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## Intention of the Parties - The Requirement of Substantial Connection

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appropriate governing law is the law of the principal place of defendant's business. Because the printing process of a national periodical often extends over several states<sup>46</sup> the selection of the law of the main publishing office<sup>47</sup> will avoid complications in locating the proper phase of the printing process.

Not only would the rule be simple in its application, but the defendant would also be able to predict with fair accuracy whether his actions will subject him to a suit for damages.<sup>48</sup> Before publishing an article, it is only natural that he look to his own law regarding his liability for defamatory material rather than to the law of some state or country where the article might be accidentally circulated. As far as the plaintiff is concerned, he can justifiably expect only that his recovery of damages will be governed by an appropriate law. Nevertheless, to be certain that no undue burdens are imposed on the plaintiff, an alternative application of the law of the state of circulation is suggested, if action is brought there and damages are limited for the harm suffered in the state of the forum.<sup>49</sup> Therefore, the plaintiff seldom will have to travel to a foreign state in order to bring suit.

Because the precise problem of a choice of law rule in multi-state libels never has been presented in Louisiana, the courts are in a position to turn to any theory. The decision of *State v. Moore*<sup>50</sup> perhaps can be said to be one step in the direction towards the proposed rule of this article.

DONALD L. PELTIER

#### INTENTION OF THE PARTIES—THE REQUIREMENT OF SUBSTANTIAL CONNECTION

"We are of the opinion, therefore, that the right of parties to a contract to have their reciprocal duties and obligations under

46. *Cannon v. Time Inc.*, 39 F. Supp. 660 (S.D. N.Y. 1939) (composition in one state, printing in another state, and distribution was handled from still another state).

47. See 2 Rabel, loc. cit. supra note 37. Professor Rabel also advocates the law of the main publishing house.

48. Goodrich, *Public Policy in the Law of Conflicts* (1930) 36 W.Va. L.Q. 156, 167-168 (emphasizes predictability). See also Rheinstejn, loc. cit. supra note 29.

49. *Wright v. RKO Radio Pictures Inc.*, 55 F. Supp. 639 (D. Mass. 1944); *Kelley v. Lowes Inc.*, 76 F. Supp. 473 (D. Mass. 1948).

50. 140 La. 231, 72 So. 965 (1916) (in interpretation of venue statute, the supreme court held that the criminal libel was committed at the place of printing and publication and not in the parishes where circulated). However, *Vicknair v. Daily Publishing Co.*, 144 La. 809, 81 So. 324 (1919) distinguishes the *Moore* case on the ground that it was a suit for criminal libel.

that contract governed by the law of some particular jurisdiction is limited to the selection as stipulated by them of the law of a jurisdiction which has a real relation to the contract. Applying this test to the situation appearing in the case at bar, we find nothing in the record herein which in any way properly connects the contract before us with the state of Florida. If it was the intention of the parties, as revealed by the language employed by them in the contract, to have the law of that state, as it was where the contract was made, control the interpretation of such contract, then that intention cannot be carried out and the law of Florida has no application to the contract herein." Thus spoke Judge Baker, in the case of *Owen v. Hagenbeck-Wallace Shows Company*.<sup>1</sup>

In the much discussed case of *Vita Foods, Incorporated v. Unus Shipping Company*<sup>2</sup> a cargo of herring was shipped in a Nova Scotian ship from Newfoundland to New York under a bill of lading which was issued in Newfoundland and which expressly provided that "the proper law of the contract is to be English law." The cargo was damaged as a result of the negligent navigation of the ship, and the owners of the cargo brought suit for the loss in the courts of Nova Scotia. They based their claim on the argument that the bill of lading under which the cargo was shipped was of a kind which was not allowed to be issued under the law of Newfoundland, the place of contracting; that it was, therefore, to be disregarded; that, consequently, the ship-owners could not rely upon an express clause contained therein and exempting them from liability for negligence and that their liability was consequently determined by the general rules on liability of common carriers. The defense was that the bill of lading specifically provided that the "contract should be governed by the English law" and that under English law the exemption clause was valid. The consignee rebutted with the argument that the transaction had no connection whatever with England and that consequently, English law could not be made the proper law of the contract by mere agreement of the parties. This argument was explicitly rejected by Lord Wright, who, speaking for the Judicial Committee of the Privy Council, said: "It will be convenient at this point to determine what is the proper law of the contract. In their lordships' opinion the express words of the bill of lading must receive effect, with the result that the contract is governed by English law. It is now well settled that by English

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1. 58 R.I. 162, 174, 192 Atl. 153, 164 (1937).

