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New York Rule as to the Law Governing the Validity of Contracts

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The New York Rule as to the Law Governing the Validity of Contracts

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"The object of our study, then, is prediction . . . " *Mr. Justice Holmes.*[1]

It is an evil inherent in the process of generalizing that to attain conciseness of expression and verbal simplicity we obscure such particulars as would mar the picture.

There is no rule or maxim in the law that lawyers state with more confidence and apply with more misgiving than the rule that the law that governs a contract is the *lex loci contractus*. A single example will make graphic the reason for the perplexity. The great Chancellor of New York lent his authority to this proposition:

> "The *lex loci* is to govern, unless the parties had in view a different place, *by the terms of the contract. Si partes alium in contrahendo locum respixerint.* This is the language of *Huber.*"[2]

May the parties give legal sanction and obligation to their agreement by the mental operation of having "in view" the law of some state that would give it such effect? Of course, this was early denied.

> "But that rule does not import that parties by a mere mental operation can import the law of another state."[3]

This recognized need for a narrowing of Kent's statement was met in *Dickenson v. Edwards:*

> "The general rule is and has been, that where the contract either expressly or tacitly is to be performed in a given country, there the presumed intention of the parties is that it is to be governed by the law of the place of performance, as to its validity, nature, obligation and interpretation."[4]

The march of progress is from intent to "presumed intent"; that

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[1] *The Path of the Law,* (1897) 10 HARV. L. REV. 457; (1920) COLLECTED LEGAL ESSAYS 167.

[2] Thompson v. Ketcham, 8 Johns. 189, 193 (N. Y. 1811). A penetrating sidelight suggests Kent's reason for this mode of approach: "I made much use of the *Corpus Juris*, and as the judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. I could generally put my brethren to rout and carry my point by my mysterious wand of French and civil law." WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT (1898) 117. Regarding the reference to Huber, see *infra* note 23.

[3] Cope v. Wheeler, 41 N. Y. 303, 313 (1869). See Bowen v. Bradley, 9 Abb. Pr. (N. S.) 395 (N. Y. 1870). Even *Dicey,* the chief exponent of the "place intended" rule, admits "this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce." CONFLICT OF LAWS, (3d ed., 1922) Appendix, n. 22 at 857, 863.

[4] 77 N. Y. 573, 578 (1879).

is, a conclusion is arrived at regardless of intent. The truth of the matter is apparent. The rule that the governing law for a contract is the law that the parties intend was never seriously entertained in this state.[5] Yet when we perceive that the intent in the minds of the parties to a contract is far from the mind of the court and that it is "the law (that) will intend the place"[6] which is to govern the contract, we have but delimited our problem. It still wants an answer.[7]

A contract that is made and is to be performed entirely within the same state is governed as to its validity by the law of that state. To this much all New York decisions subscribe.[8] Confusion arises when we suppose a contract that is made in one state and is to be performed partly or wholly in another.

The fountain-head here as in all of Conflict of Laws is Story.[9] He says:

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[5]But the so-called rule of objective intent as expressed in the sentence, "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," has received more than sporadic approval in New York. See Wilson v. Lewiston Mill Co., 150 N. Y. 314, 323, 44 N. E. 959 (1896); Youssoupoff v. Widener, 126 Misc. 491, 501, 215 N. Y. Supp. 24 (Sup. Ct. N. Y. Co. 1926). This apparently is the English doctrine. Hamlyn v. Tallisker Distilling Co., L. R. (1894) App. Cas. 202; DICEY, CONFLICT OF LAWS (3d. ed. 1922) Rule 155 and pages 606–15, *Rules for Determining the Proper Law of a Contract in Accordance with the Intention of the Parties.* Also see Appendix note 22 of that work.

[6]Strangely enough this also is the language of Chancellor Kent, Van Shaick v. Edwards, 2 Johns. Cas. 355, 367 (1801). Another clear statement is this: "Parties to a purely personal contract may stipulate by what laws or rule their contract shall be interpreted... But the validity of their contract must be tested by the law which they can neither alter or evade. And the courts, not the parties, must determine by what law the test is to be made." Bowen v. Bradley, 9 Abb. Pr. (N. S.) 394, 404 (N. Y. 1870).

[7]It is well-nigh impossible adequately to treat of the multifarious Conflict of Law problems that may arise with respect to a contract within the scope of a single article. Thus, granted a valid contract, questions will arise as to:

Its effect:

Youssupoff v. Widener, 126 Misc. 491, 215 N. Y. Supp. 24 (Sup. Ct. N. Y. Co. 1926). Ohl. & Co. v. Standard Steel, Inc., 179 App. Div. 637, 167 N. Y. Supp. 184 (1st Dept. 1917).

Its interpretation:

First Nat'l Bank of Toledo v. Shaw, 61 N. Y. 283, 293 (1874). Burns v. Burns, 190 N. Y. 211, 82 N. E. 1107 (1907). Pool v. N. E. Mutual Life Ins. Co., 123 App. Div. 885, 108 N. Y. Supp. 431 (2nd Dept. 1908).

The rights and obligations created thereby:

Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736 (1903); Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134 (1907); Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. Supp. 810 (1st Dept. 1905); Jackson v. Tallmadge, 216 App. Div. 100, 214 N. Y. Supp. 528 (3rd Dept. 1926).

Performance, discharge, breach, remedy, damages—see notes 18, 33, 34 *infra.* What law governs these subjects? Such a study is outside the purview of this paper. The subsequent discussion is directed to the single problem—what law governs as to whether or not there is a contract?

[8]See *infra.*

[9]COMMENTARIES ON THE CONFLICT OF LAWS, (1st ed. 1834).

"Sec. 242. (1) Generally speaking the validity of a contract is to be decided by the law of the place where it is made.
"Sec. 280. The rules already considered suppose that the performance of the contract is to be in the place where it is made either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance."

Add to these statements the very recent dictum of the Supreme Court of New York, "The *lex loci* governs unless the contract was positively to be performed elsewhere,"[10] and we have a fertile starting point for a study of the cases.

A contract has been defined as a legally enforcible promise or set of promises.[11] A promise is legally enforcible when it satisfies all of the essentials of contract such as capacity of the promisor to bind himself, mutual assent,[12] formalities and consideration; and when there are no invalidating circumstances affecting either the promise itself, such as mistake, fraud, duress or illegality, or affecting the thing or performance promised. A promise therefore, may be unenforcible for one or more of numerous reasons; an essential of contract may be lacking or there may be circumstances invalidating the promise or performance promised. The single query,—what law governs a contract is thus seen to be a blanket for many separate queries, each of which conceivably may require peculiar considerations.

