"Universality" in the Conflict of Laws of Contracts

Charles W. Taintor II
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INTRODUCTION

As international commerce became more important in world economics, and as intercourse between nations became more common with the development of transportation, there appeared increasing necessity of working out some method of determining the legal results arising from a series of acts connected with various states. This is the source of the quite recent branch of the law known as the Conflict of Laws or Private International Law.

The integration of territory has, by increase in the size of political units, tended to decrease the number of different systems of law upon the face of the Earth. Thus, persons of presumably harmonious ideas and ideals tend to be governed by a system of law which is reasonably satisfactory to them. This integration of

* This article is inspired by, and takes the form of comments upon, Jean-P. Barbey, Le Conflit des Lois en matière de Contrats dans le Droit des États-Unis d'Amérique et le Droit Anglais comparés au Droit Français (Paris 1938).

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1. Livermore, Dissertations on the Questions which Arise from the Contrariety of the Positive Laws of Different States and Nations (1828) 5, says that the first comprehensive treatment appears in Dumoulin's works between 1523 and 1550 A. D. (Dumoulin, In Codicen Justiniani, I, 1, Conclusiones de Statutis Aut Consuetudinibus Locallibus).

For Americans, due mainly to Story, Conflict of Laws begins with Huber, whose De Conflictu Legum (1707) Story cites with great frequency. To the same effect see Livermore, op. cit. supra, at 12.

Kent, Commentaries *455, says: "These topics were almost unknown in the English courts, prior to the time of Lord Harwicke and Lord Mansfield," and that when the subject of the Conflict of Laws was there introduced, Huber's work was the only one which attracted attention.

It appears that the first periodicals devoted entirely or to a considerable degree to the Conflict of Laws were: (France) Clunet, Journal de Droit International Privilé, first published in 1874; (Germany) Niesmeyer, Zeitschrift für internationales privatrecht, first published in 1890; (Argentina) Bulletin Argentin de Droit International Privé, published from 1903 to 1910; (United States) Komar, Journal of Conational Law, published from 1920 to 1922.


2. Wigmore, Panorama of the World's Legal Systems (1936) 844, says that in the 13th century there were "literally a thousand . . . local lawbooks" in England and on the continent of Europe.
territory has not suppressed the conflict of laws. It has tended, rather, to emphasize the existence of differences between the various systems and to make more and more complicated the functions of jurists, courts and practicing lawyers who meet cases containing foreign elements in ever greater numbers.

Because of the comparative ease of modern travel and because of growing international business relations, rights based upon groups of facts connected with two or more jurisdictions are constantly being asserted. As a consequence, uncertainties of result arise, not only from differences in the dispositive laws\(^8\) of the various nations and states, but also from differences in the indicative laws\(^4\) of the various jurisdictions. For instance, suppose that an infant and an adult purport to make a contract; and that the infant, a domiciliary of state\(^5\) X, writes to the adult in state Y an offer to deliver a chattel in state Z, and the adult accepts in writing from Y. It may be, under the dispositive laws of Y, that the infant will be bound to perform his promise; that, under those of Z he will be bound to return anything he has received or pay its value; and not bound at all under those of X. Here are differences in the dispositive laws. For, if the law of X applies, the adult will be totally without remedy. If that of Z applies he will not lose; while if that of Y applies he will get the advantage promised to him. This is bad enough but, at least at present, un-

3. By "dispositive" laws it is intended to describe the rules of law which determine the nature of rights arising from fact-groups, i.e., which determine the terms of the judgment rendered in a particular case. These rules are variously referred to by others as rules of "municipal," "domestic" or "internal" law.

It is with some trepidation that this term "dispositive" is used, for the tenacity with which the profession clings to well known terms, even if they are not descriptive, is recognized as a perhaps valid deterrent to invention. In a situation, however, in which there is no agreement as to the proper term it would appear that a descriptive term, though new, may have some chance of life.

4. By "indicative" laws it is intended to describe the rules of the law which indicate the identity of the legal system whose "dispositive" laws are to be applied to dispose of any fact-group containing multi-state elements. These rules are variously referred to by others as rules of "conflict of laws," "private international law" or "international private law," and by individual writers, "polarized" (Baty) and "conational" (Komar) law. While the disagreement as to proper terminology is not so general nor so marked as in the case of "dispositive" laws, there exists a real conflict as between the first two above mentioned. The term here used seems to be truly descriptive and perhaps valuable in that it avoids actual misdescription. See also Restatement, Conflict of Laws (1934) § 1 (2). Hereinafter this Restatement will be cited as "Restatement" simpliciter.

5. Hereinafter, the word "state" will be used to indicate a "jurisdiction" in the sense of a legal, territorial entity having laws which are supreme within its own boundaries, and the word "State" with capital "S" to indicate a State of the United States of America. See Restatement, § 2.
avoidable. The various legislators have different ideas as to the age at which a person becomes in fact competent to bind himself by contract, and those ideas may be all justified—persons of X may reach years of discretion at a later age than those of Y and Z.

While, as suggested, this sort of variation in dispositive laws is bad enough in these days of rapid and easy travel and increasing international commerce, it is not nearly so bad as the variation in the indicative laws. If the parties could be sure which system of law would be applied to their transaction they would know, in spite of the difference in dispositive laws, whether they had succeeded in making a binding contract. But that is not the case. The fortuity of the forum may make a tremendous difference.

As Griswold has cogently pointed out, it must not be forgotten that in no case, can the dispositive rules be applied until the indicative rules have been consulted and applied. A decision as to the correctly applicable dispositive law cannot be made in vacuo. This is true even in cases which contain no foreign element, although in such cases the selection of the applicable law is made unconsciously. In cases containing foreign elements the order of decision stands out more clearly, but is no different. Suppose that an English national, domiciled in Massachusetts, resident in France and physically present in Germany, writes an offer to a Swiss national, domiciled in Greece, resident and present in Spain, and that the offeree replies by mail to Germany as directed. It is conceivable that the dispositive laws of any of these places should be applicable to determine the effect of the acts, the date at which the acceptance took place, or any other question arising under the facts. The forum must, before attempting to apply any dispositive law, determine which of these possibly applicable systems of law should be consulted.

Let us consider the various possible results in our case of the infant. It may be that the indicative law of X, if the adult sues there, will prescribe the application of the dispositive law of the place where the contract was to be performed in order to determine the capacity of the infant to bind himself. The indicative law of Y may prescribe the application of the dispositive law of the domicil of the obligor; the indicative law of Z, the application of the dispositive law of the place where the contract was made; and the indicative law of state W, the application of the disposi-

tive law of the place intended by the parties, a place to be dis-
covered by search for the “subjective” intention of the parties,
or for their “objective” intention.

We have spoken above of the fortuity of the forum as making
a great difference in the results in particular cases. This fortuity
arises from the rules of jurisdiction. It may well be that the adult
plaintiff can, in our case, obtain effective jurisdiction for a judg-
ment in personam against the infant defendant only in the state
of his domicil, X. Or it may be that the plaintiff’s only worth
while chance of obtaining reparation is by way of action quasi
in rem in Y, Z, or W. So far as the matter in dispute between
plaintiff and defendant is concerned, the presence of the defend-
ant in X, or the presence of some or all of his property in Y, Z,
or W is entirely fortuitous. There is no connection between a
promise to perform a certain act and any state in which effective
jurisdiction may be obtained. The defendant may be a wanderer,
and his connection with his domicil arise from a legal conclusion
rather than from factual residence therein. It may be that, at the
time of the transaction, the defendant had no property situated
in Y or Z, but that he has since acquired property in either or
both.

It is clear that if plaintiff sues in state X he will not lose—
that is to say, he will be entitled to the return of anything which
he gave to the defendant, or to recover the value thereof. This is
not because X holds its infant domiciliaries to such an obligation.
For, by hypothesis, the dispositive law of X frees infants from
all contractual obligations. It is, rather, because the indicative
law of X prescribes the application of the dispositive law of Z.
If suit is brought in state Y, on the other hand, the infant defend-
ant will not be bound at all, because the indicative laws of Y
refer to the dispositive laws of X. Still other results, differing be-
cause of different indicative laws, not because of different atti-
ditudes toward the capacity of infants to bind themselves in
contract, may occur if suit is brought in Z or W.

Analogous variances in results arise with respect to other as-
pects of contractual questions—formalities required, illegality,
substantial validity, interpretation, construction, and so forth—
and with respect to various questions in all the other branches of
the substantive and adjective law. In all these possible questions
there exists, in the actual decision of cases containing multi-state
features, this same additional variation arising from differences
in the indicative rules of the possibly fortuitous forum.
This is the problem: How can the variances in result, caused by differences in the laws of various states, be suppressed; or, if that be impossible, how can the variances be reduced to a minimum?

The obvious solution is: Suppress all differences in the dispositive laws. This would be a complete solution, as it would entail the suppression of all laws except one harmonious body of dispositive laws. But, at least today, when the various peoples of the world retain such diverse characteristics, this is impossible. There exist many basic differences between the inhabitants of one part of the Earth and those of other parts.

A second solution which will come to mind is: Suppress all differences in the indicative laws. This suggested solution will not suppress all variances in result so long as persons who, by way of nationality, domicil, residence or physical presence, are attached to one state continue to marry, to make contracts with, to convey property to, to make bequests or devises to, or to commit offenses against persons who are attached to other states; or to convey, by deed or will, property situated in other states; or to act in such manner as to cause results in other states. It will, however, suppress differences arising from the fortuitous choice of a forum in particular cases. If all indicative laws point to the same type-group of facts, then, in any particular case, an identical result should be reached in no matter what forum the dispute comes up for adjudication. It seems impossible, today, that variations in result arising from the identity of the forum, can be completely suppressed, because some states feel strongly the necessity of protecting their nationals or domiciliaries, while others feel equally strongly the necessity of protecting the security of transactions or the integrity of their own rules respecting property situated within their boundaries.

There seems, however, to be a modernly increasing tendency toward harmony among the various systems of indicative rules.

7. This cautious form of statement—"an identical result should be reached"—is used because of the obvious danger that the courts of state X are not so well instructed in the laws of state Y as are the courts of Y. This obvious and unavoidable danger is not a valid reason for discarding this solution. The only practicable method of obviating variations arising from ignorance of foreign laws is for the indicative laws to point to the dispositive laws of the forum in all cases and situations. This solution must be discarded for two reasons. First, it is improper for the forum to apply to a fact-group a system of dispositive laws which has no connection therewith except that litigation is being carried on in the state which has that system, and second, if each form applies only its dispositive laws the variations arising from differences in laws will be intensified rather than diminished.
Inter-State and inter-national boundary lines are becoming less and less barriers to intercourse. English manufacturers must have foreign cotton; Americans must have foreign tea; the women of most nations must have Japanese silk; most nations and the private industries of most nations must borrow from other nations or the nationals of other nations; people will marry people of other nations; persons of all nations die leaving property in other nations or successors attached to other nations. Neither in our personal lives nor in our business activities are we confined even to nearby nations. Naturally we demand certainty with respect to the legal results of our activities which have multi-state contacts. The modern tendency toward harmony in indicative rules is the answer of the courts to this demand, and the strengthening of this tendency is desirable.

