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EFFECTS OF THE AUTONOMY OF THE PARTIES ON CONFLICT OF LAWS CONTRACTS

Louis C. James*

II. Case Analysis

Comment having been made regarding the several problems and solutions relating to the central core of this thesis, it is proposed, in this section to discuss some of the cases bearing upon the matter of usury, and the more specialized problems to be found in the carrier and the insurance contracts. These cases will, at least partially, answer two questions, to-wit: (1) what law may the parties choose to govern their contract, and (2) what are the limitations on party autonomy in conflict-of-laws contracts? It should be noted at the outset, however, that concern will be limited to the point of formal or essential validity of the contract so made and will not reach into extraneous matters.

A. THE EFFECT TO BE GIVEN TO USURY

1. The General Rule

A court will, in general, accept as the governing law of the contract the law of that state with which the contracting parties intended to contract but it may refuse to enforce a contract which

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1 See, in particular, the first part of this article appearing ante in 36 CHICAGO-KENT LAW REVIEW 34-59 (1959).

2 This point is discussed ante, 36 CHICAGO-KENT LAW REVIEW 35, at note 6, where it was indicated that the limitations on the presumed intent of the parties seem to be more or less similar to the limitations on the expressed intent. In the
it deems to be against its own public policy. Use of the public policy of the forum has, in turn, its own limitations; also the forum may refuse to enforce the contract if a policy determinant of the law of a place having the most vital or natural connection, as seen by the forum, with an essential element of the contract is in conflict with the law chosen by the parties. Usually, then, there seems to be little doubt, if the spatial contacts of the contract are either the place of making or the place of performance of the contract, that the courts will uphold the agreement, subject to the exceptions mentioned.

To illustrate, in the Massachusetts case of *Akers v. Demond*, a note bearing interest at the rate of ten per cent was made in New York but was to be paid in Texas. The note was usurious if the law of New York was to be applied but was valid if the law of Texas was to be used. If the court adhered rigidly to the place-
of-making rule, the note would be invalid. However, if it followed the place-of-performance rule, the note would be valid. The Massachusetts court concluded that the question of validity had to be determined by the law of the state of making, saying no other law could apply to the note. As the note had never acquired a legal existence there, the note was void in every other state. In the usury cases, however, there is also a tendency on the part of courts to uphold the contract in the interest of commerce which often causes a considerable number of them to sustain a given transaction provided it may be upheld under either the internal law of the place of performance or of the place of making, or by the law of some state with which the transaction can be said to have had its most natural or vital connection.

2. The Stipulated Law

The desire to uphold the contract may cause the court, as in Dugan v. Lewis, to permit the validation of the contract provided the interest rate is not usurious by either the law of the debtor’s domicil or the lender’s domicil, or where the stipulated law is the law of the situs of the land which is the security for the note,

8 Arnold v. Potter, 22 Iowa 194 (1867).
11 79 Tex. 246, 14 S. W. 1024, 12 L. R. A. 93, 23 Am. St. Rep. 332 (1891). The same rationale has been followed in Merchants’ & Manufacturers’ Sec. Co. v. Johnson, 69 F. (2d) 940 (1934), cert. den. 293 U. S. 569, 55 S. Ct. 91, 79 L. Ed. 668 (1934); Smith v. Parsons, 55 Minn. 520, 57 N. W. 311 (1893); Le Sueur v. Manufacturers’ Finance Co., 285 F. 490 (1922); Ashurst v. Ashurst, 119 Ala. 219, 24 So. 760 (1898); Castelman v. Canal Bank & Trust Co., 171 Miss. 291, 156 So. 648 (1934).
as in the case of *Lanier v. Union Mortgage Banking & Trust Company.* Nevertheless, several usury cases have held the stipulations of the parties to be void because the referral law was in conflict with that of the forum.

