

THE CONFLICT OF LAWS DOCTRINE IN NEBRASKA

INTRODUCTION

Conflict of Laws is that body of law which governs cases having a significant relationship to more than one state.¹ The field is extremely broad; it encompasses all situations in which human affairs are conducted across state lines.² A case in which the factual events occur in more than one state is a conflicts case, because it is necessary to choose among the laws of the relevant states involved if the case is to be correctly decided.³ A case in which the relevant facts occur entirely within a single state, but the suit is brought in another state, is also a conflicts case, because the forum state must decide whether to apply its own law or the law of the state where the factual events occurred.⁴

The field of conflicts has been called a nuisance.⁵ In fact, Dean Prosser has said that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."⁶ The problems are difficult, and the efforts of the courts to solve them have often been unsatisfactory.⁷

The original and second Restatements have been influential in shaping and stabilizing conflicts law, but neither has ever been recognized as "the law."⁸ The original Restatement subscribed to a strict rule-based territorial theory of vested rights.⁹ This vested rights doctrine was resoundingly criticized by conflicts scholars, most of whom advocated displacement of the rules with systems or methods of analysis.¹⁰ Prominent among these scholars was Professor Brainerd Currie, who formulated a governmental interest analysis which required the application of forum law, except in situations in which a foreign state had an interest in the application

1. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 2 (2d ed. 1971).

2. *Id.* § 2 comment a.

3. R. LEFLAR, AMERICAN CONFLICTS LAW § 2 (3d ed. 1977) [hereinafter cited as AMERICAN CONFLICTS LAW].

4. *Id.*

5. *Id.* § 8.

6. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

7. R. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS 3 (2d ed. 1971).

8. AMERICAN CONFLICTS LAW, *supra* note 3, § 8.

9. See notes 16-41 and accompanying text *infra*.

10. See notes 42-90 and accompanying text *infra*.

of its laws, and the forum state had none.¹¹ A second group of commentators, sometimes referred to as the "new territorialists," joined in the criticism of the first Restatement but advocated new rules, rather than systems of analysis, to replace the traditional theory.¹² The second Restatement responded to the upheaval by rejecting traditional theory and promulgating an approach which attempts to combine a general set of open-ended principles with supplementary black-letter rules.¹³

The Nebraska Supreme Court has held rather tenaciously to the traditional approach of the original Restatement.¹⁴ However, the court has recently made a few tentative gestures in the direction of the second Restatement.¹⁵ The purposes of this note will be (1) to examine the relevant Nebraska caselaw; (2) to suggest that the court may be ready to adopt a new approach to conflicts problems; and, (3) to offer a few brief recommendations as to how the court might best accomplish this task.

HISTORY AND LITERATURE

The First Restatement

The original Restatement of the Conflicts of Law was published by the American Law Institute in 1934.¹⁶ The reporter of the Restatement was Professor Joseph H. Beale,¹⁷ who devoted more than thirty years to the study and exposition of conflicts law.¹⁸ The conflicts theory espoused by Beale and by the original Restatement was a strict territorial approach, based on the idea that there exists in each political subdivision a single "law" which prevails within the territory, cannot prevail outside it, and must govern every question arising within it.¹⁹ Under this approach, legal rights incident to a given transaction are deemed to "vest"²⁰ in an individual at the time the transaction occurs and, having "vested" because they arise under, and are created by, the law of the place

11. See notes 50-68 and accompanying text *infra*.

12. See notes 76-80, 86-87 and accompanying text *infra*.

13. See notes 91-101 and accompanying text *infra*.

14. See notes 102-215 and accompanying text *infra*.

15. See notes 119, 147-61 and accompanying text *infra*.

16. RESTATEMENT OF CONFLICT OF LAWS (1934).

17. *Id.* at x.

18. *Id.*

19. J. BEALE, SELECTIONS FROM BEALE'S TREATISE ON THE CONFLICT OF LAWS, §§ 7, 14 (1935).

20. Hence, Beale's theory is often referred to as one of "vested rights." See D. CAVERS, THE CHOICE-OF-LAW PROCESS 8 (2d printing 1966); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 46 (1963); A. EHRENZWEIG, CONFLICT OF LAWS § 4 at 9-10 (1962).

of occurrence, these legal rights are entitled to "almost automatic" recognition and enforcement²¹ in whatever court in which they might be raised. Thus, subject to certain exceptions,²² an action on a legal right created by a given state could be maintained in any other state.²³ The latter state was to refer all problems with regard to the recognition or enforcement of the foreign right in question to the law of the state in which the transaction occurred.²⁴ Since the law of the foreign state could not have effect beyond the state's territorial limits,²⁵ the forum court was said to give effect not to the foreign law itself, but to the legal right created by the foreign law.²⁶ The foreign state had the power to create this legal right because it, and it alone, had "jurisdiction" over the transaction.²⁷

This vested rights theory gave rise to the familiar rules of *lex loci delicti*: the state where an injury occurs has "jurisdiction" over the tort, and its law controls; and *lex loci contractus*: the place of contracting has "jurisdiction" over the contract, and its law controls.²⁸ Similarly, the law governing the validity of a marriage is the law of the state where the contract of marriage is entered into,²⁹ the law governing legitimacy is that of the domicile of the parent whose relationship to the child is questioned,³⁰ questions involving title to land are decided in accordance with the law of the state where the land is located,³¹ and so forth.

21. AMERICAN CONFLICTS LAW, *supra* note 3, § 4.

22. Under the Restatement, an action could *not* be maintained if the law of the forum did not provide a form of action for the enforcement of the particular foreign right; if a judgment in an action provided by the law of the forum would impose on the defendant a more onerous duty, or a substantially different duty, than that imposed by the law of the state which created the right; if the right created by the law of the foreign state was created as a method of furthering its own governmental interests; if the action was one to recover a penalty, the right to which was given by the law of another state; if the enforcement of the cause of action created in another state would be contrary to the strong public policy of the forum; if the action was one to recover possession of a tangible thing located outside the state where the thing was located; if the action was one to recover compensation for a trespass upon or harm done to land in another state, unless the act causing injury to land in the other state was done in the forum state; or if the action was upon a covenant running with the land, based on privity of estate, where the land was located in another state. RESTATEMENT OF CONFLICT OF LAWS §§ 608-17 (1934).

23. *Id.* § 607. A right created by the law of a state other than the forum will hereafter be referred to as a "foreign right" and such state will be a "foreign state."

24. J. BEALE, SELECTIONS FROM BEALE'S TREATISE ON THE CONFLICT OF LAWS §§ 14-15 (1935).

25. RESTATEMENT OF CONFLICT OF LAWS § 1 (1934).

26. G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 9 (2d ed. 1951).

27. *Id.* at 10.

28. RESTATEMENT OF CONFLICT OF LAWS § 311, §§ 377-90 (1934).

29. *Id.* § 121.

30. *Id.* § 137.

31. *Id.* § 8.

If the transaction itself were interstate, Beale would "locate" it³² by selecting a significant factor,³³ and would then treat the rights of the parties involved as having "vested" according to the law of the place where the factor selected took place.³⁴ Thus, whether the transaction itself was interstate or purely intrastate,³⁵ the forum, by reference to the "proper law," would discover the rights and obligations of the parties, and would enforce those and no others.³⁶ The forum court had only to decide the nature of the issue before it (contract, tort, etc.), look to the appropriate choice-of-law rule, and apply the law of the state indicated by that rule.³⁷ This resulted in a system of conflicts rules which were relatively simple to administer and conducive to uniformity and predictability of results,³⁸ at least if they were followed by all courts and followed by all courts in the same way.³⁹ In fact, this system of conflicts rules was accepted by most courts,⁴⁰ and by many commentators.⁴¹

However, the system was also criticized by a number of writers even before the Restatement was published.⁴² On a theoretical level, the critics asserted that most choice-of-law rules are common law rules,⁴³ not inexorable laws that inevitably flow from concepts of territorial sovereignty.⁴⁴ They argued that the states were free to formulate and apply their own conflicts rules, subject only

32. *I.e.*, would give the transaction location in a given state for choice of law purposes. R. LEFLAR, *THE LAW OF CONFLICT OF LAWS* § 3 (1959) [hereinafter cited as *CONFLICT OF LAWS*].

33. *E.g.*, the significant factor in a contract case is "the principal event necessary to make a contract." *RESTATEMENT OF CONFLICT OF LAWS* § 311, comment 3 (1934). In a tort case the significant factor is the last event necessary to make an actor liable for an alleged tort. *Id.* § 377, and so forth.

34. *CONFLICT OF LAWS*, *supra* note 32, § 3.

35. A purely intrastate transaction could, of course, give rise to a conflicts issue if suit was brought in a foreign state. See text at note 4 *supra*.

36. *CONFLICT OF LAWS*, *supra* note 32, § 3.

