THE EFFECTS OF THE AUTONOMY OF THE PARTIES ON THE VALIDITY OF CONFLICT-OF-LAWS CONTRACTS UNDER THE STATUTE OF FRAUDS†

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I shall proceed under the theory that the proper characterization[1] of the statute of frauds is substantive[2] rather than procedural. (It seems highly probable that in some instances the forum may use a procedural characterization of the statute of frauds as a disguise for the use of the forum's policy[3] determinants.)

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† This is the sixth of a series of articles on the Autonomy of the Parties relating to validity of conflict-of-laws contracts. See James, *Effects of the Autonomy of the Parties on Conflict-of-Laws Contracts: Reason and Principle*, 36 CHI.-KENT L. REV. 34 (1959); James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts:* (Usury, Carrier Contracts and Insurance Contracts), 36 CHI.-KENT L. REV. 87 (1959); James, *The Effects of the Autonomy of the Parties on the Validity of Conflict-of-Laws "Illegal Contracts", Sunday, Gambling, Lottery and Other Agreements*, 8 AM. U.L. REV. 67 (1959); James, *The Effects of the Autonomy of the Parties in the Validity of Conflict of Laws of Surety and Guaranty Contracts*, 9 AM. U.L. REV. 24 (1960); and James, *Autonomy of the Parties in Conflict-of-Laws Sales Contracts*, 62 W. VA. L. REV. 223 (1960).

* See Contributors' Section, p. 87, for biographical data.

[1] RESTATEMENT (SECOND), CONFLICT OF LAWS § 334 (TENT. DRAFT NO. 6, 1960); LEFLAR, THE LAW OF CONFLICT OF LAWS 116, 117, § 64 (student ed. 1959); GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 245, § 88 (3d ed. 1949); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 141 (2d ed. 1951); Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311, 324 (1923); *cf.* COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, 154 (1949); CHESHIRE, INTERNATIONAL CONTRACTS 60 (1948), there citing other authorities; *cf.* CHESHIRE, PRIVATE INTERNATIONAL LAW 55-56, 650-51 (5th ed. 1957); CASTEL, PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE RULES PREVAILING IN CANADA AND THE UNITED STATES 85 (1960); Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874 (1959); 2 RABEL, THE CONFLICT OF LAWS 499 (1947). *But cf.* Ritz, *Phantoms in Conflicts*, 42 VA. L. REV. 139 (1956).

[2] *Ibid.*

[3] Could the reasons for the statute of frauds have been used by forums as policy determinants to affect decisions under the disguise of a characterization of "procedural"? In Heaton v. Eldridge, 56 Ohio St. 87, 46 N.E. 638, 36 L.R.A. 817, 60 Am. St. Rep. 737 (1897), the court observed that the Ohio statute of frauds was procedural. The court thought it was the legislative intent for the statute to be procedural. But why this legislative intent? Let us observe what the court says:

> That such was the intended scope of the statute is manifest [procedural in nature] when the purpose of its enactment is considered. Its well-known design was, as declared in the English statute of frauds (after which ours and those of most of the states are patterned), to prevent perjuries and fraudulent practices which were the outgrowth of the general admission of parol testimony to prove almost every kind of contract, and by means of which people were often stripped of their estates, and burdened with liability by testimony of alleged

An example will focus our attention upon the problems herein. X, in state O, makes an oral contract with Y to be performed in state Z. The case comes on for hearing in state R. Under the law of state O the contract must be in writing and properly signed by the party to be charged, or his duly authorized agent, in order that it satisfy the statute of frauds. Under the law of state Z the contract is valid. X and Y have stipulated expressly for the law of state Z to govern their contract. What state law will forum R choose to govern the contract? Will state R define the law chosen as the internal law or the entirety of the law of the state chosen including its conflict-of-laws rules? Will forum R consider its policy determinants in making the choice of law or the policy determinants of a state as seen by the forum having the most vital or natural contact with an essential element of the transaction? Must the forum consider possible constitutional limitations on the use of its policy determinants? (Constitutional limitations will not be considered in this article.)

The Rule

Usually the intention of the parties, expressed[4] or presumed,[5] is the

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conversations and verbal declarations. . . . The statute is founded on considerations of public policy and those of a moral nature, and declares a *peremptory rule of procedure* [emphasis supplied], which the courts of this state are not at liberty to disregard, in deference to the laws of any other state or country.

Id., 46 N.E. 638, 640. See also, Third Nat'l Bank of New York v. Steel, 129 Mich. 434, 88 N.W. 1050 (1902); Lemen v. Sidener, 116 Kan. 7, 225 Pac. 1048 (1924), citing with approval in much the same manner, Barbour v. Campbell, 101 Kan. 617, 168 Pac. 879 (1917), in which case at *Id.* 880, Wharton is quoted with some details in buttressing this position; Lams v. Smith, 6 Del. 477, 178 Atl. 651, 105 A.L.R. 646 (1935); Hamilton v. Glassell, 57 F.2d 1032 (5th Cir. La. 1932). True, many of the citations listed may be termed dicta, but this dicta gives us insight into what may be in the minds of some courts when they speak of the statute of frauds as being procedural.

[4] A. S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957); Dougherty v. Equitable Life Assur. Soc., 266 N.Y. 71, 193 N.E. 897 (1934) (not a statute-of-frauds case); Sliosberg v. New York Life Ins. Co., 244 N.Y. 482, 155 N.E. 749 (1927) (not a statute-of-frauds case); Reighley v. Continental Illinois Nat'l Bank & Trust Co. of Chicago, 390 Ill. 242, 61 N.E.2d 29 (1945) (not a statute-of-frauds case); Wm. H. Muller Co., Inc. v. Swedish American Line, Ltd., 224 F.2d 806 (2d Cir. 1955) (not a statute-of-frauds case); Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951) (not a statute-of-frauds case); Hollywood Plays, Inc. v. Columbia Pictures Corp., 77 N.Y.S.2d 568 (1947), *aff'd*, 274 App. Div. 912, 83 N.Y.S.2d 302 (1948), *rev'd on other grounds*, 299 N.Y. 61, 85 N.E.2d 865 (1949); Matson v. Bauman, 139 Minn. 296, 166 N.W. 343 (1918); Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3rd Cir. 1958) (not a statute-of-frauds case); Rich & Rubin v. Clayton Mark & Co., 250 F.2d 622 (8th Cir. 1957) (not a statute-of-frauds case); Wells v. J. C. Penney Co., 250 F.2d 221 (9th Cir. 1957) (not a statute-of-frauds case); Hulme v. Sweetman Const. Co., 230 F.2d 66 (10th Cir. 1956) (not a statute-of-frauds case); Boyd v. Curran, 166 F. Supp. 193 (S.D.N.Y. 1958) (not a statute-of-frauds case); Nissenberg v. Felleman, 162 N.E.2d 304 (Mass. 1959) (not a statute-of-frauds case); Overseas Trading Co., S. A. v. United States, 159 F. Supp. 382 (Ct. Cl. 1958) (not a statute-of-frauds case).

[5] Wilson v. Lewiston Mill Co., 150 N.Y. 314, 44 N.E. 959 (1896); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N.W. 1082 (1917); D. Canale & Co. v. Pauly & Pauly Cheese Co., 155 Wis. 541, 145 N.W. 372 (1914); Campbell v.

ultimate criterion of the governing law for the validity of conflict-of-laws contracts under the statute of frauds. The law chosen to govern the contract must not conflict with the public policy of the forum, or with the public policy of a place having the most vital or natural connection with an essential element of the transaction as viewed by the forum.[6] The forum's public-policy restrictions are, in turn, subject to constitutional[7] limitations.

In General

Some courts indicate that the validity of a conflict-of-laws contract under the statute of frauds is governed by the law of the place of making;[8] other courts state that the law of the place of performance[9] governs; whereas when the contract is both made and to be performed in the same place, that[10] law is chosen to govern the agreement. Some courts view the intention[11] of the parties as the governing law of the transaction.