No amount of bickering over the unwisdom of foreign dispositive laws can have a prompt effect in the direction of harmony of results. The provisions of these laws are too closely connected with the varying mores of the various nations. But, the indicative laws are not so closely connected with the mores of the nations. A Frenchman who never leaves his country demands the protection of his own dispositive laws in transactions with other Frenchmen in France, but if he leaves his country, if he acquires property in a foreign country, or if he attempts a transaction with a foreigner he voluntarily subjects himself to the possible application of some system of laws other than his own. The identity of that other system becomes a matter of comparative indifference. The indifference of the final result of the application of an indicative rule is, of course, even clearer if it be postulated that in a particular case the parties' sole connection with France is that a French court is the forum. For this reason it seems that there is a real chance for a fairly prompt attainment of the suppression of variations in the results in particular cases by suppression of variations in indicative rules.

In order to discover the extent of the process of harmonization in indicative rules, and in order to give impetus to the widening of the field in which that process is operating, a detailed study of comparative indicative law is essential.

In the field of study of the indicative law of the various states, the comparative modernity of the subject has been offset by a mass of recent writing. Beale lists four hundred twenty-nine
writers of various nationalities, many of whom have written a number of works on the subject. A search in Beale and in the catalogue of the library of the Harvard Law School has disclosed the names of only twenty-four writers upon comparative indicative law. Of these twenty-four writers, thirteen have emitted general observations or projected "uniform" codes, leaving only eleven who have examined branches of the indicative law in any detail, and of those few have made critical comparative analyses. It seems that a fair knowledge of the rules and of the principles underlying the rules of indicative laws, and critical analyses thereof may have been made available to the profession in many states, but that comparative analyses are as yet so rare that any which appears is worthy of quite detailed consideration—a consideration much more detailed than would be possible within the spatial limitations of a "book review."

A book which sets out the indicative laws of different states, compares these rules and criticizes them has been very recently published. It is Le Conflit des Lois en matière de Contrats dans le Droit des États-Unis d'Amérique et le Droit Anglais comparés au Droit Français by Jean-P. Barbey. While it is true that, as indicated by the title of his work, Barbey treats only of contracts he does so in exhaustive manner and is not satisfied with exposition and criticism but proceeds to suggestions as to the trend of the laws and indications of changes which could be made without offense to the genius of the local system. In this book, the author purports to have attempted to translate the thought of the common law into language understandable to French lawyers, and so far as a common lawyer can tell has well succeeded. This article is written, at least in part, for the purpose of translating into common law thought and the English language the ideas of a

8. 1 Beale, op. cit. supra note 1, at xxii-xxvii, §§ 6-12, lists 64 Anglo-American and English writers, 104 French, Swiss and Belgian, 80 German, 14 Dutch, 49 Italian, 84 Spanish and Portuguese, and 34 of other nationalities.
9. Ibid.
10. Published in 1938, as one of the publications of the Comparative Law Institute of the University of Paris, by Rousseau et Cie, Paris, France. (This work will be cited hereinafter by the name of the author only.)
12. Barbey (at 28) says that his purpose is, in part, to set out the American and English laws "dans les cadres du droit français, afin d'arriver, suivant une expression fort heureuse de M. Niboyet, 'à transposer les notions juridiques étrangères en pensée et en langue française'."
13. Barbey's study at the Harvard Law School has well qualified him to make this attempt to translate the juridical thought of the common law into language understandable to French lawyers.
French juristic writer, and for the purpose of commenting upon Barbey’s conclusions with respect to the extent to which progress in the direction of harmony in the indicative laws with regard to contracts has been made in the laws of England, France and the United States, and, in part, for the purpose of commenting upon Barbey’s conclusions as to the actual indicative rules of the common law systems which he discusses.

I

THE DOCTRINE OF UNIVERSALITY IN THE CONFLICT OF LAWS

Because Barbey is a disciple of Levy-Ullmann, the great proponent of the doctrine universaliste in matters of indicative law, he is predisposed to find harmony in indicative rules and has presented a very persuasive picture of principles “universal” to the three systems of law which he discusses. No intelligible discussion of his demonstration of universality in indicative law can be made without a consideration, in outline only, of the doctrine universaliste as described by its chief proponent. Levy-Ullmann, Professor of Law in the University of Paris, has not yet published an exposition of this doctrine, but Barbey has given us, as a foreword to his work, extracts from courses given by Levy-Ullmann.14 It appears that the doctrine of “universality” expresses a tendency rather than an actuality; that it is a recognition of motion in the direction of “totality,” although even this “totality” refers only to the civilized world.

The doctrine has its historical basis15 in the classical gloss of Accursius to the first law of the Code of Justinian.16 It has its rational basis in that Accursius, in his gloss, drew from Justinian’s “Cunctos populos quos”17 a conclusion of a bond between a person and his country, and in that all writers on the subject of indicative law have pursued rational systems. It has its positive basis in that it can be demonstrated a posteriori that many principles, varying to some extent in the various systems of law but absolutely alike in their general tenor, are to be found in all or most civilized systems of law. These are especially notable: (1) the territoriality of the law of immovables, (2) the extra-territoriality of the law of the status of persons, (3) the rule locus

15. Id. at x.
17. This gloss, to the third word, “quos,” reads: “If a Bolognan is in Modena, he should not be judged by the laws of Modena, to which he is not subject.”
regit actum, (4) respect for foreign acquired rights, (5) ordre public, or public policy, (6) mobilia sequuntur personam in matters of the descent of movables and (7) l’autonomie de la volonté, or freedom of the will, in matters of contracts.

The doctrine has the following qualities to recommend it: (1) It is traditional. In France it superimposes national customs on the Code Civil, thus attaching the present to the past. (2) It is pragmatic. It tends to put an end to the problems which have been vexing jurists for a long period of time. (3) It is eclectic. It bars no solution of particular questions offered by different jurists, provided that the solution leads to universally accepted results. (4) It is liberal. Differences in the details of application in various states are surely permissible, and even considerable variations in the extent of rules can be accepted without serious detriment to universality. (5) It is peculiarly attractive. It furnishes an end toward which the jurists of the twentieth century can strive, an end harmonious with the modern tendency to international peace and to harmonious public international law.

It seems almost too clear to require statement that one of the functions, if not the function, of the indicative law is to arrive at a position where any given fact-group will receive the same treatment and conduce to the same result without differences depending upon the identity of the states within which the various individual facts are localized. Ideally it should make no difference whether a Frenchman writes from France to a German in Germany and the latter replies, or whether an American writes from New York to an Englishman in England. In each case the same contact point\(^\text{18}\) should be chosen by the indicative rules of any forum in which any case arising from such facts might come up for adjudication. There should be no differences in the laws of various states as to proper characterization,\(^\text{19}\) the acceptance or

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18. A contact point is chosen through the process of the formulation of an indicative rule which refers to the dispositive rules of the indicated system of law, e.g., in a case concerning the disposition of intestate movables, the indicative rule refers to the dispositive rules of the state in which the decedent died domiciled.

Equivalents in more or less common use which have been discarded as less apt or less vivid are “connecting factor,” “point of contact” and “elements of introduction.”

19. The word “characterization” is used to indicate the doctrine which is variously called also “qualification” or “classification,” the problem of the proper determination of the juristic nature of a claim arising from a fact-group, e.g., is a given claim one arising in the category of succession to property or in that of marital property rights, or in that of contract or that of tort; or of the determination of the content of a legal concept which indicates the identity of the properly applicable legal system, e.g., domicil or
rejection of the renvoi, or the actual content of any rule indicating the proper contact point. Thus only can we attain universality. Uniformity in characterization is today a far distant goal; as is uniformity of attitude toward the renvoi. For that reason any comparative or absolute uniformity which can be attained in directly indicative rules is of tremendous importance. Barbey believes that he has discovered a very considerable uniformity in these rules in the legal systems of England, France and United States. Let us then proceed to an examination of this discovery, remembering that our author has cast the problems in the categories of the civilian so that he investigates the three mutually exclusive categories of capacity, form and substance.

II

CAPACITY

In the matter of capacity to contract Barbey finds that the American indicative rule points to the system of dispositive law governing the substance of the contract, subject to the public policy of the domicil at the time of suit brought, limited to cases

place of contracting or of injury; or the delimitation of the applicable dispositive law, the scope, e.g., of a law governing capacity, substance or form.

The word "characterization" is borrowed from Dean Falconbridge (See [1937] 53 L.Q. Rev. 235, 239, n. 17) via A. H. Robertson (See his Harvard Law School thesis of 1939) and is here adopted because, as suggested by the latter, it contains no possibly confusing common meaning to militate against the desirability of its establishment as a word of art.

20. Since the first published writings of continental jurists on this subject, Kahn, Gesetzeskollisionen (1891) 18 Iherings Jahrbucher 5, and Bartin, Conflits des Lois, Clunet 1897, 225, to Balogh's course of lectures at the Hague in 1936 and Maury's course at the same place and date (both published in Académie de Droit International, Recueil des Cours (1936) 577, 327) there has been agreement among the jurists neither as to the extent nor the solution of the problems.

There is the same lack of harmony among the writers in the English language from Lorenzen, The Theory of Qualifications and the Conflict of Laws (1920) 20 Col. L. Rev. 247, to Cheshire, Private International Law (2 ed. 1938), Goodrich, Conflict of Laws (2 ed. 1938), and Stumberg, Conflict of Laws (1937) ignore the doctrine. Beale (Treatise, §§ 7.2, 121.1, 155.1, 209.1, 311.2) either ignores the doctrine or disposes of it summarily. See also Restatement, §§ 7, 8.

21. The battle of the renvoi counts many adherents and at least three hopelessly hostile armies. See Griswold, supra note 6.

22. The reason for the injunction to remember that Barbey has cast the problems in civilian categories is that there is room for doubt that the American common law contains a separate category of "capacity"—as will be seen later.

23. Barbey, at 41 et seq.

24. The question of the identity of this system of law will be postponed to be discussed at pp. 723-734, infra.

25. Barbey, at 48, 52.
in which the forum is also the domicil,26 and to cases in which the incapacity is a general incapacity to create legal relations.27

He finds, in the law of England, three distinct periods: first, the period prior to 1860,28 during which time the indicative rule pointed to the law of the place where the contract was made; second, the years between 1860 and 1908,29 when the law of the domicil of the obligor was indicated; third, the period from 1908 to the present,30 when there has existed a tendency to prefer the law of the place of making. He also finds an exception to the general principle in cases concerning commercial contracts, in which capacity is governed by the law of the place of making.31 All of the cases cited to establish this general principle of English law—the law of the domicil determines capacity—are cases of marriage and the existence of the principle is predicated primarily upon Brook v. Brook,32 and Mette v. Mette.33

It seems unfortunately evident that, in order to uphold the "doctrine universaliste" and to furnish a basis for a later discussed "universal" rule of capacity, Barbey has made the tail wag the dog. He himself points out that commercial contracts constitute the greatest number of all contracts, but persists in speaking of the rule in such cases as being in derogation of the general principle34 of the normal applicability of the law of the domicil to determine capacity to contract.