Formalities. In a day of easy and informal contract, Conflict of Laws issues involving this problem have been rare. The formalities of writing, stamps, and acknowledgement are the only instances raised by the cases. As to all of these the rule seems to be accepted that the law of the place where the contract is to be performed

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[10]Yousoupoff v. Widener, *supra* note 7, *aff'd* (App. Div. 1927) no opinion. (1926) 26 COL. L. REV. 1024. The question in this case was whether a concededly valid contract was to be given the effect of a mortgage or a conditional sale. But the court discussed the problem as if it involved validity of a contract.

[11]WILLISTON, CONTRACTS (1920) § 1. AMERICAN LAW INSTITUTE, RE-STATEMENT OF THE LAW OF CONTRACTS (1925) § 1.

[12]What law governs as to whether or not there is mutual assent is an intriguing problem that, to the writer's knowledge, has never received judicial discussion. Obviously, we can not say the place of making governs, because our question is precisely,—where was the contract made? Thus, suppose A in New York makes an offer to B in Massachusetts, and B mails his acceptance in Massachusetts. By Massachusetts law a contract is not made until the acceptance is received; by New York law a contract is made where the acceptance is mailed. In which state is there mutual assent? Professor Lorenzen puts a more difficult case, (1921) 31 YALE L. J. 53.

governs.[13] There is an implication, however, in *Wilson v. Lewiston Mill Co.* "that the intention of the parties so far as it is disclosed must control."[14] It is enough to say that no case (save the one next noted) has found the "intention" to be directed toward any place other than the place of performance.

Assuming the place of performance rule, suppose the contract made in one state is to be performed in two or more different states. The question as to what law would provide the guide for formalities in a case where there are several places for performance was pretty much of a riddle until last year. A *nisi prius* judge declined to cut the baby and ruled "that the *lex loci contractus* determines the validity . . . of a contract."[15] The generally accepted American[16] and English[17] view that the place of contract governs formalities has, of course, no cause to deal with such a dilemma.

A related question that often arises in this connection might be mentioned. Does the particular formality involved affect the substantive basis of the obligation, or is it a matter of procedure? If it is the latter, then by the traditional doctrine the forum will follow its own law.[18] Note, though, that the law according to which

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[13]Wilson v. Lewiston Mill Co., *supra* note 5. (writing); Turnow v. Hochstadter, 7 Hun. 80 (1876) (writing); Beadall v. Moore, 199 App. Div. 531, 191 N. Y. Supp. 826 (1st Dept. 1922) (stamps); see on this case, BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (4th ed. Chafee, 1926) 819.

Cf Trustees of Randall v. Rensselaer, 1 Johns. 94 (N. Y. 1806); see Everett v. Vendryes, 19 N. Y. 436 (1859); The situs probably governs the formalities of a contract regarding land, Burrell v. Root, 40 N. Y. 496, 498 (1869); Abell v. Douglas, 4 Denio 305 (N. Y. 1847), see Reilly v. Steinhart, 217 N. Y. 549, 112 N. E. 468 (1916); Marie v. Garrison, 13 Abb. N. C. 210 (N. Y. 1883); Lorenzen, *Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws*, (1910) 20 YALE L. J. 427.

[14]150 N. Y. 314, 323, 44 N. E. 959 (1896).

[15]Smith v. Compania Litografica De La Habana, 127 Misc. 508, 511, 217 N. Y. Supp. (Sup. Ct. 1926); Is this not reminiscent of Mr. Justice Bradley's solution of a similar problem? "In this embarassment I do not know that I ean do better than to fall back on the general rule that the contract is to be governed by the law of the place where it is made." Morgan v. N. O. etc. R. R., 2 Woods 244, 253 (1876).

Other solutions have been adopted elsewhere. See Pittsburgh, etc. Ry. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61 (1897) (place of breach governs); Packing Co. v. So. Pac. Ry Co., 58 Wash. 239, 108 Pac. 613, (1910) 27 L. R. A. (N. S.) 975 (forum governs).

[16]STORY, (8th ed. 1883) § 260. Cases will be found in (1893) 19 L. R. A. 792; (1904) 64 L. R. A. 119; (1914) 51 L. R. A. (N. S.) 907; 1916 A L. R. A. 1011. Some of the recent decisions are Detroit and Cleveland Nav. Co. v. Hade, 106 Ohio St. 464, 140 N. E. 180 (1922); Canale v. Pauly Cheese Co., 155 Wis. 541, 145 N. W. 372 (1914); (1922) 23 COL. L. REV. 68.

[17]DICEY, (3rd ed.) Rule 159; WESTLAKE, (5th ed.) 207–210.

[18]"The requirement that it be protocolized is thus seen to be a rule of evidence. As such, it does not bind our courts (Bristow v. Sequeville, 5 Exch. 275 (1850); Emery v. Burbank, 163 Mass. 326, 327, 39 N. E. 1026 (1895); DICEY, CONFLICT OF LAWS (2d ed. 1908) 710; WHARTON, CONFLICT OF LAWS, (3rd ed. 1905) 688); Reilly v. Steinhart, 217 N. Y. 549, 553, 112 N. E. 468 (1916). See Scott v.

it is determined whether a formality is procedural or substantive is the law of the place that governs the formalities and not the forum.[19]

Capacity. As early as 1809, the Supreme Court of New York passed on the liability of an infant upon a promissory note that was made in Jamaica.[20] Parol evidence was admitted at the trial to prove "that the money for which the note was given was lent with a view to its being repaid . . . in New York."[21] The court held such evidence proper and thereupon concluded that ". . . the case stands precisely upon the same footing as if the note had been made in this state. For it is a well-settled rule[22] that where a contract is made in reference to another country in which it is to be executed it must be governed by the law of the place where it is to have its effect."[23] Here is precise adjudication that the law of the place of performance governs capacity[24] for contractual obligations.

Later cases have dissipated the certitude. *Union National Bank v.*

Pilkington, 15 Abb. Pr. 280 (1861); Skinner v. Tinker, 34 Barb. 333 (N. Y. 1861); Nash v. Tupper, 1 Caines Rep. 402 (1791); Lodge v. Phelps, 1 John. Cas. 139 (1799); Trustees of Randall v. Van Renssallaer, 1 John. Rep. 94 (1806); Smith v. Spinolla 2 Johns. Rep. 198 (1807); Thompson v. Lakewood City Co., 105 Misc. 680, 174 N. Y. Supp. 825 (Sup. Ct. Tr. Term 1919).