As I have stated before,[12] it is my contention that often when courts speak of the law of the place of making, place of performance, *et cetera,* as governing the validity of the parties' contracts, they may

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Sheraton Corp. of America, 363 Mo. 688, 253 S.W.2d 106 (1952); Eckhart v. Plastic Film Corp., 129 F. Supp. 277 (D.C.D.Conn. 1955); Castorri v. Milbrand, 118 So. 2d 563 (Fla. 1960); Macias v. Klein, 203 F.2d 205 (3rd Cir. 1953), *cert. denied,* Macias v. Oakland Truck Sales, 346 U.S. 827 (1953); Silverman v. Indevco, Inc., 106 N.Y.S.2d 669 (Sup. Ct.), *aff'd,* 279 App. Div. 573, 107 N.Y.S.2d 542 (1951); Bitterman v. Schulman, 265 App. Div. 486, 39 N.Y.S.2d 495 (1943); Rubin v. Irving Trust Co., 107 N.Y.S.2d 847 (1951), *aff'd,* 280 App. Div. 348, 113 N.Y.S.2d 70 (1952), *reargued and aff'd,* 113 N.Y.S.2d 77 (1952), *rev'd* on New York domicile rather than Florida, 305 N.Y. 288, 113 N.E.2d 424 (1953) (strong policy of New York turned the decision after New York found to have more important contacts than Florida with the transaction); Oakes v. Chicago Fire Brick Co., 388 Ill. 474, 58 N.E.2d 460 (1945), *rehearing denied,* 58 N.E.2d 460 (1945); Hamilton v. Glassell, 57 F.2d 1032 (5th Cir. 1932).

[6] Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953); Joseph v. Krull Wholesale Drug Co., 147 F. Supp. 250 (E.D. Pa. 1956); A. S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957); Heaton v. Eldridge, 56 Ohio St. 87, 46 N.E. 638, 36 L.R.A. 817, 60 Am. St. Rep. 737 (1897); Third Nat'l Bank of New York v. Steel, 129 Mich. 434, 88 N.W. 1050 (1902).

[7] See James, *The Effects of the Autonomy of the Parties on the Validity of Conflict-of-Laws Sales Contracts,* 62 W. VA. L. REV. 223, 225 n.7 (1960).

[8] Lams v. F. H. Smith Co., 6 Del. 477, 178 Atl. 651 (1935); Canister Co. v. National Can Corp., 63 F. Supp. 361 (D. Del. 1946); Continental Collieries, Inc. v. Shober, Jr., 130 F.2d 631 (3rd Cir. 1942); Anderson v. May, 10 Heisk (Tenn.) 84 (1872); Cochran v. Ward, 5 Ind. App. 89, 29 N.E. 795 (1892); Callaway v. Prettyman, 218 Pa. 293, 67 Atl. 418 (1907); Linn v. Employees Reinsurance Corp., 392 Pa. 58, 139 A.2d 638 (1958); Smith v. Onyx Oil & Chemical Co., 120 F. Supp. 674 (D. Del. 1954), *vacated,* 218 F.2d 104 (1955).

[9] Bernstein v. Lipper Mfg. Co., 307 Pa. 36, 160 Atl. 770 (1932); Garrigue v. Keller, 164 Ind. 681, 74 N.E. 523, 69 L.R.A. 870, 108 Am. St. Rep. 324 (1905).

[10] Denny v. Williams, 5 Allen (Mass.) 1 (1862); Sun Life Assur. Co. of Canada v. Hoy, 174 F. Supp. 859 (E.D. Ill. 1959); Cleapor v. Atlanta B. & C. R. Co., 123 F.2d 374 (5th Cir. 1941).

[11] Cases cited notes 4, 5 *supra.*

[12] See James, *The Effects of the Autonomy of the Parties on the Validity of Conflict-of-Laws Sales Contracts,* 62 W. VA. L. REV. 223, 226, 227 (1960).

mean that these physical designations in space may be indications of what the parties mentally intended as the law to govern their agreement when they have not expressly stipulated for a reasonably connected place law to govern the transaction. The question remains, should not the courts use these spatial contacts on all occasions to reach parties' intent law when, by their words, deeds, or other surrounding circumstances, the parties have not otherwise indicated the law they desire to govern the validity of their agreement? It often appears that the law of the place of performance, the place of making, *et cetera,* are but mere presumptions,[13] in many instances, by means of which some courts, when the parties have not expressly stipulated a reasonable law to govern their contract, viewing the evidence they have before them, try to locate what law the parties actually intended as the law to govern their transaction. If we approach the cases from this angle, it seems that the law governing the validity of conflict-of-laws contracts under the statute of frauds is not in a chaotic state.

Another question (prior to case discussion) seems pertinent: If the statute of frauds is substantive, is there any reason why the parties should not be as free in the choice of a reasonably connected place law with the transaction in this area as in other substantive matters of conflict-of-laws contracts relating to validity? Should the parties be as restricted in this area as in others of substantive law relating to the validity of the agreement since this area relates to the formal validity of the transaction?

A noted writer seems to answer these questions.

> If, for instance, two Englishmen make a contract by which the one agrees to act in a play to be produced by the other at a London theatre, the mere fact that they sign a memorandum to this effect in some foreign place scarcely requires that the one question of formal validity should be tested exclusively by the lex loci contractus. The place may be accidental. It may even be uncertain, as for instance when the parties conclude the transaction in the Simplon-Orient express to Istanbul. Moreover, if English law governs the contract in every other respect, as obviously it does, why should the single question of formal validity be imperatively referred to another law?[14]

Other[15] than statute-of-frauds cases have been used because of the paucity of cases under the statute relating directly to the point at issue.

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[13] *Ibid.*

[14] CHESHIRE, PRIVATE INTERNATIONAL LAW 228 (5th ed. 1957); *Cf.* GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 316, 317, 318 (3rd ed. 1949); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 141-47 (2nd ed. 1951); DICEY, CONFLICT OF LAWS 624-29 (6th ed. 1949).

[15] Although I disagree with Goodrich that the formal validity of Conflict-of-Laws contracts must comply with an imperative rule of the *lex loci contractus,* I do agree that there is no reason why, at the maximum of requirements, the formal validity of the agreement should be more restrictive in the choice-of-law field than in mat-

It is felt that were parties better informed of the law relating to formal validity the cases bearing upon our discussion might be more numerous. Let us now turn to the cases.

In *Wilson v. Lewiston Mill Co.*[16] (a presumed-intent statute-of-frauds transaction), plaintiffs were cotton dealers in New York. They filled their orders for cotton (which they later sold to mills for processing) in the South. They sent an agent to a mill (defendant's) in Maine. Plaintiffs, through this agent, made an offer to the defendant mill in Maine. The defendants made an offer of purchase which was transmitted to plaintiffs in New York, the cotton to be delivered in Maine, there to be inspected and paid for. It was held by the court that the contract was a Maine transaction and controlled by the laws of that state since the parties might be assumed to have intended Maine law to control. The court said:

> It is now contended that the contract was a New York contract, and not a Maine contract, and that, consequently, it is not controlled by the statute of frauds of Maine. Owing to the great number of cases appearing in the books bearing upon this question, its solution is involved in some difficulty. The transactions of the business world are so numerous, and of such a variety, that it is difficult, if not impossible, to formulate a general rule that should control in all cases in the determination of such a question. In some cases the place where the contract was accepted has been considered as controlling; in others, where the contract of affreightment was made; and still others, the place where the contract is to be performed.[17] . . . A further discussion of them, we do not deem necessary or profitable, for, as has been stated, the question must be determined with reference to the facts and circumstances surrounding the parties in each case, and the intention of the parties, so far as it is disclosed, must control. The place where the contract is accepted is important. It fixes the time that the minds of the parties met, and the contract was consummated. It does not, however, necessarily determine that place or law under which the contract must be executed. So also, is the place important where the contract was talked over, and its substantial details arranged. Yet this, standing alone, may not control, for the place in which the contract is to be executed is of equal importance in determining what must have been the intention and purpose of the parties. The *lex loci solutionis* and the *lex loci contractus* must both be taken into consideration, neither of itself being conclusive; but the two must be considered in connection with the whole contract, and the circumstances under which the parties acted in determining the question of their intent.[18]

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ters relating to essential validity. It would seem that form is not as important as essence in any phase of life. See GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 316-20 (3rd ed. 1949).