2. [1939] A.C. 277.

law (and the law of Nova Scotia is the same) the proper law of the contract 'is the law which the parties intended to apply.' . . . But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible; provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy. . . . It might be said that the transaction, which is one relating to the carriage on a Nova Scotia ship of goods from Newfoundland to New York between residents in those countries, contains nothing to connect it in any way with English law, and therefore the choice could not be seriously taken. Their Lordships reject this argument both on grounds of principle and on the facts. Connection with English law is not as a matter of principle essential."<sup>3</sup>

An express clause in a contract stipulating that controversies arising therefrom shall be decided under the law of a particular state or country, will, as a general rule, be honored universally.<sup>4</sup> But a survey of the American cases and authorities also shows frequent expressions of an alleged exception to the effect that the law so chosen by the contracting parties must have some real and objective connection with the transaction.<sup>5</sup> Occasionally, the connection is qualified to the extent that the contract either has been concluded or is to be performed at the place whose law has been chosen.<sup>6</sup> Among the cases in which this limitation of the parties' freedom of choice has been formulated, usury cases occupy a conspicuous place.<sup>7</sup> Here the requirement of substantial

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3. [1939] A.C. 277, 289.

4. 2 Rabel, *The Conflict of Laws: A Comparative Study* (1947) 369 (after referring to summaries of Anglo-American law, continental law, Latin-American law, and Japanese law); Lorenzen, *Selected Articles on the Conflict of Laws* (1947) 269. See also Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 389.

5. *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937); *Brierly v. Commercial Credit Co.*, 43 F.(2d) 724 (D.C. Pa. 1929); *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931). See also *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); *Merchants' and Manufacturers' Securities Co. v. Johnson*, 69 F. (2d) 940 (C.C.A. 8th, 1934); *Crawford v. Seattle, Renton and S.R. Co.*, 86 Wash. 628, 150 Pac. 155 (1915); 2 Beale, *Conflict of Laws* (1935) 1081, § 332.2. But see *Duskin v. Pennsylvania Central Airlines Corp.*, 71 F. Supp. 867 (Tenn. 1947); *Hurwitz v. Hurwitz*, 216 App. Div. 362, 215 N.Y. Supp. 184 (1926); *Boole v. Union Marine Ins. Co., Ltd.*, 52 Cal. App. 207, 198 Pac. 416 (1921).

6. 2 Beale, *Conflict of Laws* (1935) § 332.2, at 1081.

7. *Andrews v. Pond*, 38 U.S. 65 (1839); *Brierly v. Commercial Credit Co.*, 43 F. (2d) 730 (C.C.A. 3rd, 1930), cert. denied 282 U.S. 897, 51 S.Ct. 182, 75 L.Ed. 790 (1931); *Merchants' and Manufacturers' Securities Co. v. Johnson*, 69 F. (2d) 940 (C.C.A. 8th, 1934), cert. denied 293 U.S. 569, 79 L.Ed. 68, 55 S.Ct. 80 (1934); *Arnold v. Potter*, 22 Iowa 194 (1867); *Locknane v. United States*

connection is often cited as decisive in determining whether or not the courts will give effect to the stipulation by the parties for the law of some particular state or country,<sup>8</sup> while the real and underlying consideration apparently is whether the stipulation was made in "good faith,"<sup>9</sup> that is, without intent to evade the usury laws of some state substantially connected with the transaction.<sup>10</sup> In *Brierly v. Commercial Credit Company*,<sup>11</sup> in a contract made in Maryland for the loan of money to a Pennsylvania corporation by a corporation with its principal place of business in Maryland, a stipulation that Delaware law should "govern the contract" was held ineffective by a federal court in Pennsylvania, in determining whether the interest reserved was usurious, because the State of Delaware had no objective relation with the transaction. The court then found a "presumed intention" that Maryland law should apply, saying, "the parties certainly had a legal right to contract for a rate of interest which was lawful in Maryland, since the contract was made there,"<sup>12</sup> excluding, however, the obvious intent to evade this law by the stipulation of a different law allowing a higher rate of interest. In a case where the factual situation was identical,<sup>13</sup> the court again refused to give effect to the stipulation for Delaware law because no transaction had taken place in that state, but the argument that the contract should be governed by Maryland law rather than that of North Carolina was rejected on the grounds that the stipulation had not been made in "good faith." A comparison of these two cases and an examination of other cases indicate that the motivating consideration of the decisions is the fear of the courts that to permit the parties to choose a law having no connection with the transaction would in effect nullify the usury laws of the states with which the transaction is connected.<sup>14</sup> Exemplifying this attitude