[19]See *supra* notes 13 and 18. See Marie v. Garrison, *supra* note 13. Franklin Sugar Refining Co. v. Mullen Co., 7 Fed. (2d) 470 (D. C. D. Del. 1925); (1925) 39 HARV. L. REV. 632; (1925) 24 MICH. L. REV. 501; (1926) 10 MINN L. REV. 268. Professor Lorenzen has made an interesting contribution, *The Statute of Frauds and the Conflict of Laws*, (1922) 32 YALE L. J. 311.

The cases on this whole subject are collected in (1893) 19 L. R. A. 792; (1904) 64 L. R. A. 119; (1914) 51 L. R. A. (N. S.) 907.

[20]Thompson v. Ketcham, 4 Johns. 285 (N. Y. 1809).

[21]*Ibid* at 288.

[22]The court relied upon Robinson v. Bland, 2 Burr. 1077, 1 W. Bl. 234, 256 (1760) in which the English court denied recovery upon a bill of exchange made in France for a consideration illegal by the law of England. Lord Mansfield said: "First, the parties had a view to the laws of England. The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed (citing Huber and Voet). Now here the payment is to be in England." For an evaluation of how far this case really supports such a proposition, see Beale, *What Law Governs the Validity of a Contract*, (1909) 23 HARV. L. REV. 1, 4.

[23]*Ibid* at 288. This case came on for rehearing and was reversed 8 Johns. R. 189 (1811); but solely on the ground that it was improper to admit parol evidence to prove the place of payment. The doctrine with which we are concerned here was affirmed by Chancellor Kent entirely on the strength of Lord Mansfield's opinion in Robinson v. Bland and the Dutch Civilian writer, Huber. Robinson v. Bland did not involve capacity to contract; nor, as was later pointed out, was the remark of Huber directed to capacity. "But that remark does not have reference to the capacity of the parties, as the illustration shows which he gives." Learned P. J. in Voight v. Brown, 42 Hun. 394 (N. Y. 1886). Indeed in this case Huber is relied upon for the 'place of making' rule. For an exposition on Huber, see Lorenzen, *Huber's De Conflictu Legum*, WIGMORE, CELEBRATION LEGAL ESSAYS (1919) 199. I BEALE, TREATISE ON THE CONFLICT OF LAWS, (1916) Part 1, § 34.

[24]It may probably be questioned whether minority is an incapacity, since an infant's contract is not void but voidable. See Lorenzen, *The Rules of the Conflict of Laws Applicable to Bills and Notes*, (1916) 1 MINN. L. REV. 10, 15.

Chapman, nearly a century later, squarely held that the capacity of a married woman to enter into a contract is governed by the place where the contract was made and not where it was to be performed. The court stated as "settled beyond controversy" the "general principal" that "the capacity of the parties to a contract is determined by the law of the place where the contract is made."[25] What is latest may be best; but is it the law? A subsequent decision of the Court of Appeals that may be said to shake the *Chapman* case is *International Text-Book Co. v. Connelly*.[26] There, an infant's contract made in Pennsylvania to be performed by both parties in New York, was held to be governed as to the infant's capacity by the law of New York. But the principle of the *Chapman* case was reaffirmed and the court came to its decision on "the presumption that the common law of that state (Pennsylvania) is the same as our own."[27] The preponderance of American authority is in accord with the rule set forth in the *Chapman* case.[28]

The rules treated thus far, the more or less definite one as to formalities and the still nebulous one as to capacity, indicate a rather local trend and one not shared by the weight of authority outside

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[25]169 N. Y. 538, 62 N. E. 672 (1902). In accord with this case are Heidelberger v. Heidelberger, 171 App. Div. 106, 155 N. Y. Supp. 993 (1st Dept. 1915); Waldron v. Ritchings, 9 Abb. Pr. (N. S.) 359 (N. Y. 1870); Alexander v. Shillaber, 64 How. Pr. 530 (N. Y. 1882), (capacity to contract regarding real estate); Voight v. Brown, *supra* note 23. *Contra:* Hammerstein v. Sylva, 66 Misc. 550, 124 N. Y. Supp. 535 (Sup. Ct. Sp. T. 1910) (place of perf.); Shillito v. Reincking, 30 Hun. 345 (N. Y. 1883) (place intended).

Some language in the Chapman case which appears to qualify the "place of making" rule with the proviso, "unless the parties clearly manifested an intention that it should be governed by the laws of another state," really does nothing of the sort. The only question about which the court indicated any doubt was—where was the note made; where signed by the accommodation maker or where first discounted for value? It was in answer to this question that the court declared intent to be important. Thus, quoting fully (p. 545) "* * it seems clear that the capacity of Mrs. Chapman to contract must be determined by the law of the state where the contract was executed unless it can fairly be said that she, at the time of the inception of the instrument * * * intended that it should be governed by the laws of another state. Such an intention * * * is not manifest in this case; *instead thereof, it is found that she did not know where the paper was to be discounted.*" (Italics ours.) It is the intention to make a contract and not the intention to be governed by a particular law, that was the subject of the court's discussion. Compare the cases cited in notes 46 and 54 *infra*. See (1920) 5 CORNELL LAW QUARTERLY 312, esp. 316 n. 40.

[26]206 N. Y. 188, 99 N. E. 722 (1912). Also *Cf.* Chemical National Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103 (1905).

[27]*Ibid* at 200.

[28]Collections of the cases will be found in (1920) 5 CORNELL LAW QUARTERLY 312; (1910) 26 L. R. A. (N. S.) 764; 1916A L. R. A. 1054; (1915) 57 L. R. A. 513; (1919) 18 A. L. R. 15, 18. But supporting the place of performance rule are Mayer v. Roche, 77 N. J. L. 68, 75 Atl. 235 (1908); (1910) 26 L. R. A. (N. S.) 763. Poole v. Perkins, 126 Va. 331, 101 S. E. 240 (1919) 18 A. L. R. 1509. The English law is probably in accord. DICEY 3rd ed., Rule 159, p. 583; see exception 3 to that rule at p. 586.

of this state. But as to the governing law for what Dicey calls the "essential validity"[29] of a contract, New York becomes cosmopolitan and shares the doubts of the common law world.

Essential Validity. Generalization on the basis of an undistributed middle term is the shifting ground-work for much of the mischief. It has already been suggested that the question,—what law governs a contract,—always arises with reference to a particular element of a contract. Formalities in execution and capacity have already been considered. Logically, both of these are involved in the conception "validity of contract," and the only apparent justification for isolating them from the major problem is that many decisions and most writers on the subject have drawn such a line.[30] For the purpose of this study the phrase will be confined to these elements of contract: sufficiency and legality of consideration, mutual assent, circumstances that might invalidate the promise.[31]

It will be noticed that "essential validity" as here delimited, and legal enforcibility are not concepts that coincide completely. For a promise may be essentially valid on the score of every factor just mentioned, and nevertheless be unenforcible because the performance promised is illegal. In other words, there are two distinct reasons for denying legal consequences to an alleged contract,—first, that there is no contract; second, that the performance undertaken is illegal in the place where it is due. Where we have two separate reasons that lead to the same result, there is a natural tendency to identify the reasons. And the ills of such confusion lie dormant until there comes a case where the reasons lead to diverse consequences.

