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Comment

THE STATUTE OF FRAUDS IN THE CONFLICT OF LAWS

LAW AND REASON VERSUS THE RESTATEMENT

Courts have divided markedly on the question of which law is to determine the requirements for formal validity of a contract. Some have thought that the Statute of Frauds¹ of the forum declares a procedural policy which

¹ "Statute of Frauds" is an ambiguous term. In the United States many writing requirements have been adopted which were not part of the original English statute. This comment is confined to the statutes which require that various types of contracts be in writing. The term "Statute of Frauds" is to be so understood when it is used, and "formal validity" will be used to refer to the satisfaction of writing requirements.

must be enforced, regardless of where the contract was made, while others have doubtless been influenced by the undesirability of forum shopping that would be encouraged by such a rule. Characterization of the statute as procedural or substantive, rather than intent of the parties, has been the formal basis for most decisions. Following traditional conflicts theory, if the statute is "procedural," the *lex fori* is applied; if it is "substantive," the *lex contractus* is applied. Indiscriminate reliance on the distinction between substance and procedure has frequently led to invalidation of contracts contrary to the expectations of the parties. The technique is further obscured by a lack of consistency in approach, both primary and secondary characterization being employed.

The problems of characterization in the conflict of laws have been extensively discussed elsewhere.² For present purposes it is enough to say that characterization is the qualitative definition of a legal problem which must be undertaken before it can be decided what conflict of laws principle shall govern it. Specifically, characterization is the process of determining whether a question is, for example, one of tort or contract. A moment's reflection will make it obvious that this kind of analysis is daily resorted to by all lawyers and judges, whether or not a conflict of laws is present. This doubtless explains why courts seldom make a point of discussing characterization.

The choice of law rule made relevant by primary characterization of the legal problem may refer to the law of another jurisdiction. Secondary characterization is the additional definition which may then be necessary. Thus, if the forum characterizes the question as one involving real property, and the choice of law rule is that the law of the situs governs real property matters, secondary characterization may be necessary to determine precisely what is included in the real property law of the situs. There seems to be general agreement that secondary characterization is to be according to the views of the foreign jurisdiction to which reference has been made.

It is apparent that courts could disagree on the question whether the Statute of Frauds is substantive or procedural and on the question whether the distinction between substance and procedure³ is a matter of primary or secondary characterization. There is, in fact, deep cleavage along these lines.

The Restatement,⁴ rather than taking sides in the controversy, appears to recognize virtually all judicial attempts to solve the problem of the Statute of Frauds in the conflict of laws. Section 602, which would invalidate a foreign contract failing to comply with formal requirements of the *lex fori*, seems to characterize the Statute of Frauds as procedural, a view

² See, e.g., ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940); Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 So. CALIF. L. REV. 221 (1941).

³ See McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. OF PA. L. REV. 933 (1930).

⁴ RESTATEMENT, *CONFLICT OF LAWS* (1934).

supported by comment *a*.⁵ In comment *b*, however, the possibility of a substantive secondary characterization of the statute is recognized.⁶ This would permit invalidation of contracts failing to meet the formal requirements of the *lex contractus* although no writing was required by the forum. Section 334 seems to assume a substantive primary characterization under the *lex fori* when it advises that "the law of the place of contracting determines the formalities required for making a contract." However, comment *b* to this section refers to secondary characterization under the *lex contractus* when it suggests that "the requirement of writing may be a requirement of procedure or a requirement of validity, or both." Section 598, like section 334, states that the Statute of Frauds may be substantive or procedural, but it also declares that the policy behind the forum's statute may be "... of such importance as to be applicable to all cases adjudicated in the [forum] irrespective of where the transactions occurred. . . ."

Far from being a restatement of the law, these sections are a mere catalogue of existing confusion.⁷ While an attempt at a definitive formulation of current court practice may be premature,⁸ it is not improbable that the presumed intent of the parties is an important factor underlying the varying approaches to the choice of the law governing formal contractual validity. This is suggested by cases where the courts have decided the question of formal validity under the Statute of Frauds of the place of contracting without resort to characterization.⁹ It is significant that these are all cases where the forum was the place of contracting or where the place of con-

⁵ "If the statute of frauds of the forum requires a written agreement as a condition of bringing action on a contract of a certain sort, no action can be maintained on a foreign oral agreement even if it complies with the law of the place of contracting."

⁶ "The statute of frauds of the place of contracting is in some states interpreted as creating a condition to the existence of the contract. In that case, the agreement must be in writing though no writing is required by the law of the forum"

⁷ The same difficulty is met in the reporter's textbook. See 2 BEALE, CONFLICT OF LAWS § 334.1 (1935), 3 *id.* § 602.1.