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Savings and Loan Co., 103 Ky. 265, 44 S.W. 977 (1898); *Goode v. Colorado Investment Loan Co.*, 16 N.M. 461, 177 Pac. 856 (1911); *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931).

8. See 2 Beale, loc. cit. supra note 6.

9. *Andrews v. Pond*, 38 U.S. 65 (1839). Following this case, the courts accepted the statement that parties' agreement upon a rule must be bona fide. 2 Beale, loc. cit. supra note 6. This rule has been most often applied in usury cases.

10. *Locknane v. United States Savings and Loan Co.*, 103 Ky. 265, 44 S.W. 977 (1898); *Fidelity Savings Association v. Shea*, 6 Idaho 405, 55 Pac. 1022 (1899) "*Bona fide* seems to mean that the place should not be *intentionally* selected for the purpose of evasion." 2 Rabel, *The Conflict of Laws: A Comparative Study* (1947) 410.

11. 43 F. (2d) 724, 730 (C.C.A. 3rd, 1930), cert. denied 282 U.S. 897, 51 S.Ct. 182, 75 L.Ed. 790 (1931).

12. 43 F. (2d) 724, 728 (C.C.A. 3rd, 1930).

13. *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931).

14. See *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 408, 47 S.Ct.

is the decision in *London Finance Company v. Shattuck*.<sup>15</sup> An application for a loan had been executed in New York by a resident of that state, but apparently had been acted upon in Massachusetts, from which state the check was mailed. The lending corporation had also required the borrower to execute a promissory note bearing interest at the rate of three per centum per month, and a confession of judgment. The New York court vacated a judgment by confession obtained against the defendant on the promissory note, saying that "it was apparent the contract was made in the state of New York" and the claim that it had been made in the state of Massachusetts was "a mere subterfuge for the purpose of evading the usury laws of the state of New York." The courts are concerned with preventing the evasion of usury statutes, which are enacted for the very purpose of protecting parties in an inferior bargaining position against economic exploitation.

Even if the contract would be considered usurious under the law of the place where it was made, or under the law of the place where it was to be performed, many courts hold that the contract will be upheld if it is valid under the law of either one of these.<sup>16</sup> Although these latter cases would at first appear to negative the idea that the courts are concerned with preventing evasion of the usury statutes, they are perhaps better interpreted as evidencing the reluctance of some courts to enforce regulatory laws thought to be incompatible with the doctrine of *laissez faire*.

When the requirement of substantial connection is raised in transportation cases, there is usually involved a provision in a bill of lading limiting the carrier's liability, or exempting it from liability completely, for loss due to theft or negligence, and providing that the contract shall be governed by the law of some state or country under which such limitations are valid.<sup>17</sup>

In these cases, also, the courts seem to rely, ostensibly at least, upon the requirement of substantial connection to declare

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626, 628, 71 L.Ed. 1123, 1127 (1927), where the court, in speaking of the qualification of good faith, said, "The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject." See also 2 Rabel, *op. cit.* supra note 10, at 411.

15. 221 N.Y. 702, 117 N.E. 1075 (1917).

16. See 2 Beale, *op. cit.* supra note 6, at 1241, § 374.4; Goodrich, *Conflict of Laws* (2 ed. 1938) § 108; Stumberg, *Conflict of Laws* (1937) 212.