37. *AMERICAN CONFLICTS LAW*, *supra* note 3, § 86.

38. *Id.*

39. *Id.*

40. See *e.g.*, *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir. 1956); *Alabama Great Southern R.R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892); *Milliken v. Pratt*, 125 Mass. 374 (1878).

41. H. GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* (2d ed. 1927), Griswold, *Mr. Beale and the Conflict of Laws*, 56 *HARV. L. REV.* 690 (1943).

42. See *e.g.*, Cavers, *A Critique of the Choice-of-Law Problem*, 47 *HARV. L. REV.* 173 (1933); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457 (1924); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736 (1924).

43. *AMERICAN CONFLICTS OF LAW*, *supra* note 3, § 86.

44. W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 41 (1949).

to restrictions imposed by federal or constitutional law.⁴⁵ Thus, they concluded, "vested rights" could not exist in any realistic sense, since no state could be compelled to recognize or enforce such rights.⁴⁶

On a practical level, the critics argued that the results produced by the application of the territorial rules were often anomalous.⁴⁷ The territorial rules provided for reference to a given state's law without any consideration of the content of the specific laws in conflict and thus, without any consideration of the specific purposes behind those laws.⁴⁸ The result was often the application of a given state's law with little reasonable basis for that application.⁴⁹

Governmental Interest Analysis

The first major alternative to the territorial theory of conflicts law was developed by Professor Brainerd Currie.⁵⁰ His "governmental interest analysis" was premised upon the idea that foreign law is justifiably applied when that law embodies a foreign state's policy, under circumstances in which the relationship of the case with the foreign state gives that state a legitimate interest in having its policy applied, and where the forum state has no conflicting interest.⁵¹ Conversely, a court would not be justified in displacing local law with foreign law when it could not determine that the foreign state's interest was entitled to recognition, or when it had no information about the foreign law or interest.⁵² In contrast to

45. *Id.* At the least, limitations are imposed by the due process and full faith and credit clauses of the United States Constitution.

46. AMERICAN CONFLICTS LAW, *supra* note 3, § 86.

47. See B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 77-127 (1963).

48. D. CAVERS, THE CHOICE-OF-LAW PROCESS 65 (2d printing 1966) [hereinafter cited as THE CHOICE-OF-LAW PROCESS].

49. *Id.* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 77-127 (1963) [hereinafter cited as SELECTED ESSAYS].

A hypothetical frequently set forth to illustrate this proposition proceeds as follows: two state A residents undertake an automobile trip which is to originate and terminate in State A, but which will take them briefly into State B. While passing through State B, they are involved in a one-car collision, and the State A passenger brings a personal injury action against the State A driver in State A. State B has enacted a guest statute; State A has not. The territorial system mandates application of the State B guest statute, since the injury occurred in State B. The critics of the territorial approach would ask what justifies this result in light of the fact that the State B legislature could not have intended to regulate the guest-host relationship of State A residents. The fact that the accident occurred in State B is said to be a fortuitous circumstance which cannot justify the application of the law of State B.

50. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 4 (1971).

51. SELECTED ESSAYS, *supra* note 49, at 4.

52. *Id.*

the territorial approach, which, in a case involving foreign factors,⁵³ mandated the application of foreign law or no law at all,⁵⁴ Currie advocated the application of forum law as a general rule.⁵⁵ If the application of foreign law was suggested, the forum court's first task was to determine the governmental policy embodied in the law of the forum, and then to ascertain whether the relation of the case to the forum was such as to provide a legitimate basis for the assertion of an interest in applying that policy to the case.⁵⁶ This was essentially a task of statutory interpretation or construction.⁵⁷ If necessary, the court was to undertake a similar analysis of the foreign law, the policies expressed by that law, and the legitimacy of the foreign state's assertion of an interest in the application of its law.⁵⁸ The foreign law would be applied if the foreign state had an interest in the application of its policy and if the forum state did not. If the forum state did have such an interest, however, forum law would be applied even if the foreign state also asserted a justifiable interest.⁵⁹

Currie believed that utilization of his interest-analysis method would prove many traditional conflicts problems to be "false conflicts" in the sense that, in many situations involving foreign elements, only one state would have a justifiable interest in having its law applied.⁶⁰ Currie's insistence on resort to forum law whenever a conflict did appear was based upon his belief that no court could or should attempt to determine which of the two possible laws were more important, enlightened, or deserving of application.⁶¹ However, Currie later modified his approach to permit an interested forum to consider the interest embodied in the foreign state's law in deciding the proper scope of the forum law.⁶² In other words, the forum court, confronted with an apparent conflict between the interests of the two states should, before mechanically applying forum law, reconsider the nature and scope of the interests in conflict.⁶³ By engaging in a more "moderate and restrained interpretation" of the policy or interest of one of the

53. See notes 16-49 and accompanying text *supra*.

54. SELECTED ESSAYS, *supra* note 49, 49.

55. *Id.* at 183.

56. *Id.*

57. *Id.* at 183-84.

58. *Id.* at 184.

59. *Id.*

60. *Id.* at 107, 184.

61. *Id.* at 117.

62. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242 (1963).

63. *Id.*

states, a conflict might be avoided.⁶⁴ If this was not possible, the law of the forum should be applied.⁶⁵ Currie also advocated the application of forum law in situations where the forum state itself had no interest, but the interest of two other states were in conflict.⁶⁶ Currie was also the first to "discover" the "unprovided case," a term used to describe a case in which neither of two potentially interested states actually had an interest.⁶⁷ Since neither state has an interest in the outcome, again Currie advocates application of forum law on grounds of convenience.⁶⁸

The general interest-analysis approach was employed by the United States Supreme Court in constitutional choice-of-law cases as early as 1935.⁶⁹ Interest analysis has been employed by a number of courts at one time or another in recent years.⁷⁰

64. *Id.*

65. *Id.* at 1242-43; see text at note 61 *supra*.

66. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1243 (1963). This is the problem of the "disinterested third state," discussed more fully in Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963).

67. SELECTED ESSAYS, *supra* note 49, at 152.

68. *Id.* at 156. Convenience would be accomplished because the court is presumed to know forum law, and there is no need to expend effort to ascertain foreign law.

69. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

70. *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978) (Louisiana law denying corporate employer a cause of action for negligent injury to a key employee applied to California employer where employee was injured in Louisiana because California's interest in applying its own law, which would grant a cause of action, not sufficiently compelling so as to prevent accommodation of Louisiana's strong interest in having its law applied); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976) (California law imposing liability on tavern keeper for selling and furnishing alcoholic beverages to persons who become intoxicated and injure plaintiffs applied to Nevada defendant where accident occurred in California because California cannot effectuate its policy without extending its regulations to include non-resident tavern keepers who regularly sell alcoholic beverages to intoxicated persons); *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (contract made in and valid under Nevada law but invalid under California statute of frauds held enforceable in California); *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957) (California requirement of reasonable investigation on part of mortgagee to avoid forfeiture of his interest not imposed on Texas mortgagee because the legislature was concerned with California, not Texas, mortgagees); *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957) (suit brought in Minnesota against Minnesota bartender under Minnesota dramshop act for injuries sustained by Minnesota plaintiff in Wisconsin governed by Minnesota law); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (New York has the only real interest in whether recovery should be granted to a New York plaintiff against a New York defendant for injuries arising out of an accident in Michigan; *but see Cousins v. Instrument Flyers*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978) (applying New York law in a product liability action arising out of the rental of a plane in New York which crashed in Pennsylvania, saying that "lex loci delicti remains the general rule in tort cases to be displaced only in extraordinary circumstances," *and*

Interest analysis has been and continues to be criticized. Doubt has been expressed as to the utility of the "ordinary processes of construction and interpretation" as tools for resolving conflicts problems.⁷¹ It has been suggested that these processes cannot regularly be expected to reveal a relevant policy for each law subjected to them, that their application will only serve to produce an unjustified reliance on forum law and will too often ignore the importance of factors not reflected in the specific laws in question.⁷² Furthermore, it is said that a court engaging in a more "restrained and moderate interpretation"⁷³ of its own or another state's law in reality faces the question of which law is to be preferred and why, questions which Currie does not answer.⁷⁴ The Currie methodology has also been attacked on grounds that such methods encourage subjective evaluation of conflicting laws, thereby inevitably producing ad hoc decisions.⁷⁵

Other Approaches

Professor David Currie is a vocal critic of interest analysis, although he shares Currie's view that the central problem in conflicts is the need to choose between two specific rules of law, rather than to choose between the legal systems of two jurisdictions.⁷⁶ Cavers, reacting against the "freewheeling analysis of government-

Neumeier v. Kuchner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (applying "principles of preference" to hold an automobile guest suit involving a New York host, an Ontario guest, and an accident in Ontario governed by the Ontario guest statute); *Babcock v. Johnson* 12 N.Y.2d 743, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (employing a "grouping of contacts" approach (similar to that of the second Restatement) and using a form of interest analysis to judge the significance of the contracts and holding that litigation arising from an automobile accident in Ontario was to be governed in this case, where both guest and host were New York residents, by New York Law); *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973) (reversing the dismissal of a loss of consortium action brought by a Washington plaintiff against an Oregon defendant, on grounds that Oregon law, permitting such an action, should govern rather than Washington law, which did not so permit, since neither state had a vital interest and there was thus no reason why forum law should not govern); *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964) (Oregon spendthrift law applied to relieve Oregon defendant of liability to California plaintiff on notes executed and delivered in California); *Wilcox v. Wilcox*, 26 Wis.2d 617, 133 N.W.2d 408 (1965) (Wisconsin law applied to action brought by Wisconsin wife against Wisconsin husband for injuries sustained in accident in Nebraska).