⁸ The necessity of slowly and gradually developing a common law of conflicts for fact situations to be newly classified in the light of existing case law (which is frequently contrary to the fixed rules of the Restatement) has already brought forth a substantial body of writing. See, e.g., Ehrenzweig, *American Conflicts Law in Its Historical Perspective: Should the Restatement Be "Continued"?*, 103 U. OF PA. L. REV. 133 (1954); Shavelson, *Survival of Tort Actions in the Conflict of Laws: A New Direction? Law and Reason vs. The Restatement*, 42 CALIF. L. REV. 803 (1954); Ehrenzweig, *Interstate Recognition of Support Duties*, 42 CALIF. L. REV. 382 (1954); Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. OF CHI. L. REV. 620 (1954); Taintor, *Adoption in the Conflict of Laws*, 15 U. OF PITT. L. REV. 222 (1954); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason versus The Restatement*, 15 U. OF PITT. L. REV. 397 (1954); Ehrenzweig and Mills, *Personal Service Outside the State*, 41 CALIF. L. REV. 383 (1953); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Ehrenzweig, *Recognition of Custody Decrees Rendered Abroad*, 2 AM. J. COMP. L. 167 (1953); *A Symposium on Conflict of Laws*, 6 VAND. L. REV. 441-742 (1953); Ehrenzweig, *The Place of Acting in International Multistate Torts: Law and Reason versus The Restatement*, 36 MINN. L. REV. 1 (1951).

⁹ See, e.g., *Hooper v. First Exchange Nat. Bank of Coeur D'Alene*, 53 F.2d 593 (9th Cir. 1931); *Richmond-Corcia Oil Co. v. Coates*, 17 F.2d 262 (5th Cir. 1927); *Hotel Woodward Co. v. Ford Motor Co.*, 258 Fed. 322 (2d Cir. 1919), *cert. denied*, 256 U.S. 698 (1921), 259 U.S. 588 (1922); *Ellis and Baker v. Lead Co.*, 116 Kan. 144, 225 Pac. 1072 (1924); *Dudley A. Tyng & Co. v. Converse*, 180 Mich. 195, 146 N.W. 629 (1914); *Howell v. North*, 93 Neb.

tracting was the place of performance. In either case it is not unreasonable to infer that the parties looked to the *lex contractus* for requirements of formal validity.

Even though there are foreign contacts with the transaction, when the forum is the place of contracting, it would be surprising indeed to find a court holding that formal validity was to be determined under any law but the *lex fori*, which by hypothesis is also the *lex contractus*.

When the place of contracting and the place of performance are identical it is still not unreasonable to suppose that the parties intended, on the question of formal requirements, to be guided by the *lex contractus*. The parties to a contract made where it is to be performed may normally expect that an action for breach, if any, will arise in the jurisdiction where they contract. If that assumption is not completely satisfactory, it is at least likely that there is doubt in which foreign forum the parties might find themselves at some future date. Either premise suggests the probability that the parties looked to the *lex contractus* for requirements of formal validity when they contracted at the place of performance.

The trouble begins when the courts employ the characterization process to determine the choice of the law governing formal validity of the contract. What needs explanation in the characterization cases is the frequent invalidation of contracts contrary to the apparent initial expectations of the parties. Reliance on some policy of the forum is the only rational explanation for the fact that characterization as substantive or procedural has been used both to validate and to invalidate foreign oral agreements. However, the failure of most courts to identify specific and compelling policy reasons which would justify invalidation contrary to what the parties intended has led to somewhat indiscriminate application of the characterization process. Since most courts talk substance and procedure when they meet the Statute of Frauds in a conflicts situation, it is necessary to an understanding of what has been done to analyze briefly the ways in which the problem has been attacked and the results obtained.

According to the leading English case of *Leroux v. Brown*¹⁰ the Statute of Frauds is to be characterized as substantive or procedural depending on the particular language found in the statute. A section of the statute declaring that "no action shall be brought" was characterized as procedural. The validity of a contract falling within this section was thus determined by the law of the forum, and in this case invalidation of the contract followed. The court indicated that the language "no contract shall be allowed to be good," found in another section of the English statute, was substantive and would not be applied to a foreign contract. American courts which purport to follow *Leroux v. Brown* have invariably characterized a "no action shall be brought" statute of the forum as procedural and, in most

(Lindsay) 505, 140 N.W. 779 (1913); *Adams v. Thayer Estate*, 85 N.H. 177, 155 Atl. 687 (1931); *Bernstein v. Lipper Manufacturing Co.*, 307 Pa. 36, 160 Atl. 770 (1932); *Beach v. Gehl*, 204 Wis. 367, 235 N.W. 778 (1931).

¹⁰ 12 C.B. 801, 138 Eng. Rep. 1119 (1852).

cases, have applied it to invalidate the contract.¹¹ Generally, however, the language test of *Leroux v. Brown* is not followed.¹²

A number of courts have given the statute of the forum a primary procedural characterization and have applied it sometimes to invalidate¹³ and sometimes to validate¹⁴ the contract. One case has been found in which the contract was held subject to the forum's statute after initially determining as a matter of secondary characterization that the statute of the place of contracting was procedural and therefore inapplicable.¹⁵

Professor Lorenzen, with an exception to be noted, preferred to treat the Statute of Frauds as substantive, taking the position that formal validity of the contract should be determined by the same law which controls other questions of substance under the contract.¹⁶

Substantive characterization leads to determination of formal validity under the *lex contractus*. Some courts have used primary substantive characterization of the Statute of Frauds to validate contracts under the statute

¹¹ *Boone v. Coe*, 153 Ky. 233, 154 S.W. 900 (1913); *Kleeman & Co. v. Collins*, 72 Ky. (9 Bush) 460 (1872); *Third Nat. Bank of New York v. Steel*, 129 Mich. 434, 88 N.W. 1050 (1902); *Marvel v. Marvel*, 70 Neb. 498, 97 N.W. 640 (1903) (the holding is somewhat weakened by the statement of an alternate ground of decision). *Woolley v. Bishop*, 180 F.2d 188 (10th Cir. 1950) follows *Leroux v. Brown* but validates under the statute of the forum a contract which was invalid where made. *Downer v. Chesebrough*, 36 Conn. 39 (1869), is often cited as though it followed *Leroux v. Brown*, but the question decided was the admissibility of parol evidence to vary an indorsement, so that the discussion of the *Leroux* case was dictum. See *Pritchard v. Norton*, 106 U.S. 124, 134 (1882).