[16] *Supra* note 5.

[17] *Id.* at 322, 44 N.E. at 961.

[18] *Id.* at 323, 44 N.E. at 961-62.

This case has several points of significance. The statute of frauds is definitely characterized as substantive rather than procedural. Thus, it appears, the law controlling substantive validity matters will control the statute of frauds (formal validity). The court considered the intent of the parties as controlling the proper choice of law. In doing this, the place of making, *et cetera*, was considered as a factor or presumption in arriving at the intent of the parties when that intent was not "spelled out". The court avoided renvoi by using the local law of Maine as the intended choice of law. No forum policy determinant intervened to prevent the use of Maine law. It was a reasonably connected law with an essential element of the transaction.

In *Halloran v. Jacob Schmidt Brewing Co.*,[19] it was observed by the Minnesota court that since the guaranty agreement was executed in the forum as required by the statute of frauds of the state where it was made and to be performed, it should be enforced in the forum. Said the court:

> As a general rule, a contract entered into with all the formalities required to make it valid in the state where made and to be performed will be enforced in another state unless contrary to the public policy of the laws of the forum: In England it was held in Leroux v. Brown, 12 C. B. 801, that the statute of frauds pertained to the remedy or procedure, and therefore the courts of England would not enforce a verbal contract made and to be performed in France, though there valid, because in England the statute reads that no action could be maintained upon the contract unless in writing. In that case one of the judges suggested a distinction between the fourth and the seventeenth sections in their statute of frauds, namely, that since the former says no action shall be maintained upon certain contracts unless in writing, it merely relates to procedure, and therefore applies to every contract, no matter where made or where to be performed implying that the latter section, which reads that no contract of the kind therein specified shall be good unless in writing, relates to the validity of the contract, rather than to the procedure, and might not apply to a foreign contract. In Wharton, Conflict of Laws (3d ed.) Secs. 690b-690f, the matter is fully discussed.[20]

The court further observed that:

> The parties being in Iowa, desired [intended] to contract with reference to the lease of property therein situate, and to have the payment of the rent therefor guaranteed to the landlord in Iowa. The guaranty to be valid was considered within their statute of frauds, and was accordingly expressed in writing, signed by the guarantor in strict conformity with that statute. It would seem that the parties took pains to comply with the only statute of frauds applicable to their contract.[21]

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[19] *Supra* note 5.
[20] *Id.* at 145-46, 162 N.W. at 1084.
[21] *Id.* at 147, 162 N.W. at 1084.

The court then held the contract valid observing that it was not against the public policy of Minnesota, the forum.

From the *Halloran* case, we may observe that the court characterized the statute of frauds as substantive and to be considered in choice-of-law matters relating to the validity of the contract as other substantive law questions. Renvoi was avoided as apparentlty not within the contemplated intent of the parties. The law chosen by the court to govern the agreement had a reasonable connection with an essential element of the transaction.

In *D. Canale & Co. v. Pauly & Pauly Cheese Co.*,[22] plaintiff and defendant orally contracted in Tennessee whereby the defendant agreed to sell to the plaintiff a quantity of cheese. Wisconsin was the agreed place of performance. By the laws of Tennessee the contract was valid. Under the laws of Wisconsin the contract (because of the amount involved in value) was unenforceable. Even though Wisconsin was the agreed place of performance, the court, looking to the intent of the parties to make a valid contract, decided that it might be presumed that they intended the law of Tennessee to control the formal validity of their agreement. Said the court:

> There being nothing inherently bad about such a contract as that in question, if it is valid by the place of the agreement, it should be so treated here, regardless of our statute of frauds. International Harvester Co. v. McAdam, 142 Wis. 114, 124 N.W. 1042, 26 L.R.A. (N.S.) 774, 20 Ann. Cas. 614.[23]

Continued the court:

> The trial court seems to have regarded the agreed place of performance conclusive in favor of the claim that the agreement should be held to be a Wisconsin contract. Such circumstance is not necessarily conclusive. The place of a contract is a matter of mutual intention. For aids in discovering such intention, there are some rules, any one of which is persuasive, merely, or conclusive, or not of any evidentiary value, according to the circumstances. . . . .The law is thus stated in the International Harvester case: 'As to mere personal contracts the law thereof as to their validity and interpretation, is that of the place where they were made; . . . unless the parties thereto intended that they should be governed by the law of the place of performance, or some other place; . . . but the intended place, as determined by legal presumption in some cases and evidentiary circumstances in others, settles all questions as to [the legal test of] validity.'[24]

The court's decision in favor of the intent theory in the choice of law pertaining to the validity of contracts is so clear and convincing

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[22] 155 Wis. 541, 145 N.W. 372 (1914).
[23] *Id.* at 543, 145 N.W. at 372.
[24] *Id.* at 544, 145 N.W. at 372.

that it would be pointless to discuss it. Again, renvoi was avoided apparently as not conducive to parties' intent law.

The case of *Campbell v. Sheraton Corporation of America*[25] (statute-of-frauds employment contract in which characterization and presumed intent were used by the court to arrive at its decision) is of some degree of interest. Here, an employment agreement was made which was not to be performed within one year from the making of the contract. It was alleged by the plaintiff to have been made with the defendant in Massachusetts and contended that Massachusetts law controlled its validity. Massachusetts law was to the effect that an agreement made to be performed in a particular place was to be controlled by the law of the place of performance. The contract was to be performed in Missouri. The Missouri statute of frauds was a "no-action-shall-be-brought" type[26] and considered remedial. The court found the agreement governed by the Missouri statute of frauds and in so doing stated:

> With respect to the law of place of performance, the Massachusetts case of *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 1909, 203 Mass. 159, 174, 89 N.E. 193, 200, 40 L.R.A.N.S. 314, states: 'Where a contract is made with a purpose [intent] by the parties to it that it shall be performed in a particular place, its validity and interpretation are to be determined by the law of the place where it is to be executed [performed]. It is made with a *view* to that law.[27]

The court then by means of presumed intent of the parties under Massachusetts law found that the Massachusetts law referred the case for the governing law to Missouri and that the Missouri statute of frauds (internal law of Missouri here used) was procedural and controlled the agreement. The court found, in its characterization of Missouri law (internal law of Missouri) as procedural that the agreement did not comply with the Missouri statute of frauds. The court went further and stated that in the event the forum found the enforcement of a contract before it objectionable to its public policy it would refuse the enforcement of the agreement. Apparently, the Massachusetts court in the case at bar did not find any objectionable features contrary to Massachusetts public policy.

The case "rings a bell" of some significance. Presumed intent is used by the Massachusetts court to arrive at its decision to use Missouri law. When Missouri law is referred to it is to the internal law

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[25] 363 Mo. 688, 253 S.W.2d 106 (1952).

[26] See Leroux v. Brown, 12 C.B. 799, 138 Eng. Rep. 1119 (C.P. 1852). Also see Ehrenzweig, *Contracts in the Conflict of Laws, Part One: Validity*, 59 COLUM. L. REV. 973, 995, 996 (1959); Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874 (1959).

[27] Campbell v. Sheraton Corp. of America, 363 Mo. 688, 693, 253 S.W.2d 106, 109 (1952).

of Missouri rather than to its law in its entireaty including its conflict-of-laws rules which might have referred the case back to Massachusetts or to some other state law as controlling the validity of the agreement. Thus renvoi is neatly disposed of. How much better it would have been had the parties expressly stipulated a reasonably connected law to govern their contract so that the court might have been saved these myriad mental gyrations needs no further explanation.