The mode of expression that leads to this identification is illustrated in a case where the decrees of a Russian court had made illegal the performance in Russia of a concededly valid New York contract. Damages for the breach of contract were denied (though restitution of the promisee's consideration was decreed). The Court said:

> "These decrees do not regulate performance of the agreement. They wipe the agreement out and annul its obligation. Performance has been thwarted."[32]

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[29]"A contract though made by persons competent to contract and though formally valid, may nevertheless, on account of something in the nature of the contract itself be wholly or partially invalid. It may, that is to say, be a contract to which, on account of its terms or of its nature the law refuses to give effect." DICEY, 3rd ed. 588–589.

[30]One example is DICEY, see his rules 158, 159, 160 (3rd ed.).

[31]Promises made on Sunday, promises to exempt from or limit liability, gambling promises, promises to pay usury would be included here.

[32]Sokoloff v. National City Bank, 239 N. Y. 158, 170, 145 N. E. 917 (1924). *Cf.* Richards & Co. v. Wreschner, 174 App. Div. 484, 156 N. Y. Supp. 1054 (1st Dept. 1916). See Duff v. Lawrence, 3 Johns. Cas. 162 (N. Y. 1802).

There is no doubt that the result is sound. The law of the place of performance determines questions of breach,[33] discharge,[34] and measure of damages.[35] That, therefore, is the proper law to excuse performance and to grant immunity from damages. In this sense and to this extent, Judge Cardozo was right in saying that the laws of the place of performance "wipe the agreement out and annul its obligation."[36] If his thought is spelt out it comes to this: The law of the place of performance "wipes out" the obligation of contract where the reason for excusing or denying the obligation is that the performance would be illegal by that law.[37] Now observe how this thought may be subsumed unguardedly in the form of the following proposition: The place of performance governs the obligation of contract. With the phrase "obligation of contract" we thus import all of the other elements of contract to which it has been applied,—sufficiency and legality of consideration, mutual assent, circumstances that might invalidate the promise, and even those elements that most clearly go to the very existence of a contract, capacity and formalities. Shall the place of performance provide the governing law for these factors, too?

It is submitted that this problem is separate analytically from the illegal performance cases and that a solution of the latter is not, *ex proprio vigore*, a solution of the former. The pragmatic justification for this approach is two-fold. It will tie up more of the actual decisions and thus be a safer guide to prophecy; it will leave to be

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[33]Bank of Commerce v. Rutland & Washington R. R., 10 How. Pr. 1 (N. Y. 1854); Bank v. Brown, 86 App. Div. 599, 83 N. Y. Supp. 1037 (3rd Dept. 1903) (days of grace).

[34]Graham v. First National Bank of Norfolk, 84 N. Y. 393 (1881); Sherrill v. Hopkins, 1 Cow. 103 (N. Y. 1823); Hicks v. Brown, 12 Johns. 142 (N. Y. 1815); Casper v. Kuhne, 159 App. Div. 389, 144 N. Y. Supp. 502 (1st Dept. 1913); See Sylvester v. Crohan, 138 N. Y. 494, 34 N. E. 273 (1893); Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. Supp. 1062 (1st Dept. 1905).

[35]Richard v. American Union Bank, 241 N. Y. 163, 149 N. E. 338 (1925), "The well-established rule is that a breach of an executory contract is to be allocated to the place where the contract is to be performed." Die Deutsch Bank Filiale Nurnberg v. Humphrey, 47 Sup. Court Rep. (U. S.) 166 (1926), (1927) 40 HARV. L. REV. 619. *Cf.* Gross v. Mendel, 171 App. Div. 237, 157 N. Y. Supp. 357 (1st Dept. 1916).

[36]Conversely, if the performance is legal by the law of the place where it is due, though it would have been illegal if due in the state where the contract was made, the contract is enforcible. Harris v. White, 81 N. Y. 532 (1880); Kentucky v. Bassford, 6 Hill. 526 (N. Y. 1844). See Thatcher v. Norris, 11 N. Y. 437 (1854); Goodrich v. Houghton, 134 N. Y. 115, 31 N. E. 516 (1892); Brooks v. People's Bank, 233 N. Y. 87, 134 N. E. 846 (1921).

[37]The point was made by Judge Davies in his dissent to Jewell v. Wright 30 N. Y. 259 (1864), printed in 9 Abb. Pr. (N. S.) 400, 402, (N. Y. 1870) "If the thing to be done on the face of the contract was contrary to the laws of New York, the rule that the laws of the place of performance must control might perhaps apply."

solved upon its own merits the question, what law governs as to whether or not there is a contract.

We turn again to the cases.

The "general rule" that runs familiarly through the opinions,

> " . . is and has been that where the contract either expressly or tacitly is to be performed in a given country, the presumed intention of the parties is that it is to be governed by the law of the place of performance as to its validity, nature, obligation and interpretation."[38]

The bulk of authoritative support for this proposition is found in the usury cases. *Jewell v. Wright*[39] and *Dickenson v. Edwards*,[40] perhaps the two leading ones, may be taken as a basis for discussion. In the *Jewell* case a note dated and executed by an accommodation party in New York and payable there, was first discounted by the accommodated party in Connecticut at a rate illegal in both states. By the New York law, usury rendered the note altogether void, whereas under Connecticut law principal less interest might be recovered. The court held the New York law to govern because " . . . if such note or contract is by its terms to be performed in another state, the laws of that state must govern."[41] The cases relied upon for this conclusion are abstracted in the note.[42]

The *Dickenson* case[43] presented an identical state of facts except that the note was discounted by the accommodated party in Massachusetts at a rate permissible there but illegal in New York. Again, the rule was laid down "that a purely personal contract is to be governed by the law of the place where by its terms it is to be performed."[44] But this time the court had to take account of the

[38]Dickenson v. Edwards, 77 N. Y. 573, 578 (1879) and cases there cited; see *infra* note 42.

[39]30 N. Y. 259 (1864).

[40]77 N. Y. 573 (1879).

[41]30 N. Y. 259 (1864). See the vigorous dissent of Judge Davies first published as a footnote to Bowen v. Bradley, 9 Abb. Pr. (N. S.) 395, 400 (N. Y. 1870).