¹² The validity of the reasoning which makes the substance-procedure characterization turn upon the language used in the statute has been doubted in England. See *Williams v. Wheeler*, 8 C.B. (N.S.) 299, 141 Eng. Rep. 1181 (1860), where Willes, J., stated that he was "not satisfied that either of the sections of the Statute of Frauds to which reference has been made, warrants the decision. We must, however, act upon *Leroux v. Brown* until it is overruled by a court of error." *Id.* at 316, 141 Eng. Rep. at 1188.

¹³ *Buhl v. Stephens*, 84 Fed. 922 (D. Ind. 1898); *Campbell v. Sheraton Corp. of America*, 363 Mo. 688, 253 S.W.2d 106 (1952); *Heaton v. Eldridge & Higgins*, 56 Ohio St. 87, 46 N.E. 638 (1897). See *Hamilton Foundry & M. Co. v. International M. & F. Wkrs.*, 193 F.2d 209 (6th Cir. 1951), *cert. denied*, 343 U.S. 966 (1952); concurring opinion of Desmond, J., in *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424, 432 (1953).

¹⁴ *Straesser-Arnold Co. v. Franklin Sugar Ref. Co.*, 8 F.2d 601 (7th Cir. 1925), *cert. denied*, 270 U.S. 642 (1926); *Fimian v. Guy F. Atkinson Co.*, 209 Ga. 113, 70 S.E.2d 762 (1952). *Semble*: *Young v. Pearson*, 1 Cal. 448 (1851) (substance-procedure distinction not articulated). Up to 1939, when the California annotations to the Restatement were published, the California courts had not directly considered the conflict of laws characterization of the Statute of Frauds, and no case since that date has been found. In domestic cases the courts have come to regard the requirement of a writing as going to the remedy rather than to the substance of the obligation. *O'Brien v. O'Brien*, 197 Cal. 577, 241 Pac. 861 (1925); *Ayoob v. Ayoob*, 74 Cal. App.2d 236, 168 P.2d 462 (1946); *Taylor v. J. B. Hill Co.*, 67 Cal.App.2d 581, 154 P.2d 926 (1945).

¹⁵ *Continental Collieries v. Shober*, 130 F.2d 631 (3rd Cir. 1942). *Cf. Cooper v. A.A.A. Highway Express Inc., et al.*, 206 S.C. 372, 34 S.E.2d 589 (1945). The court validated a contract which was formally invalid under the law of Georgia where it was made and to be performed. Refusing to pass generally upon the question of the nature and character of the Statute of Frauds and saying that it was unnecessary to decide whether the South Carolina statute is substantive or procedural, the court adopted the procedural secondary characterization of the Georgia statute. "When the contract in question was made in Georgia, the parties were charged with knowledge that the [Georgia statute] related merely to the remedy and not to the validity of the contract." *Id.* at 381, 34 S.E.2d at 592.

¹⁶ Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311, 328 (1923).

of the place of contracting.¹⁷ Others have adopted a secondary substantive characterization, applying the *lex contractus* both to invalidate¹⁸ and to validate¹⁹ contracts.

It is evident from the conflicting results observed that characterization of the Statute of Frauds as substantive or procedural does very little to advance clear thinking about the choice of law problem. "[C]oncerned as it is with nebulous legal conclusions, [characterization] does little more than restate the problem."²⁰ A different analysis of the cases is needed to provide a unified theory which will indicate the proper result, rather than providing a mere formal explanation.

A promising line of investigation is suggested by the fact that in most of the cases studied which adopted the substantive characterization the place of contracting was the place of performance.²¹ In the remaining sub-

¹⁷ *Smith v. Onyx Oil and Chemical Co.*, 218 F.2d 104 (3rd Cir. 1955); *Canister Co. v. National Can Corp.*, 63 F.Supp. 361 (D.Del. 1945); *Lams v. Smith Co.*, 36 Del. (5 Harrington) 477, 178 Atl. 651 (Super. Ct. 1935); *Halloran v. Jacob Schmidt Brewing Co.*, 137 Minn. 141, 162 N.W. 1082 (1917). *Cf. Macias v. Klein*, 106 F.Supp. 107 (W.D.Pa. 1952), *rev'd. on other grounds*, 203 F.2d 205 (3rd Cir. 1953), *cert. denied sub nom.*, *Macias v. Oakland Truck Sales, Inc.*, 346 U.S. 827 (1953). The court cites RESTATEMENT, CONFLICT OF LAWS § 334 (1934) for the proposition that the law of the place of contracting determines the formalities required to make a contract. But because the defendant was on the telephone when he accepted the offer, and plaintiff did not know where defendant was when he spoke, the court, citing section 326(c) of the Restatement, says the contract could have been made in any of three jurisdictions having contacts with the transaction. Validation follows from the assumption that a determination that the contract had been taken out of the forum's statute satisfied the formal requirements of the similar statutes of the other jurisdictions where the contract might have been made.