It appears that the fact is that the English courts determine capacity to make mercantile contracts by the "proper law" of the contract, that is, in most cases by the lex loci contractus according to Cheshire,35 or strictly by the lex loci contractus according to Barbey. The cases cited by Cheshire, Male v. Roberts36

26. Id. at 47. To the same effect see Stumberg, op. cit. supra note 20, at 216.
27. Id. at 48.
28. Id. at 58.
29. Id. at 63.
30. Id. at 69.
31. Id. at 76. To the same effect, but somewhat doubtingly, see Dicey, Conflict of Laws (4 ed. 1927) 598-602.
34. Barbey, at 76: "C'est là une dérogation extrêmement grave au principe de compétence de la loi du domicile, puisque les contrats d'affaires représentent la majorité des contrats."
and McFeetridge v. Stewarts and Lloyd can stand for either proposition as can the other case cited by Barbey. For our present purposes it is sufficient to recognize that in cases concerning mercantile contracts, which indubitably constitute the great body of contracts, some law other than the personal law of the obligor will be applied.

With respect to marriage contracts, it is clear that the law of England determines capacity by the dispositive law of the intended family domicil. If the question here in issue is capacity to contract, which is doubtful, the application of the law of the domicil should be expressed as an exception to the law of capacity to contract, simpliciter. It seems more probable that the rule which obtains in England arises from a realization that the so-called marriage contract is either not a "contract" or is a contract sui generis. In either case its sole function is to create a status in which the interest of the intended family domicil is so strong that its law is applicable to determine the effect of the attempt to create the status.

In his exposition of the law of France, Barbey points out that in that legal system the laws of capacity are laws protective of the will (l'autonomie de la volonté), having the purpose of fixing the conditions under which the will may act with legal effect and those under which an act of the will is insufficient in law to produce a legal effect. This doctrine gives rise to rules which, in order to protect those types of persons who are deemed in need of protection, ascribe either no capacity or only limited capacity to certain classes of persons, notably infants, married women and prodigals. As a result of the personal nature of the law of France, the absence of capacity or the presence of limited capacity attaches to the juristic personality of the person protected and he is nowhere capable of performing any juristic act,

39. Cheshire, op. cit. supra note 20, at 218 et seq.
40. Id. at 227.
41. Care must be taken to distinguish between the contract to marry at some future date, and the marriage contract, usually represented by some form of ceremonial observance, which takes effect, contemporaneously, to create the status of marriage.
42. Cheshire (op. cit. supra note 20, at 218 et seq.) uses the term "matri monial domicil" to indicate that state in which the persons who claim to be married will settle as a married pair.
or juristic acts other than those appropriate to his limited personality.\textsuperscript{43}

In French law, personality is attributed to an individual by his national law and it follows that capacity is created in him by the same law if at all. It seems that in the common law, on the other hand, all persons have complete capacity, subject to limitations imposed by the appropriate law. For the English courts, according to Barbey, the appropriate law is that of the domicile and for American courts the law of the state whose legal system is to be applied to govern the contract. Considering, however, the analysis above set out, do we not reach the conclusion that the actual law of England and the United States harmonizes with the common law concept of the nature of capacity, and that capacity is for us rather an element of each transaction than an element of personality, inherent in the person?

There appears to be then, in this matter of capacity, a basic disagreement\textsuperscript{44} among the three systems, which must continue to lead to diverse results and the absence of "universality" unless judicial technique, in the customary manner of courts, leads to the application of principles of law other than those determining the capacity of the propositus.

We find, as shown by Barbey, three techniques which are in

\textsuperscript{43} Thus, in so far as capacity is concerned a natural person is, for French purposes, in the same position as is a corporation in the common law, where it can have no capacity beyond that attributed to it as part of its personality by the law of the state which created it. See 2 Beale, op. cit. supra note 1, §§ 249.4, 306.3.

\textsuperscript{44} It must be recognized that the disagreement exists primarily, if not solely, in cases of commercial contracts. In the French and English systems capacity to make marriage contracts is referable to the law of the nationality or domicile which, in most cases will coincide. This is probably true of prematrimonial and matrimonial property contracts as well. It seems possible that the Court of Cassation has decided that capacity to make a marriage contract depends upon the law of the intended family domicil. Cf. Bouly de Lesdains v. Mabel Bailey, (1921) 17 Revue de Droit International Privé 240, with Dame Bolo-Soumaiville v. Dame Bolo-Muller, id., at 241. Although the talk is in terms of fraude à la loi, it is to be noted that the marriage was held valid where the parties intended to live in the foreign state, and invalid where they intended to return to live in French territory.

In the American system, Beale (op. cit. supra note 1, § 121.6) to the contrary notwithstanding, it is only in polygamous marriages that the matter is controlled by incapacity which has extra-territorial effect. All other impediments to marriage—e.g., nonage, consanguinity, remarriage after absolute divorce, and so forth—represent, not limitations upon capacity, but prohibitions, that is, creation of illegality. See 2 Beale, op. cit. supra note 1, §§ 129.4-132.8; Goodrich, op. cit. supra note 20, at 305-316, §§ 114-115; Stumberg, op. cit. supra note 20, at 285-285; Taintor, Effect of Extra-State Marriage Ceremonies (1938) 10 Miss. L.J. 105.
more or less general use: (1) the *renvoi*, (2) characterization and (3) public policy or *ordre public*. All three usually, though not necessarily lead to the application of the law of the forum which will, at least in France and England, probably be either the domicil or the nation of one of the parties, or the place of making the contract.

The *renvoi*, as Barbey says, has never been applied by an English court to a contract case, and in this country only in Michigan, in *University of Chicago v. Dater*. He points out that in England there is a paucity of cases on the subject of capacity to contract, and that it is not surprising that the *renvoi* has not appeared. When we consider the willingness of the English judges to treat a given case in the same manner as a judge of the state to which the English indicative laws refer, it would seem by no means bold to prophecy that if the English rule refers to the law of France, as the proper law of the contract, the former will dispose of the case as it believes a court of the latter would dispose of it. The failure of American courts to apply the *renvoi* may be explained in four different ways: *First*, there is, in all the States, a strong tendency to select the law of the place of making a contract as the proper law. *Second*, our courts are strongly impelled to territorialism, and the usual function of the *renvoi* is to substitute a personal law for a territorial law or vice versa. *Third*, when a court has determined the "centre of gravity" of a transaction, it is much more difficult for it to revise its opinion and accept the different determination of another court. Since the appraisal of the comparative importance of various possible factors—place of contracting, place of performance, domicil of the parties, location of the subject matter, place of negotiation, place expressly indicated by the parties—is an identical process in both courts, it is natural that the forum should prefer its own evaluation of the importance of the various contact points. *Fourth*, *renvoi* is a very difficult doctrine to handle, to say the least; and there is a real doubt as to the possibility of a logical solution, or even of any solution but a strong-arm one.

45. The French appear to use exclusively the word "qualifications." Barbey (at 265) speaks of "le jeu des qualifications."
47. 277 Mich. 658, 270 N.W. 175 (1936).
49. See 2 Beale, op. cit. supra note 1, §§ 322.1-322.37.
As our author indicates, the Dater case was a particularly appealing case, as the contract was to be performed in Michigan and the domicil of the obligor was in that State. The doctrine of the renvoi is accepted by the French Court of Cassation and several of the inferior courts as properly applicable to capacity to contract. It operates in the usual case to cause the application of the French law of capacity to purchases made of French tradesmen in France.

Characterization of a particular provision of dispositive law is resorted to by the courts in order to call into action an indicative rule of the forum which refers matters of form to the lex loci actus or matters of substance to the law of the “centre of gravity of the transaction,” thus avoiding the application of some foreign law as the law properly applicable to determine capacity, in cases in which the contract was made in the state of the forum or where the state of the forum is the “centre of gravity.” This technique is, according to Barbey, never employed in the American courts, because of the fact that capacity is here assimilated to substantial validity of the contract, and is employed on the English courts, for an analogous reason, only in marriage contract cases. In the French courts, on the other hand, “le jeu des qualifications” is frequently used to characterize a question as one of substance of contract or matter of form, rather than capacity, in order to bring into play the indicative rule which will point to French dispositive rules.

Public policy or ordre public, under the guise of the “jurisprudence of national interests,” forbids that a party to a contract allege a personal incapacity which is foreign to the law of the forum, or to the properly applicable law. In the United States this technique has exerted a strong influence towards the adoption of the indicative rule which refers capacity to the law governing the contract, and in England towards the application of the law of the place where the contract was made. In France, on the other hand, this technique is used primarily to protect French tradesmen in cases of purchases made in France when the indicative national law of the purchaser does not refer the

51. Barbey, at 252.
52. Id. at 254-257.
53. Id. at 265.
54. Id. at 266. A horrible example is Ogden v. Ogden, [1908] P. 46.
55. Barbey, at 267.
56. Id. at 268. See also 2 Beale, op. cit. supra note 1, § 120.12. For Beale, of course, this law is, as a matter of juridical necessity, the law of the place where the contract was made.
determination of capacity to French law, and so deprives France of the opportunity of accepting the renvoi. While it is true that this technique is available, according to the famous Lizardi case, only if the French party has acted "sans légéreté, sans imprudence et avec bonne foi," it appears that imprudence and bad faith will be found only if the party is evidently foreign, and of tender years or a married woman. This conclusion is drawn from Barbey's remarks on the subject of the arguments given in the cases to the effect that the doctrine rests upon two considerations: first, that Frenchmen cannot be expected to know the capacity of a foreigner; and second, that the foreign purchaser has derived benefits from the purchases he has made.

The French use a fourth doctrine, la théorie du mandat domestique, which we can recognize as practically equivalent to the common law quasi-contractual liability for the purchase of necessities by a wife. The application of this doctrine is territorial, and it therefore applies to foreigners as well as to French persons.

The situation in the three countries, then, according to Barbey, is as follows: In the United States capacity is to be determined by the dispositive rules of the law governing the contract, with a tendency towards the identification of that law with the law of the place of making the contract. In England the law of the domicil of the obligor determines his capacity with an exception in cases of mercantile contracts, where the law of the place of making prevails. In France, capacity is to be governed by the dispositive rules of the nationality of the obligor, except that there is a strong tendency to apply French dispositive law to contracts made in France.