In *Robert H. Eckhart v. Plastic Film Corp.*,[28] there was an action by a former employee against his former employer for wrongful termination of an alleged oral agreement for life employment. The action being in a federal district court sitting in Connecticut the federal court followed the state court's characterization of the statute of frauds and looked to the law of the place of performance as the law controlling the validity of the agreement. New York law, the place of performance of the contract, was thus looked to as controlling the statute of frauds applicable to this case. Under the New York law an oral contract for life employment was found not to be within the provisions of the New York statute of frauds since such a contract could terminate within one year.

In stating that the Connecticut state courts would look to the law of the place of performance [New York] to find the law controlling the formal validity of this agreement, the court apparently looked to the internal law of New York rather than using a renvoi process which might have led the court far afield. It may be assumed that few (if any) contracting parties are cognizant of the manifold intricacies of renvoi. Normally, might not the parties in such cases be presumed (when an expressed intent is not used) to intend the local or internal law of the state to govern the question of formal validity? Possibly, the court in the *Eckhart* case reasoned in this manner. Certainly, the court cited two presumed intent cases[29] as a reason for the Connecticut state courts following the place-of-performance rule.

In *Castorri v. Milbrand*,[30] there was a suit to recover for the alleged breach of an oral agreement whereby defendants were to employ plaintiff to manage defendants' construction firm for a period of years. The contract was made in Michigan and partly to be performed there although the greater part of its performance was to take place in Florida since it related to the work of a construction firm located at Fort Lauderdale, Florida. Some work of the plaintiff employee was performed for defendants while he was in Michigan.

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[28] 129 F. Supp. 277 (D.C.D. Conn. 1955).
[29] McLoughlin v. Shaw, 95 Conn. 102, 111 Atl. 62 (1920); and Craig & Co., Ltd. v. Uncas Paperboard Co., 104 Conn. 559, 113 Atl. 673 (1926).
[30] 118 So. 2d 563 (Fla. 1960).

The court, in its decision, leaned to the law of the place of making (Michigan, and it was also the place of some of the performance of the agreement) as the law to determine whether the oral contract was valid or not. In deciding that Michigan law should control the validity of the oral agreement the court looked to the internal law of Michigan thus eliminating any chance of renvoi being used. The court also characterized the Michigan statute of frauds as substantive rather than procedural in so far as it applied to this case.

In looking to the law of the place of making as the proper choice-of-law rule to govern the validity of the contract the court cited the United States Supreme Court in *Scudder v. Union Nat'l Bank.*[31] The *Scudder* case cites with favor *Miller v. Tiffany*[32] as well as *Andrews v. Pond.*[33] It may be assumed today that many writers would classify both the *Miller*[34] case and the *Andrews*[35] case as intent-theory authorities. It is believed, therefore, that the court in the case at bar may have leaned heavily upon the intent theory for the proper choice of law to control the formal validity of this case irrespective of its omission to state so directly.

Macias v. Klein[36] presents interesting points in characterization and the avoidance of renvoi. It seems that in 1948, a verbal agreement (for a stipulated sum) was entered into in California between Macias, as seller, and Oakland Truck Sales, Incorporated, as buyer, for sale of truck parts. The buyer then delivered a check to seller for a part of the sum stipulated for in the sales arrangement. In October, 1948 (thereafter), the seller telephoned the buyer from California and suggested modification of the sales contract so as to increase the parts items sold to a somewhat larger sum than that for which the original agreement called. The buyer agreed to this arrangement over the telephone and asked the seller to credit his account on the new agreement with the original down-payment on his first agreement. The goods were shipped to the buyer in Detroit with the bill of lading attached and on the bill of lading was noted a credit of the down-payment made under the first agreement of sale.

Apparently, the buyer was in Pennsylvania when this second alleged agreement was made and when the offer was accepted over the telephone by speaking his acceptance in the telephone in Pennsylvania. This point is not too clear from the opinion. When the buyer refused

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[31] 91 U.S. 406 (1876).
[32] 1 Wall. 298 (1863).
[33] 13 Pet. 54 (1839).
[34] *Supra* note 32.
[35] *Supra* note 33.
[36] 203 F.2d 205 (3rd Cir. 1953), *cert. denied,* Macias v. Oakland Truck Sales, 346 U.S. 827 (1953).

to accept the goods and honor the second agreement the question necessarily arose as to the proper choice-of-law rule to govern the formal validity of the alleged second agreement.

The case arose under the diversity rule in a federal district court. The court observed that since this was a diversity case it must follow the rule of Pennsylvania, where it sat, as to the proper choice of law to govern the validity of the contract. In the eyes of the federal court the statute of frauds affected substance but under the applicable law in Pennsylvania to this case the Pennsylvania statute of frauds was considered by the Pennsylvania state courts as procedural. The federal court, after characterizing the Pennsylvania statute of frauds as substantive, followed the Pennsylvania state law and state characterization of the same statute as procedural to conform in diversity cases with the state law of the state where it was sitting. Since the second agreement of the case at bar did not conform to the Pennsylvania state statute of frauds (which was procedural by state court interpretation), it was void. The court looked only to internal law of Pennsylvania rather than to Pennsylvania law in its entirety including its conflict-of-laws rules which might have produced some complicated renvoi problems. Of course, if a forum court classifies its statute of frauds as procedural and is convinced that legislative intent directs that it be applied even to conflict-of-laws cases there is little that parties' stipulated law can do to remove this obstacle. It may be doubted that legislative intent advisedly goes this far. It is also possible that forum courts may, at times, use a procedural classification as a "cover" or "disguise" for the use of its own public policy[37] determinants.

In *Silverman v. Indevco, Inc.*[38] there was an action by Silverman against Indevco on an alleged oral contract of employment made in Pennsylvania for a period of two years. The court held that a contract made in Pennsylvania in the absence of a clear intention of the parties that the agreement be covered by the law of the place of performance would be controlled as to its validity by the *lex loci contractus.* The contract was to be performed in New York under which law the contract would have been void as not being in writing. The court assumed that the parties intended a valid contract and since it would be valid under Pennsylvania law, that the parties did intend Pennsylvania law to govern their transaction. Renvoi was avoided by the use of the internal law of Pennsylvania.

In *Bitterman v. Schulman*[39] (a real estate brokerage oral contract

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[37] *Supra* note 3.
[38] 106 N.Y.S.2d 669 (1951), *aff'd,* 107 N.Y.S.2d 542, 279 App. Div. 573 (1951).
[39] 39 N.Y.S.2d 495, 265 App. Div. 486 (1943).

made in New York which involved real estate situated in New Jersay), the court stated: "The validity and operation of a contract are generally governed by the law of the state where the contract was made, unless the contract provides otherwise or by its terms is to be performed in another state. . . ."[40]

In the case of *Rubin v. Irving Trust Company*[41] (a contract made in Florida, where it was valid even though oral, attempted to control the testamentary disposition of property apparently in New York where deceased was apparently domiciled at his death and where the will was probated) the court used the center-of-gravity[42] theory in order to arrive at its opinion that New York law (by which law the oral agreement was invalid) controlled the agreement.

It is of interest that the court in citing authority for its use of the center-of-gravity theory cited *Wilson v. Lewiston Mill*[43] and *Jansson v. Swedish American Line.*[44] Few would doubt that the courts in these two cases used the presumed intent theory for the governance of the contract. Possibly, the center-of-gravity theory may be considered by some courts as no more than a "by-road presumption"[45] to arrive at the intent theory when it is not expressly stipulated by the parties.

Also noteworthy in this case is the court's implied reasoning that *Emery v. Burbank*[46] and *Caruth v. Caruth*[47] were largely decided upon grounds of policy determinants. Again, I ask, do some courts at times use a procedural characterization of the statute of frauds to gain policy ends?