¹⁸ *Franklin Sugar Refining Co. v. William D. Mullen Co.*, 7 F.2d 470 (D. Del. 1925); *Franklin Sugar Refining Co. v. Holstein Harvey's Sons*, 275 Fed. 622 (D. Del. 1921); *Cochran v. Ward*, 5 Ind.App. 89, 29 N.E. 795 (1892); *Refining Co. v. Grocery Co.*, 94 W.Va. 504, 119 S.E. 473 (1923). *Cf. Jackson v. Jackson*, 252 P.2d 214 (Utah 1953), which may be an application of Professor Cook's theory that the characterization of its own Statute of Frauds by the place of contracting is not binding on the forum, which should be free to adopt a different characterization for purposes of its own conflict of laws rule. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 225-234 (1942).

¹⁹ *Miller v. Wilson*, 146 Ill. 523, 34 N.E. 1111 (1893) (in effect saying, "This is a Kansas contract and Kansas law should govern"; validation in absence of proof that there was a Kansas statute requiring writing); *Lenn v. Riche*, 117 N.E.2d 129 (Mass. 1954) (without discussion of characterization).

Illinois law is thrown in doubt by *Oakes v. Chicago Fire Brick Co.*, 388 Ill. 474, 58 N.E.2d 460 (1944). Although the court applies the *lex contractus* to validate a contract invalid under the *lex fori*, it does so on the ground that there was no proof that performance was to be wholly within one state, indicating that if the latter had been proved, the formal validity of the contract would have been determined under the law of the place of performance. The court also discusses *Leroux v. Brown*, 12 C.B. 801, 138 Eng. Rep. 1119 (1852), with apparent approval, thus leaving open the possibility that Illinois may adopt the language test of that case. See text at note 9 *supra*.

Goodrich apparently adopts the view that the Statute of Frauds is substantive. GOODRICH, CONFLICT OF LAWS § 88 (3d ed. 1949). Stumberg leans toward the substantive characterization, but refrains from taking a categorical position on the matter. STUMBERG, CONFLICT OF LAWS 143-147 (2d ed. 1951).

²⁰ *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 298, 113 N.E.2d 424, 427 (1953).

²¹ *Canister Co. v. National Can Corp.*, 63 F.Supp. 361 (D.Del. 1945); *Franklin Sugar Refining Co. v. William D. Mullen Co.*, 7 F.2d 470 (D. Del. 1925); *Franklin Sugar Refining Co. v. Holstein Harvey's Sons*, 275 Fed. 622 (D. Del. 1921); *Miller v. Wilson*, 146 Ill. 523, 34 N.E. 1111 (1893); *Cochran v. Ward*, 5 Ind.App. 89, 29 N.E. 795 (1892); *Halloran v. Jacob Schmidt Brewing Co.*, 137 Minn. 141, 162 N.W. 1082 (1917); *Refining Co. v. Grocery Co.*, 94 W.Va. 504, 119 S.E. 473 (1923).

stantive characterization cases it appears that the place of performance might have been the place of contracting or one or more other jurisdictions.²² Substantive characterization may therefore be a way of expressing a strong preference for the *lex contractus et solutionis* when the forum's contact with the transaction is more or less incidental, thus giving effect to the intention of the parties to be contractually obligated. Support for this hypothesis is found in the reasoning of courts which have adopted the substantive characterization:²³

It would seem that the parties took pains to comply with the only statute of frauds applicable to their contract. This writing, a perfectly valid and competent proof of that engagement, when and where made and to be performed, should now be held competent and valid here, though slightly different from the form prescribed by our statute, in that it does not express the consideration. At most, an insignificant variance . . . Admitting the written evidence of the guaranty can surely not run counter to the policy of the forum here upon the subject of perjury.

Adverse to the theory just advanced are a number of procedural characterization cases which have applied the *lex fori* despite the fact that the place of contracting was certain²⁴ or likely²⁵ to be the place of performance. An Ohio court, invalidating a contract which was valid under the law of Pennsylvania where it was made and to be performed, explained its action by saying:²⁶

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

Because this argument is exclusively oriented to the invalidation of foreign contracts, it is not persuasive that the Statute of Frauds should always be given a procedural characterization. Validation contrary to the *lex contractus et solutionis* has also followed a procedural characteriza-

²² *Smith v. Onyx Oil and Chemical Co.*, 218 F.2d 104 (3rd Cir. 1955); *Lams v. Smith Co.*, 36 Del. 477, 178 Atl. 651 (Super. Ct. 1935); *Lenn v. Riche*, 117 N.E.2d 129 (Mass. 1954); *Jackson v. Jackson*, 252 P.2d 214 (Utah 1953).

²³ *Halloran v. Jacob Schmidt Brewing Co.*, 137 Minn. 141, 147, 162 N.W. 1082, 1084 (1917). See also *Lams v. Smith Co.*, 36 Del. 477, 178 Atl. 651 (Super. Ct. 1935), where the court said, "Where two people solemnly enter into a contract which is good, valid and entirely enforceable in that jurisdiction where it is made, it seems to us as an unnecessary and undesirable construction to hold the contract unenforceable in another jurisdiction where one of the parties may have taken refuge unless, indeed, the contract contravenes some rule of public policy decreed by the law of the forum." The court proceeds to dismiss the argument that generally the Statute of Frauds is expressive of such a public policy. *Id.* at 483, 178 Atl. at 653.