71. THE CHOICE-OF-LAW-PROCESS, *supra* note 48, at 74.

72. *Id.*

73. See notes 62-65 and accompanying text *supra*.

74. THE CHOICE-OF-LAW PROCESS, *supra* note 48, at 75.

75. AMERICAN CONFLICTS LAW, *supra* note 3, § 92.

76. THE CHOICE-OF-LAW PROCESS, *supra* note 48, at 72. The latter is of course the question with which Beale and the original Restatement were concerned. See notes 16-49 and accompanying text *supra*.

tal purposes and functions,"⁷⁷ proposed seven "principles of preference" to guide courts faced with conflicting laws.⁷⁸ These seven

77. AMERICAN CONFLICTS LAW, *supra* note 3, § 92.

78. THE CHOICE-OF-LAW PROCESS, *supra* note 48, at 139-224. The tort principles are:

1. Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship. *Id.* at 139.
2. Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship. *Id.* at 146.
3. Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions. *Id.* at 159.
4. Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which is higher than the like standard imposed by the state of injury, the law of the former state should determine the standard of conduct or of financial protection applicable to the case for the benefit of the party protected by that state's law. *Id.* at 156.
5. Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which was lower than the standards imposed by the state of injury, the law of the former state should determine the standard of conduct or financial protection applicable to the case for the benefit of the party whose liability that state's law would deny or limit. *Id.* at 177.
6. Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law. *Id.* at 181.
7. If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the pre-

principles were offered with the suggestion that, if adopted by courts working with conflicts issues, they would be developed into a comprehensive system of rules for resolving conflicts problems.⁷⁹ This methodology differs from that suggested by various other modern conflicts scholars in that it urges the adoption of rules rather than of general approaches.⁸⁰

Beale, Currie, and Cavers have not been the sole commentators on conflicts problems, or the only ones to offer solutions. Professor Albert Ehrenzweig promulgated a choice-of-law theory advocating the application of "a proper law in a proper forum."⁸¹ Ehrenzweig argues that in many typical fact situations,⁸² American courts have developed and uniformly applied conflicts rules based on fairness and policy considerations, which he calls "true rules."⁸³ When there is no applicable "true rule," he suggests that forum law is *prima facie* applicable and should not be displaced in the absence of a sound reason for the application of foreign law.⁸⁴ Ehrenzweig's emphasis on forum policy leads him to stress the importance of the "proper forum," a forum which can properly apply its own law because of its contacts with the case or parties.⁸⁵

Professor Leflar has proposed the adoption of five "choice influencing considerations" to guide the determination of choice of law questions.⁸⁶ Leflar cites cases from five jurisdictions as examples of this approach as employed by the courts.⁸⁷

ceding principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interests created run counter to applicable mandatory rules of the situs of the land. This principle does not govern the legal effect of the transaction on third parties with independent interests. *Id.* at 194.

79. *Id.* at 136-37.

80. See notes 50-68 and accompanying text *supra* and notes 81-85, 88-90 and accompanying text *infra*.

81. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965) [hereinafter cited as Ehrenzweig, *A Proper Law in a Proper Forum*].

82. These would include litigation of contracts, torts, wills, and so forth where interstate elements are involved.

83. Ehrenzweig, *A Proper Law in a Proper Forum*, at 344-46.

84. *Id.* at 345-50.

85. *Id.* at 352. See the critical discussion of Ehrenzweig's approach by Currie, Cavers, Leflar, and others in 18 OKLA. L. REV. 233-375 (1965), wherein they state that Ehrenzweig's "practice of extracting true rules" is "too subjective to be relied upon;" that a number of Ehrenzweig's points are "troublesome;" and that Ehrenzweig has "totally failed to sustain" at least one of his rules (the rule of validation), and so forth.

86. AMERICAN CONFLICTS LAW, *supra* note 3, § 96. These considerations are: (A) Predictability of results; (B) Maintenance of interstate and international order; (C) Simplification of the judicial task; (D) Advancement of the forum's governmental interests; (E) Application of the better rule of law." *Id.* § 96 at 195.

87. AMERICAN CONFLICTS LAW, *supra* note 3, § 96 at 193 n.2. See *Turcotte v. Ford*

A "functional analysis" has also been advocated by Professors Arthur von Mehren and Donald Trautman.⁸⁸ A functional analysis, according to the author, is "one that aims at solutions that are the rational elaboration and application of the policies and purposes underlying specific legal rules and the legal system as a whole."⁸⁹ Professor Russell Weintraub has also developed his own form of functional analysis.⁹⁰

The Second Restatement

The second Restatement of Conflicts attempted to respond to the upheaval that had gripped conflicts law in the years following the publication of the original volume.⁹¹ The second Restatement replaces the territorial rules with the broad principle that the rights and obligations of parties to a lawsuit, with respect to a particular issue, are to be determined according to the law of the state which has the "most significant relationship" to the occurrence.⁹² The factors relevant to that appraisal are enumerated in Section 6 as follows:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states

Motor Co., 494 F.2d 173, 176-77 (1st Cir. 1974) (wrongful death action brought by Rhode Island decedent's father against Michigan car manufacturer after decedent's death in Massachusetts, accident governed by Rhode Island law under conflicts law of Rhode Island); Milkovich v. Saari, 295 Minn. 155, —, 203 N.W.2d 408, 410 (1973) (personal injury action brought by Ontario plaintiff against Ontario defendant after accident in Minnesota governed by Minnesota law on grounds that it was the better law); Mitchell v. Craft, 211 So. 2d 509, 510 (Miss. 1968) (wrongful death action brought by Mississippi plaintiff against Mississippi defendant after accident in Louisiana governed by Mississippi law); Clark v. Clark, 107 N.H. 351, —, 222 A.2d 205, 206-07 (1966) (personal injury action by New Hampshire plaintiff against New Hampshire defendant after Vermont accident governed by New Hampshire law); Conklin v. Horner, 38 Wis. 2d 468, —, 157 N.W.2d 579, 581, 587 (1968) (action by Illinois guest passenger against Illinois host after Wisconsin accident governed by Wisconsin common law of negligence on grounds that it was the better law). Evaluations of Leflars contribution to the field may be found in Felix, *Symposium: Leflar on Conflicts*, 31 S.C.L. REV. 409 (1980).

88. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

89. *Id.* at 76.

90. See R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (2d ed. 1980).

91. *AMERICAN CONFLICTS LAW*, *supra* note 3, § 1.

92. *RESTATEMENT (SECOND) CONFLICT OF LAWS*, vii-viii (1971).

- 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.⁹³

The authors of the second Restatement concede that this "mode of treatment leaves the answer to specific problems very much at large"⁹⁴ and therefore, in most instances, provide a supplementary statement in black letter setting forth the choice of law that courts will "usually" make in the given situation.⁹⁵ The second Restatement was not received without criticism.⁹⁶ The second Restatement's combination of black-letter rules and open-ended principles offers little improvement in terms of resolving the difficulties and tensions that are the hallmark of the policy-based, "no-rule" approach.⁹⁷

The second Restatement's chief virtue, which is its flexibility, is also apparently its chief weakness: it offers little guidance in the "hard cases" because it does not identify the considerations which influence courts to adopt one solution or the other within the formula.⁹⁸ Indeed, its approach has been called question-begging⁹⁹ and has been charged with permitting judicial discretion to run unchanneled.¹⁰⁰ Nevertheless, a growing number of courts have explicitly adopted second Restatement methodology.¹⁰¹

93. *Id.* § 6 at 10.

94. *Id.* at viii.

95. *Id.*

96. See notes 97-100 and accompanying text *infra*.

97. A. VON MEHREN, RECENT TRENDS IN CHOICE-OF-LAW METHODOLOGY, 60 CORNELL L. REV. 927, 964 (1975).

98. AMERICAN CONFLICTS LAW, *supra* note 3, § 91.

99. THE CHOICE-OF-LAW-PROCESS, *supra* note 48, at 207.

100. *Id.* at 208.