We find, then, no universality in the indicative laws relating to capacity, as they are analyzed by Barbey. Let us, however, look at actuality. In both of the great common law systems the

57. Req. 16 janv. 1861, Dalloz. 1861.1.193.
58. Barbey, at 271. It is especially interesting to note the application of this technique in the recent case of Pietraru v. Soc. Weyl-Sauerbach et Cie., Paris, 22 juillet 1933, (1935) 30 Revue Critique de Droit International 424. In this case it appeared that defendant knew that plaintiff was Roumanian and that she was married. Nevertheless, the court refused to protect her by the application of Roumanian incapacity. It is also noteworthy that she was incapable under the French dispositive rule, but was still held to capacity. Niboyet, in his note to the above-mentioned case (supra, at 430-432) suggests that this case represents a tendency in the direction of the determination of capacity by the lex loci contractus. Sed quaere: considering her incapacity under French law of that place.
indicative laws in the matter of capacity point to the system of law applicable to the substance of the contract, while in France the rule is as above stated. We still find no universality, although we do find a different alignment with the United States and England opposed to France instead of the first opposed to the other two.

The desirability of uniformity naturally leads to a consideration of possible remedies for the diversity. Barbey says that the adoption of the American doctrine is impossible in France since it conflicts too violently with the French theory of the personality of law; that the English doctrine is the best of the three, but that the exception in relation to mercantile contracts will not, for much the same reason, be acceptable to the French. The English rule is the best because it leaves to the personal law of the propositus that type of contract, marriage contracts, which touches most closely the family; and to the local law that type of contract which most affects third persons.

For remedy Barbey suggests that French law should make two simple and useful changes, neither of which entails any sacrifice of principle nor does violence to basic French conceptions. Of these the first is a change from the national to the domiciliary law as the personal law. He takes notice of the fact that French juristic writers are in disagreement on this subject. The arguments of those who sustain the choice of the national law as the personal law are: that nationality is more stable than domicil; that it is often more easily determined; and that it is better adapted to the needs, mentality and temperament of those it governs. He denies all these propositions for the following reasons, which seem well founded: First, domicil is hardly less stable than nationality, particularly if the doctrine of the domicil of origin is adopted. Second, the determination of nationality may be complicated by multiple nationality or by the absence of

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60. We have also a special rule in cases of marriage contracts and contracts relating to matrimonial property, a rule which is probably not one of capacity but of public policy.

61. "Son introduction brutale dans le cadre d'un pays uni comme la France ne serait pas sans comporter de sérieux inconvénients." Barbey, at 212.

62. Id. at 217.


64. He mentions M. A. Audinet and Crémieu as proponents of the national law, and Lerebours-Pigeonnière, E. Audinet, Niboyet and Battifol on the side of the domiciliary law.
nationality. Third, a person soon adapts himself to the customs of his habitual residence and is often more at home with them than with the customs of his nation. Fourth, now that immigration is so common, French law will be applicable to an increasing number of persons who establish domicils in France without change of nationality. He hopes, proposes and trusts that France will abandon the system of national personal law which, as said by Lerebours-Pigeonnière, is based upon “more sentiment than sense,” to return to the traditional French system of domiciliary personal law which is resorted to even now in cases in which the nationality of the person is unknown. He suggests, further, the adoption of the doctrine of the domicil of origin in France, as that will facilitate the reintroduction of the domiciliary personal law by giving a common ground to partisans of both the national and domiciliary systems. He would add to this remedy a change in the personal law of French persons, namely, so change the law that a person whose personal law is French shall be incapable of asserting a French incapacity in cases where the contract was not made in France. The result of these reforms would be to effect virtual harmony between the English and the French systems, leaving the American system still different.

Let us examine, however, the situation in actuality if the proposed reforms are made. The indicative laws of England and the United States will be unchanged. That is, in both systems the determination of the capacity of a party to a commercial contract will be referred to the law of that place which is found, after consideration of all the contact points which the transaction may have with various states, to be the centre of gravity of the transaction, while in the case of marriage contracts the matter will be controlled by the public policy of the intended family domicil. The French law will refer capacity to the domicil of the obligor in both commercial and marriage contracts but will not allow the assertion of domiciliary incapacity which differs from that of the lex loci contractus. Since, as shown by Beale and Cheshire, the law governing the contract will probably be the law of the place where the contract is made in most cases in either common law system, it appears that the “universality” of the indicative rules will be even more complete than Barbey has demonstrated.

65. This is not a “bull,” because “universal” means “tending to totality” not “total.”
As the indicative laws now are, we can add to Levy-Ullmann's seven "universal" principles two more: First, extra-territoriality of the law of the intended family domicil in marriage contracts; second, competence, in matters of capacity, of the law of the place of making a contract when that is also the forum. These two principles support the preponderant interests of the state in which the new family, if any, will settle and assert rights arising from their status as married persons, and that of all states in free and certain international commerce.

III

FORM OF CONTRACT

With respect to matters of form, Barbey finds\(^66\) that the American indicative rules refer to the dispositive rules of the law governing the contract or, alternatively the law of the place where the contract was made. He draws this conclusion from *Scudder v. Union National Bank of Chicago*,\(^67\) and *Hall v. Cordell*,\(^68\) of which the first determined the formal validity of a contract by the law of the place of making and the latter by the law of the place of performance. For Barbey these two cases do not represent,\(^69\) as they do for Beale,\(^70\) confusion of thought upon the subject, but are completely harmonious, and are to be explained thus: The first represents the application of the rule *locus regit actum* and the second represents the facultative application of some other law which is determined to be the proper law to govern the contract.\(^71\) This rule tends to harmonize the American, English and French laws. In England there is to be observed a transition from the applicability of the *lex loci contractus* as an imperative legal principle, to the applicability of that law or of the proper law of the contract as a legal principle tending to

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66. Barbey, at 90, 91.
67. 91 U.S. 406, 23 L.Ed. 245 (1875).
68. 142 U.S. 116, 12 S.Ct. 154, 35 L.Ed. 956 (1891).
69. Barbey, at 91.
70. 2 Beale, op. cit. supra note 1, § 332.1.
71. Approximately to this effect are 2 Beale, op. cit. supra note 1, §§ 334.2, 336.1; Goodrich, op. cit. supra note 20, at 270, 271, § 106; Stumberg, op. cit. supra note 20, at 216, especially note 65. Marriage contracts are exceptional, as the forms of the *lex loci celebrationis* must always be employed. 2 Beale, op. cit. supra note 1, §§ 121.4, 121.5; Goodrich, op. cit. supra note 20, at 302, 303, § 113; Stumberg, op. cit. supra note 20, at 257. The Restatement (§§ 121, 334-346) states an invariable application of the rules of the *lex loci contractus* to all types of contracts.
utility. The French law is found to reach the same results as the English and American laws, although it starts from a different doctrine. The normally applicable law is the national law of the parties and the maxim *locus regit actum* is applied as a substitute in aid of the freedom of the will. The parties are thus given an option to have applied that one of the two laws which will give validity to their acts. Barbey suggests, further, that if this theory be valid, the proper doctrine is that proposed by Lainé, namely, that a contract is formally valid if valid by the law of any state with which the transaction has a reasonable contact: the forum, the nation, the domicil, the place of acting, the situs of the subject matter (and, it is to be supposed, the place of performance).

Barbey properly criticizes the American and English courts for their tendency to expand the scope of the characterization "procedure," finding examples in cases which hold that the Statute of Frauds is procedural. His criticism is upon two grounds: First, the identity of the forum is essentially accidental and the forum has, qua forum, no real connection with the contract. Second, this doctrine leads to many situations in which there is a conflict of characterizations. It will be recognized that the forum may characterize its statute as substantive; that is, satisfaction of the requirement of a writing may be a condition precedent to the formation of a contract governed by the law of the forum as the law governing the substantial validity of the contract. Or it may characterize its statute as procedural, in which case a writing which satisfies the statute is a condition precedent to proof of the contract in court. The same difference in characterization may exist in the state whose laws are to govern the validity of the contract. Different courts construing

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73. The English law contains the same exception with respect to marriage contracts. Cheshire, id., at 322, 499.

74. It seems unrealistic to describe this as the "option" theory, since the courts will apply the law which will validate the contract, selecting it, if necessary, contrary to the subjective will of the parties in aid of the principle, *ut res magis valeat quam pereat*.

75. Barbey, at 224, 225.

76. "L'une des lois ayant sur le contrat une légitime influence." Id., at 225.

77. Id. at 96-99, 107-109.


Let us suppose a contract which is to be governed as to substantial validity by the dispositive laws of state X and which is sued upon in a court of state Y. If the statute of Y is characterized as going to substance and that of X as going to procedure, no statute need be satisfied in order that plaintiff may recover. If both statutes are substantive, only that of X need be satisfied; if both are procedural, only that of Y. If the statute of X is substantive and that of Y procedural, both statutes must be satisfied as the contract is not valid, qua contract, unless X is satisfied, and it cannot be shown in evidence unless Y is satisfied. Such a fruitful source of encouragement of the search for a favorable court is surely undesirable.

The situation in the three legal systems is as follows: In the United States the confusion is hopeless. England is committed to the doctrine that the Statute of Frauds is procedural. In France, not only is the requirement of a writing considered a condition precedent to the formation of a contract, but the requirements of proof are considered substantive, as distinguished from the manner of proof which is procedural.


Some States make a distinction, following that made in Leroux v. Brown, 12 C. B. 801, 188 Eng. Rep. 1119 (1852), according to whether the statute is in the form of section 4 of the "Act for the Prevention of Frauds and Perjuries" (29 Charles II), "no action shall be brought," or in that of section 17, "no contract shall be allowed to be good," holding, under the first type, that the statute is procedural, and under the second that it is substantive. See Klemman and Co. v. Collins, 9 Bush 460 (Ky. 1872); Thrd Nat. Bk. v. Steel, 129 Mich. 454, 88 N.W. 1050, 65 L.R.A. 119 (1902). This distinction has been much criticized. See especially per Willes, J., in Williams v. Wheeler, 8 C.B. (N.S.) 269, 141 Eng. Rep. 1181 (1860), and Gibson v. Holland, L.R. 1 P.C. 1 (1865). Other States disregard the distinction and hold that a statute in the form of section 4 is substantive. Lams v. Smith, 36 Del. 477, 175 Atl. 651 (1935). See also Lorenzen, The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws (1911) 20 Yale L.J. 427, 439.

81. This was the result in Marie v. Garrison, 13 Abb. N. C. 210 (N. Y. 1883), in which the court characterized its statute as substantive because it provided that an oral contract should be "void," and the statute of the other State as procedural, since it was in terms of "no actions shall be brought."

82. Another example is to be found in the characterization of the parol evidence rule which has been held to be substantive, in Dunn v. Welsh, 62 Ga. 241 (1879); Baxter Nat. Bk. v. Talbot, 154 Mass. 213, 28 N.E. 163, 13 L.R.A. 52 (1891); and procedural, in Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29 (1869).