17. *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A.C. 277; *E. Gerli and Co. v. Cunard S.S. Co.*, 48 F. (2d) 115 (C.C.A. 2d, 1931); *F. A. Strauss and Co., Inc. v. Canadian Pacific Ry.*, 254 N.Y. 407, 173 N.E. 564 (1930).

these stipulations for a particular law invalid, yet in other cases involving the validity of clauses limiting the liability of the carrier, one of the most commonly discussed questions has been whether the shipper or passenger was in such an unfair bargaining position that the contract was really the result of a form of economic duress.<sup>18</sup> The English rule is that the expressed intention of the parties will be allowed to govern although the law chosen has no connection with the contract,<sup>19</sup> but even in the *Unus* case, which is most often cited as authority for the rule, Lord Wright said that the intention must be bona fide ("in good faith").

"In good faith" has a variety of meanings, and certainly the question of whether one of the parties had been coerced into an agreement would be within the scope of almost any definition of the term. It has been suggested that the possibility of a contract having been executed under coercion should deter the forum from attaching significance to expressions of the parties' intention as to the governing law.<sup>20</sup> This would appear to be a just requirement. But is there any reason for requiring, as the American courts generally do, an objective connection with the law stipulated for,<sup>21</sup> when the real concern appears to be a fear that the agreement may not have been freely entered into? Does the existence of a substantial connection with some particular state or country negative, in some inexplicable manner, the possibility of coercion? In a number of cases where foreign laws favorable to the carriers were stipulated, they have been disregarded because frequently the party submitting thereto had no actual intention to do so and there was no freedom of contract.<sup>22</sup> These cases indicate that this fear of economic duress is the courts' real concern, and not whether there is a "substantial connection" with the stipulated law.

Many insurance contracts stipulate that the law of the place

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18. See *New York Central R.R. v. Lockwood*, 17 Wall. 357, 379 (U.S. 1873): "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. . . . He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business."

19. *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A.C. 277; *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 130.

20. Note (1941) 54 Harv. L. Rev. 663, 669.

21. See cases cited supra note 5 and cases collected in (1938) 112 A.L.R. 124, 125.

22. *Oceanic Steam Navigation Co. v. Corcoran*, 9 F. (2d) 724, 727 (1925); *Phillips v. The Energia*, 56 Fed. 124 (S.D. N.Y. 1893).

where the insurer has its seat of business shall govern the contract.<sup>23</sup> This law is important, for the insurer who must know upon which law he has to compute his risk and, consequently, the premiums. For this reason these stipulations are generally upheld, *unless* the court finds that a local statute designed for the protection of the citizens of the forum (which is usually the domicile of the insured) would be evaded by giving effect to the stipulation.<sup>24</sup>

The Missouri court thus found in the case of *Cravens v. New York Life Insurance Company*<sup>25</sup> that giving effect to a stipulation for New York law would defeat the operation of a Missouri statute providing for the issuance of extended insurance in the event of default in the payment of premiums—a statute obviously designed to prevent anyone from taking advantage of a person in an economically weak bargaining position. A number of courts have struck down agreements for the application of the laws of other states, when to uphold them would permit evasion of a statute of the insured's domicile which provided that only misrepresentations which were wilfully and fraudulently made, or which were material to the risk, should void the policy.<sup>26</sup> For what other reason would legislatures enact such statutes if it were not for a feeling that otherwise the insured would be forced to contract under strict common law warranty, with the consequent loss to his beneficiaries of benefits under the policy, regardless of whether or not the insured's misrepresentations had in any way increased the insurer's risk? In the case of *Griesemer v. Mutual Life Insurance Company*,<sup>27</sup> the State of Washington apparently had no statute requiring that extended policies should be issued whenever the principal policy was forfeited for non-payment of the premiums, and the court allowed the stipulation for New York law. However, the effect of the decision was to permit the insured to recover, for under New York law a policy could not be forfeited for non-payment of premiums unless written notice had been given the assured, which had not been done in this case.

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23. See cases collected (1938) 112 A.L.R. 130, 131.

24. *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385 (1908), *Dolan v. Mutual Reserve Fund Life Assoc.*, 173 Mass. 197, 53 N.E. 398 (1899); *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 50 S.W. 519 (1899); *Keatley v. Travelers' Ins. Co.*, 187 Pa. 197, 40 Atl. 808 (1898).

25. 148 Mo. 583, 50 S.W. 519 (1898), affirmed 178 U.S. 389, 20 S.Ct. 962, 44 L.Ed. 1116 (1900).