101. See *e.g.*, Schwartz v. Schwartz, 103 Ariz. 562, —, 447 P.2d 254, 255 (1968) (spousal immunity); First Nat'l Bank v. Rostek, 182 Colo. 437, —, 514 P.2d 314, 320 (1973) (aircraft guest statute); Rungee v. Allied Van Lines, Inc., 92 Idaho 718, —, 449 P.2d 378, 383 (1968) (recovery of attorneys fees in connection with claim for damage to household goods during a move from Florida to Idaho); Champagne v. W. E. O'Neil Constr. Co., 77 Ill. App. 3d 136, —, 395 N.E.2d 990, 996 (1979) (validity of indemnity agreement); Berghammer v. Smith, 185 N.W.2d 226, 231 (Iowa 1971) (loss of consortium; *but see* Marriage of Reed, 226 N.W.2d 795, 796 (Iowa 1975) (validity of common law marriage; court is "not unmindful" of the "current turmoil in the conflict of laws area" but departure from traditional rule in favor of second Restatement would not avail petitioner)); Mitchell v. Craft, 211 So. 2d 509, 515 (Miss. 1968) (comparative negligence; *but see* Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975) (guest statute applying "center of gravity or of most substantial relationships" and

CONFLICT OF LAWS: THE NEBRASKA PERSPECTIVE

Nebraska has held rather tenaciously to the traditional territorial approach to conflicts problems.¹⁰² This is especially true when conflicts questions have arisen in disputes involving real and personal property and marriages.¹⁰³ In the areas of tort and contract, the court has recently made several forays beyond the mandate of the original Restatement.¹⁰⁴ However, the July, 1982 decision of *First Mid America Inc. v. MCI Communications Corp.*,¹⁰⁵ embracing the rule of *lex loci contractus*,¹⁰⁶ makes it quite clear that the court has not yet abandoned the territorial theory.

Tort

The case of *Crossley v. Pacific Employers Insurance Co.*¹⁰⁷ gave the Nebraska Supreme Court its most recent opportunity to address the conflicts issue as presented in a tort framework. In *Crossley*, the plaintiff, a Nebraska citizen, brought a personal injury action against his own insurer under the uninsured motorist provisions of his insurance policy.¹⁰⁸ The injuries were the result of an automobile accident in Colorado; the driver of the other vehicle was a Colorado resident.¹⁰⁹ Colorado is a "no-fault" jurisdiction, and the plaintiff's medical and related expenses fell far below the statutory minimum required to file a tort claim in Colorado for general damages.¹¹⁰ The plaintiff's theory was that the effect of the Colorado no-fault legislation was to render the Colorado car uninsured.¹¹¹ The insurance coverage on the Colorado vehicle was consistent with the Nebraska statutory requirements.¹¹² The court

Estate of Torian v. First Nat'l Bank, 321 So. 2d 287, 293 (Miss. 1975) (estate taxation applying "interest analysis approach"); National Starch & Chem. Corp. v. Newman, 577 S.W.2d 99, 102 (Mo. App. 1979) (contractual restriction on post-employment competition); Brickner v. Gooden, 525 P.2d 632, 635 (Okla. 1974) (limitation on damages for personal injury); Gutierrez v. Collins 583 S.W.2d 312, 318 (Tex. 1979) (damages for personal injuries suffered in Mexico; *but see* Robertson v. Estate of McKnight, 591 S.W.2d 639, 641, 643 (Tex. Civ. App. 1979) (interspousal immunity; *Gutierrez* not applicable to statutory causes of action, here wrongful death)); Mentry v. Smith, 18 Wash. App. 668, —, 571 P.2d 589, 590 (1978) (guest statute).

102. See notes 16-41 and accompanying text *supra*.

103. See notes 179-200 and accompanying text *infra*.

104. See notes 119, 147-61 and accompanying text *infra*.

105. 212 Neb. 57, 321 N.W.2d 424 (1982).

106. *Id.* at 59, 321 N.W.2d at 425. See note 28 and accompanying text *supra*.

107. 198 Neb. 26, 251 N.W.2d 383 (1977).

108. *Id.* at 26-27, 251 N.W.2d at 384-85.

109. *Id.* at 27, 251 N.W.2d at 385.

110. *Id.* at 27-28, 251 N.W.2d at 385.

111. *Id.* at 28-29, 251 N.W.2d at 385-86.

112. *Id.* at 29, 251 N.W.2d at 385. The Colorado no-fault legislation provided that no person is permitted to recover against an owner or driver with the required in-

held that the Colorado car was not an uninsured vehicle, noting that it clearly would have been insured had the accident occurred in Nebraska.¹¹³ The court further stated that it was not the Colorado insurance policy which restricted the legal liability of the defendant, but "it was the law of Colorado which had that effect."¹¹⁴ The plaintiff argued that he should be permitted to recover "as though the tort liability law of Nebraska applied to the accident in Colorado," or, alternatively, to recover under the uninsured motorist provisions of his own policy.¹¹⁵ The court replied that "in an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will be applied, and that law governs not only the amount of recovery, but also the right to recover."¹¹⁶ This is a straightforward application of the territorial analysis in the original Restatement.¹¹⁷ However, the court stated that the result in this particular case would have been the same under virtually any of the modern conflicts theories.¹¹⁸ In support of this proposition, the court cited the second Restatement, which states that "[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship. . . ."¹¹⁹

insurance except where there was death, dismemberment, permanent disability, permanent disfigurement, reasonable need for medical services having a reasonable value in excess of \$500, or loss of earnings beyond a 52-week period not compensated by an insurance policy complying with the terms of the act. COLO. REV. STAT. §§ 10-4-701 to -716 (1975). The Colorado driver had liability insurance of \$15,000 each person, \$30,000 each occurrence, for bodily injury; and \$10,000 each occurrence property damage coverage. 198 Neb. at 29, 251 N.W.2d at 385. Nebraska law requires coverage of not less than \$15,000 for bodily injury or death of one person and not less than \$30,000 for bodily injury or death of two or more persons; and not less than \$10,000 for property damage. NEB. REV. STAT. § 60-509 (Reissue 1978). The plaintiff had lost "a few days" of work and his total medical costs were \$118.26. 198 Neb. at 29, 251 N.W.2d at 385.

113. 198 Neb. at 29, 251 N.W.2d at 385.

114. *Id.*

115. *Id.* at 29-30, 251 N.W.2d at 386.

116. *Id.* at 30, 251 N.W.2d at 386.

117. RESTATEMENT OF CONFLICT OF LAWS §§ 378, 381, 384, 412 (1934). See notes 16-41 and accompanying text *supra*.

118. 198 Neb. at 30, 251 N.W.2d at 386.

119. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971). This is a "supplementary" black letter rule. See notes 91-95 and accompanying text *supra*. The general principle set forth by the second Restatement to govern choice of law in a tort suit calls for the application of the law of the state with "the most significant relationship to the occurrence and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). "Contacts" to be taken into account in applying the § 6 principles include the place of injury, the place where the conduct causing the injury occurred, the domicile of the parties, and the place where the relationship, if any, is "centered." *Id.* See text at note 93 *supra*.

This ambiguity was laid to rest, however, when the Nebraska Supreme Court summarized the decision in *Crossley* in *Lane v. State Farm Mutual Automobile Insurance Co.*¹²⁰ In *Lane*, the court stated that *Crossley* stands for the proposition that "the law of the place where the accident occurred governs not only the amount of the recovery but also the right to recover."¹²¹

The *Crossley* court cited two earlier tort cases in support of its ruling.¹²² In *Peterson v. Dean*,¹²³ injuries were incurred in Iowa by two Nebraska residents involved in a one-car collision.¹²⁴ While the opinion does not expressly discuss the conflicts of law issue, the court based its decision on the applicable Iowa law, which was the Iowa guest statute.¹²⁵ The second decision was that of *Lorenzen v. Continental Baking Co.*¹²⁶ *Lorenzen* held that a Nebraska plaintiff in a wrongful death action, brought after an accident occurring in Iowa, is limited to the damages available under the Iowa survival statute, as opposed to the more liberal damages recoverable under the Nebraska wrongful death statute.¹²⁷ As in *Crossley*, the court did not expressly discuss the conflicts issue, contenting itself with the statement that "[t]he accident occurred in Iowa and the rule of damages is therefore determined from the law of Iowa."¹²⁸ The court supported this holding with a citation to the original Restatement, Sections 391 and 412.¹²⁹

Earlier Nebraska tort cases are consistent in their application of *lex loci delicti*.¹³⁰ In *Cappellano v. Pane*,¹³¹ the court stated, without citation of authority, that "[t]he accident occurred . . . in the State of Iowa which requires our application of the laws of that state to the cause of action."¹³² *Portis v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*¹³³ held that the plaintiff's cause of action "arose in" Minnesota, where the accident occurred, and that therefore the Minnesota rule as to contributory negligence would be recognized and followed.¹³⁴ In *Whitney v. Penrod*,¹³⁵ the court

120. 209 Neb. 396, 308 N.W.2d 503 (1981).