83. Cheshire, op. cit. supra note 20, at 636.

84. Barbey, at 228-229. As examples of requirements of proof and, therefore, matters of substance, Lerebours-Pigeonnier (Précis de Droit International Privé (1928) § 318) gives burden of proof and requirement of a writing.
What is the solution? When we consider the content of the "universal" indicative rules: matters of procedure are referred to the lex fori; matters of substance of contract are referred to the law governing the contract—it becomes apparent that what is necessary is a "universal" characterization of the juridical nature of the requirement, represented by the Statute of Frauds, of a writing in the cases of certain classes of contracts.

An obvious possibility is to characterize this question as pertaining solely to procedure. This is the English solution. It seems undesirable for several reasons. From a doctrinal point of view, the requirement of a writing appears to represent the prescription of a means of assuring a "certain and decisive expression of the consent" of the party; or from the agreement there was created, by the law governing the contract, a right which is denied if the forum will not give a remedy, and this is "not consonant with the nature of Private International Law." From the point of view of social desirability, it seems improper to select a characterization which will tend to impel plaintiffs to search out a favorable forum, which search, considering the possibilities of manifold jurisdiction in personam or quasi in rem, might well prove profitable, particularly in these days of widespread multi-state corporate activity and ownership of property. It seems improper, also, to choose a rule which will make the selection of the forum, even if that selection be forced upon the plaintiff by reason of a restricted field of effective jurisdiction, determinative of the result since, as suggested above, the relation to the contract of the forum, qua forum, is accidental.

A second obvious possibility is the adoption of the "universal" characterization of this requirement as pertaining solely to the substance of the contract. There are several advantages in this possible solution. (1) It tends to harmonize with the French solution. (2) It avoids encouragement to the plaintiff to seek a

Pillet (2 Traité Pratique de Droit International Privé (1924) 500-502, n° 647) speaks of the requirement of testimony under oath as an example of mode of proof.

85. Barbey, at 229.
86. Cheshire, op. cit. supra note 20, at 636.
87. It was held that the French law does not apply to contracts not made in France. Benton v. Horeau, Cass., 24 août 1880, Sirey, 1880.1.413, Dalloz, 1880.1.447, where the court construed Art. 1341, French Civil Code: "Il doit être passé acte devant notaires ou sous signatures privées de toutes choses excédant la somme ou valeur de cinq cents francs . . . ."

The statement that this characterization will tend to harmonize with the French solution is made because of the tendency of the common law courts to find that the "centre of gravity" or the "proper law" of a contract is to be found at the place of contracting.
favorable forum, for that will no longer be necessary in order to
enforce an oral contract which is valid by the law governing the
substance of the contract. (3) It will make it impossible for a de-
fendant to avoid liability by moving to a state in which there is
a statute which will prevent enforcement of his liability, nor will
the residence or domicil of one party, which is by definition im-
material in the case of a mercantile contract to be governed by
some other law, enable him to escape. (4) It will obviate ano-
malous results arising from the accidental nature of the identity
of the forum.

There are certain disadvantages in this suggested character-
ization. If the Statute of Frauds of the forum is cast in terms of
"no action shall be brought," the apparent disregard of these
terms may make it appear to courts which are imbued with ter-
ritorial pride that the admitted supremacy of their own law with-
in their own boundaries is infringed upon by the intrusion of a
variant foreign law. Such a court may object that the statute
prescribes a rule of evidence. This objection may be repelled by
the following considerations which are valid, no matter in what
form the statute is cast: 88 (1) A memorandum made after the suit
is begun will not satisfy the statute. (2) The defendant may admit
the making of an oral contract but rely upon the statute. (3) A
parol agreement within the statute may be shown as a defense,
or for collateral purposes. (4) Contracts made prior to the enact-
ment of the statute are not affected. (5) Parol evidence of a lost
or destroyed memorandum is sufficient. It cannot be maintained
in the face of these rules that the statute prescribes merely a rule
of evidence.

Objection may arise also from the form of statement used by
Williston—the rule of the statute is a rule of "remedial proce-
dure." 89 This objection may be answered by distinguishing be-
tween the remedy and the procedure, for the categories between
which we must distinguish—in order to formulate indicative rules
—are "substance and procedure," not "substance and remedy."
For this purpose we characterize as substantive, the legal effect
of operative facts upon which legal relations are predicated, and

88. With respect to Nos. 1-5, inc., see Williston, A Treatise on the Law
of Contracts (rev. ed. 1936) 1517, 1529, §§ 527, 530; and, with respect to Nos.
1-4, inc., Lorenzen, The Statute of Frauds and the Conflict of Laws (1923)
32 Yale L. J. 311, 324 et seq. See also Loring, The Effect of the Seventeenth
Section of the English Statute of Frauds (1875) 9 Am. L. Rev. 434; Restate-
ment, Contracts, § 215.

89. Williston, op. cit. supra note 88, at 1521, § 527. Cf. von Bar, Private
International Law (Gillespie's trans. 2 ed. 1892) § 121.
as procedural, the method of showing to the court that those facts exist. 90 It appears that the remedy is part of the cause of action. That is to say, if the law governing the substantive rights of the parties provides no remedy the law of procedure of the forum cannot be invoked to provide a remedy. For instance, if the dispositive law of the place where a tort is committed provides no remedy for a wife against her husband, suit cannot succeed in a state in which actions between the spouses are permitted. 91 On the other hand, if the forum provides no procedure by which the injured person can vindicate his rights, no suit can be brought at the forum even though by the law governing substantive rights the plaintiff has been wronged. 92 This is true even though the type of right invaded is vindicable at the forum, if the remedy is one which the forum has no machinery to enforce. 93 This distinction makes it necessary to determine the procedural or remedial nature of the Statute of Frauds in the sense used when we discuss the formulation of the rule of indicative law. It appears that, in this sense the statute is remedial, rather than procedural, for the following reasons: (1) A contract which is within the statute founds a suit for specific performance if signed by the defendant only, even under the older theory which required mutuality for access to a court of Equity. 94 (2) If a conveyance is made under a verbal contract it is not vulnerable to attack by the party entitled under an intermediate written contract. 95 (3) A conveyance made less than four months before bankruptcy under an oral contract made more than four

90. Stumberg, op. cit. supra note 20, at 128. Cf. Goodrich, op. cit. supra note 20, at 188, § 77, who distinguishes between "a 'secondary right,' a substitute for the first right . . ., by which the injured party is given a claim against him who hurt him," and "a 'remedial right'" created to secure "the enforcement of the secondary right." See also Pomeroy, Remedies and Remedial Rights (2 ed. 1883) § 2. Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L. J. 333, 349, points out that "remedial" expresses substance when used in the sense in which Goodrich uses "secondary."


93. An American court has no machinery to enforce a remedy given by the Mexican law for a wrong committed in that country, when that remedy consists in the award of installment payments calculated upon the probable period of survival of the decedent and the needs of the decedent's dependants. Slater v. Mexican Nat. Ry. Co., 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1903).

94. Hatton v. Grey, 2 Cas. Ch. 164, 22 Eng. Rep. 895 (1864). An attempt to analyze this situation as representative of the supplying of the memorandum by the bill seems to require self elevation by the bootstraps, and it appears, rather, that the rule rests upon an obligation of the plaintiff antecedent to the suit. See also Pomeroy, op. cit. supra note 90, § 170.

months before is not a fraudulent preference. It thus appears that there exists an obligation in cases of contracts within the Statute of Frauds, but that the obligation is imperfect as no remedy is provided against the obligor. The obligation is moral rather than legal and, as has been shown, if no legal obligation is created by the law of the state whose dispositive law is applicable to substance there exists no right upon which the procedure of the forum can operate.

A third possibility is to characterize the statute as both substantive and procedural. This characterization can be arrived at by examination of the purpose of the statute—"to prevent frauds and perjuryes"—upon the ground that frauds are prevented by holding it substantive, and perjury by holding it procedural. Another, more indirect method, is to adopt the characterization "substantive" and to hold that there is also represented a declaration of local public policy which forbids that any contract not meeting the local requirements be enforceable in the state. Selection of this alternative will prevent the anomalous result of enforcing a contract which is valid by the law of neither state, forum or centre of gravity. It will not, however, prevent the undesirable result that a contract which is valid by the law governing substance is, in effect, invalid at the forum.

A fourth possibility is to reframe the common law indicative rule to read: With respect to a requirement of a writing or any other form, only the dispositive rules of the state in which a contract is made must be complied with. This solution would harmonize with Williston's reasoning that "Parties to a contract or sale naturally observe the formalities requisite to make it enforceable in the place where they are contracting." It is, however, unacceptable as it postulates the presence of both parties in the same state at the making of the contract, and a rule of this nature must cover all possibilities, including contracts made by persons at a distance from each other. If two persons act in dif-

96. Id. § 136.
97. "Procedure" is the "means of enforcing substantive rights." See Cook, supra note 90, at 350. Cook (at 344) suggests that the question to be answered is: "How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?" Surely no court will be hindered or inconvenienced by applying the foreign Statute of Frauds.
98. See Goodrich, op. cit. supra note 20, at 208, n. 78.
99. See Goodrich, op. cit. supra note 20, at 208, n. 77; Stumberg, op. cit. supra note 20, at 140.
ferent states it seems more "natural" that each should observe the formalities requisite in the state in which he acts, particularly since that state will normally be that of his domicil or residence or place of business and its law his "home" law.

This criticism of the fourth possibility leads directly to the fifth possibility, namely, to reframe the indicative rule to read: With respect to a requirement of a writing or any other form, only the dispositive rules of the state in which each party acts must be complied with by him.\textsuperscript{100} This solution offers some advantages: (1) It makes for certainty of result, since it avoids any determination of that matter upon which there is no international agreement, namely, the identification of the place where a contract is made. (2) It applies the "naturalness" of a man's observing the formalities of the place where he acts. (3) It meets doctrinal criticism of the application to an act of a system of law to which the actor was not subject at the time of action.\textsuperscript{101} It suffers, however, from countervailing disadvantages: (1) It makes for tremendous difficulty in giving advice. Few lawyers will have access to the statute books of the great number of foreign states in which the other party may act.\textsuperscript{102} (2) In order to reach reasonable results it will require a fictional definition of "act" to take care of those cases in which a party does the act, which is relied upon, in some state in which he is only casually present. (3) It will add another type of case in which one party is bound and the other is not.

The considerations just discussed lead to a sixth possibility, namely, to reframe the indicative rule to read: Neither party is bound unless each party has complied with the requirement of a writing or other form prescribed by the dispositive rules of the state in which he acts. This solution offers the same advantages and suffers from the same disadvantages as the fifth possibility, except that disadvantage (3) obviously does not exist.\textsuperscript{103}

\textsuperscript{100} See Stimson, Which Law Should Govern (1938) 24 Va. L. Rev. 863.
\textsuperscript{101} Idem.
\textsuperscript{102} This difficulty is of much less magnitude under the fourth possible solution suggested, because parties who wish to make a binding contract can easily do the last act necessary to make the obligation binding, in some state whose laws the advising lawyers know.
\textsuperscript{103} von Bar, op. cit. supra note 89, favors the applicability of the requirements of the domicils of both parties, upon the ground that no preference can be given to the \textit{lex loci actus} of either party, and dismisses, \textit{sub silente}, the possibility that compliance with the laws of both places of acting may be required.