In *Oakes v. Chicago Fire Brick Co.*,[48] the court observed that the oral contract was made in Pennsylvania and to be performed in several states. Said the court:

. . . in George v. Haas, 311 Ill. 382, 143 N.E. 54, 55, it was stated

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[40] *Id.* at 498, 265 App. Div. at 489, *aff'd,* 46 N.Y.S.2d 250, 267 App. Div. 858, 56 N.E.2d 294 (1944).

[41] 107 N.Y.S.2d 847 (1951), *rev'd,* In re Rubin's Will, 113 N.Y.S.2d 70, 280 App. Div. 348, (1952), *aff'd,* Rubin v. Irving Trust Company, 305 N.Y. 288, 113 N.E.2d 424 (1953).

[42] For the Center-of-Gravity theory see Global Commerce Corp. v. Clark-Babbitt Indus., 239 F.2d 716 (2d Cir., 1956); and Rubin v. Irving Trust Co., *supra* note 41.

[43] Supra note 5, cited in Rubin v. Irving Trust Co., 280 App. Div. 348, 352, 113 N.Y.S.2d 70, 75 (1952), *reargued and aff'd,* 305 N.Y. 288, 113 N.E.2d 424 (1953).

[44] 185 F.2d 212 (1st Cir. 1950), cited in 280 App. Div. 348, 354, 113 N.Y.S.2d 70, 75 (1952).

[45] *Supra* note 42.

[46] 163 Mass. 326, 39 N.E. 1026, 28 L.R.A. 57 (1895), cited in Rubin v. Irving Trust Co., 280 App. Div. 348, 354, 113 N.Y.S.2d 70, 75, 76 1952), *reargued and aff'd,* 113 N.Y.S.2d 77 (1952).

[47] Caruth v. Caruth, 128 Iowa 121, 103 N.W. 103 (1905), cited in Rubin v. Irving Trust Co., 280 App. Div. 348, 354, 113 N.Y.S.2d 70, 75, 76 (1952), *reargued and aff'd,* 113 N.Y.S.2d 77 (1952).

[48] 388 Ill. 474, 58 N.E.2d 460 (1944), *rehearing denied,* 58 N.E.2d 460 (1944).

> that if a contract is executed in one state with the intention that it is to be performed in another, and the states are governed by different laws, the law of the place where the contract is to be performed will control as to its validity and will prevail over the law where the contract was entered into and it will be enforced under the law of the place of performance. . . . 'Parties are presumed to contract with reference to the law of the state where the contract is to be performed, rather than of the state where the contract was made, and to agree to be governed by such law.'[49]

The court continued:

> Having reached the conclusion that the intention of the parties must be considered as a guide in this case, we have endeavored to find something in the proof concerning the terms of the agreement as to the place of performance so as to apply the rule announced in George v. Haas, 311 Ill. 382, 143 N.E. 54. That we have been unable to do.[50]

The court then decided that since it could not find a definite place of performance that would control the contract it would use the place-of-making law (Pennsylvania) as the most logical presumed-intent law of the parties. Renvoi was avoided. The forum court (Illinois) could find nothing in its public policy to hinder the enforcement of the contract in Illinois.

In *Hamilton v. Glassell*[51] (suit for breach of a partly oral contract to take Texas oil and gas leases, drill wells, *et cetera*, held not to lie under forum's characterization of Texas statute of frauds as procedural and forum's mandatory statutory requirements not being met), the court observed:

> It is not alleged where the contract here in question was made, but, since it concerns Texas land and could have been performed only in Texas, the *parties must have looked to the law of Texas* [emphasis supplied by writer] as governing their relations under it. Pritchard v. Norton, 106 U.S. 124, 1 S. Ct. 102, 27 L. Ed. 104. By the same authority questions touching its validity and construction are to be solved by the law of Texas, but questions relating to the remedy upon it are regulated by the law of the forum, in which the remedy is sought.[52]

Since the Texas statute of frauds as characterized by the forum (Louisiana) court was procedural, the forum looked to its own law to determine the validity of the contract. How did Louisiana classify its own statute of frauds? The court found that the Louisiana statute was procedural and so Louisiana law controlled. If the statute of frauds was characterized as substantive by all courts it would appear that parties' intent law would have one less hurdle to cross. Undoubtedly,

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[49] *Id.* at 477-78, 58 N.E.2d at 462.
[50] *Id.* at 478, 58 N.E.2d at 462.
[51] 57 F.2d 1032 (5th Cir. 1932).
[52] *Id.* at 1033.

had the characterization of both the Texas and Louisiana laws been substantive rather than procedural the court would, unless a strong policy determinant had made the local enforcement of the contract repugnant to the forum, have carried out the parties' stipulated law as it undoubtedly attempted to do under a presumed intent law.

Stipulated Law

In *A. S. Rampell, Inc. v. Hyster Co.*,[53] there were two contracts in regard to plaintiff's (A. S. Rampell, Inc.) distributorship of defendant's (Hyster Company) products pertaining to the duration and under what terms the agreements might be terminated. The first was written. The second, which purported to modify the first, was oral. Plaintiff was a distributor in New York and New Jersey of defendant Hyster's manufactured products. Hyster was an Oregon corporation doing business in New York. We are not sure, from the facts of the case, where the first contract was entered into. The written agreement did state that either party might terminate it at any time and there was a further statement that it was to be construed according to Oregon law.

Plaintiff also alleged that an oral contract was subsequently entered into between itself and the defendant modifying the written agreement in the extent of its duration and further that it would not be terminated except for just cause or reason and upon reasonable notice. The court apparently read both contracts together and applied Oregon law in matters of construction. Said the court:

> Although Oregon law controls the construction of this agreement, since the parties intended it to be applicable and it has a reasonable relation to it (*Compania De Inversiones Internacionales v. Industrial Mtge. Bank*, 269 N.Y. 22, 26, 198 N.E. 617, 618, 101 A.L.R. 1313; *Dougherty v. Equitable Life Assur. Soc.*, 266 N.Y. 71, 80, 193 N.E. 897, 899), no cases of that State are presented to us which have considered this problem.[54]

Continued the court:

> The complaint also alleges, however, that the action of Hyster was in violation of oral agreements entered into after that date, and it is to the validity of these agreements that we now turn. The argument that these agreements are unenforceable because they violate section 33-c of the Personal Property Law, Consol. Laws, c. 41 [New York] is not well taken upon this motion addressed to the face of the complaint, since it is alleged therein that Oregon law was agreed to govern the contract. Under that law parties may orally modify written agreements. . . . The public policy of this state does not prevent the enforcement of an oral modification of a commercial contract where the modification is a valid exercise of powers

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[53] 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957).
[54] *Id.* at 381, 165 N.Y.S.2d at 486, 144 N.E.2d at 379.

given the parties by the law governing the agreement (See *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424, 428.)[55]

The court characterized the statute of frauds as substantive in order to apply Oregon law as chosen by the parties to govern their contract. The court looked to the internal or domestic law of Oregon rather than to the entirety of Oregon laws including its conflict-of-laws rules which might have gone far afield of any expressed intent of the parties through the complexities of the renvoi theory. The court considered whether Oregon law chosen by the parties had a reasonable relation to the transaction. Further, the court considered whether any policy determinants of the forum (or as seen by the forum of a place having a most vital contact with an essential element of the transaction other than Oregon) were violated.

The court, in *Dougherty v. Equitable Life Assur. Soc.*[56] (not a statute-of-frauds case), observed that the Equitable Life Assurance Society began to do business in Russia in the 1890's under Russian law which required that each policy should be governed by Russian law and decided by Russian courts. Equitable Life Assurance Society was a New York corporation. All policy holders were Russians in the case at bar and all contracts were made in Russia with premiums to be paid in Russian rubles at St. Petersburg, Russia.

When the Russian Imperial Government fell to the Soviet's regime the Equitable Life Assurance Society thought it could continue to do business according to New York law. The United States having recognized Russia in 1933, the Imperial Russian rights and duties passed retroactively to the Soviets.