Turning to a more detailed analysis of what the courts have said and done in the usury situations, attention might first be drawn to the Kansas case of *Midland Savings & Loan Company v. Solomon* where the court held that the parties to the contract could stipulate that their contract should be governed by the laws of a state of their choice. It concluded that, if the stipulation was made fairly and in good faith, it would be the duty of the courts of any other state, in which litigation growing out of the contract arose, to permit recovery on the bond and thus to give effect to the stipulation. In that case, the contract had contact with the state of Colorado, whose law was expressly chosen to govern the transaction, for the building and loan association lender was a Colorado association and payment of the debt was to be made there. While the mortgaged security for the loan was located in Kansas; the suit was brought in Kansas; the mortgagor was a

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13 64 Ark. 39, 40 S. W. 466 (1897).
15 71 Kan. 185, 79 P. 1077 (1905).
16 See the concept of "good faith" portrayed in Seeman v. Philadelphia Warehouse Co., 274 U. S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927), and in Green v. Northwestern Trust Co., 128 Minn. 30, 150 N. W. 229 (1914). A note in 62 Harv. L. Rev. 647, at 650, suggests that "good faith . . . apparently means no more than that the stipulated law has some relation to the contract." See also note in 10 N. Car. L. Rev. 64, and the holdings in Ripple v. Mortgage Corporation, 193 N. Car. 422, 137 S. E. 156 (1927); Morris v. Hockaday, 94 N. Car. 258 (1886); Houston v. Potts, 64 N. Car. 33 (1870); Roberts v. McNeely, 52 N. Car. 506 (1860); Arrington v. Gee, 27 N. Car. 500 (1845); Crawford v. Seattle R. & S. R. Co., 86 Wash. 628, 150 P. 1155 (1915). Bad faith must not be evident before the court if the parties' intent is to be fulfilled: Fidelity Sav. Ass'n v. Shea, 6 Id. 405, 55 P. 1022 (1899); Meroney v. Atlanta Bldg. & L. Assn., 116 N. Car. 882, 21 S. E. 927, 47 Am. St. Rep. 841 (1895); Stoddard v. Thomas, 60 Pa. Super. 177 (1915).
resident of Kansas; and the mortgage was acknowledged in Kansas; the petition in the action alleged that the bonds and mortgage were delivered to the plaintiff in Colorado. Since an instrument is deemed made where delivery occurs, Colorado was, in essence, both the place of making and the place of performance of the contract.

In the course of its opinion, the court stated:

The contract having been made in Colorado, and the sums due upon it having been made payable there, the presumption of law is that it is solvable in that state. That presumption however, is a rebuttable one, and, if nothing further appeared, the court would have the right to take into consideration extraneous facts in ascertaining the true intention of the parties. But an express provision of the contract makes it subject to, and entitled to the benefits of, the laws of Colorado. Presumably, the parties knew what they desired, and understood the force of the language they used; and, having agreed in writing, further inquiry, except, of course, for fraud and the like, is precluded. The contract must be adjudged by the express terms, no matter where the parties were when it was made . . . Where . . . the parties to the contract have themselves expressly declared that their contract shall be held and construed as made with reference to a certain jurisdiction, that shows by what law they intended the transaction to be governed.17

Citing Chief Justice Marshall as authority for the fact that a contract is to be governed by the law with reference to which it is made,18 the Kansas court pointed to the fact that there was no room for inference or presumption as to what that intention was.

17 71 Kan. 185 at 187, 79 P. 1077 at 1078. The court quoted from Philmore, 4 Int. Law 469, to the effect that it “is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment whether that place be fixed by express words or by tacit implication—as the place of the jurisdiction to which the contracting parties elected to submit themselves.”

when it was expressed in the contract, so it then examined the contract in question for any evidence of an evasion of usury laws and found none.

The court also expressed itself on the role that public policy should play in cases of this nature when it said:

The courts of this state should not refuse, on the ground of a supposed public policy, to enforce collections of sums on a lawful bond solvable by the laws of a foreign state, and not given in evasion of the usury laws of this state, merely because, if construed by the laws of this state, the rate of interest would be higher than that allowed by the laws here.