²⁴ *Woolley v. Bishop*, 180 F.2d 188 (10th Cir. 1950); *Buhl v. Stephens*, 84 Fed. 922 (D. Ind. 1898); *Heaton v. Eldridge & Higgins*, 56 Ohio St. 87, 46 N.E. 638 (1897).

²⁵ *Straesser-Arnold Co. v. Franklin Sugar Refining Co.*, 8 F.2d 601 (7th Cir. 1925), *cert. denied*, 270 U.S. 642 (1926); *Third Nat. Bank of New York v. Steel*, 129 Mich. 434, 88 N.W. 1050 (1902); *Marvel v. Marvel*, 70 Neb. 498, 97 N.W. 640 (1903).

²⁶ *Heaton v. Eldridge & Higgins*, 56 Ohio St. 87, 103, 46 N.E. 638, 640 (1897).

tion.²⁷ This is the negative side of what was considered by the Ohio court—validation in the absence of a procedural policy of the forum requiring a writing.

What the Ohio court said suggests an approach to the Statute of Frauds which is based solely on the policy of the forum. In a few cases public policy has been the express reason given for preferring the forum's statute to that of the place of contracting.²⁸ It is doubtful, however, that such a policy should be extended to all actions on foreign contracts, which is the result indicated by some courts.²⁹ The most carefully reasoned opinions in which the *lex fori* has been applied on policy grounds are found in *Rubin v. Irving Trust Co.*³⁰ and *Emery v. Burbank*.³¹ Both cases involve oral foreign contracts to make or alter a will. The policy ground for invalidation under the *lex fori* was the special interest of the forum in the disposition of the estates of decedents domiciled there. Each court was careful to limit its decision to the particular facts presented, avoiding the statement of a rule of general applicability. Thus in the *Rubin* case the court remarked that the special interest of the domicile in the disposition of decedents' estates was a policy consideration which might be absent in ordinary commercial situations.³²

An obvious line of development is suggested by the approach of the New York Court of Appeals in *Rubin*. This would be to adopt a "normal" rule permitting action on foreign contracts, according to the expectations of the parties, and to limit policy application of the *lex fori* to the types of oral contracts which are especially disfavored or which present unusual opportunities for perjury.

Intent of the parties was the express basis of decision in the pioneering Wisconsin decision of *D. Canale & Co. v. Pauly & Pauly Cheese Co.*³³ This was an action brought in Wisconsin, the place of performance, on an oral

²⁷ *Woolley v. Bishop*, 18 F.2d 188 (10th Cir. 1950). *Cf. Straesser-Arnold Co. v. Franklin Sugar Refining Co.*, 8 F.2d 601 (7th Cir. 1925), *cert. denied*, 270 U.S. 642 (1926).

²⁸ *Barbour v. Campbell*, 101 Kan. 616, 168 Pac. 879 (1917); *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895); *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953); *Farley v. Fair*, 144 Wash. 101, 256 Pac. 1031 (1927). See also *Hamilton v. Glassell*, 57 F.2d 1032 (5th Cir. 1932). Although the court cites the *Barbour* and *Emery* cases, *supra*, with apparent approval, it characterizes the statute of the forum as procedural and applies it to invalidate the contract. In so doing, the court remarks that its task is made easier by the fact that the same result would follow from application of the statute of the place of contracting. Professor Cook recognized that the forum may say that its "substantive" Statute of Frauds lays down a policy which must be carried out, no matter where the agreement was made. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 227 (1942).

²⁹ *Barbour v. Campbell*, 101 Kan. 616, 168 Pac. 879 (1917); *Farley v. Fair*, 144 Wash. 101, 256 Pac. 1031 (1927). See also *Hamilton v. Glassell*, 57 F.2d 1032 (5th Cir. 1932).

³⁰ 305 N.Y. 288, 113 N.E.2d 424 (1953). Noted in 67 HARV. L. REV. 179 (1953); 52 MICH. L. REV. 902 (1954); 20 BROOKLYN L. REV. 289 (1954); 54 COLUM. L. REV. 140 (1954); 39 CORNELL L. Q. 538 (1954); 38 MINN. L. REV. 540 (1954). See also Comment, *Statute of Frauds: Substance or Procedure?*, 18 ALBANY L. REV. 28 (1954).

³¹ 163 Mass. 326, 39 N.E. 1026 (1895).

³² 305 N.Y. 288, 305, 113 N.E.2d 424, 428 (1953).

³³ 155 Wis. 541, 145 N.W. 372 (1914).

contract made in Tennessee and there valid, but invalid under the law of the forum. In disposing of the defense of formal invalidity, the court said:³⁴

It does not seem necessary to consider the distinction between a statute of frauds, in terms making specified contracts unenforceable, and a statute declaring certain contracts void . . . [W]e must view the acts of the parties from a common sense standpoint, presuming that they intended to deal with each other honestly, in the moral as well as the legal aspects of the matter, and that when they, in form, made the oral agreement, they did not intend any idle ceremony . . . [I]t seems to us that evidentiary circumstances, inconsistent with the presumption arising from the agreed place of performance, clearly overcomes the latter and, therefore, that the contract ought to be held to be just what the parties evidently intended it should be; that is, a binding agreement; hence a Tennessee obligation.