121. *Id.* at 404, 308 N.W.2d at 508.

122. 198 Neb. at 30, 251 N.W.2d at 386.

123. 186 Neb. 716, 186 N.W.2d 107 (1971).

124. *Id.* at 717-18, 186 N.W.2d at 108-09.

125. *Id.* at 719-21, 186 N.W.2d at 109-10.

126. 180 Neb. 23, 141 N.W.2d 163 (1966).

127. *Id.* at 31-32, 141 N.W.2d at 168-69.

128. *Id.* at 31, 141 N.W.2d at 168.

129. *Id.*

130. See note 28 and accompanying text *supra*.

131. 178 Neb. 493, 134 N.W.2d 76 (1965).

132. *Id.* at 495, 134 N.W.2d at 78.

133. 158 Neb. 28, 62 N.W.2d 323 (1954).

134. *Id.* at 33, 62 N.W.2d at 326-27. This, again, is the position of the original Re-

was asked by a Nebraska defendant to apply the Nebraska guest statute to an accident occurring in Missouri on the grounds that application of Missouri law violated Nebraska law and public policy.¹³⁶ Although such a holding would have been permissible under the territorial theory,¹³⁷ the court declined to accept the defendant's argument, relying on Professor Beale's statement that "a mere difference between the laws of the two States . . . will not necessarily render the enforcement of a cause of action arising in one State, contrary to the public policy of another State."¹³⁸ A review of the remaining relevant tort decisions reveals the mechanical application of *lex loci delicti*,¹³⁹ generally without discussion.¹⁴⁰

Contract

The Nebraska contract decisions, however, are not quite as unanimous in their support of the original Restatement's territorial approach.¹⁴¹ On July 2, 1982, the Nebraska Supreme Court decided *First Mid America Inc. v. MCI Communications Corp.*,¹⁴² the most recent contract case presenting a conflicts issue. The action, brought by a Nebraska corporation, was based upon an alleged oral contract entered into in New York.¹⁴³ The parties had agreed that "the validity of a contract is to be determined by the *lex loci contractus* unless there is something in the contract which is prohibited by express statute or infringes on some positive rule

statement. RESTATEMENT OF CONFLICT OF LAWS § 384 (1934). See note 16-41 and accompanying text *infra*.

135. 149 Neb. 636, 32 N.W.2d 131 (1948).

136. *Id.* at 639, 32 N.W.2d at 134. The contention of the defendant was apparently that application of the Missouri negligence rule, which permitted a guest to recover against a host driver for failure of the host to exercise the highest degree of care, would be offensive to Nebraska law and policy as expressed in the Nebraska guest statute. *Id.*

137. See notes 16-41 and accompanying text *supra*, and RESTATEMENT OF CONFLICT OF LAWS, § 612 (1934).

138. *Whitney*, 149 Neb. at 639, 32 N.W.2d at 134.

139. See note 28 and accompanying text *supra*.

140. *Yanney v. Nemer*, 154 Neb. 188, 189, 47 N.W.2d 368, 369 (1951) (action on Iowa accident governed by Iowa guest statute); *Bittner v. Corby*, 138 Neb. 738, 739, 295 N.W. 277, 278 (1940) (action on Iowa accident governed by Iowa guest statute); *Barnard v. Heather*, 135 Neb. 513, 521, 282 N.W. 534, 539 (1938) (action on Iowa accident governed by Iowa guest statute); *Alesio v. Lococo*, 134 Neb. 461, 463-65, 279 N.W. 154, 155-56 (1938) (action on Texas accident governed by Texas guest statute); *Bailey v. Bryant*, 127 Neb. 843, 843, 257 N.W. 241, 241 (1934) (action on Iowa accident governed by Iowa guest statute); *Jennings v. Biurvall*, 122 Neb. 551, 555-56, 240 N.W. 757, 759-60 (1932) (action on Iowa accident governed by Iowa guest statute) and so forth.

141. See notes 16-41 and accompanying text *infra*.

142. 212 Neb. 57, 321 N.W.2d 424 (1982).

143. *Id.* at 58, 321 N.W.2d at 425.

of public policy."¹⁴⁴ The court found no such prohibition and held the alleged contract void under the New York statute of frauds.¹⁴⁵ Although the original Restatement was not cited, the analysis proceeded precisely according to the approach advocated by the Restatement's territorial theory.¹⁴⁶

However, the Nebraska Supreme Court explicitly relied on the second Restatement in the 1978 decision of *Shull v. Dain, Kalman & Quail, Inc.*¹⁴⁷ Shull, a Nebraska citizen, sought a declaratory judgment to determine the usury rate applicable to funds advanced to him by the Minnesota defendant under a margin contract.¹⁴⁸ The district court held that the "last act" necessary to make the agreement binding, *viz.*, approval by the defendant, took place in Minnesota and that therefore the Minnesota usury law governed.¹⁴⁹ This was again an application of the original Restatement's analysis.¹⁵⁰

On appeal, the Nebraska Supreme Court began by noting that, "at various times, and under varying circumstances, this court has applied the 'last act' test;¹⁵¹ . . . a place of execution and place of performance rule;¹⁵² . . . and very recently has held that where a contract specifies that the law of a particular state is to be applied and that state bears some relationship to the transaction, the con-

144. *Id.* at 59, 321 N.W.2d at 425. See note 28 and accompanying text *supra*.

145. 212 Neb. at 59-61, 321 N.W.2d at 425-27. The New York Statute of Frauds provides in part:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . . 10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

N.Y. [GEN. OBLIG.] LAW § 5-701 (McKinney 1978).

146. RESTATEMENT OF CONFLICT OF LAWS §§ 311, 312, 347 (1934). See notes 16-41 and accompanying text *supra*.

147. 201 Neb. 260, 267 N.W.2d 517 (1978).

148. *Id.* at 261, 267 N.W.2d at 518.

149. *Id.* at 263-64, 267 N.W.2d at 519.

150. RESTATEMENT OF CONFLICT OF LAWS § 311, Comment d, § 332 (1934). See notes 16-41 and accompanying text *supra*.

151. (*Quoting* *Dunlop Tire & Rubber Corp. v. Ryan*, 171 Neb. 820, 108 N.W.2d 84 (1961)).

152. (*Quoting* *Kinney Loan & Finance Co. v. Sumner*, 159 Neb. 57, 65 N.W.2d 240 (1954)).

tract will be enforced, if it is enforceable, under that state's law."¹⁵³ After pointing out that under the general principles adhered to in Nebraska, issues of validity were determined under the laws of the state in which the contract "took effect"¹⁵⁴ and that the usury laws of other states had often been applied,¹⁵⁵ the court stated that the applicable choice of law rules were set out in the second Restatement.¹⁵⁶ Turning to the second Restatement, the court cited the "general principle" stated in section 188,¹⁵⁷ which provides that "the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6."¹⁵⁸ The court, noting the difficulty of determining the state with "the most significant relationship" to the contract, then turned to section 203,¹⁵⁹ which states in black letter that: "the validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188."¹⁶⁰ Adopting section 203 of the second Restatement as its rule of decision, the court held that, in this case, either Nebraska or Minnesota might be found to have the most significant relationship to the transaction and parties, and that the rate charged was permissible in Minnesota, and therefore affirmed the district court's judgment.¹⁶¹

153. *Shull*, 201 Neb. at 264, 267 N.W.2d at 519-20 (quoting *Exchange Bank & Trust Co. v. Tamerius*, 200 Neb. 807, 265 N.W.2d 847 (1978)). See notes 162-67, 178 and accompanying text *infra*.

154. See RESTATEMENT OF CONFLICT OF LAWS § 311 (1934) to this effect. See notes 16-41 and accompanying text *supra*.

155. See notes 168-70, 178 and accompanying text *infra*.

156. *Shull*, 201 Neb. at 264, 267 N.W.2d at 520. See notes 91-95 and accompanying text *supra*.

157. 201 Neb. at 264, 276 N.W.2d at 520.

158. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). The court also cited § 188(2) of the second Restatement, which states:

In the absence of an effective choice of law by the parties, . . . the contacts to be taken into account in applying the principles of § 6 to determine the law applicable in an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, . . . of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 188(2) (1971).

159. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971).

160. 201 Neb. at 265, 267 N.W.2d at 520.

161. *Id.* at 267, 267 N.W.2d at 521.