[42]Jacks v. Nichols, 5 N. Y. (1 Seld.) 178 (1850)—("* * * if it was to be performed in New York, it must *prima facie* be regarded as having been with reference to the laws of New York"—as to usury); Bower v. Newell, 13 N. Y. 290 (1855)—(days of grace); Everett v. Vendryes, 19 N. Y. 436 (1859)—(formalities of an indorsement of a bill); Cutler v. Wright, 22 N. Y. 472 (1860)—(Note dated and payable in Florida "and although it was actually made and executed in this State (N. Y.) it is to be regarded as a Florida contract."—as to usury); Curtis v. Leavitt, 15 N. Y. 9, 227 (1857) *semble;* Pomeroy v. Ainsworth, 22 Barb. 118, 127 (N. Y. 1856), *semble.*

[43]77 N. Y. 573 (1879).

[44]*Ibid.* at 587. *Accord:* Simpson v. Hefton, 42 Misc. 482, 87 N. Y. Supp. 243 (C. C. N. Y. Tr. Term 1904); Berrien v. Wright, 26 Barb. 208 (N. Y. 1857); Hildreth v. Shepard, 65 Barb. 265 (N. Y. 1873); Clayes v. Hooker, 4 Hun. 231 (N. Y. 1875); Agric. Nat'l Bank v. Sheffield, 4 Hun. 421 (N. Y. 1875). And see cases in note 41 *supra* and Fanning v. Consequa, 17 Johns. 511 (N. Y. 1824). Also see the comprehensive dissenting opinion in George v. Oscar Smith's Ins. Co., 250 Fed. 41, 45 (C. C. A. 5th 1918).

challenge "that *Jewell v. Wright* has been so seriously questioned as to impair its authority; and to throw doubt upon the soundness of the rule it gives out; and that there are adjudications that stand in opposition to it."[45] The court, therefore, looked at the many cases[46] cited by diligent counsel and concluded that the alleged "opposition" was illusory. They were all distinguishable from the instant case on the assumed factual difference that in those cases it was the intention of the obligors that the instrument be used in a state other than the state of payment. " . . . The naming of the place of payment was an incidental circumstance for the convenience of the acceptors or to help the negotiation and not as an essential part of the contract or with the intent to affix a legal consequence to the instrument."[47]

The place of payment, then, does not govern when it is "an incidental circumstance"; the place where the contract is made governs. The ease with which it may be determined whether the place of payment is "incidental" or essential is brought out ironically in this very court's application of the test to *Wayne County Savings Bank v. Low.*[48] At the time of writing the *Dickenson* opinion, the *Wayne County Bank* case had been decided by the lower court[49] and an appeal was pending. The inferior court had declined to follow *Jewell v. Wright* and this court took occasion to reprimand the lower tribunal, saying:

> "We cannot but think that the learned court ignored what is the conceded general rule, that the place fixed by the contract for the performance of it is an essential part of the agreement and gives the law that is to determine its validity."[50]

Yet, one year later, when the *Wayne* case did get to the Court of Appeals it was affirmed.[51] More than that, the reason "clearly appeared." Thus,

> "In the present case the fact which was wanting in *Jewell v. Wright* and *Dickenson v. Edwards clearly appears,*[52] and the case is brought within the principle of *Tilden v. Blair* and the cases which have followed it."[53]

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[45]*Ibid.* at 579, and at 577. "It is said that the case of Jewell v. Wright has been so much questioned by bar and bench as not to be a reliable precedent."

[46]Tilden v. Blair, 21 Wall. (U. S.) 241 (1874); Bank of Georgia v. Lewis, 45 Barb. 340 (N. Y. 1865); Brown v. Bradley, 9 Abb. Pr. (N. S.) 395 (N. Y. 1870); National Bank v. Morris, 1 Hun. 680 (N. Y. 1874); Providence County Savings Bank v. Frost, 13 Nat. B. Reg. 356. In all of these cases essentially alike on their facts, the place where the accommodation paper had its inception by the first transfer for value, rather than the place of execution or of payment governed usury.

[47]*Ibid.* at 580.

[48]*Ibid.* at 584.

[49]6 Abb. N. C. 76 (1878).

[50]*Ibid.* at 584.

[51]81 N. Y. 566 (1880).

[52]Italics ours.

[53]*Ibid.* at 571.

The rule of place of performance, as far as it is deducible from the usury cases, must not be taken as dogma. On the contrary, if the note has its inception at the place intended by the obligor, that place governs its validity, regardless of the place of payment.[54]

> "The rule deducible from all these cases is that the whole transaction will be looked into to ascertain where the real contract . . . took place. When that is ascertained neither the date of the instrument, where signed or where payable is controlling."

To hold otherwise "would be against the decisions of the Court of Appeals."[55]

So much for the usury cases. After all, usury has a unique groundwork in history and public policy. The competing premises, one operating to sustain[56] the validity of obligations wherever possible and the other to deny the exaction of an "unconscionable" rate of

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[54]Pratt v. Adams, 7 Paige 615 (N. Y. 1839); Pomeroy v. Ainsworth, 22 Barb. 118 (N. Y. 1850); Cook v. Lichfield, 9 N. Y. 279, 290 (1853); City Savings Bank v. Bidwell, 29 Barb. 325 (N. Y. 1859); Balme v. Wambaugh, 38 Barb. 352 (N. Y. 1862); Weil v. Lange, 6 Daly 549 (N. Y. 1876); Richardson v. Draper, 23 Hun 188 (N. Y. 1880); LeBaron v. Van Brunt, 9 Daly 349 (N. Y. 1880); Western Transportation and Coal Co. v. Kilderhouse, 87 N. Y. 430 (1882); Sheldon v. Huxton, 91 N. Y. 124 (1883) *affirming* 24 Hun 196 (N. Y. 1880); Hooley v. Talcott, 129 App. Div. 233, 113 N. Y. Supp. 820 (1st Dept. 1908); Smith v. Dixon, 150 App. Div. 571, 134 N. Y. Supp. 1097 (1st Dept. 1912). And see cases in note 46 *supra*. See Whithead v. Heidenheimer, 57 App. Div. 590, 68 N. Y. Supp. 704 (1st Dept. 1901). Where a separate place of payment was not mentioned or did not appear: Davis v. Garr, 6 N. Y. 124 (1851); Merchants Bank v. Griswold, 72 N. Y. 472 (1878); Thompson v. Erie R. R. Co., 147 App. Div. 8, 131 N. Y. Supp. 627 (2nd Dept. 1911); Reversed on other grounds, 207 N. Y. 171, 100 N. E. 791 (1912). Smith v. Dixon, 150 App. Div. 571, 134 N. Y. Supp. 1097 (1st Dept. 1912); See Potter v. Tallman, 35 Barb. 182 (N. Y. 1861). Place of payment and inception same—Hull v. Wheeler, 7 Abb. Pr. (N. S.) 411 (N. Y. 1858).