In a suit in New York regarding all incidents and relations growing out of the policies, the New York court found that Russian law controlled the insurance policies as contracts under Russian stipulated law. The court observed:

> Until the Russian law, not New York law, determines that there be an obligation, the Equitable is not liable. By the undisputed terms of the insurance policies, these obligations, or any dispute about them, are to be determined by the Russian law; . . . .[57]

Said the court:

> The plaintiffs have read these contracts as if the defendants had said: 'If for any reason we cannot carry on this insurance business in Russia we will take over the policies and carry them on from New York. If the Russian law will not give you relief we will guarantee you a continuance of the policy and of our obligations under it in spite of Russian law; no matter how the government of Russia by its legitimate laws may affect the insurance contract or policies,

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[55] *Id.* at 382, 165 N.Y.S.2d at 486-87, 144 N.E.2d at 379-80.
[56] 266 N.Y. 71, 193 N.E. 897 (1934).
[57] *Id.* at 79, 193 N.E. at 899.

> we will carry out the obligation as though it were an obligation to be performed according to New York law.' There is no such contract. Russians in Russia made a contract as to which 'all disputes . . . shall be settled according to the Russian laws.'[58]

The court continued:

> The law of the place of performance generally governs the contract and its discharge. . . . But we are not left to the general rule, whether it be the place of performance, or some other place, because the parties have stipulated that the Russian law shall govern.[59]

The court concluded by finding no public policy of the forum violated by the enforcement of these contracts. It emphasized that it was not the Russian law as such that made the court observe these contracts under the law as stipulated, but the contracts *qua* contracts themselves between the parties with their stipulation expressed as to their choice of law. This choice of law by the parties had a reasonable connection with essential elements of the transaction. The court also looked to the internal law of Russia rather than its law in its entirety including its conflict-of-laws rules. Renvoi was eliminated from the case.

The court, in *Reighley v. Continental Illinois Nat'l Bank and Trust Co. of Chicago*[60] (not a statute-of-frauds case), observed that an agreement made in one nation or state and performable in another will generally be enforced in the latter unless it is contrary to the public policy of the forum.

Lily Parsons Reighley, the plaintiff in the case at bar, filed suit in an Illinois forum against Continental Illinois National Bank & Trust Company of Chicago, as trustee, and appellant, Reginald B. Parsons, her former husband, to recover support money which she claimed was due and owing to her by Parsons and secured by a deposit or deposits of securities with the bank. Payments were to be made to the wife at her German residence. The court, after reviewing numerous facts of the case, not meaningful to us, observed:

> It is claimed by appellant that the contract expressly provides that its legality and construction be determined by the law of the State of Illinois, and, therefore, even though it be held valid under the laws of Germany [where it was apparently made], yet, construed by Illinois law, it is void.[61]

The parties had provided that the contract and any disputes that might arise under it should be controlled by Illinois law. But they also provided that:

> Section 6 of the Berlin contract provides that disputes arising from the contract may be litigated in the courts where the plaintiff files

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[58] *Id.* at 79, 80, 193 N.E. at 899.
[59] *Id.* at 80, 193 N.E. at 899.
[60] 390 Ill. 242, 61 N.E.2d 29 (1945).
[61] *Id.* at 247, 61 N.E.2d at 32.

> suit, subject to the condition that the agreement between the parties would be legal according to the law of the place where the court was situated. It is, however, further provided that, in case of divergence in the law, the suit may be brought where the deposit is situated, and be governed by the Federal law or the State law in the United States of America with the further proviso that if individual stipulations of the contract should be declared void the entire contract may not be declared void.[62]

The court continued:

> From these provisions relating to the jurisdiction of courts and the adoption of laws therein, it will be seen there is no precise agreement to be bound by all laws of Illinois, but only as to the court that may hear the case, as there is not only an express reservation that the Berlin contract must be legal in the law of the forum, but also in no event should the entire contract be held void. It thus cannot be said that the parties left the construction, validity and interpretation of the contract in its entirety to the law of Illinois.[63]

The agreement was valid in Germany and not invalid in Illinois. Illinois public policy would not be against its enforcement in Illinois. The court observed:

> It is said that the Berlin contract expressly provided that the law of Illinois should be adopted and become a part thereof. Ordinarily the law of the country where the contract is made is considered a part of the contract, but it is permissible for the parties to agree, subject to certain limitations, that the construction of a contract and the validity of the same may be governed and controlled by a law agreed upon by the parties.[64]

The court, therefore, apparently reading into the contract the parties' intention found that they intended first, that the contract be valid; second, that if Illinois law should hold it valid then Illinois law should be used, but if invalid under Illinois law, then German law should be used if that law held the contract valid; third, that the law which would validate separate provisions of the agreement might be used (German or Illinois law) so that in no event should the contract as a whole be held invalid. Since contract was valid either by Illinois law or German law and it was not contrary to Illinois public policy the court upheld the agreement.

Again, renvoi was avoided in this case. The internal law of Illinois and the internal law of Germany were considered by the court. The law selected by the parties had vital contacts with essential elements of the agreement whether their selection be defined as Illinois law or German law. It appeared that neither the public policy of Illinois nor that of Germany hindered the enforcement of the agreement.

In *Wm. H. Muller Co., Inc. v. Swedish American Line, Ltd.*[65] (not

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[62] *Id.* at 249, 61 N.E.2d at 33.
[63] *Ibid.*
[64] *Ibid.*
[65] 224 F.2d 806 (2d Cir. 1955).

a statute-of-frauds case, but one involving the loss of a shipment of goods from Sweden to the United States), the court observed that the appellant, Muller & Company, Incorporated, was a New York corporation and the consignee of the goods which were being transported on a Swedish vessel built in Sweden and manned by Swedish crew members. In the libel action filed in the federal court in admiralty against the shipping line to recover for the loss of the cargo the court refused jurisdiction since it would appear that Sweden was a more convenient forum; further, that such an action in Sweden would not be contrary to American public policy and the parties had stipulated for Swedish court jurisdiction and the application of Swedish law.

In *Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S.*[66] (not a statute-of-frauds case), an action was brought in admiralty against Knut Knutsen, O.A.S., for loss of concentrates shipped on board a vessel. The court listed several factors which it considered pertinent for declining jurisdiction in the case: (1) the parties had stipulated for Norwegian law to control all claims arising out of the shipment of the goods; (2) all claims aforesaid were to be tried under the jurisdiction of Norwegian courts; (3) the bill of lading was issued in Peru where it was signed on behalf of the libelant, and such powers were valid under both the laws of Norway and Peru; (4) no loading of the vessel took place in the United States; (5) all cargo was to be delivered in European ports; (6) no crew members of the vessel were in the United States or planned to be here; and, (7) such agreements did not impinge upon the public policy of the United States.

In both of these cases[67] (although they were decided on inappropriate-forum issues rather than on a question of validity), the courts would have undoubtedly, if they had assumed jurisdiction, have used the stipulated law as one reasonably connected with an essential element of the transaction, to control the validity of the agreement. Both cases[68] would appear to indicate a reasonably connected place law chosen by the parties to govern their agreements would most likely have been respected unless a policy determinant of the forum, or of a place as seen by the forum as having the most vital connection with an essential element of the transaction, negatived parties' intent.

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[66] 187 F.2d 990 (2d Cir. 1951).

[67] *Supra* notes 65, 66.

[68] *Supra* notes 65, 66. For articles on renvoi see generally, Griswold, *Renvoi Revisited*, 47 HARV. L. REV. 1165 (1938); Briggs, *Excerpts From Utility For Solving The Renvoi*, CULP, ANTIEAU, DAINOW, HOLT, REESE, RHEINSTEIN, SELECTED READINGS OF CONFLICT OF LAWS 189 (1956); Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874 (1959); Ehrenzweig, *Contracts in the Conflict of Laws, Part One: Validity*, 59 COLUM. L. REV. 973, 996 (1959).