This "common sense" solution of the Statute of Frauds difficulty could have been adopted in *Alaska Airlines v. Stephenson*,³⁵ recently decided by the Ninth Circuit. Instead, the court seems to have applied *renvoi*, distinctly a new approach to the Statute of Frauds. The *Stephenson* case was an action brought in an Alaska forum on an alleged oral contract of employment made in New York. Because not to be performed within one year, the contract fell within the New York Statute of Frauds and, for purposes of analyzing what the court did, it must be assumed that no exception to the New York statute would have saved the contract had the action been brought there rather than in Alaska.

Assumed also is a desire to validate the foreign contract under an exception to the Alaska statute, based on promissory estoppel, which the court intended to make.³⁶ It is then apparent that several possibilities for validation were open to the court, none of which was expressly adopted in arriving at that result.³⁷ The Alaska Statute of Frauds declares that contracts subject to it are "void unless . . . in writing . . ."³⁸ A procedural

³⁴ *Id.* at 543-546, 145 N.W. at 372, 373.

³⁵ 217 F.2d 295 (9th Cir. 1954).

³⁶ The court reads RESTATEMENT, CONTRACTS § 90 (1932) (the "detrimental reliance" section) into the Statute of Frauds. It relies also on *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88 (1909), which is a leading authority for taking a contract out of the statute where the plaintiff has given up his job on the strength of the defendant's promise to employ him and has promised to reduce the agreement to writing.

³⁷ After deciding that New York would apply the Alaska statute to this case, the court said, "We do not deem it necessary to proclaim the Alaska statute of frauds one of substance or procedure . . . We think substance is the better rule . . . We think that we should hold that if the *lex loci contractus* is procedural and the law of the Territory of Alaska is primarily substantive, the fundamental public policy of the territory should require that no contract invalid under the Alaska statute of frauds, if made in Alaska, escapes invalidity under the statute of frauds just because it is made outside of Alaska. (If the Alaska statute is procedural, then certainly whatever interpretation we give the Alaska statute is applicable to the *Stephenson* contract.) Here, following the Restatement of Contracts as we have applied it, and depending on how one looks at it, the contract is not within the Alaska statute, or it is within Alaska's statute but subject to a recognized exception of the Restatement of Contracts." 217 F.2d 295, 299 (9th Cir. 1954).

³⁸ ALASKA COMP. LAWS ANN. § 58-2-2 (1949).

characterization of this statute would have been a direct means of applying the *lex fori*. The substantive characterization seemingly favored³⁹ would have required a reference to the *lex contractus*, New York, but the indicated result under the New York cases was invalidation, contrary to the validation actually accomplished. Invalidation would also have followed from secondary substantive characterization of the New York statute.

If the Statute of Frauds of the place of contracting, New York, had been given either a secondary⁴⁰ or a primary procedural characterization, the *lex fori* would have been applied. The contract could then have been validated under the exception to the forum's statute previously mentioned, if the procedural characterization were primary. If the procedural characterization of the New York statute were secondary and the forum characterized its own statute as substantive, traditional analysis would force the conclusion that neither statute was to be applied.

Application of the forum's Statute of Frauds, on the ground that it was expressive of an important policy, might have been supported by the New York case of *Rubin v. Irving Trust Co.*,⁴¹ but it must be recalled that the policy deemed controlling in that case was the special one relating to decedents' estates, and that the court expressly avoided the statement of a general rule. The case is not authority for an employment contract such as was involved in *Stephenson*. Furthermore, the cases which have applied the forum's statute on policy grounds have ordinarily done so for the purpose of invalidating contracts.

The problem in *Stephenson* was one of validation, which could have been solved in a straightforward manner by following Professor Lorenzen. Though generally preferring to treat the Statute of Frauds as substantive, he thought that where the question was one of validation of a contract, the *lex fori* should be applied in preference to the invalidating *lex contractus*.⁴² This view, if adopted, would have been a sufficient justification of the result in the *Stephenson* case.⁴³

³⁹ 217 F.2d 295, 299 (9th Cir. 1954).

⁴⁰ Whether the New York Statute of Frauds is substantive or procedural is a question left undecided by *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953).

⁴¹ *Ibid.*

⁴² Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311, 333-338 (1923). Professor Lorenzen summarized the conclusions of his study as follows:

"(1) The fourth and seventeenth sections of the statute of frauds affect the substantive rights of the parties and not merely procedure, and matters falling within their provisions are controlled by the law governing the formalities of contracts in general.

"(2) The statute of frauds is not expressive of a public policy from the standpoint of the Conflict of Laws, so as to preclude the enforcement of a foreign contract. A contract satisfying the requirements of the proper foreign law will therefore be enforced, although it does not meet the requirements of the statute of frauds of the forum.

"(3) The peculiar nature of the statute of frauds makes it desirable, at least as a matter of legislative policy, that contracts not enforceable under the statute of frauds of the state whose law determines the formalities of contracts in general shall be enforced nevertheless if they meet the requirements of the statute of the forum." *Id.* at 338.

⁴³ Language in the opinion suggests an opposed view, 217 F.2d 295, 299, but the result of the case is consistent with the Lorenzen policy of validation.

None of the suggested solutions to the choice of law problem was expressly adopted by the court in the *Stephenson* case;⁴⁴ instead, the court seems to have applied renvoi as the means of deciding the question of formal validity under the Statute of Frauds of the forum.