[55]Hooley v. Talcott, *supra* note 54. A modification was suggested in Cope v. Alden, 53 Barb. 350 (N. Y. 1867). "The general rule that the validity of a contract is to be decided by the laws of the place where the contract is to be performed does not apply to cases involving the rate of interest where it is stipulated in the contract at the place where the loan is made in conformity with the law of the place that a higher rate of interest shall be paid than is allowed by the place of performance, but that the *lex loci* controls." To same effect see Pomeroy v. Ainsworth, and Balme v. Wambaugh, *supra* note 54. The fact that security for the obligation has a situs in another state will not vary the rule: Williams v. Fitzhugh, 37 N. Y. 444 (1868); Cope v. Wheeler, 41 N. Y. 303 (1869), *affirming* Cope v. Alden, 53 Barb. 350 (N. Y. 1867); Whitman v. Conner, 40 N. Y. Super. Ct. R. 339 (1876); Manhattan Life Ins. Co. v. Johnson, 188 N. Y. 108, 80 N. E. 658 (1907) *affirming* 115 App. Div. 429 (1st Dept. 1906) wherein may be found a good discussion. Huber v. D'Esterre, 180 App. Div. 220, 167 N. Y. Supp. 835 (2nd Dept. 1917), (Chattel mortgage.) But see Chapman v. Robertson, 6 Paige 627 (N. Y. 1837) and comment on that case by Judge Laughlin in Manhattan Life Ins. Co. v. Johnson, *supra*; Hosford v. Nichols, 1 Paige 220 (N. Y. 1828); and STORY'S dissent from these cases, CONFLICT OF LAWS § 293, c. 1. (8th ed. 1883); 2 KENT 460. And see Van Shaick v. Edwards, 1 Johns. Cas. 355 (1801).

[56]A recent illustration is to be found in Beadall v. Moore, *supra* note 13—"The parties would be presumed to have intended to make a valid and enforcible instrument instead of one that was void."

interest carry varying weight in particular cases.[57] A not unnatural result is conflict among successive holdings.[58]

The next large group of cases involves the validity of agreements to limit or exempt from liability for negligence. These cases have always arisen with respect to contracts between common carriers and shipper or passenger. Federal legislation has now largely preempted the field of interstate carriage.[59] But local decisions are still applicable to passenger agreements and what is more important, will continue to serve as a mine for analogical reasoning.

The last word of the Court of Appeals is *Fish v. Delaware, Lackawanna & Western R. R. Co.*[60] An agreement and release absolving the carriers from liability for personal injuries to the plaintiff in consequence of negligence on the part of the carriers, were signed and executed in Michigan, where the carriage started. Such an agreement and release were invalid in Michigan. New York was the destination and the place where the accident occurred; and by its law the agreement and release were valid. The Court repeated Story's language[61] to the effect that the place of performance should govern. But since the contract of carriage was performable in many states, the application of the so-called "general rule" would, the Court reasoned, lead to the result that "... it could never be known by what law a contract is to be governed."[62] "It cannot be presumed that parties have contracted with reference to such uncertainty,"[63] is the way the Court solved the poser. The rule was laid down that where a contract is made in one state, to be performed in part in that state and in part

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[57]The strength of this policy has also been exemplified recently. "* * * regardless of where the contract was made, whether in New York State or in Rhode Island, it should not be enforced by a court of equity of this state because of its unconscionable character." Westchester Mfg. Co. v. Grand Rapids & Ionia R. Co., 126 Misc. 534, 213 N. Y. Supp. 593 (Sup. Ct. Wes. Co. 1926).

[58]New York is not alone. For a view of the impossible condition in other jurisdictions see (1890) 8 L. R. A. 170; (1903) 62 L. R. A. 33; (1906) 4 L. R. A. (N. S.) 1191; (1908) 16 L. R. A. (N. S.) 616; 1916 D. L. R. R. A. 745, 750.

[59]Prior to federal legislation, states were free to apply their own rules of Conflict of Laws. Pennsylvania R. R. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132 (1903). Now federal law applies to interstate shipments of goods. Hepburn Act, 34 Stat. 584, 595 U. S. Comp. Stat. 8563, 8579; Carmach Amendment, March 4, 1915, 38 Stat. 1196, 1197; U. S. Comp. Stat. 8592, 8604a. Carriage by sea, Harter Act, 27 State 445, U. S. Comp. Stat. 8029, 8030. See (1923) 23 COL. L. REV. 576. But federal law has not yet preempted the field of passenger carriage, Chicago R. I. and Pacific Ry. Co. v. Maucher, 248 U. S. 359, 39 Sup. Ct. 108 (1919). See (1926) 35 YALE L. J. 997.

[60]211 N. Y. 374, 105 N. E. 661 (1914), writ of error dismissed 245 U. S. 675, 38 Sup. Ct. 10 (1917).

[61]§ 242, 280.

[62]*Supra* note 60.

[63]*Ibid:* Cf. *supra* note 15.

in other states, "the rights of the parties are to be determined by the *lex loci contractus*."[64]

There is adequate authority in this state[65] and elsewhere[66] to support such a conclusion. The consequence is that we once again have lip-service rendered to Story's place of performance rule which in this class of cases, at least, has never been made the basis of an actual decision.[67] A point worth observing about this whole series of holdings is that when the court talks of place of performance, it means the place where the contract of carriage is to be performed, that is, the destination. But is not the only contract in issue the contract to limit the carrier's liability?[68] Where is that to be performed? There can be no specified place to perform a negative promise, an agreement to forbear. And in the absence of a definite place of performance that is "positively" different from the place of making, even the Story formula would permit the place of making to govern.[69] Why use a bludgeon for the work of a scalpel?

The remaining cases where the governing law for the validity of contracts was at issue will not stand up under a broad grouping. The conventional "place of performance" formula and, not infrequently, an echo of the "place intended by the parties" rule is faithfully stated and then honored in the breach.[70] In many of the cases the place of making and of performance are the same; upon such authority advocates of either view may equally rest. Here follows a catalogue.

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[64]*Ibid.* at 384, quoted from Brockway v. American Express Co., 171 Mass. 159, 50 N. E. 626 (1898).