26. *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385 (1908); *Dolan v. Mutual Reserve Fund Life Assoc.*, 173 Mass. 197, 53 N.E. 398 (1899).

27. 10 Wash. 202, 38 Pac. 1031 (1894).



The leading case of *Owens v. Hagenbeck-Wallace Shows Company*<sup>28</sup> involved the interpretation of an employment contract made in Indiana. The employing circus maintained its winter quarters in Indiana and gave as its permanent address "Chicago, Illinois"; but the contract provided that the contract should be "localized" in Sarasota, Florida, and that all matters pertaining to it should be decided according to the laws of Florida. The plaintiff employee was given written notice of discharge in Massachusetts and was dismissed there. Suit was then brought in Rhode Island, where the circus had moved for a routine performance. The court rejected the reference to Florida law, on the ground that Florida had no "real relation to the contract," and held that the law of Indiana, the place where the contract was made, should govern. No further mention was made of Massachusetts, and simultaneously Indiana law was eliminated as not proved. The result was that the Rhode Island court, whose jurisdiction of the case was purely accidental, applied its own law, which certainly had no "real relation to the contract." Although the result was an arbitrary and incorrect application of the requirement of close connection, it tends to substantiate the theory that the courts' real concern is the fear of "economic coercion," for under Florida law the plaintiff employee could have been dismissed practically at the defendant's pleasure.

Looking beyond the mere words used by the courts to explain their decisions and seeking to ascertain the real motivations, it seems that there is no need for the alleged general rule limiting the choice of law by the parties to a state or country having some objective connection with the transaction.<sup>29</sup> The courts have another and more flexible tool with which to invalidate agreements for the applicable law, that is, that the stipulation is the result of a form of economic duress; and the cases demonstrate that it is this latter rule which the courts are really applying.

There is, apparently, no American decision squarely holding that there is freedom of choice to select a law which has no substantial connection with the contractual relation, but several cases so indicate, at least in dicta.<sup>30</sup> The most recent of these, *Duskin v. Pennsylvania-Central Airlines Corporation*,<sup>31</sup> may signify a new point of departure for American decisions regarding

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28. 58 R.I. 162, 174, 192 Atl. 158, 164, 112 A.L.R. 113 (1937).

29. Rabel, *op. cit.* supra note 4, at 408.

30. *Duskin v. Pennsylvania-Central Airlines Corp.*, 167 F.(2d) 727 (C.C.A. 6th, 1948); *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416 (1921); *Hurwitz v. Hurwitz*, 216 App. Div. 362, 215 N.Y. Supp. 184 (1926).

31. 167 F.(2d) 727 (C.C.A. 6th, 1948).

the freedom with which parties to a contract may stipulate as to the applicable law. The defendant, a Delaware corporation, entered into an employment contract with the plaintiff's husband at its principal offices in Washington, D. C., which provided that Pennsylvania law should govern the rights of the parties under the contract. At the time of his death, the plaintiff's husband was domiciled in Tennessee, and was temporarily a resident of New York. The flight which resulted in his death in Alabama originated in New York. To the plaintiff's plea that the stipulation for Pennsylvania law was invalid because "no part of the contract was properly referable to that state," the court said, "There seems no more justification for precluding parties to a contract from stipulating that the laws of any jurisdiction, even if foreign to the elements of the contract, should govern the rights and obligations of the parties, where not against public policy, than for precluding them from stipulating in express terms what interpretation should be placed upon certain terms, clauses or provisions of the contract."<sup>32</sup> Although there was no formal determination of the presence of actual contacts with the contract, the fact that there were substantial connections with Pennsylvania detracts from the weight of this statement.<sup>33</sup> Though the case is not authoritative, a stipulation that English law should be determinative of the rights and obligations of the parties to a marine insurance contract has been held valid, despite the absence of any evidence that the transaction was in any manner related to England;<sup>34</sup> and the New York court has held that where two residents of that state entered into an antenuptial agreement in New York that their property rights should be governed by the "Jewish laws of Israel and Moses" the express agreement was sustained, but on the ground that the so-called "laws of Moses and Israel" were not really "foreign" laws.<sup>35</sup>

Arrayed against unlimited freedom of choice of the law applicable to a contract are such eminent writers as Beale, Falconbridge, Goodrich, Judge Learned Hand, Westlake, and Lorenzen.<sup>36</sup> Their argument, purely a conceptualistic one, is substan-

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32. *Id.* at 730.