In *Hollywood Plays, Inc. v. Columbia Pictures Corp.*[69] there was an action for breach of defendant's contract to purchase motion picture rights to a stage play, and certain other rights, such as radio and television, etc. The agreement was with a California producer and made in New York containing a provision that the agreement was to be governed by New York law rather than California law. The agreement arose out of an oral offer to buy the aforesaid rights. The court observed:

> The transaction out of which the suit arises, involves a series of acts, some of which were peformed in California, while others were executed in New York City. The plaintiffs, as undisclosed principals, were represented in the transaction in New York City by . . ., a lawyer, who also, is the president of the corporate plaintiffs. [The lawyer] had engaged Music Corporation of America or its affiliates, M.C.A. Artists, Ltd., well-known theatrical agents, to sell the 'motion picture rights' in the play. These agents carried on negotiations in California for the sale of such rights to the defendant, a domestic corporation engaged in the business of producing motion pictures in California.[70]

The oral offer in the negotiations was followed by a telegram acceping the offer. Defendant then wired back from California confirming the "deal". Because of certain defects in the title to the play (which defects caused reversal in upper court[71] later on) defendants mailed letter to New York City terminating all of its alleged negotiations in the purchase-sale relationship. The lower court[72] found that there was a contract; that the validity of the agreement, the defendant's contention that the agreement is unenforceable, must be tested by the statute of frauds of this (New York) state, because the agreement was made in New York where the telegraphic acceptance of the offer was sent and a provision in the agreement that the laws of New York controlled.

Once more we witness the use of the domestic law of the state rather than its laws in their entirety including the conflict-of-laws rules of the state law chosen to govern the transaction. New York had a reasonable connection with the transaction. Its law was a part of the agreement and was deemed to apply to the agreement.

In *Matson v. Bauman*[73] (a case involving the sale of certain shares of stock by defendant to plaintiff and option to resell to defendant upon certain conditions within certain time specified the same shares),

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[69] 77 N.Y.S.2d 568 (1947), *aff'd*, 83 N.Y.S.2d 302, 274 App. Div. 912 (1948), *rev'd on other grounds*, 299 N.Y. 61, 85 N.E.2d 865 (1949), *reargument denied*, 299 N.Y. 683, 87 N.E.2d 70 (1949).

[70] *Id.* at 572.

[71] 299 N.Y. 61, 85 N.E.2d 865 (1949), *reargument denied*, 299 N.Y. 683, 87 N.E.2d 70 (1949).

[72] 77 N.Y.S.2d 568 (1947).

[73] 139 Minn. 296, 166 N.W. 343 (1918).

the court found that at the time of the transaction the plaintiff and defendant resided in Iowa; that the shares of stock sold by defendant to plaintiff were of a corporation in the state of Washington. All agreements relative to the sale and option to resell were in Iowa. When the plaintiff tried to enforce the option to resell these shares to defendant, the defendant refused to repurchase and raised the defense of the staute of frauds because the agreement did not express on its face consideration upon which it was founded.

The forum court (Minnesota) observed that the statute of frauds is substantive. Said the court: "The contract in the case at bar was made in Iowa by parties residing there and with reference [intent] to the laws thereof."[74]

The court then found that Iowa laws controlled in reference to the issue of the statute of frauds. Certainly, Iowa had a reasonable relationship to the agreement. Apparently the court found the internal law of Iowa as the law the parties had reference to rather than proceeding possibly to negate parties' intent law by the complexities that might arise through the use of renvoi. No public policy seemed to have been violated in the forum by the use of Iowa law.

In *Prashker v. Beech Aircraft Corporation*[75] (not a statute-of-frauds case), the action was for wrongful death of plaintiff's deceased who was killed when an airplane, manufactured by defendant and sold by co-defendant, crashed, and for loss of the airplane. The court held in relation to the breach of warranty alleged between Beech as seller and Atlantic as buyer that the law as stipulated by the parties would apply. Said the court: "The law of Kansas will, therefore, be applied to determining the breach of whatever warranties accompanied the sale."[76]

Apparently, Kansas law had a vital connection with the transaction as the domicile of one of the contracting parties. Kansas internal law was looked to rather than Kansas law in its entirety including its conflict-of-laws rules. No policy determinants seemed to have interfered with the court's enunciation of the governing choice-of-law rule.

In *Rich & Rubin v. Clayton Mark & Company*[77] (not a statute-of-frauds case), there was an action by the seller of certain steel tubing against alleged guarantors of purchases involving a balance due on account. The Hamilton Tool & Manufacturing, Incorporated, arranged to buy under a contract certain tubing from Clayton Mark Company. Before Clayton Mark Company would send the tubing to Hamilton, etc., it had to be guaranteed by Rich & Rubin. Rich & Rubin made

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[74] *Id.* at 299, 166 N.W. at 345.
[75] 258 F.2d 602 (3rd Cir. 1958).
[76] *Id.* at 607.
[77] 250 F.2d 622 (8th Cir. 1957).

the guaranty contract by mailing a letter to Clayton Mark & Company. The letter was mailed from St. Louis, Missouri, to Clayton Mark & Company in Illinois. When the letter was received by the Illinois firm they approved it. The contract apparently was made in Illinois. Performance under the agreement in the nature of shipment of the tubing from Illinois also partly took place in Illinois. The parties stipulated for the agreement to be controlled by Illinois law. The court observed: "A determination of the dispute [letter, whether made a contract of guaranty or not] as to the character of the contract proceeds in view of the showing as to the intention of the parties, the view as to intention being decided by the language of the writing and the circumstances attending its execution."[78] Continued the court: "The law of Illinois, by which the parties agree that the question here is controlled, is to the same effect."[79] The Illinois law was deemed to control the agreement. Once more, the court looked to the internal law of the place law chosen to govern the agreement rather than use renvoi with its possible complexities which might negate parties' intent. Policy determinants did not hinder the use of parties' stipulated law.

In *Hulme v. Sweetman Constr. Co.*[80] (not a statute-of-frauds case), we are not informed by the court where the agreement was made. At least, South Dakota was the location of both plaintiff and defendant during the operation of the agreement because both parties were in construction work there. Performance was provided for in South Dakota and it appears that South Dakota law was designated by the parties to control their agreement. The case does not indicate where either of the parties was domiciled or where the corporation was organized.

The suit upon the agreement arose in Kansas based upon a breach of the agreement and a request for damages by Hulme against the Sweetman Construction Company for failure to stockpile rocks for construction work.

The court observed that Souuth Dakota law controlled the agreement of the parties since it was stipulated in the agreement. The court found that under the South Dakota law the contractor (Hulme) had to give reasonable notice to Sweetman Construction Company that he needed more rock stockpiled and this was not performed as required by South Dakota law. Sweetman Construction Company was thus not in breach of the agreement. The contact of the agreement with South Dakota was a reasonable one; renvoi was not adopted by the court, but

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[78] *Id.* at 627.
[79] *Ibid.*
[80] 230 F.2d 66 (10th Cir. 1956)

rather the law chosen to govern the contract was the local law of South Dakota.

In *Boyd v. Curran*[81] (not a statute-of-frauds case), the plaintiff alleged that she was the legal widow of Robert Boyd and should recover from the trustees of the National Maritime Union Pension and Welfare Plan death benefits under "the Plan" due to the beneficiary. The defendant apparently drowned in or near Morocco. He had changed his beneficiary under "the Plan" to Emma Louise Boyd and declared her his wife. Plaintiff states she was the legal widow of the deceased.