In *Exchange Bank and Trust Co. v. Tamerius*,¹⁶² the court apparently relied on the Uniform Commercial Code to hold a contract, which was usurious by the law of Nebraska, enforceable in Nebraska.¹⁶³ The contract at issue was to be performed, *i.e.*, payments were to be made, in Texas, and the agreement itself specifically referred to the Texas Consumer Code.¹⁶⁴ The Nebraska court cited U.C.C. section 1-105, which provides in part that "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."¹⁶⁵ The court interpreted the reference to the Texas Consumer Code as a manifestation of the parties' intent that their agreement should be governed by the laws of Texas, but stated that, even if this evaluation of the parties' intent was erroneous:

The rule is well established that '[w]here a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the law of the place of performance . . . unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made.'¹⁶⁶

This is, of course, an invocation of traditional theory.¹⁶⁷

In *Grady v. Denbeck*,¹⁶⁸ a promissory note executed, payable, and valid in Oklahoma, though usurious in Nebraska, was held enforceable in Nebraska without discussion of the applicable conflicts rule.¹⁶⁹ The court rejected the defendant's argument that the enforcement of the note would offend Nebraska public policy.¹⁷⁰

The court's application of traditional theory¹⁷¹ was more straightforward in *Diamond Match Division of Diamond Interna-*

162. 200 Neb. 807, 265 N.W.2d 847 (1978).

163. *Id.* at 810-11, 265 N.W.2d at 849-50.

164. *Id.* at 810, 265 N.W.2d at 849.

165. *Id.*

166. *Id.* at 810-11, 265 N.W.2d at 850.

167. RESTATEMENT OF CONFLICT OF LAWS § 358 (1934). See notes 16-41 and accompanying text *supra*.

168. 198 Neb. 31, 251 N.W.2d 864 (1977).

169. *Id.* at 32, 251 N.W.2d at 864.

170. *Id.* at 33, 251 N.W.2d at 865. The defendant argued that the rate of interest was usurious in Nebraska, and thus that enforcement of the note would violate settled Nebraska public policy and would work an injury to a Nebraska citizen. The court replied that:

in the absence of any statute requiring the application of a contrary rule: 'usury laws are not so distinctive a part of the public policy of the forum that the courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, though valid according to its proper law.'

Id.

171. See notes 16-41 and accompanying text *supra*.

tional Corporation v. Bernstein.¹⁷² The issue in *Diamond Match* was the validity of a post-employment anti-competition clause in an employment contract.¹⁷³ The contract provided that it was to be governed by the law of New York, although there was no evidence of where the agreement was entered into, and performance was limited to the defendant's sales territory, which included the defendant's home state of Nebraska.¹⁷⁴ The plaintiff argued for the application of New York law, believing that under that law the anti-competition clause would be enforceable.¹⁷⁵ The court said:

[a] general rule in this jurisdiction is that a contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens.¹⁷⁶

As noted, there was no evidence of where the contract was "made," but the court was willing to apply New York law, which in this situation did not differ significantly from Nebraska law, and found the provision unenforceable.¹⁷⁷ The earlier contract cases are consistent in their adoption of the traditional territorial approach.¹⁷⁸

172. 196 Neb. 452, 243 N.W.2d 764 (1976).

173. *Id.* at 453-54, 243 N.W.2d at 765-66.

174. *Id.* at 454, 243 N.W.2d at 766.

175. *Id.*

176. *Id.* at 455, 243 N.W.2d at 766.

177. *Id.* at 455-56, 243 N.W.2d at 766-67. Both Nebraska and New York law provided for the enforcement of reasonable contracts in restraint of trade; the laws of New York further provided that restrictive covenants would not be enforced where the effect would be to protect the plaintiff from ordinary competition rather than to protect the plaintiff's business against competition by improper and unfair methods. *Id.* Presumably Nebraska law also so provided.

178. *Midland-Ross Corp. v. Swartz*, 185 Neb. 484, 485-86, 176 N.W.2d 735, 736-37 (1970) (promissory note governed by Nebraska law because the defendant failed to plead foreign law; see notes 201-15 and accompanying text *infra*); *Dunlop Tire & Rubber Corp. v. Ryan*, 171 Neb. 820, 825 108 N.W.2d 84, 88 (1961) (action on guaranty executed and to be performed in Nebraska governed by Nebraska statute of limitations, despite recital in guaranty that New York law should govern; result would have been different if this had been a "New York contract" rather than a "Nebraska contract," since, where a provision of a contract valid in the state where the contract was entered into is a bar to recovery, that provision must be enforced); *Kindler v. Kindler*, 169 Neb. 153, 160, 98 N.W.2d 881, 886 (1959) (contracts creating joint tenancy in Wyoming bank account governed by Wyoming law); *State v. Associates Discount Corp.*, 168 Neb. 298, 322-23, 96 N.W.2d 55, 72 (1959) (the presumption of identical law does not arise with respect to penal laws; see notes 201-15 and accompanying text *infra*); *Universal C.I.T. Credit Corp. v. Vogt*, 165 Neb. 611, 617-18 86 N.W.2d 771, 775-76 (1957) (validity and effect of conditional sale are governed by the law of the state in which the contract was made); *Kinney Loan & Fin. Co. v. Sumner*, 159 Neb. 57, 61, 65 N.W.2d 240, 245 (1954) (contract made and valid in Colorado enforceable in Nebraska although usurious in Nebraska); *Refrigeration & Air Conditioning Inst., Inc. v. Hilyard*, 146 Neb. 42, 45, 18 N.W.2d 548, 550 (1945) (declining to find a contract made in Illinois enforceable in Nebraska, stating that doctrine of comity, by which

Real Property

There has been little or no deviation from the traditional territorial theory of conflicts¹⁷⁹ in Nebraska cases dealing with real property and mortgages of either real property or chattels.¹⁸⁰ The

foreign rights are enforced and by which foreign corporations may sue in this state, requires that a corporation which solicits a contract in this state from a Nebraska citizen abide by the local law; such solicited contract will not be enforced if contrary to local law); *Banks v. Metropolitan Life Ins. Co.*, 142 Neb. 823, 833-34 8 N.W.2d 185, 191 (1943) (affidavit of attorney that he was unable to find Colorado law authorizing allowance of attorney's fees insufficient to meet presumption that Colorado law was the same as Nebraska law authorizing such allowance; see notes 201-15 and accompanying text *infra*); *Young v. Order of United Commercial Travelers*, 142 Neb. 566, 570, 7 N.W.2d 81, 84 (1942) (where provision of contract, valid in state where contract was made, is a bar to recovery, such provision must be enforced by this state under the full faith and credit clause of the United States Constitution); *Avondale v. Sovereign Camp, W.O.W.*, 134 Neb. 717, 723, 279 N.W. 355, 359 (1938) (holding as in *Young*; *Jorgensen v. Crandell*, 134 Neb. 33, 39, 277 N.W. 785, 789 (1938) (validity and obligations of contract and capacity of parties thereto are to be determined by the *lex loci contractus* unless there is something in the contract which is prohibited by express statute or infringes upon some positive rule of public policy); *Personal Fin. Co. v. Gilinsky Fruit Co.*, 127 Neb. 450, 451-52, 255 N.W. 558, 559 (1934) (assignment of wages to secure loan made by Iowa resident in Iowa directed to Nebraska employer, providing for interest rate usurious in Nebraska, although valid where made, contrary to established public policy of Nebraska and unenforceable; this is a "fluke" case in terms of result, but the analysis is strictly traditional); *First Nat'l Bank v. Ernst*, 117 Neb. 34, 38, 219 N.W. 798, 800 (1928) (where parties to a contract are in different jurisdictions, the place where the last act is done which is necessary to give validity to the contract is the place where the contract is entered into, and the law of that jurisdiction governs); *United States Bank & Trust Co. v. McCullough*, 115 Neb. 327, 300, 212 N.W. 762, 763 (1927) (promissory note made in Nebraska to be performed in California governed by California law); *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, 295, 202 N.W. 877, 878 (1925) (*lex loci contractus* may mean either the place where the contract was made or the place where it is to be performed; here capacity was determined according to the law of the place of performance; although this result is probably erroneous under the original Restatement, the analysis is clearly the traditional territorial approach); *Haas v. Mutual Life Ins. Co.*, 90 Neb. 808, 819, 134 N.W. 937, 941 (1912) (insurance contract is entered into in state where application is made, premium is paid, and policy is delivered); *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 711-12, 130 N.W. 434, 436 (1911) (insurance business transacted in Nebraska by New York company not subject to New York statutory provisions requiring notice as a condition of forfeiture for nonpayment of premium); *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, 867-69, 122 N.W. 27, 28 (1909) (holding as in *Rye*); *Hewit v. Bank of Indian Territory*, 64 Neb. 463, 90 N.W. 250, *reh'g granted*, 64 Neb. 468, 472, 92 N.W. 741, 743 (1902) (a book purporting to contain the laws of a foreign jurisdiction proves itself, and is admissible as evidence without other authentication, but its authenticity cannot be established by the mere statement of counsel as to what it is; see notes 201-15 and accompanying text *infra*); *Minneapolis Harvester Works v. Smith*, 36 Neb. 616, 619, 54 N.W. 973, 974 (1893) (Nebraska statute of limitations does not begin to run in favor of a defendant until he becomes a resident of Nebraska as to cause of action arising against him while resident of another state); *Coad v. Home Cattle Co.*, 32 Neb. 761, 767, 49 N.W. 757, 758 (1891) (contract made and valid in Wyoming governed by Wyoming usury law).