The renvoi problem arises in this manner.⁴⁵ If the choice of law rule of the forum dictates a reference to the law of another jurisdiction having contacts with the case, there is a question whether the reference is only to the internal law of the foreign jurisdiction or to its whole law including its conflict of laws rules. If the latter, and the foreign conflicts rule refers back to the law of the forum, there is said to be a renvoi. When this happens, there is seen the possibility of endless references back and forth—the inextricable circle—which will result in a choice of law never being made.⁴⁶

Several theories have been suggested to overcome this difficulty. Rejection of the renvoi doctrine is accomplished by making reference only to the internal law of the foreign jurisdiction. This is the view taken by most writers and by the Restatement.⁴⁷ Recognition of renvoi calls for a reference to the whole law of the foreign jurisdiction. If the conflicts rule of that jurisdiction then refers back to the law of the forum, two principal theories have been employed to avoid the endless circle problem. Acceptance of renvoi breaks the circle by assuming that the re-reference to the law of the forum is only to internal law.⁴⁸ The foreign court theory proceeds on the

⁴⁴ See note 33 *supra*.

⁴⁵ The statement of the renvoi problem and theories advanced for its solution is adapted from Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938).

⁴⁶ Instead of referring to the law of the forum, the choice of law rule of the foreign jurisdiction may refer to the law of a third jurisdiction. This variation of renvoi is known as transmission. In cases of transmission the endless circle problem of renvoi does not appear unless the law of the third jurisdiction refers to the law of the forum or the first foreign jurisdiction. *Mason v. Rose*, 176 F.2d 486 (2d Cir. 1949), involves a problem of transmission.

⁴⁷ RESTATEMENT, CONFLICT OF LAWS § 7 (1934); 1 BEALE, CONFLICT OF LAWS §§ 5.1, 7.3 (1935); GOODRICH, CONFLICT OF LAWS § 10 (3d ed. 1949); MENDELSSOHN-BARTHOLDY, RENVOI IN MODERN ENGLISH LAW (1937), reviewed in 51 HARV. L. REV. 573 (1938), 1 MOD. L. REV. 332 (1938), and 47 YALE L.J. 857 (1938); Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 SO. CALIF. L. REV. 221 (1941); Falconbridge, *Renvoi and Succession to Movables*, 46 L.Q. REV. 465 (1930), 47 *id.* 271 (1931); Falconbridge, *Renvoi, Characterization and Acquired Rights*, 17 CAN. BAR REV. 369 (1939); Pollock, *The 'Renvoi' in New York*, 36 L.Q. REV. 91 (1920); Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COL. L. REV. 190, 327 (1910); Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country,"* 27 YALE L.J. 509 (1918); Schreiber, *The Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523 (1918). Stumberg, in the latest edition of his text, has refrained from committing himself either to recognition or to rejection of renvoi. STUMBERG, CONFLICT OF LAWS 12n. (2d ed. 1951). *Matter of Tallmadge*, 109 Misc. 696, 181 N.Y. Supp. 336 (Surr. Ct. 1919), is the leading case authority for the rejection of renvoi. The case is discussed by Professor Lorenzen in Comment, 29 YALE L.J. 214 (1919). Renvoi was also rejected in *Gray v. Gray*, 87 N.H. 82, 174 Atl. 508 (1934). An exception to the rejection of renvoi has been recognized by the Restatement and by some writers in cases involving marital status or title to land. RESTATEMENT, CONFLICT OF LAWS § 7 (1934). See Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 SO. CALIF. L. REV. 221, 262-270 (1941), and authorities there cited.

⁴⁸ *In re Schneider's Estate*, 96 N.Y.S.2d 652 (Surr. Ct. 1950), *aff'd*, 100 N.Y.S.2d 371 (Surr. Ct. 1950), noted, 31 B.U.L. REV. 69 (1951), 1 BUFF. L. REV. 49 (1951), 26 N.Y.U.L.

basis that the case should be decided exactly as it would be decided by the foreign court. This theory is satisfactory if the foreign court rejects or accepts renvoi, but it breaks down if the foreign court itself follows the foreign court theory.⁴⁹

Alaska Airlines v. Stephenson,⁵⁰ it will be recalled, was an action brought in Alaska on an alleged oral contract of employment made in New York. The court's reason for determining the formal validity of the contract under the Alaska Statute of Frauds is that New York would apply the Alaska statute. This necessarily implies a reference to the whole law of New York and a finding that the New York conflicts rule relating to formal validity under the Statute of Frauds refers to some other jurisdiction having substantial contacts with the case, here the place of performance. This possibility is definitely left open by the New York case of *Rubin v. Irving Trust Co.*⁵¹ and, if such a rule were adopted in New York, would support the apparent application of the renvoi doctrine by the court of appeals in the *Stephenson* case.

Assuming, *arguendo*, that New York has such a conflicts rule, the apparent recognition of renvoi in the *Stephenson* case is consistent with either the foreign court theory or acceptance of renvoi. The court's statement, "[W]e think it demonstrates that the New York courts would hold that the Alaska statute is the one to be applied in this case,"⁵² indicates a disposition to decide the case as it would be decided by the foreign court—the foreign court theory of renvoi. On the other hand, accepting the reference to the *lex fori* which resulted in this case is consistent with acceptance of renvoi.