Plaintiff claimed that she and her husband were domiciliaries of California and, as his legal widow, she would be entitled to one half at least of his death benefits notwithstanding the designation of the said Emma Louise Boyd. The court observed that "the Plan" took the form of an agreement and declaration of trust between the said Maritime Union and the several employees who adopted the agreement. Said the court:

> The agreement and declaration of trust were executed in New York. The offices of the Trustees are in New York. The fund is administered here [in New York]. The declaration of trust provides that it 'is executed and is accepted by the trustees in the State of New York, and, regardless of the domiciles of the parties hereto, shall be interpreted and governed in accordance with the laws of that State.'[82]

But the court continued:

> For the agreement of the parties that the agreement and declaration 'shall be interpreted and governed' in accordance with the New York law does not apply to the situation now before the court. It is limited to questions involving the validity, interpretation, construction or performance of the agreement as between the parties.[83]

The court continued further:

> The declaration of trust is plainly valid and there is no question that the insurance benefits are payable thereunder. These benefits are in the nature of a property right arising out of the declaration of trust. What is involved here is whether plaintiff has a legal and enforcible claim to such a property right. While the property right arises by virtue of the agreement, plaintiff's claim thereto does not. It arises out of the Community Property Law of California governing the right of a spouse to community property wherever situated when the married persons are California domiciliaries. The parties [the deceased and the Maritime Union] to the declaration of trust cannot by agreement between themselves dictate what law shall govern the claims of a third party to a property right arising from a trust.[84]

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[81] 166 F. Supp. 193 (S.D.N.Y. 1958).
[82] *Id.* at 195.
[83] *Id.* at 196.
[84] *Ibid.*

The court then proceeded to use New York law as to the validity of the agreement itself (the designated parties' law), but looked to California law as to rights in the property of the widow. The case is stated with such particularity that it requires no comment.

In *Nissenberg v. Felleman*[85] (not a statute-of-frauds case), a suit in equity was prosecuted by certain guarantors for a decree that defendants, as co-guarantors, be held jointly and severally liable for one-half of the obligation which the plaintiffs might be required to pay. The court found that the plaintiffs and defendants were all residents of Massachusetts and were stockholders, officers, and directors of the Furniture & Toy Company, Incorporated, a Massachusetts corporation, which had made with Whitehall Mercantile Corporation (the factor), a New York corporation, a contract (the agreement) dated June 19, 1956, to provide for securing certain loans. A written guaranty, dated the same day, was also executed by each plaintiff and defendant. By this document, the signers jointly and severally guaranteed "the due payment and performance by" "Furniture" "of all moneys to be paid . . . pursuant to [the] agreement."[86] It appears that each instrument provided that New York law was to be applicable to it. The court found the wording of the document as follows:

> The agreement provided that 'this agreement and all transactions, assignments and transfers hereunder, and all rights of the parties, shall be governed as to validity, construction, enforcement, and in all other respects by the law of . . . New York.' The guaranty provided: 'This guaranty, all acts and transactions hereunder, and the rights and obligations of the parties hereto, shall be governed, construed, and interpreted according to the law of . . . New York.'[87]

The court thought that New York was the place where both instruments were made. The court stated:

> In any event, since New York is the place where, as the agreement states 'the transactions hereunder will take place,' effect should be given, in determining the substantive rights created by the instruments, to the reasonable stipulations of the parties . . . that New York law is to be applicable.[88]

The court then applied New York law to the substantive rights of the parties, but left the question of remedies to the forum court.

In *Overseas Trading Co., S.A. v. United States*[89] (not a statute-of-frauds case), the plaintiff, a Belgian Corporation, was assignee of a contract between the United States Government (through its agent in Belgium) and one William H. Preyer, for the purchase of certain surplus

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[85] 162 N.E.2d 304 (Mass. 1959).
[86] *Id.* at 306.
[87] *Ibid.*
[88] *Ibid.*
[89] 159 F. Supp. 382 (Ct. Cl. 1958).

United States property in Belgium. He was also assignor of the same contract to an agency of the Belgium Government. The suit by plaintiff was in quasi contract against the United States Government for certain shortages of goods sold. The original contract between the United States Government and Preyer contained a stipulation that:

> 'D. C. Law to Govern: This contract shall be governed by and construed in accordance with the law now prevailing in the District of Columbia, United States of America.'[90]

The court observed:

> In support of its position, plaintiff urges that Belgian law recognizes recovery of payment made in error being personal to the party who so made the payment, and arising pursuant to quasi contract. [It seems that payment was made for the surplus property to the Office of Foreign Liquidation Commission (an agent of the United States Government) by plaintiff through Preyer.] Belgian law is applicable in this instance, argues plaintiff, on the authority of Justice Storey's opinion in *Black and Chapman v. J. W. Zacharie & Co.*, 3 How. 483, 44 U.S. 483, 11 L.Ed. 690, in which he held that assignments are to be construed by the law of the state in which the assignment is made. There can be no doubt that the assignment in this case was executed in Belgium, but in answer to plaintiff it should be emphasized that a more complete expression of this doctrine requires that the intention of the parties, where set forth in the contract, be taken into consideration. If the intention of the parties with respect to the law to be applied to the contract is expressly incorporated into the agreement, then that intention is to be given effect.[91]

Then said the court:

> Plaintiff, as assignee of Preyer, who so contracted with the Government [U.S.], takes subject to the terms of the above provision. However, plaintiff argues that the question of the effect of an assignment is not specifically covered by the provision. This is no doubt true. But we are unwilling to further acknowledge that District of Columbia law is applicable only when construing the contract. Due to the multitude of legal questions which can arise during the existence of a contractual agreement, draftsmen frequently resort to general phraseology to encompass many contingencies. Such was the situation here. The phrase 'governed by' is extremely broad in scope and not unreasonably includes the *nature of the action* [emphasis supplied by writer] for recovery, whether that action be on the contract or in the form of quasi-contract.[92]

If the phrase "to be governed by" may be so broadly construed as here indicated by the court, and further, be governed by parties' stipulated law, may it be possible for courts in the future to consider that parties, by their stipulations of a reasonably connected law to govern their contractual relations, may also control characterization of questions —

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[90] *Id.* at 384.
[91] *Ibid.*
[92] *Ibid.*

a realm so far, in most instances, considered the particular province of the forum? For instance, may parties stipulate that the statute of frauds shall be characterized as substantive or procedural and in so doing finally control the contract as they intend it to be rather than have some court construe the statute of frauds as procedural and so, in large measure, negate parties' stipulated law? Why is this so much more shocking to the legal mind than to let the parties avoid renvoi by a stipulation of the internal law (domestic law some have phrased it) of a reasonably connected place with their transactions? *Do all courts on all occasions* use a procedural characterization of a formal matter, similar to the statute of frauds, because it is their interpretation that their statute was drafted to apply to conflict-of-laws cases and their statute is procedure *qua* procedure or do they, at times, disguise the use of their policy determinants by a characterization of a statute of frauds (for instance) as procedural?[93] Whose contract are we interested in — the parties' or the state's, and what state? Should judges be the wise and sagacious source of contract-making for parties of mature and rational minds where there is freedom of contract by both parties to the agreement?

The case at bar speaks well for parties' stipulated law. By what it may indicate and leave unsaid for the future it may be a barometer of more than passing significance. In Western political[94] thought, the State is thought of as a servant of the people rather than their master. Should the contractual field be an exception in Western thought?

Conclusion

If the statute of frauds is substantive rather than procedural (and it is believed it is), there would seem to be no clear reason why the validity of a contract under the statute should not be treated as other questions pertaining to validity in contractual relations in conflict-of-laws contracts; at least, it would seem that no greater restrictions on party autonomy should exist here than on other validity questions, even if as many. Form should not be as essential as essence. If the parties stipulate expressly for a law to control the validity of their contracts under statutes of frauds in the conflict-of-laws field then, so long as they stipulate for a reasonably connected place law to control their agreement, it should be upheld unless it violates a policy determinant of the forum, or of a place, as seen by the forum, as having the most vital contact with an essential element of the transaction.

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[93] *Supra* note 8.

[94] In general see, BOWLE, WESTERN POLITICAL THOUGHT (1948); WILLOUGHBY, AN EXAMINATION OF THE NATURE OF THE STATE: A STUDY IN POLITICAL PHILOSOPHY (1911); GETTELL, HISTORY OF AMERICAN POLITICAL THOUGHT (1928).