It appears that the continental jurists who maintain the applicability of the \textit{lex loci actus} treat the place of making the contract as the \textit{locus}. See Lapradelle & Niboyet, 5 Répertoire de droit international (1929) 218, § 5.
If the preferred solution—form should be referred to the system of dispositive law which governs the substance of the contract; the requirement of a writing is a matter of form, not of procedure—be adopted by common law courts we shall have arrived at a principle which approaches "universality." No stronger statement can be made, even though "universal" means merely "tending to totality," because it is not the rule of the common law that the centre of gravity or the "proper law" is to be found at the place where a contract is made, although there is a strong tendency in that direction. It seems that a tendency to a tendency to totality can best be expressed as an approach to "universality."

As the indicative rules actually are, Barbey sees in all three systems a rule which makes valid all contracts which conform to the dispositive rules of the place of making the contract, and an alternative application of the law of the domicil, or of the nationality, or of the centre of gravity of the contract. There thus appears a universal principle, which is inaccurately called the principle of locus regit actum, ascribing validity to contracts made in accordance with the formal requirements of the place where the contract is made. If, on the other hand, these requirements are not complied with, either the personal law of the parties—and although Barbey does not repeat in this connection his observations made under the heading of capacity, it is to be supposed that he would favor the supplanting of the national law by the domiciliary in France—or the law governing the contract will be applied, if this law will validate. It is to be noted, in this connection again, that the domicil and the nationality will probably be identical. It thus appears that the English and French courts will likely reach the same result when confronted by any given fact-group, and, since the American courts are very likely to find that the centre of gravity is at the place of contracting or at the domicil or in the nation of the parties, an American court would probably reach the same result on the same fact-group.

These writers suggest (§ 21) that when the parties act in different states the more strict law should be applied.

106. In France.
107. In the United States.
108. It seems fictional to say that a person who mails a letter in France acts when that letter is received in New York, yet the latter is the place of contracting if, as is the law in many of the civil law nations, a contract is made when the acceptance is received, and if the place of making a contract is the locus actus.
Let us examine, however, the laws of the common law states. In England a mercantile contract is formally valid if it complies with the requirements of the *lex loci contractus* or the "proper law." In the United States the situation is much the same as in England. In practically all of the cases concerning a contract, formally valid according to the *lex loci contractus*, the validity of the contract has been sustained. On the other hand, those contracts which did not comply with the formal requirements of the *lex loci contractus* and which have been held formally invalid were closely in contact with the place of making the contract. Further, those contracts which were formally invalid by the *lex loci contractus* and which were held valid under some other law, were so held through the application of a system of law with which they were in close contact. It thus appears that the law of the place where a contract was made is applied through its function as representative of the centre of gravity or "proper law" of the transaction. In only one case is the "option" theory of the French jurist discoverable; and in that case the court employed the supposed intention of the parties to be honest and to make a binding contract in order to apply the law of the place of making as the law governing the contract. It seems, then,

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109. Cheshire (op. cit. supra note 20, at 243-248) says that this is the law of England. His categorical statement that the rule "*locus regit actum* . . . no doubt . . . represents the law of England" (at 243) is, however, somewhat weakened by his conclusion that the older statements, in terms of the "law of the place where the contract was made" are travesties of the modern statement, in terms of the "proper law" (at 247), and that the cases which apply the *lex loci contractus* apply it properly because it was also the "proper law." See Cheshire's discussion (at 246-247) of Trimby v. Vignier, 1 Bing. N. C. 151 (1834). See also Foster, supra note 63, at 91-92.

Dicey, op. cit. supra note 31, at 603, 606: "Rule 159.—Subject to the Exceptions hereinafter mentioned, the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*) . . . . Exception 3.—A contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made." Dicey's example of the third exception is Van Grutten v. Digby, 31 Beav. 561, 54 Eng. Rep. 1256 (1862), which, while it is a case of a pre-matrimonial settlement contract and not of a mercantile contract, strongly supports, as Cheshire says, the applicability of the "proper law" to determine form.


111. See 2 Beale, op. cit. supra note 1, § 334.2, p. 1184, n. 10-13; p. 1185, n. 1, 2.


that it is impossible to make a definite statement that the common law recognizes the facultative application of different systems of law to determine formal validity in cases of mercantile contracts. It is, however, clear that the indicative laws of France, England and the United States refer matters of form in marriage contracts to the \emph{lex loci celebrationis}.\textsuperscript{115}

As the indicative laws now are, we must limit Levy-Ullmann's third "universal" principle—\emph{locus regit actum}—in matters of form to marriage contracts.\textsuperscript{116} Its position in English law in mercantile contracts appears to be primary, with the "proper law" of the contract as a substitute. In France its applicability is subordinate to that of the personal law of the parties. In the United States it appears to have little, if any, standing as an independent principle, but to be called into play in those cases in which the \emph{locus actus} is also the centre of gravity of the contract. It is to be feared that Barbey's devotion to the "\emph{doctrine universaliste}" has caused him to express wishful thought when he says: "That which must be emphasized is the recognition, in the United States and England as well as in France, of the facultative nature of the rule \emph{locus regit actum}, recognition which is the consequence of its foundation in utility."\textsuperscript{117} We can, however, recognize some tendency in the American courts to select as the centre of gravity of a contract that state whose dispositive rules will make the contract binding.\textsuperscript{118} To that extent a tendency to harmony of result in similar fact-groups exists in all three systems.\textsuperscript{119}

\section*{IV}

\textbf{VALIDITY AND EFFECTS OF CONTRACT}

With respect to the validity and effects of a contract Barbey finds\textsuperscript{120} that the American indicative rules show the existence in

\textsuperscript{115} See note 71, supra.
\textsuperscript{116} The principle is inapplicable even to pre-matrimonial contracts. See note 109, supra.
\textsuperscript{117} Barbey, at 303. "Ce qu'il convient au contraire de souligner, c'est la considération aussi bien aux États-Unis et en Anglaterrre, qu'en France, du caractère facultatif de la règle \emph{locus regit actum}, conséquence de son fondement d'utilité pratique."
\textsuperscript{119} Stumberg (op. cit. supra note 20, at 218) suggests that, as Anglo-American courts are not committed to any particular rule, the methods applied in the usury cases would procure the most desirable results.
\textsuperscript{120} Lorenzen (supra note 80) suggests that a contract should be valid if it conforms to the requirements of the \emph{lex loci actus}, the law governing the contract, or the law of the forum.
this country of the doctrine of the freedom of the will (l’autonomie de la volonté) in that they point to the law of the place chosen by the parties. He derives this conclusion from his discovery that none of the cases have shown a separation of the contract into obligation and performance and the application of different systems of law to the separated parts; and from the opinions in a great number of cases which apply either the lex loci contractus or the lex loci solutionis as the law which it is presumed the parties intended, not as the law which must be applied from juridical necessity. He points out that no distinction is made by American courts or text writers between imperative dispositive rules, going to legality, and those rules which determine the nature and effect of a contract. This lack of distinction arises from the fact that the intention of the parties is limited by American courts to some state which has an objective connection with the contract rather than allowed to extend, as it is in theory by the French courts, to any state subjectively chosen by the parties.

This limitation of the intention of the parties to some state which has an objective connection with the contract is based upon the principle that the intention of the parties cannot be allowed power contrary to the nature of things. It has developed under the jury system which tends to turn all inquiries to the objective side, since juries are incapable of making a subjective determination. It is to be noted that there are two possibilities in the determination of the intention of the parties: either they have expressly manifested an intention that the laws of a particular state should govern the contract; or no express manifestation has been made.

If the parties have expressly stated that the law of a particular state should apply, this manifestation of intention will be given

121. Barbey (at 133, n. (1)) quotes two passages which are typical of American opinions. They fell from Shaw, C. J., in Carnegie v. Morrison, 2 Metc. 351, 397, 401 (Mass. 1841): “The general rule certainly is, that the lex loci contractus determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; ... There is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption, that the parties looked to them as furnishing the rule of law, which should govern this contract.”

122. Barbey, at 133, n. (3).

123. Id. at 135. Cf. Cheshire, op. cit. supra note 20, at 253-254: “The ascertainment of the proper law ... involves the consideration of the intention of the parties ... but only sofar as it appears that the contract and the circumstances in which it was made do not negative that intention.”

124. Barbey, at 135.
effect in questions of legality if that state is the place of making
the contract or the place of performance.\footnote{125} If, however, the
indicated state is still a third, the intention may still be given effect
in questions of the effect of a contract, provided that there is some
real connection between it and the transaction: for example, if it
is the state in which one of the parties is incorporated and where
the premiums on the insurance policy are to be paid.\footnote{126} In the
usury cases this principle appears with the greatest clarity: for
example, a contract for interest which is usurious by the laws of
the place of making and of payment, is valid if valid by the law
of the domicil of the debtor and of the situs of land, mortgaged as
security.\footnote{127} But, even in the usury cases an express reference
to a system of law will be ineffective if the connection with that
law is non-existent or fictitious.\footnote{128}

In cases in which the parties have not expressly manifested
an intention directed to the dispositive laws of a particular state
Barbey finds an apparent confusion in the decisions.\footnote{129} The Su-
preme Court of the United States presumed that the intention of
the parties was directed to the \textit{lex loci contractus},\footnote{130} and sixteen
years later presumed an intention directed to the \textit{lex loci solu-
tionis}.\footnote{131} The same contradiction appears in Illinois in a case
decided in 1914\footnote{132} and another decided in 1924.\footnote{133} These apparent
contradictions are, however, not contradictory but harmonious.
What is happening is that the American courts have a strong de-
sire to arrive at general solutions which will lead to certainty of
result in a class of cases, and they, therefore, examine the inti-
macy of contact with various states; they seek the "proper law"
of the contract by determining which law will produce the result
most in harmony with the requirements of utility; and they
justify the application of that law by its correspondence with the
\textit{lex loci contractus} or \textit{solutionis}, as the case may be.\footnote{134} This

\begin{itemize}
  \item \footnote{125} Ibid.
  \item \footnote{126} Mutual Ins. Co. v. Minehart, 72 Ark. 630, 83 S.W. 323 (1904) [cit. Bar-
bev, at 138, n. (1)].
  \item \footnote{127} Arnold v. Potter, 22 Iowa (1867) [cit. Barbey, at 140, n. (1)].
  \item \footnote{128} Shannon v. Georgia State Bldg. and Loan Ass’n, 78 Miss. 955, 30 So.
51, 57 L.R.A. 800, 84 Am. St. Rep. 657 (1901) [cit. Barbey, at 141, n. (2)].
  \item \footnote{129} Barbey, at 143-144.
  \item \footnote{130} Scudder v. Union National Bank of Chicago, 91 U.S. 406, 23 L.Ed.
245 (1875).
  \item \footnote{131} Hall v. Cordell, 142 U.S. 116, 12 S.Ct. 154, 35 L.Ed. 956 (1891).
  \item \footnote{132} Burr v. Beckler, 274 Ill. 230, 106 N.E. 206 (1914).
  \item \footnote{133} George v. Hass, 311 Ill. 382, 143 N.E. 54 (1924).
  \item \footnote{134} Barbey, at 143-146.
\end{itemize}
the words of the decisions, is re-enforced by the appearance in recent cases of the technique of determining the "proper law" without recourse to any presumptions of intention.135