[65]Dike v. Erie R. R. Co., 45 N. Y. 113 (1871); Faulkner v. Hart, 82 N. Y. 413 (1880); China Mutual Ins. Co. v. Force, 142 N. Y. 90, 36 N. E. 874 (1894); Barnes v. Long Island R. R. Co., 47 Misc. 318, 93 N. Y. Supp.. 616 (Sup. Ct. Queens Tr. Term 1905); Grand v. Livingston, 4 App. Div. 589, *aff'd* no opinion, 158 N. Y. 688, 53 N. E. 1125 (1896); Valk v. Erie R. R. Co., 130 App. Div. 446, 114 N. Y. Supp. 964 (1st Dept. 1909); Willcox v. Erie R. R. Co., 162 App. Div. 94, 147 N. Y. Supp. 360 (1st Dept. 1914), appeal dismissed 220 N. Y. 701, 116 N. E. 1083, (1917). But see Curtis v. Delaware, Lack. & W. R. R. Co., 74 N. Y. 116 (1878) which is distinguished in the Fish case (p. 384) and in Valk v. Erie R. R. Co., " * * * on ground that there the question was not what contract was made but whether a statute of Pennsylvania limiting the liability of a carrier * * * governs in an action against the carrier for a failure to deliver baggage in the state of New York * * * " Williams v. Central R. R. Co. of N. J., 93 App. Div. 582, 88 N. Y. Supp. 434 (2d Dept. 1904); Cappel v. Weir, 46 Misc. 441, 92 N. Y. Supp. 365 (App. Term 1905).

[66]Carrier contracts, (1904) 63 L. R. A. 513; (1906) 5 L. R. A. (N. S.) 425; (1909) 18 L. R. A. (N. S.) 874; (1911) 34 L. R. A. (N. S.) 67; Ann. Cas. 1915 C. 620. Telegraph Company contracts, (1902) 56 L. R. A. 301; (1910) 23 L. R. A. (N. S.) 648, 968; (1910) 28 L. R. A. (N. S.) 490; (1911) 29 L. R. A. (N. S.) 795.

[67]The possible exceptions to this statement are given in note 65 *supra*.

[68]See, for example, Valk v. Erie R. R. Co., *supra* note 65.

[69]See *supra* note 9.

[70]See *infra*.

The law of the place where a contract was made has been held decisive in determining the validity of a wagering contract,[71] of a contract made on Sunday,[72] of a lottery agreement,[73] of a proviso in a note to pay attorney's fees upon default,[74] of an arbitration clause,[75] of a contract ultra vires,[76] of a conditional sale agreement,[77] of an assignment of an insurance policy,[78] of a contract of insurance between a resident and a foreign insurance company,[79] and in determining the legality of consideration,[80] and the adequacy of consideration.[81]

The law of the place of performance has been held to determine whether an assured must have an interest in the life of the insured[82] and whether an antecedent debt is value.[83]

It is time to summarize the evidence. Remember the limits of this inquiry,—what law governs the validity of a contract; more specifically, capacity, formalities, adequacy and legality of consideration, and the circumstances that might invalidate the promise.[84]

To many of these queries there is no chapter and verse citation in the New York reports. But on the basis of what there is and what

[71]Ball v. Davis, 1 N. Y. State Rep. 517 (1886) (Place of performance not specified). See for other American authorities (1904) 64 L. R. A. 160. (1913) 46 L. R. A. (N. S.) 650.

[72]Northrup v. Foot, 14 Wend. 248 (N. Y. 1835) (Place of performance not specified). See for other American authorities (1910) 26 L. R. A. (N. S.) 773. (1911) 34 L. R. A. (N. S.) 67.

[73]Thatcher v. Morris, 11 N. Y. 437 (1854) (Places of making and performance different). See Goodrich v. Houghton, 134 N. Y. 115, 31 N. E. 516 (1892) and note 36 *supra*.

[74]First National Bank v. Fleitman, 168 App. Div. 75, 153 N. Y. Supp. 869 (1st Dept. 1915). (Places of making and payment same).

[75]Meacham v. Jamestown, F. & C. R. R. Co., 211 N. Y. 346, 105 N. E. 653 (1914). (Places of making and performance different). *Cf.* Wilson v. Central Ins. Co., 135 App. Div. 649, 119 N. Y. Supp. 955 (1st Dept. 1909).

[76]Bath Gas Light Co. v. Rowland, 84 App. Div. 563, 82 N. Y. Supp. 841, *aff'd.* 178 (2nd Dept. 1903) N. Y. 631, 71 N. E. 1127 (1903).

[77]Ohl & Co. v. Standard Steel Sections Inc., 179 App. Div. 637, 167 N. Y. Supp. 184, (1st Dept. 1917).

[78]Jackson v. Tallmadge, 216 App. Div. 100, 214 N. Y. Supp. 528 (3rd Dept. 1926).

[79]Swing v. Dayton, 124 App. Div. 58, 108 N. Y. Supp. 155 (1908), (Place of performance did not appear.); Western Mass. Fire Ins. Co. v. Hilton, 42 App. Div. 52, 58 N. Y. Supp. 996 (1899), (Place of making and of performance same.) Stone v. Penn Yan, etc., Ry., 197 N. Y. 279, 90 N. E. 843 (1910), (Places of making and of performance same.)

[80]Backman v. Jenks, 55 Barb. 468 (N. Y. 1869), (Places of making and of payment different.)

[81]Hyde v. Goodnow, 3 N. Y. 767 (1850).

[82]Ruse v. Mutual Life Ins. Co., 23 N. Y. 516 (1861). (Places of making and of payment different.) Court said (521), " * * although where there is anything in the circumstances to show that the parties had specially in view the law of the place where the contract is made, this law will govern, although the contract is to be performed elsewhere."

[83]Bright v. Judson, 47 Barb. 29 (N. Y. 1866). (Places of making and of payment different.) *Cf.* First Natl. Bank v. Dean, 16 N. Y. Supp. 107 (1891), *aff'd.* 17 N. Y. Supp. 375 (1892).

[84]See *Supra* note 31.

has been presented here, is it a Quixotic inference that Story's "place of performance" rule, despite its frequent repitition by the courts so that it has become a ritualistic running-start for every sort of a case,[85] finds no overwhelming reflection in the actual decisions? Indeed, quantitatively at least, the considerable weight of cases is with the proposition that the law of the place where the contract is made governs its validity. Certainly this much is true,—the bones of doctrine have not yet hardened one way or the other.