179. See notes 16-41 and accompanying text *supra*.

180. See notes 181-94 and accompanying text *infra*.

Nebraska Supreme Court has held that Nebraska trial courts do not have subject matter jurisdiction¹⁸¹ over land outside of the Nebraska domain.¹⁸² Although Nebraska's position is that the courts of one state cannot "directly affect" real estate situated in another state,¹⁸³ a Nebraska court is permitted to act indirectly upon such land¹⁸⁴ through its actions upon a person over whom the court in question has personal jurisdiction.¹⁸⁵ However, where a court utilizes this doctrine¹⁸⁶ to compel a conveyance of land, the decree and order to convey can only affect the person; they cannot in any way affect the title to the land if the person ordered to convey does not choose to do so.¹⁸⁷

Jurisdictional problems aside, Nebraska clearly adheres to the *lex rei sitae*¹⁸⁸ principle, which holds that the law of the state where the land in question is situated is controlling as to such land, and the land is not affected by the law of a foreign state or country.¹⁸⁹ Thus, Nebraska courts hold that the laws of the state where the land is located control the descent, alienage, and transfer of the land, as well as the effect and construction of instruments intended

181. A court is said to have jurisdiction over the subject matter of an action when an appropriate sovereign has invested the court with the power to decide the category of case in which the particular action falls, M. GREEN, BASIC CIVIL PROCEDURE 14 (2d ed. 1979) [hereinafter cited as BASIC CIVIL PROCEDURE].

182. *First Nat'l Bank v. McFerrin*, 142 Neb. 617, 620, 9 N.W.2d 166, 169 (1943) (Nebraska court has jurisdiction over action in ejectment only if land in question is in Nebraska, not Iowa); *Higgins v. Vandever*, 85 Neb. 89, 96, 122 N.W. 843, 846 (1909) (probate courts of Nebraska lack authority to adjudicate rights of rival claimants to succession of real estate in a sister state; any attempt to do so would be an "absolute nullity.").

183. *Modisett v. Campbell*, 144 Neb. 222, 225, 13 N.W.2d 126, 128 (1944).

184. *Id.* at 225-26, 13 N.W.2d 126. *Modisett* held that it was proper for the trial court to appoint a receiver for land, where part of the land was in Nebraska, and part located in South Dakota.

185. A court has personal jurisdiction if it may exercise its authority over the particular parties to the dispute. BASIC CIVIL PROCEDURE, *supra* note 181, at 32.

186. This is essentially the doctrine of *quasi in rem* jurisdiction. An action is said to be *quasi in rem* if the purpose of the action is to determine the status of property as between the parties to the dispute. BASIC CIVIL PROCEDURE, *supra* note 181, at 45.

187. *Fall v. Fall*, 75 Neb. 104, 106 N.W. 412 (1905), *rev'd* 75 Neb. 120, 129, 113 N.W. 175, 178-79 (1907); *aff'd sub nom. Fall v. Eastin*, 215 U.S. 1 (1909) (Nebraska need not enforce a deed to Nebraska land made by a commissioner under the decree of a court of the state of Washington); *Kirkendall v. Weatherley*, 77 Neb. 421, 424, 109 N.W. 757, 758 (1906) (Nebraska will not enforce assignment of Nebraska land executed in foreign state unless executed and recorded so as to be valid under Nebraska law).

188. *In re Heirship of Robinson*, 119 Neb. 285, 298, 228 N.W. 852, 858 (1930) (demands of creditors permitted by Kansas court against Kansas decedent's estate void as to land in Nebraska).

189. For a discussion of this term see *Jorgensen v. Crandell*, 134 Neb. 33, 277 N.W. 785 (1938).

to convey it.¹⁹⁰

Nebraska has recognized one exception to the *lex rei sitae* principle:¹⁹¹ this principle does not govern "obligations which, although in relation to real property, do not directly affect the title to or interest in the property itself."¹⁹² The Nebraska rule as to chattel mortgages *i.e.*, security interests, parallels the original Restatement rule;¹⁹³ a chattel mortgage, properly executed and recorded according to the law of the state where the mortgage is executed and the property is located, will, if valid in such state, be held valid in this state.¹⁹⁴

Marriage and Divorce

The original Restatement rule as to the validity of marriages¹⁹⁵ provides that, except in cases involving remarriage after divorce, or "polygamous, incestuous, and abhorrent marriages," "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."¹⁹⁶ Nebraska has applied this rule without exception.¹⁹⁷

Nebraska will not enforce a divorce obtained in another jurisdiction if both parties were domiciled in Nebraska when the action was commenced.¹⁹⁸ This matter is expressly regulated by stat-

190. *Shearer v. Brumbaugh*, 150 Neb. 898, 903, 36 N.W.2d 83, 488 (1949) (whether interests in land are equitably converted into personal property by dealings with the land depends on the law of the state where the land is located); *Whipple v. Fowler*, 41 Neb. 675, 692, 60 N.W. 15, 20-21 (1894) (construction of mortgage executed in Iowa upon Iowa real estate is governed by the *lex rei situate*, or law of Iowa).

191. See text at note 189 *supra*.

192. *Jorgensen*, 134 Neb. at 39, 277 N.W. at 789 (California postnuptial agreement renouncing claim to Nebraska land enforceable in Nebraska).

193. RESTATEMENT OF CONFLICT OF LAWS § 265 (1934).

194. *Green Fin. Co. v. Becker*, 151 Neb. 479, 485, 37 N.W.2d 794, 797-98 (1949) (mortgage on car executed, recorded, and valid in Missouri while car was in Missouri held valid in Nebraska as against subsequent purchaser).

195. RESTATEMENT OF CONFLICT OF LAWS § 121 comment a (1934).

196. *Id.* § 121.

197. *Ropken v. Ropken*, 169 Neb. 352, 354, 99 N.W.2d 480, 483 (1959) (the parties did not have a common law marriage relationship under the law of Iowa, and therefore there is no valid marriage for Nebraska to recognize); *Bourelle v. Soo-Crete, Inc.*, 165 Neb. 731, 741, 87 N.W.2d 371, 397 (1958) (common law marriage in Iowa will be recognized as valid in Nebraska); *Abramson v. Abramson*, 161 Neb. 782, 787, 74 N.W.2d 919, 924 (1956) (parties domiciled in Nebraska cannot enter into valid common law marriage by making temporary trips into another state which recognizes common law marriage and there cohabitating and holding themselves out as husband and wife, without intending to or changing their domicile or residence to such state and without intending to or entering into a common law marriage contract in such state in conformity with its laws).

198. *Weber v. Weber*, 200 Neb. 659, 666, 265 N.W.2d 436, 441 (1978) (divorce of

ute¹⁹⁹ and is also the position of the original Restatement.²⁰⁰

Proof of Foreign Law

The Nebraska court's traditional approach to conflicts law is also evident in its resolution of the question of how foreign law becomes relevant in a given case in the first instance.²⁰¹ The original Restatement mandates that foreign law must be alleged in pleading and proved by evidence.²⁰² Additionally, in the absence of evidence of the common law of another common law state, that law—but not its statutory law—is presumed to be the same as the law of the forum.²⁰³ Under this approach, foreign law must be pleaded and proven just as any other fact because it is viewed simply as one of the facts on which the claims of the parties depend.²⁰⁴

Nebraska departs from the rules set forth by the original Restatement only in that the court has extended the presumption of identical law, employed in the absence of proof of foreign law, to encompass the statutory as well as the common law of foreign states.²⁰⁵ Broadening the presumption of identical law in this manner is apparently consistent with the traditional approach, however.²⁰⁶ Furthermore, Nebraska has not been the only state to so extend this presumption.²⁰⁷

Nebraska citizens obtained by husband in Dominican Republic not valid in Nebraska).

199. NEB. REV. STAT. § 42-341 (Reissue 1978).

200. RESTATEMENT OF CONFLICT OF LAWS § 111 (1934).

201. See notes 202-15 and accompanying text *infra*.

202. RESTATEMENT OF CONFLICT OF LAWS §§ 621-23 (1934).

203. *Id.*

204. D. CAVERS, THE CHOICE-OF-LAW PROCESS 269 (2d printing 1966); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 127 (1962); R. LEFLAR, THE LAW OF CONFLICT OF LAWS § 68 (1959); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 176 (2d ed. 1951).

