit to restate its Restatement again?

In *In re Hughes*,[50] defendant had obtained custody of his and plaintiff's child in a California court and with that court's permission removed the child to Arizona. Upon the mother's motion, the custody was given to her by the same court in modification of the earlier decree. Affirming a decree restoring the father's custody, the Arizona Supreme Court found that full faith and credit had not been violated. There is considerable and growing authority for the proposition that custody decrees as such are not constitutionally entitled to recognition.[51] But the court preferred to rely on the Restatement's mechanical domicile test which in countless cases has caused misery and injustice. It may be hoped that in the future it will decide to follow what is likely to become the majority rule of "clean hands."[52]

It is fortunate that the court, in *Trujillo v. Trujillo*,[53] enforcing full faith and credit to a sister state support judgment, avoided the anachronistic and inhuman dogma of the Restatement according to which "no state will directly enforce a duty to support created by the law of another state."[54] It would have been helpful, however, had the court taken

[46] Brandt v. Brandt, 76 Ariz. 154, 261 P.2d 978 (1953). For an attempt to reconcile this decision with *In re* Brandt's Estate, 67 Ariz. 42, 190 P.2d 497 (1948), see Brandt v. Brandt, *supra*, 261 P.2d at 982. *Cf.* EHRENZWEIG, CONFLICT OF LAWS 249 (1959). Should the 1948 amendment of the *Restatement* be the reason for the apparent shift in the attitude of the Arizona court?

[47] Unruh v. Industrial Commission, 81 Ariz. 118, 301 P.2d 1029 (1956).

[48] Brandt v. Brandt, 76 Ariz. 154, 261 P.2d 978, 981. *Accord*, Green v. Green, 77 Ariz. 219, 269 P.2d 718 (1954).

[49] See in general EHRENZWEIG, CONFLICT OF LAWS 244 (1959). In White v. White, 83 Ariz. 305, 320 P.2d 702 (1958) (support surviving *ex parte* divorce) the court wisely refrained from relying on the obsolete *Restatement*. See also Hack v. Industrial Commission, 74 Ariz. 305, 248 P.2d 863 (1952); *In re* Nolan's Estate, 56 Ariz. 361, 108 P.2d 388 (1940).

[50] *In re* Hughes, 73 Ariz. 97, 237 P.2d 1009 (1951).

[51] Bachman v. Mejias, 1 N.Y.2d 575, 186 N.E.2d 866, 868 (1956). The U.S. Supreme Court has reserved judgment on this point. Kovacs v. Brewer, 356 U.S. 604, 608 (1958). For other custody cases based on formal jurisdictional tests see Blair v. Blair, 48 Ariz. 501, 62 P.2d 1321 (1936). *But cf.* for an excellent analysis in a domestic case of the court's philosophy, Fladung v. Sanford, 51 Ariz. 211, 75 P.2d 685 (1938).

[52] EHRENZWEIG, CONFLICT OF LAWS 279, 286 (1959).

[53] Trujillo v. Trujillo, 75 Ariz. 146, 252 P.2d 1071 (1953).

[54] RESTATEMENT, CONFLICT OF LAWS § 458 (1934). *Cf.* EHRENZWEIG, CONFLICT OF LAWS 264 (1959).

this opportunity for expressly disavowing its general approval of the *Restatement of Conflict of Laws*, particularly since in the equally problematic field of workmen's compensation the Arizona Supreme Court has apparently disassociated itself from the Restatement's attempt at following the vagaries of constitutional law in its amendments.[55] The same observation applies to the recognition of sister state judgments in general.[56]

c. *Choice of Law*

Even prior to the publication of the Restatement, reliance on its drafts threatened to stifle the natural growth of the law. That the interstate law of mortgages is an area of conflicts law particularly incapable of "Restatement," is shown in the fundamental changes which the announcements of the American Law Institute have undergone from the original draft,[57] through the (First) Restatement,[58] to the current draft of the Second Restatement.[59] We may hope that *Davis v. Standard Accident Ins. Co.*[60] will not prevent Arizona courts from going beyond the first stage of this process.[61] It may also be hoped that these courts will not be prevented by *Rodriquez v. Terry*[62] from following the decision of the Supreme Court of California in *Grant v. McAuliffe*[63] in applying their own progressive survival statute. That the approach of the *Grant* case was "contrary to the conclusions reached" in the Restatement[64] is hardly significant.

In *James v. Hiller*[65] the court upheld the claim of a New Mexico real estate broker under a New Mexico commission agreement concerning Arizona real estate although plaintiff had not been licensed to do business in Arizona. While refraining from citing the Restatement, the court relied on the inaccurate proposition of Professor Beale that the *lex contractus* governed such transactions and that Arizona law was

[55] See Collins v. American Buslines, 79 Ariz. 220, 286 P.2d 214, 218 (1955), *rev'd on other ground*, 350 U.S. 528 (1956). See in general EHRENZWEIG, CONFLICT OF LAWS 144, 216 (1959).