33. The major portion of decedent's flying service had been over the state of Pennsylvania, and each of his flights required a junction point stop at Pittsburgh, where the defendant maintained a large operating base. Defendant also maintained and operated two other Pennsylvania bases.

34. *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416 (1921).

35. *Hurwitz v. Hurwitz*, 216 App. Div. 362, 215 N.Y. Supp. 184 (1926).

36. 2 Beale, *op. cit. supra* note 6, at 1079, 1083, § 332.2; Falconbridge, *Essays on the Conflict of Laws* (1947) 349; Goodrich, *Conflict of Laws* (2 ed. 1938) 278, 279. See Judge L. Hand's opinion in *E. Gerli and Co. v. Cunard*

tially this: that the stipulation for the law applicable is itself already a contract. Therefore, in order to know whether or not the contract is valid resort must be had to some legal system, and that system can only be one with which the contract has some contact, that is, that there is only one proper law which can determine the validity of any contract. However, that this position is untenable has been pointed out by such equally eminent writers as W. W. Cook, Nussbaum, Rheinstein, and Wolff.<sup>37</sup>

Assuming that the conceptual argument advanced against it is not valid, are there any reasons why the freedom of the parties to choose the law applicable to their contract ought to be delimited?

It has been suggested that there is a danger that the time of the courts will be wasted by seeking to ascertain and interpret some foreign, conceivably exotic law which the parties have chosen without good reason.<sup>38</sup> Without question, the time of the court is too valuable to be so wasted; but experience has shown that parties to a contract simply do not pick some law for no reason. The example of two parties in Missouri stipulating for the law of Pakistan lies within what has been termed the realm of "unreal horrors." Experience has shown that in practically all cases where the parties have agreed upon some particular law, the law chosen has some connection with the contract,<sup>39</sup> albeit a hidden one. At first glance, the contract in the *Hagenbeck-Wallace* case seems to have no connection whatever with Florida; but the significant factor, and the one which the Rhode Island court apparently overlooked, is that Sarasota, Florida, is the circus capital of the United States. It would seem desirable to have all circuses operating under one law, and a uniform stipulation for the law of Florida in all contracts concerning circus people would give to their contracts a highly desirable certainty and uniformity. Certainly it would be eminently just to permit a Louisiana orange grower and a dealer to whom he was selling his crop to agree that the law of California should be determinative of their rights and obligations under the contract. The courts

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S.S. Co., 48 F.(2d) 115 (C.C.A. 2d, 1931); Westlake, *Private International Law* (7 ed. 1925) 302, 304; Lorenzen, *Selected Articles on the Conflict of Laws* (1947) 215, 282.

37. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 393-401; Nussbaum, *Principles of Private Inter-National Law* (1943) 160-167; Rheinstein, *Book Review* (1948) 15 *U. of Chi. L. Rev.* 484-488, reviewing Falconbridge, *Essays on The Conflict of Laws* (1947); Wolff, *Private International Law* (1944) 420.

38. Cook, *loc. cit. supra* note 4, at 418.

39. Rabel, *op. cit. supra* note 4, at 405.

and the legislature of California are without doubt more experienced in dealing with the problems apt to arise out of transactions involving the citrus industry, and the parties could thus avoid many of the pitfalls possibly contained in the laws of a state relatively inexperienced in coping with the problems peculiar to this industry.

But there is at least one reason why the parties' freedom to choose should not be completely unlimited. It is the danger that the stipulation would become a device for overreaching purposes, used by those in an economically stronger position to take advantage of those in an inferior bargaining position. With the economic preponderance of big enterprises this could become a real danger, if the right were permitted to exist unchecked. If the parties are allowed to refer all circus contracts to Florida law for decision, it is possible that the circus owners would, in time, become so strong that they would be able to influence the passage of laws in Florida which would be decidedly favorable to them, and then to insist that all contracts contain an agreement that Florida law shall govern the parties' rights under the contract. These dangers, though real, do not require that the whole principle of freedom of choice be cast aside. The law has means of clamping down on abuses. The courts are not required to recognize a stipulation if they feel that to do so would work undue hardship or would be obviously unfair; and in every legal system there are already in existence provisions for abrogating agreements obtained under duress, coercion or compulsion. The desire to obviate the danger of abuses does not, and should not, require that the whole idea be discarded.