In order to determine the "proper law" the courts take into account three considerations:136 First, the circumstances surrounding the making and the performance of the contract. Thus, where the contract was made in New York, one of the parties was domiciled in New York, and the contract was for carriage beginning in New York upon an American ship, the application of the lex loci contractus was justifiable.137 Where performance was due in several states, the result was the same.138 Second, the fact that one of the systems of law will give effect to the contract and the other will not. Thus, where the law of the place of performance will validate and that of the place of contracting will not, the former is applicable,139 and the same is true in the usury cases.140 Third, the nature of the contract. The cases concern, for example, contracts for the sale of real property, labor contracts, insurance contracts,141 carrier's contracts.142

Beale's rigidly territorial doctrine—which holds that the lex loci contractus must govern matters of obligation, and lex loci solutionis matters of performance—is criticized upon the ground that a contract is indivisible and cannot be separated into matters of obligation and matters of performance; and that, even if a contract is thus divisible, the division cannot be made logically at any point but must be made arbitrarily; and that this makes for uncertainty which Beale purports to vanquish; and that no case has been decided upon the ground of divisibility of a contract.143 Barbey suggests that a search for the centre of gravity of a contract,144 and the application of the dispositive law of the

135. Id. at 147-149. To this effect two very recent cases are cited: In re Lucas's Estate, 272 Mich. 1, 261 N.W. 117 (1935); Gregg v. Fitzpatrick, 54 Ga. App. 303, 187 S.E. 730 (1936).
139. Fritschard v. Norton, 106 U.S. 124, 1 S.Ct. 102, 27 L.Ed. 104 (1882) [cit. Barbey, at 152, n. (1)].
140. Even Beale (op. cit. supra note 1, § 347.4) agrees that this is true in usury cases.
141. The Supreme Court of the United States appears to be developing a constitutional law of indicative laws in insurance cases. See the series of cases printed in Harper and Taintor, op. cit. supra note 32, at 881-892.
142. See Restatement, §§ 387, 388, 415.
143. Barbey, at 118-124.
144. "Le lieu où il peut être le mieux localisé." Id. at 124.
state so determined, can equally well and more reasonably represent the application of a territorial law. The criticism of Beale seems well founded, on the doctrinal and practical grounds above indicated and upon the actual results of the cases as well. It is, however, perhaps a little difficult to see how the application of the "proper law" represents territoriality. In discussing the doctrine that the validity of a contract is to be tested by the dispositive rules of the place of performance Goodrich says:

"A theoretical difficulty appears at the outset. If an offer and acceptance takes place in Michigan by which the parties agree to do certain things in Ohio, how can Ohio law determine the validity of the things done in the other state? That the law of Ohio cannot thus extend into Michigan's territory is fundamental. To say that the validity of this Michigan made contract is to be governed by Ohio law because it is to be performed there looks as though there was claimed for Ohio law a real extraterritorial effect."

"To refer the validity of the contract to the rule of the place of performance involves looking to some other law than the place where acts are done to determine their legal effect." 145

Whether the reference is to the law of the place of performance or to some other law makes no difference in the correctness of Goodrich's analysis, provided that the law referred to is not that of the place of making the contract. He does not, however, go far enough. In any case in which the parties make their offer and acceptance in different states it is apparent that the law of some state in which one of the parties did not act determines the effect of his act.

A logical application of the "fundamental" doctrine that the "law of Ohio cannot . . . extend into Michigan's territory" will lead to one of two results. Either there is no contract and neither party is bound unless the laws of both states in which the parties acted will create a contract, each system of law determining the legal effect of the acts done within its boundary, and each having in its law of contracts a rule to the effect that there can be no binding contract unless both parties are bound; or, the laws of each state determine the legal effect of the acts within that state and there exists no rule in the law of contracts like the one indicated above, in which case the acceptor may be bound while the

offeror is not, or vice versa.\textsuperscript{146} It is to be noted that in these circumstances the extra-territorial act of the offeror or acceptor is simply a fact which conditions the legal effect of the intra-territorial act, and that there is no attempt to ascribe legal effect to the extra-territorial act as an act. Let us suppose, for example, that the contract law of the place whence the offeror dispatches his offer is that a contract is created when the acceptance is mailed. Then, the offer is, by force of that law of contracts, in these terms: I promise to perform upon condition that an instrument purporting to accept my offer be put in the mail. The act of the acceptor is important not as an act but as an event, analogous to the arrival of a shipment in cases of "no arrival no sale."

It is, however, clear that this is not the concept of the territorialists.\textsuperscript{147} Beale,\textsuperscript{148} Goodrich,\textsuperscript{149} and the Restatement\textsuperscript{150} agree that the question of legality and effect of a contract are to be determined by the law of the place where the contract is made. How can this doctrine be justified under territorial theories? Perhaps it can be said that he who despatches an offer from state X to state Y submits himself to the law of Y, or perhaps by this despatch he causes a result in Y. It seems that this must by the territorialist's explanation. He has no trouble with finding a tort liability in the actor under the law of the state where the act causes a result,\textsuperscript{151} nor with finding a contract made in the state where an agent acts.\textsuperscript{152}

If it be true that the doctrine of the commission of a tort at the place where the injury occurs, or the creation of a contract at some place other than where the party acts, represents territoriality, then it is no more difficult to see territoriality in a doctrine which creates a contract at that place which has the most intimate connection with the transaction, since both parties either submitted themselves to the law of that place or caused a result there. It must be recognized, however, that this is not territorial control of the legal effect of acts.

\textsuperscript{146} This statement is based upon the possibility that the law of the state in which the acceptor acts creates a contract upon the mailing of the acceptance and that in which the offeror acts does not create a contract until the acceptance is received, or vice versa.

\textsuperscript{147} Except Stimson (supra note 100) who out-Beales Beale.

\textsuperscript{148} 2 Beale, op. cit. supra note 1, § 332.4.

\textsuperscript{149} Goodrich, op. cit. supra note 20, at 274-277.

\textsuperscript{150} Restatement, § 332.

\textsuperscript{151} 2 Beale, op. cit. supra note 1, §§ 377.2-395.1; Goodrich, op. cit. supra note 20, at 222-225; Restatement, §§ 377-395.

\textsuperscript{152} 2 Beale, op. cit. supra note 1, § 328.1; Goodrich, op. cit. supra note 20, at 264; Restatement, §§ 323, 330.
Barbey praises Lorenzen's system as representative of a more utilitarian point of view and as one which takes into account the necessities of international commerce. He finds that this system arrives at freedom of the will with respect to the effects of a contract, and, with respect to validity, by the application of the law of any state with which the transaction has a substantial connection and which will validate the contract, with two exceptions: the contract is invalid (1) if the making of it is contrary to the public policy of the place of making, or (2) if the performance is contrary to the public policy of the place of performance.

The English indicative rules are, according to Barbey, the same as the American, with unimportant variations. In England there exists the doctrine of the freedom of the will, but the English restrict the will objectively in determining both the legality and the effects of a contract to the selection of some state which has a reasonable connection with the transaction, rather than typically to the place of making or of performance. On the other hand, where the parties have not expressed any intention, the search is for the "proper law" of the contract with a tendency, analogous to the American tendency to apply the law of the place of contracting, to find that the English law is the proper law.

Thus, according to Barbey, the English and American technique and results are identical, with one unimportant difference. This difference, arising from the fact that for American courts the foreign law is usually that of a sister state, and for the English courts that of another nation, leads the American courts to apply the foreign law, as the "proper law," much more freely. In both systems of law, the indicative rules are based upon the principle of the freedom of the will, but this freedom is restrained by objective considerations, and the identity of the state intended by the parties is to be determined in an objective manner.
systems the theory is that the exercise of the freedom of the will is protected in that it is considered that the parties would have chosen the "proper law" if their attention had been directed to the problem and they had made a conscious choice.

In France the results are in effect the same as in the common law systems, any differences being theoretical rather than practical. In theory the French court searches for the law intended by the parties, untrammeled by any presumptions. A distinction must be made, however, between mandatory and facultative laws. The will operates only within the compass allowed by the law; it is not superior to nor parallel with the law. The first search must be for the state which has legislative jurisdiction and the requisite determination of the scope allowed to the will must be according to the law of that state. French doctrinary writers, by their disagreement upon the identity of that state, have shown the impossibility of any logical solution of this problem. The only system remaining is the "intention of the parties" which must be adopted, since it appears in all three systems of law, as a sort of emergency solution which is applicable to all contracts with equal propriety. Even in the domain of the mandatory, the rules of the various states are so harmonious that it will be possible for the parties to find a state which will validate a particular contract which is illegal in others, only in rare cases. On the other hand, the universal recognition of the freedom of the parties to connect their contract with any state they desire offers great advantages, because business men, to whom certainty is an essential, tend to employ forms which are in common use and to specify the state to which they wish to attach the transaction.

In France, on theory, an express manifestation of intention to connect a transaction with a particular state is effective, even though there is in fact no contact between the transaction and that state, other than the desire of the parties to be governed by its dispositive rules. This, however, Barbey believes to be merely

161. Id. at 231.
162. Id. at 231-232, points out that some of the writers insist upon the application of the lex loci contractus, others upon the lex loci solutionis, and others, with whom he tends to agree, upon the law of that state in which each contract can be economically and juridically localized.
163. "Une sorte de solution de secours." Id. at 232.
164. Ibid.
165. Id. at 233.
theoretical\textsuperscript{166} since the doctrines of fraud on the law\textsuperscript{167} and ordre public are available to make inapplicable an obviously inappropriate foreign law. No case has been found in the French reports, but a Belgian case on the "gold clause" applies the law of New York since it was not only expressly indicated by the parties, but was, in accordance with the reality of things, the law to govern the contract as the place of making and performance of the contract.\textsuperscript{168}

If the parties have not manifested any intention it is the duty of the French judge to determine what their intention was. Is it possible to determine with any certainty the content of a subjective intention from purely objective evidence? Must not the approach of the French judge be in fact identical in practice with that of the common law judge? Must he not consider all the elements of the transaction and find a centre of gravity, a "proper law," and conclude that the parties must have intended to refer the contract to that law? Again, suppose that if the first determination must be of the identity of the state which has legislative jurisdiction, and that that determination must be, as seems clear, upon an objective basis,\textsuperscript{169} having once determined that the competent law is the law of state X, must not the judge be led to conclude that the parties intended to subject their transaction to that law?