What is the starting point for a critique? Shall we assume with Mr. Justice Holmes that "the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and consequences of the act,"[86] and with Judge Cardozo that "the fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained"?[87] Then it would be a necessary deduction of logic that the place of making alone governs the validity of a contract. A contract is created not by the parties to it but by the law. Parties make an agreement; it is for the law to say whether the agreement is binding. Which law? The law of the place where the agreement is made. Otherwise the parties, by the device of naming a place of performance elsewhere, escape the requirements of legality set up by the state where they act, and, in effect, may choose a more congenial law.

But there is another spring-board that is less mechanical and smacks less of the necessitarianism implicit in the method of dialectical inference from "self-evident" first principles,[88] namely, which

[85]In Hyde v. Goodnow, 3 N. Y. 267 (1850) the court did just this and went on to say. "This general rule however has its exceptions; one of which is, that when a contract is declared void by the law of the state or country where it is made, it cannot be enforced as a valid contract in any other though by its terms it was to have been performed there * * * * A contract illegal where made or payable is bad everywhere." That the converse case is also an "exception" to the "general rule," see Balme v. Wombough, 38 Barb. 352 (N. Y. 1862); Cope v. Alden, 53 Barb. 350 (N. Y. 1867).

[86]Liebing v. Mutual Life Ins. Co., 259 U. S. 209, 214, 42 Sup. Ct. 467 (1921). For a New York court's expression of substantially the same thought, see Voight v. Brown, *supra* note 23, "We do not see how the place of performance in any way affects the capacity to contract. The law of the place of performance does not forbid her to perform and even if it did, that might not affect her capacity. Certainly when the law of this state says that a married woman may make a contract, neither her privilege to contract nor the rights of those with whom she contracts are to be taken away by the law of another state."

[87]Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 113, 120 N. E. 198 (1918); 1 BEALE, TREATISE ON CONFLICT OF LAWS (1916) Part 1 § 73. A vigorous "territorialist" stand is taken in a note in (1920) 5 CORNELL LAW QUARTERLY 312. For recent criticisms of the "vested rights" theory see *Cook, The Logical and Legal Bases of the Conflict of Laws*, (1924) 33 YALE L. J. 457; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, (1924) 33 YALE L. J. 736.

[88]As to the place and limitations of "first principles" and logic in the law, see Pound, *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 605; M. R. Cohen, *The Place of Logic in the Law*, (1916) 29 HARV. L. REV. 622.

is the better working-rule? Unfortunately, there is a dearth of reasoned discussion from the courts.[89] And one may well venture a suspicion as to the cause. Is this not one of those oft-recurring situations in the law where "it is more important that a rule of law be settled than that it be settled right"?[90] That should be reason sufficient for settling a formula which if it be denied the virtue of being an unclouded mirror of all past decisions, may at least attain the more humble aspiration of being a reliable guide to conduct.

The defects in the place of performance rule have in large part already been hinted at. If the contract is to be performed in more than one place, the rule balks; the place of making governs.[91] If the agreement is executory on both sides and the performance of the first promisor is due in a state other than that in which the performance of the second promisor is due, what law shall determine the validity of the obligation?[92] Questions like these[93] suggest that the place of performance rule, to be workable, must be stated qualifiedly. But the rule that the place of making governs can have general application. And if there were nothing more to be said for the place of making rule, the fact that it presents a simple,[94] definite and predictable rule is reason enough for preferring it to the other.

But there is also good sense to it. When parties are making an agreement in a particular state the best and most reliable legal information available to them as to how to make their agreement binding, is with regard to the contract law of the state in which they are acting. They will consult local attorneys or persons versed in local law. It must be admitted that in the bulk of agreements advice of counsel is not sought. A note is signed, a bill of lading is accepted, a promise is made,—as it does really happen—without benefit of legal clergy. But the point in getting a simple rule of law is that

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[89]For a resume of the numerous solutions that have been advanced, see Lorenzen, (1921) 30 YALE L. J. 655.

[90]Brandeis, J. in Di Santo v. Comm. of Pennsylvania, 47 Sup. Ct. Rep. 267, 270 (1927).

[91]See *supra* notes 15 and 65.

[92]That such a supposition is not altogether fanciful, see Blackman v. Jenks, 55 Barb. 468 (N. Y. 1869); Wilson v. Todhunter, 137 Ark. 80, 207 S. W. 221 (1918); Price v. Burns, 101 Ill. App. 418 (1902); DICEY, 3rd ed. 612 (second case).

[93]Or suppose the obligation may be performed in either one or two states, at the option of the promisor? See Hale v. N. J. Steam Navigation Co., 15 Conn. 539 (1843).

[94]The point should, however, be made that sometimes it is not so "simple" to tell *where* the contract is made. Thus, is an accommodation instrument made upon delivery to the accommodated party or upon the first transfer for value? *Cf.* Union National Bank v. Chapman, 169 N. Y. 538, 62 N.E. 672 (1902). And see Lee v. Selleck, 33 N. Y. 615 (1865). *Cf.* Quast v. Fidelity Mut. L. Ins. Co., 226 N. Y. 270, 123 N. E. 494 (1919); and see *supra* note 12.

when people do seek legal counsel they can get it with some assurance that the "prophecy" will be fulfilled.[95]

[95]Much of this inquiry becomes moot if we are to take seriously the provincial doctrine professed in this state, namely, that conceding the common law of another state is applicable to a situation,—"the common law there is the same as that which prevails here and elsewhere and the judicial expositions of the common law there do not bind the courts here." Saint Nicholas Bank v. State National Bank, 128 N. Y. 26, 33, 27 N. E. 849 (1891). The first case that took this view, Faulkner v. Hart, 82 N. Y. 413, 418 (1880), relied upon the well-known Swift v. Tyson, 16 Pet. (U. S.) 19. That case had to do with the attitude of federal courts to the decisional law of the states within which they sit. Now federal courts sit as state courts; they are of coordinate jurisdiction with the state courts, and it is a theoretically defensible doctrine that the decisions of state tribunals are not binding upon them. (1916) BEALE, CONFLICT OF LAWS, § 1 12a. Schofield, *Swift v. Tyson*, (1910) 4 ILL. L. REV. 533, (1921) 1 CONSTITUTIONAL LAW AND EQUITY, 38. But see GRAY, THE NATURE AND SOURCES OF THE LAW, § 479, 535–544. Here, however, the story is different, " * * * for what may be foreign law upon a given subject presents a question of fact, not a question of law * * * and must be proved and found like any other question of fact." Spies v. National City Bank, *supra* note 7. There are other straws in the direction of such latitudinarianism. Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 37, 45 N. E. 390 (1896); Hanna v. Lictenheim, 182 App. Div. 94, 98, 169 N. Y. Supp. 589 (1st Dept. 1918). See BEALE, *supra* § 119.