Alaska Airlines v. Stephenson is perhaps the only case to apply renvoi by implication as a means of deciding a Statute of Frauds problem under the *lex fori*. It is by no means the first case to use renvoi as a means of getting to the *lex fori*. A much-discussed case, *In re Schneider's Estate*,⁵³ did the same thing. In the *Schneider* case it is arguable that the foreign conflicts rule did not refer to the law of the forum and that the question of

Q. REV. 201 (1951). 64 HARV. L. REV. 166 (1950), 50 COLUM. L. REV. 862 (1950), 35 MINN. L. REV. 87 (1950), 2 SYRACUSE L. REV. 186 (1950). The recognition and acceptance of renvoi in the *Schneider* case throws doubt on the status of the renvoi in New York, since the doctrine was emphatically rejected in *Matter of Tallmadge*, 109 Misc. 96, 171 N.Y. Supp. 336 (Surr. Ct. 1919). The cases may be harmonized by noticing that each expresses a preference for the *lex fori*. In the *Schneider* case this is seen as a preference for the result indicated by application of New York internal law; in the *Tallmadge* case it appears as a preference for the result indicated by the New York conflict of laws rule. See discussion in the text at note 50 *et seq.*

⁴⁹ Some English cases have followed the foreign court theory. *In re Annesley* [1926] Ch. 692; *In re Ross* [1930] 1 Ch. 377; *In re Askew* [1930] 2 Ch. 259. A similar theory has been advocated in Germany. PAGENSTECHER, DER GRUNDSATZ DES ENTSCHEIDUNGSEINKLANGES IM INTERNATIONALEN PRIVATRECHT (1951).

⁵⁰ 217 F.2d 295 (9th Cir. 1954).

⁵¹ 305 N.Y. 288, 113 N.E.2d 424 (1953).

⁵² 217 F.2d 295, 298 (9th Cir. 1954).

⁵³ 96 N.Y.S.2d 652 (Surr. Ct. 1950), *aff'd*, 100 N.Y.S.2d 371 (Surr. Ct. 1950).

applicable law was controlled by treaty.⁵⁴ Nevertheless, renvoi was recognized and the *lex fori* applied.

That renvoi is not as satisfactory as the "procedural" characterization for the purpose of applying the *lex fori* in Statute of Frauds cases is shown by the fact that the same policy consideration which motivates recognition of renvoi may lead to its rejection. The leading American case in support of the view that renvoi should be rejected is *Matter of Tallmadge*.⁵⁵ The question before the court was the construction of the will of an American national domiciled in France. According to New York law a will was construed under the law of the domicile. According to the law of the domicile in this case the will was construed under the national law of the decedent. Although the New York court rejected renvoi and applied French internal law, it is to be noted that the acceptance of renvoi in this case would have resulted in the construction of the will according to New York internal law. This result would have been contrary to the policy of New York that wills are construed under the law of the testator's domicile. In a very real sense, then, the rejection of renvoi in this case led to application of the *lex fori*, a result which could be described as an inverse foreign court theory. The true rationale of the decision may be that the policy of the forum is decisive when there is a conflict of choice of law rules.

This comparison of the two leading American cases illustrates the unreliability of the renvoi doctrine in its present state. That it cannot be applied consistently emphasizes the undesirability of its adoption as the solution to a specific problem such as the formal validity of contracts. The fact that the courts have resorted to renvoi in the Statute of Frauds cases, even by implication, is proof that they are groping for an adequate solution not supplied by the substance-procedure characterization which is patently unsatisfactory because it only describes the formal means of getting to particular results which have varied from case to case.

If more were known of the real motivating factors in the Statute of Frauds cases, it might be possible to show that cases of invalidation are really policy exceptions to a general rule of validation which would be consistent with, if not ahead of, the well recognized trend in non-conflicts cases to avoid invalidation under the Statute of Frauds.⁵⁶ If this be true, the premise for any working theory should be that, generally, the parties intended to contract. If that intent is sufficiently clear, the contract should not fall before writing requirements unless a strong policy of the forum compels such a result. This is the constructive approach suggested by the carefully considered opinion of the New York Court of Appeals in *Rubin*

⁵⁴ See the penetrating discussion by Falconbridge, *Renvoi in New York and Elsewhere*, 6 VAND. L. REV. 708, 725-731 (1953).

⁵⁵ 109 Misc. 696, 181 N.Y.S. 336 (Surr. Ct. 1919).

⁵⁶ A significant development in this area was the partial repeal, effective June 4, 1954, of the English Statute of Frauds. All that remains is that promises to answer for the debt, default, or miscarriage of another, and contracts for the sale of land, must be in writing. See 68 HARV L. REV. 383 (1954); 70 L. Q. REV. 441 (1954).

*v. Irving Trust Co.*⁵⁷ The traditional use of characterization is question begging, and renvoi, apparently applied in a recent case, is unreliable. In contrast, the normal expectation of the parties that their agreement places them under contractual obligation could provide a solid foundation for the case by case development of a sensible conflicts law for the Statute of Frauds. Such an approach is certainly to be preferred to the Restatement's passive recognition of the confusion resulting from multifarious judicial attempts to solve the problem. It should also lead to more discriminating use of the forum's policy to invalidate contracts which the parties reasonably believed to have been enforceable.

Graham B. Moody, Jr.

⁵⁷ 305 N.Y. 288, 113 N.E.2d 424 (1953).