It seems justifiable to conclude that the technique of the French courts differs only verbally from that of the English and American courts, and that all three systems refer questions of the validity and effects of contracts to the "proper law," the law of

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\textsuperscript{166} Id. at 305.

\textsuperscript{167} The French technique of fraude à la loi is vividly illustrated in Bouly de Lesdains v. Mabel Bailey and Dame Bolo-Soumaille v. Dame Bolo-Muller, both in (1921) 17 Revue de Droit International Privé, at 240 et seq. In both of these cases the parties omitted certain formalities prerequisite to marriage. In the first case the court found fraude à la loi since the parties could have married at the French legation in Pekin to which Bouly de Lesdains was attached. In the second case no fraud was found, because the parties were living an adventurous life in the wilds of South America. It appears, thus, that there was a real connection between Bolo and the South American law which he used, and only a fictitious connection between Bouly de Lesdains and the Tibetan law which he attempted to use.

\textsuperscript{168} Ville d’Anvers C. La Belgique Industrielle, Bruxelles, 4 février 1936, Sirey, 1937.4.1.

\textsuperscript{169} The objective nature of this determination follows from the fact that its necessity depends upon the doctrine that a contract is made by the action of a system of dispositive laws acting upon the wills of the parties, and not by the sovereign wills of the parties alone.
that state which is determined to be the centre of gravity of the contract.\textsuperscript{170}

With respect to the techniques used by the courts to avoid the application, in a particular case, of the normally applicable foreign law in questions of validity and effects of the contract, Barbey finds that the French courts will use the doctrine of \textit{fraude à la loi} to repress a fictitious foreign contact point. His theory is that the law determines whether a contract is international \textit{vel non}, and that the parties cannot, by an act of the will transform a domestic contract into a foreign one.\textsuperscript{171} It is to be supposed that analogously the parties cannot transform a contract which is most closely connected with one state into a contract connected with another. We see this suggested principle in operation in the usury cases in the United States. It is also to be noted that the public policy of the forum is determinative in the French and English courts much more frequently than in this country, because the great number of contracts with which the European courts deal are international, while most of the cases

\textsuperscript{170} Cheshire (op. cit. supra note 20, at 258-259) suggests the matters which are important: "The Court must take into account, for instance, the following matters: the domicile and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situate; the place where the contract is made and the place where it is to be performed; the form in which the contract is drafted, as, for instance, whether the language employed is appropriate to one system of law but inappropriate to another; the fact that a certain stipulation is valid under one law and void under another; the matrimonial domicile in the case of a marriage settlement contract; the nationality of the ship in maritime contracts, an express provision subjecting the contract to a particular law; a provision that disputes arising between the parties shall be submitted to the tribunals of a certain country for settlement, the fact that one of the parties is a sovereign state, and, in short, any other fact from which the character of the contract and the nature of the transaction can be inferred."

Judge Haight, speaking in Wilson v. Lewiston Mill Co., 150 N.Y. 314, 323, 44 N.E. 959, 55 Am. St. Rep. 680, 685 (1896), said: "The place where the contract is accepted is important . . . It does not, however, necessarily determine the place, or the 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."

Roguin, \textit{Conflicts de Lois en matiere d'Obligations} (1904) 20 \textit{Annuaire de l'Institut de Droit International} 77, suggests that the judge should "examine, among other things, the identity of the place where the contract was made and where it was to be performed. He should consider also, the domicile and nationality of the parties, particularly when the parties have either or both in common. He should also take account of the fact that two or more of the possibly applicable systems of law contain the same solution. And, finally, the judge should select that system of law which appears to him best under all the circumstances of the concrete case before him."

\textsuperscript{171} Barbey, at 284, n. (1); Société Muller C. Mordelé, Rennes, 26 juillet 1926, (1927) 22 \textit{Revue de Droit International Privé} 523 [cit. Barbey, at 285, n. (1)].
in American courts deal with interstate contracts. This seems an expectable difference: a New Yorker is much more like a Floridian than an Englishman is like a Frenchman.

As Barbey sees the indicative rules in the three systems of law, the results in any given case are extremely likely to be the same whether it comes before a French, an English or an American court; and this harmony of result arises from the universality of the principle of l'autonomie de la volonté. We can well agree with him that the results will demonstrate universality, but we cannot agree with the universal principle which he finds them supporting. As has been shown, the technique in all three systems of law is to determine the "proper law," the "centre of gravity of the transaction" or "le lieu où le contrat peut être le mieux localisé." All three of these expressions indicate the same technique, namely, that it must be determined with what state a concrete contract has the closest connection and that the dispositive rules of the law of that state are to be applied to determine the validity and effects of the contract. It might well be advisable to allow persons, particularly business men, to indicate the law which they desire to have applied to their contracts in the interest of certainty, but there is no indication that this is allowed unless the indicated state has a "real," a "substantial" or a "reasonable" connection with the contract. It might be well, in the interests of certainty to establish a universal indicative rule that validity and effects of a contract are to be determined by the law of the place of contracting. It seems clear that this is not the law. In any case, since non-commercial persons normally make contracts without any thought as to the system of law which will

172. Barbey, at 286.

173. Nebraska, which Beale places among those States which adhere to the rule of lex loci contractus, has reached irreconcilable conclusions as to the identity of the place where a contract was made in two cases with undistinguishable facts. In the first case, Sands v. Smith, 1 Neb. 108 (1867), a note was made in Nebraska on a loan made in New York, secured by a mortgage on Nebraska land. The court held that the note was incidental to the loan and that the validity of the contract, as to usury, was governed by the New York lex loci contractus. In the second case, Coad v. Home Cattle Co., 32 Neb. 761 (1891), a note was made in Wyoming by Wyoming domiciliaries, secured by a mortgage on Nebraska land. The loan, however, was made in Nebraska after inspection of the land. The court held that the validity of the contract, as to usury, was governed by the Wyoming lex loci contractus.

If a court plays fast and loose in this manner with the concept of the place of making, it seems clear that the adherence to the indicative rule—lex loci contractus governs validity of contracts—is purely verbal, and that some other technique is hidden.

See discussion of these cases and of the problem in McMahon, Conflict of Laws—Contracts (1938) 17 Neb. L. Bull. 361-369.
govern their contract, and since, in fact, they usually have never
even heard of a possibility that some particular system of dis-
positive laws must be applied to their contract, and since it is
likely that they do not even know that the various states have
different systems of dispositive laws, it seems that certainty of
result is of little importance, in cases of this kind, compared with
the desirability of reaching a just result in the particular case.
This just result can best be reached by applying the dispositive
law with which the parties have most closely connected their
contract.

If in either of these situations, mercantile or non-mercantile
contracts, the intention of the parties is significant, it would seem
that the important intention is one directed to factual connection
with a state, not with intention directed to a system of laws. In
determining domicil the significant intention is that which is di-
rected toward the making of a home as a fact, not that directed
toward acquiring a domicil as a legal conclusion. Analogously, to
repeat, is the significant intention not one which is directed to
factual contact with a state, rather than one directed to legal
contact with a state?

CONCLUSION

We can be thankful that the skepticism, arising from the di-
versity of solutions proposed by the doctrinary writers, with
which Barbey began his research\textsuperscript{174} did not keep him from mak-
ing the attempt to discover harmonious principles in the French,
the English and the American indicative rules. While, as has ap-
peared in the course of this discussion, it has been impossible to
agree with some of his conclusions as to the nature of the "uni-
versal" principles he considers he has discovered, it has been pos-
sible to find a surprising harmony of result in types of cases irre-
spective of the identity of the hypothetical forum as between the
three countries.

In matters of capacity to contract marriages—perhaps "mat-
ters of the essential validity of marriage" is a more exact phrase,
at least in so far as this country is concerned—the "universal"
application of the law of that state with which the married pair
will be most closely connected has been observed. It is true that,
at present, the identities of the states may be different in the
common law and the French systems since the controlling state

\textsuperscript{174}. Barbey, at 321.
will be the intended family domicil in the former and, while possibly the intended family domicil, will probably be the nation in the latter. In matters of capacity to make contracts which are not so closely connected with the welfare of the persons, it appears that the dispositive law of the place of making a contract will be applied, if that is also the forum. If, however, the contract was made in another state it appears that the English and American courts will apply the dispositive law of the state which is the centre of gravity, which furnishes the "proper law," while French courts will apply the dispositive law of the nationality of the obligor, except that a foreign obligor will not be allowed to assert an incapacity peculiar to his national law.

In matters of form, with the exception of the requirement of a writing, the indicative law with respect to which is at present in hopeless confusion, it has been shown that the principle *locus regit actum* is "universal" with respect to marriage contracts, which must according to all three systems of law conform to the requirements of the *lex loci celebrationis*. With respect to other types of contracts, similarity between the English and French indicative rules has appeared, in that both hold valid a contract which is formally valid by the *lex loci contractus*. A difference has appeared, however, in that the English courts refer alternatively to the "proper law" and the French courts to the law of the nationality. In the American courts, there appears to be no alternative applicability. The rule seems to be simply that the formal requirements which must be conformed with are those of the law governing the contract. In the cases of marriage contracts alone, then, it can properly be said that *locus regit actum* is controlling, for, if the parties act in different states there is no one *locus* to rule the acts; and if the law of the place of acting is applicable only alternatively and only if it validates the forms used, it cannot be said to *rule* the act.

In matters of validity and effects of contract, a real "universality" has appeared. The indicative rules of all three systems point to the dispositive rules of the state which represents the centre of gravity of the transaction, to the state whose system of dispositive rules represents the "proper law" of the contract, to the state "où le contrat peut être le mieux localisé." This universality appears more definitely in cases in which the parties have not expressly manifested an intention to connect their contract with any particular state since, in such cases, only an objective determination of what the parties must have intended is
possible, and a determination of objective intention is not a determination of "intention" at all. In so far as the cases in which the parties have manifested an intention are concerned, it appears that the rules in all three systems are very much alike. In England and in France the courts have upheld the effectiveness of such manifestations only in cases in which the contract had a reasonable or a substantial connection with the state intended. In the United States there is a tendency to restrict the parties to the place of making the contract or the place of performance, but there are cases which allow an intention to be effective when it is directed to some other state. It seems impossible to find that the principle of l'autonomie de la volonté is universal unless volonté be taken in an objective sense, in which case, as suggested above, it is not volonté but "proper law" which is the criterion.

When all three branches of this inquiry are considered—capacity, form and substance—it is apparent that there exists a surprising universality in the indicative rules pertaining to contracts in the three systems.