205. *State v. Associates Discount Corp.*, 168 Neb. 298, 322, 96 N.W.2d 55, 72 (1959) (the presumption employed in the absence of the common law or statutes of any other jurisdiction being pleaded or presented, that the law of such other jurisdiction is the same as Nebraska's, is not employed where the local statute prescribes penalties and forfeitures); *Scott v. Scott*, 153 Neb. 906, 908-10, 46 N.W.2d 627, 630-31 (1951) (in the absence of the pleading and presentation of foreign law as to validity of marriage, validity of marriage will be governed by Nebraska law).

206. See 3 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 623.1 (1935), where Professor Beale discusses this variant of the presumption without criticism.

207. *Id.* See *Tiner v. State*, 279 Ala. 126, —, 182 So.2d 859, 866 (1966) (in the absence of proof of the law of a sister state not of common origin with Alabama, it will be presumed that the law of the sister state is the same as the law of Alabama, including Alabama statutory law); *Louknitsky v. Louknitsky*, 123 Cal. App. 2d 406, —, 266 P.2d 910, 911 (1954) (in the absence of evidence of the laws of China or Hong Kong, such laws are presumed to be the same as the laws of California); *Fruchtman v. Manning*, 156 Conn. 500, —, 242 A.2d 723, 724 (1968) (New York law presumed to be the same as Connecticut law, since the applicable law of New York was not dis-

Although the Nebraska legislature enacted the Uniform Judicial Notice of Foreign Law Act²⁰⁸ in 1947, Nebraska courts have continued to require that a litigant alleging that the law of another state is applicable must allege the facts which make foreign law material, as well as the substance of the foreign law relied upon in order to avoid application of the presumption.²⁰⁹ As a matter of statutory interpretation, the court has held that the judicial notice statutes are intended only to remove the necessity of proving foreign law; that such law must still be pleaded and presented; and that if it is not, the common law or statutes of another jurisdiction will be presumed to be identical to those of Nebraska.²¹⁰ Although this interpretation of the judicial notice statutes does not appear to comport with legislative intent, it is not unique; most state judicial notice statutes have been interpreted so as to give courts a greater or lesser amount of discretion to take judicial notice of foreign law but not to require them to do so.²¹¹ The Nebraska approach is also not necessarily inconsistent with the approach taken by the second Restatement,²¹² which provides only that "the local law of the forum determines the need to give notice of reliance on foreign law, the form of notice and the effect of a failure to give such notice."²¹³ Similarly, "the local law of the forum determines how the content of foreign law is to be shown and the effect of a failure to show such content."²¹⁴

Nevertheless, the Nebraska approach is susceptible to confusion. For example, one federal district court concluded that a review of the Nebraska caselaw did not yield a conflicts rule to be followed by a federal court in a situation in which a Nebraska citizen is injured in another state by a citizen of that state, and the

closed); *Lyons v. Lyons*, 2 Ohio St. 2d 243, —, 208 N.E.2d 533, 535 (1965) (The Applicable law of Arizona was not pleaded and thus was presumed to be the same as Ohio law); *Sidran v. Tanenbaum*, 391 S.W.2d 93, 96 (Tex. Civ. App. 1965) (New York law presumed to be the same as Texas law where New York law is not pleaded and proved); *Grow v. Oregon Short Line R.R.*, 44 Utah 160, 167, 138 P. 398, 401 (1914) (law of another state presumed to be the same as Utah law in the absence of proof of such other law).

208. NEB. REV. STAT. § 25-12,105 to -12,107 (Reissue 1979).

209. *Midland-Ross Corp. v. Swartz*, 185 Neb. 484, 486, 176 N.W.2d 735, 736-37 (1970).

210. *Scott v. Scott*, 153 Neb. 906, 908-10, 46 N.W.2d 627, 630-31 (1951).

211. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) comment d (1971); Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1035-38 (1941).

212. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 (1971).

213. *Id.* § 136(1).

214. *Id.* s 136(2).

injured party sues in Nebraska.²¹⁵

CONCLUSION

The majority of the caselaw analyzed above demonstrates the Nebraska Supreme Court's general adherence to the territorial approach to conflict of laws questions.²¹⁶ As noted, however, the court's acceptance of this approach is apparently not absolute.²¹⁷ The court has shown a willingness to consider alternative approaches to conflicts problems in both contract and personal injury cases.²¹⁸ In both areas, the court has indicated an awareness of the approach set forth in the second Restatement.²¹⁹ Unfortunately, the court has not demonstrated any knowledge of the vast differences between the rules-based original Restatement and its method-oriented successor.²²⁰ Nor has the court referred to any of the other alternatives advocated by the conflicts scholars.²²¹ The court has also avoided any discussion of the merits of any one of the alternative approaches,²²² and has not indicated why the territorial analysis is to be applied in some cases, while the principles of the second Restatement are to be recognized in others, if indeed they are to be recognized with any degree of consistency.

It does appear, however, that if the Nebraska Supreme Court is moving in any direction at all in the conflicts area, it is moving toward the approach of the second Restatement.²²³ This is not necessarily desirable, however. As noted above,²²⁴ the second Restatement has been resoundingly criticized. The Nebraska Supreme Court has even been a party to this criticism.²²⁵ In considering the contacts to be taken into consideration in determining which state has the most significant relationship to a contract for choice of law purposes, as advocated by section 188, the court said:

[i]t is often difficult to determine the actual effective location of many of the contacts to be taken into account, as well as difficult to determine which of two different states

215. *Fullington v. Iowa Sheet Metal Contractors, Inc.*, 319 F. Supp. 243, 244 (D. Neb. 1970); see notes 230-32 and accompanying text *infra*.

216. See notes 16-41, 107-200 and accompanying text *supra*.

217. See notes 119, 147-61 and accompanying text *supra*.

218. *Id.*

219. See notes 91-95 and accompanying text *supra*.

220. See notes 16-41, 91-95 and accompanying text *supra*.

221. See notes 50-90 and accompanying text *supra*.

222. *Id.*

223. *Shull v. Dain, Kalman & Quail, Inc.*, 201 Neb. 260, 264-67, 267 N.W.2d 517, 520 (1978); *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 30, 251 N.W.2d 383, 386 (1977).

224. See notes 96-101 and accompanying text *supra*.

225. *Shull*, 201 Neb. at 265, 267 N.W.2d at 520 (1978).

has 'the most significant relationship to the transaction and parties.' One difficulty with relying on such general rules as the criteria for determining the governing law is that the place of performance or execution is often arbitrarily and randomly selected. The choice of law is thus left to happenstance rather than to a rational decision by the parties or by a court which attempts to protect the justified expectations of the parties, as well as the relative interests and policies of the interested states.²²⁶

It is commendable that the Nebraska Supreme Court has apparently become aware that the territorial approach is not the only method available for resolving conflicts questions. It thus appears that the court might even be ready, in the near future, to discard the traditional system in favor of a new conflicts methodology. Before blindly embracing the second Restatement, however, the court should be encouraged to undertake a thoughtful and reasoned evaluation of other alternatives.²²⁷ In so doing, the court might find that the public and social policy of our state is best served by the application of one or another of the variants of interest analysis originally promulgated by Professor Currie, or that the best alternative for Nebraska remains a rule-based territorial approach, whether it be the traditional, Bealian methodology²²⁸ or one of the systems advocated by the "new territorialists" such as Professor Cavers.²²⁹ Whatever conclusion the court might reach, an appropriate resolution of the question requires a careful analysis.

Nebraska practitioners are here presented with a unique opportunity to aid the court in the formulation of policy. One of the key sources of the current confusion is the reluctance of lawyers to address conflicts questions in the cases in which they arise. Chief Judge Robinson, ruling that Nebraska espouses no conflicts rule to be followed by a federal court in a personal injury action,²³⁰ noted the Nebraska Supreme Court's interpretation of the Uniform Judicial Notice of Foreign Law Act²³¹ and said: "The absence of any applicable choice of law rule is due to the fact that foreign law is rarely pleaded and proven in Nebraska, and the Nebraska courts

226. *Id.* As noted above, the court went on to adopt as its rule of decision one of the black letter rules provided by the second Restatement, as opposed to the general principle of § 188. See notes 147-61 and accompanying text *supra*.

227. See notes 50-101 and accompanying text *supra*.

228. See notes 16-41 and accompanying text *supra*.

229. See notes 76-80 and accompanying text *supra*.

230. *Fullington*, 319 F. Supp. at 244.

231. See notes 208-14 and accompanying text *supra*.

therefore follow their own law."²³² If, as suggested, the court is ready to consider alternatives to the traditional approach, Nebraska practitioners would be well advised to acquaint themselves with the various modern conflicts theories and perhaps to prepare themselves to advocate one or another before the court. A successful argument for the application of foreign law could, of course, be the key on which any given case turns. Presented with the right factual setting and with well reasoned arguments, the court might well be willing to openly confront the question of which conflicts approach better suits Nebraska policies, needs, and interests, and to give that question an enlightened answer.

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232. *Fullington*, 319 F. Supp. at 244.