[56] Stephens v. Thomasson, 63 Ariz. 187, 160 P.2d 338 (1945) (attack for fraud). See EHRENZWEIG, CONFLICT OF LAWS 195 (1959).

[57] RESTATEMENT CONTINUED, CONFLICT OF LAWS § 287 (Tent. Drafts Nos. 1-3, 1928).

[58] RESTATEMENT, CONFLICT OF LAWS § 266 (1934).

[59] RESTATEMENT SECOND, CONFLICT OF LAWS § 268 (Tent. Draft No. 5, 1959).

[60] Davis v. Standard Accident Ins. Co., 35 Ariz. 392, 278 Pac. 384, 386 (1929).

[61] In Dissing v. Jones, 85 Ariz. 139, 333 P.2d 725 (1958); in Frontier Motors v. Chick Norton Buick Co., 78 Ariz. 341, 279 P.2d 1032 (1955); and in Ragner v. General Motors Acceptance Corp., 66 Ariz. 157, 185 P.2d 525 (1947), the *Restatement* remained unmentioned. For a detailed analysis of the most crucial problems in this area, namely those of the used car dealer, see Comment, 47 CALIF. L. REV. 543 (1959).

[62] Rodriquez v. Terry, 79 Ariz. 348, 290 P.2d 248 (1955).

[63] Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

[64] Rodriquez v. Terry, *supra* note 62, at 290 P.2d 249. For a defense of the *Grant* case, *supra* note 53, against a most peculiar constitutional attack, see Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 281 (1957).

[65] James v. Hiller, 85 Ariz. 40, 330 P.2d 999 (1958).

therefore applicable as that of the place "where the last act necessary to make it binding occurs."[66] Although producing the proper result in the case at bar, the formula used by the court could in other situations produce intolerable consequences.[67] This is equally true for the adoption in *Western Coal & Mining Co. v. Hilvert*,[68] of the anything but helpful Restatement adage that "the law of the place of performance determines whether a breach has occurred."[69]

The court was, of course, justified by much authority in annulling the marriage of Arizona domiciliaries validly concluded in New Mexico, on the ground that this marriage between first cousins violated a strong public policy of the forum and was evasionary.[70] But reliance for this holding on Section 132 of the Restatement may cause difficulty in the future, since that provision would compel Arizona to annul a marriage which would have been valid under both the law of Arizona and the law of the state of celebration, merely because the law of the parties' continued and intended domicile at the time of marriage was to the contrary.[71] In other marriage cases the court has foregone reliance on this doubtful authority.[72] In this respect the case of *Gradias v. Gradias*[73] seems significant in that the court, in apparent reliance on the general principle of favoring the validity of contracts in general,[74] and of marriage contracts in particular,[75] upheld the validity of a foreign common law marriage in the assumption that the marriage had been "contracted in a state where such marriages were valid,"[76] without even referring to the mechanistic "rule" of the Restatement.[77]

Perhaps in future cases the Supreme Court of Arizona may wish to reconsider its general adherence to the tenets announced by the American Law Institute in the field of the law of the conflict of laws.

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[66] *Id.* at 330 P.2d 1002. See also Acacia Mut. Life Ass'n v. Berry, 54 Ariz. 208, 94 P.2d 770 (1939), examining the question independently as to insurance contracts. Statutory Analysis sufficed in Bank of America v. Barnett, 87 Ariz. 96, 348 P.2d 296 (1960).

[67] See Ehrenzweig, *The Real Estate Broker and the Conflict of Laws*, 59 COLUM. L. REV. 303 (1959).

[68] Western Coal & Mining Co. v. Hilvert, *supra* note 1, at 160 P.2d 335.

[69] For criticism and analysis, see Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973 (1959).

[70] *In re* Mortenson's Estate, 83 Ariz. 87, 316 P.2d 1106 (1957).

[71] See Ehrenzweig, *Miscegenation in the Conflict of Laws: Law and Reason versus the Restatement Second*, 45 CORNELL L. Q. 659 (1960).

[72] See *cf.* Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950) (tribal marriage). For another case refraining from citing the *Restatement* or its drafts, see, *e.g.*, Wells Fargo & Co. v. Tribolet, 46 Ariz. 311, 50 P.2d 878, 883 (1933) (presumption as to foreign law).

[73] Gradias v. Gradias, 51 Ariz. 35, 74 P.2d 53 (1937).

[74] See Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973 (1959); *The Statute of Frauds in the Conflict of Laws*, 59 COLUM. L. REV. 874 (1959).

[75] Ehrenzweig, *Miscegenation in the Conflict of Laws: Law and Reason versus the Restatement Second*, 45 CORNELL L.Q. 659 (1960).

[76] Gradias v. Gradias, *supra* note 73, 74 P.2d at 54.

[77] RESTATEMENT, CONFLICT OF LAWS § 123 (1934).