The problem has not yet arisen in Louisiana,<sup>40</sup> but when it does it is suggested that it be handled in the following way: that the court uphold the stipulation as valid, without regard to the existence of any substantial connection between the contract and the law stipulated for, unless facts are shown or indicated which strongly suggest the possibility of overreaching, or that the stipulation was purely frivolous. If this procedure is followed when the court is presented with the problem, the dangers which are al-

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40. But see *Hall v. Keller*, 80 F. Supp. 763, 771 (1948), modified by 81 F. Supp. 835 (W.D. La. 1948), wherein the court said, ". . . the governing law of a contract is that which the parties expressly or presumably intended, provided such place has a reasonable relation to the transaction, and provided the parties in selecting the governing law acted in good faith." (Italics supplied.)

ways present when dogmatic principles are blindly adhered to will be avoided.

J. DOUGLAS NESOM\*

## LAW DETERMINING THE STATUS OF A POSSESSOR OF NEGOTIABLE PAPER

This paper will deal with the choice of law problems relative to the status of one who is in possession of negotiable paper and who asserts claims against either the primary obligor (maker of a promissory note or acceptor of a bill of exchange) or secondary obligors (drawer of a bill of exchange and endorsers). Problems of the law applicable to the question of negotiability and the nature of the defenses raised will be treated incidentally.

Every transfer of a negotiable instrument has two aspects: First, the endorser transfers title to the instrument and the claims embodied therein; and, second, he guarantees payment by the primary obligor.

The making of the instrument and each transfer constitute separate transactions, each of which may be subject to the laws of different jurisdictions. The applicable law ordinarily is that of the place of payment. For makers and acceptors, the place of payment is that made apparent in the instrument.<sup>1</sup> Drawers<sup>2</sup> and endorsers<sup>3</sup> are usually deemed to have agreed to pay at their respective places of business.

Though each obligor's liability is determined by the law of his contract, it does not necessarily follow that the same law

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1. *Mussou v. Lake*, 45 U.S. 262, 11 L.Ed. 967 (1846); *Phipps v. Harding*, 70 Fed. 468, 30 L.R.A. 513 (C.C.A. 7th, 1895); *Rose v. Park Bank*, 20 Ind. 94, 83 Am. Dec. 306 (1863); *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79 (1860); *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504 (1850); *Walling v. Cushman*, 238 Mass. 62, 130 N.E. 175 (1921); *Hinkly v. Frienk*, 86 N.J.L. 281, 90 Atl. 1108 (1914); *Brownell v. Freese*, 35 N.J.L. 285, 10 Am. Rep. 239 (1871); *Security Trust and Sav. Bank v. Gleichmann*, 50 Okla. 441; 150 Pac. 908 (1915); *Nichols v. Porter*, 2 W. Va. 13, 94 Am. Dec. 501 (1867).

2. *Mussou v. Lake*, 45 U.S. 262, 11 L.Ed. 967 (1846); *Crawford v. Branch Bank*, 6 Ala. 12, 41 Am. Dec. 33 (1844); *Briggs v. Latham*, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546 (1887); *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79 (1860); *Kuenzi v. Elvers*, 14 La. Ann. 391, 74 Am. Dec. 434 (1859); *Brownell v. Freese*, 35 N.J.L. 285, 10 Am. Rep. 239 (1871); *Amsinck v. Rogers*, 189 N.Y. 252, 82 N.E. 134 (1907).

3. *Brabston v. Gibson*, 50 U.S. 263, 13 L.Ed. 131 (1850); *Nathan v. Louisiana*, 49 U.S. 73, 12 L.Ed. 992 (1850); *Mussou v. Lake*, 45 U.S. 262, 11 L.Ed. 967 (1846); *Huse v. Hamblin*, 29 Iowa 501, 4 Am. Rep. 244 (1870); *Mackintosh v. Gibbs*, 81 N.J.L. 577, 80 Atl. 554 (1911); *Aymor v. Sheldon*, 12 Wend. (N.Y.) 439, 27 Am. Dec. 137 (1834); *Nichols v. Porter*, 2 W.Va. 13, 94 Am. Dec. 501 (1867).