The court, having observed that presumptions are all in favor of the legality of contracts and of the "good faith" of the parties to them, expressed the belief that the Colorado law chosen by the parties had, in the eyes of the forum, a most vital and natural connection with essential elements of the transaction, so it upheld and enforced the stipulations of the parties.

In a later Kansas case, that of Steinman v. Midland Savings & Loan Company, the expressed stipulations in the contract were similar in nature to those in the case last mentioned. The same Colorado building and loan association had issued to Steinman a certificate for shares of its capital stock for which he had agreed to pay them a stipulated amount monthly. Steinman then obtained a loan on the strength of these shares from the loan company but later made default thereon. When suit in Kansas on this loan followed, questions of usury and of the pertinence of the express stipulation in the contract that the law of Colorado should govern the transaction arose. Again, the interest rate was valid by Colorado law, but invalid by the law of Kansas. Once more, the court found that the contract was made in Colorado; that there

20 71 Kan. 185 at 190-1, 79 P. 1077 at 1079.
21 Ibid.
22 78 Kan. 479, 96 P. 860 (1908).
had been no attempted evasion of usury laws; that "good faith" existed in the entire transaction; and that there was no evidence of fraud or the imposition of the will of the lender upon that of the borrower. Giving judgment for the lender, the court added the cautionary remark that if "our citizens choose to apply for loans to corporations in other states, no fraudulent scheme or evasion being pleaded or proven, they must abide by their agreement that the laws of that state shall govern in such matters."

A slightly different approach is manifested in the Tennessee case of Manufacturers Finance Company v. B. L. Johnson & Company, where it was held that, for an express stipulation of the law of a state for the governance of the transaction to be upheld, the transaction had to have some vital connection with the state whose law had been chosen to govern the transaction. Delaware, the state referred to, was neither the place of making nor the place of performance of the contract. It is true that the court found that the corporation making the loan was chartered in Delaware, but its principal address was Maryland and the loan was made to a Tennessee corporation. The court found that the offer was accepted in Maryland and the performance was to be in Maryland and in Tennessee, so the court felt inclined to view the Maryland law as having more essential contacts with the contract than the law of any other place, hence it governed the contract on the point as to usury. It is interesting to observe that the contract rate of interest was valid in Maryland and in Delaware, but invalid in Tennessee. It would have been most interesting to observe what the court would have done had the Maryland and Tennessee laws both rendered the contract rate of interest usurious and only the Delaware law would have rendered the contract valid.

At best, with as little reasoning as we have from the court for its decision, the opinion seems somewhat dogmatic. Certainly, Delaware, where the corporation was chartered and had its domicil, had a connection with the transaction. The question remains, what is the most vital or natural connection of contract elements?

23 78 Kan. 479 at 482-3, 96 P. 860 at 861.
24 15 Tenn. App. 236 (1931).
What are the essential elements of a contract? Who is to make the decision on these issues other than the forum? Are all forums in agreement on these issues? If they are not, and they certainly are not, does not the use of the "most vital or natural contact" theory leave much to be desired in the way of uniformity in the conflict of laws as to contracts? Must we not pause and ask, would it not be better, on the whole, to let the parties accomplish this uniformity by the use of their expressly stipulated law?

By way of contrast, turn to the federal court decision in the case of Brierley v. Commercial Credit Company. It was there held, in relation to a contract made in Maryland for the loan of money by a Maryland corporation to a Pennsylvania corporation, that a stipulation to the effect that the law of Delaware should govern the validity, enforcement, interpretation, construction, and effect of the agreement, was not effective in determining whether the reserved interest was usurious because Delaware was said to have had no normal relations with the transaction.

The significance to be given to the "contact theory" of validity is well illustrated by the Arkansas case of Lanier v. Union Mortgage Banking & Trust Company. A stipulation there contained in a trust deed of real property located in Arkansas recited that the trust deed should be construed in accordance with the laws of that state where the deed of trust was made. The provision was found to be binding on the parties, and subjected the contract to the laws of Arkansas with respect to usury, in spite of the fact that the deed of trust and the note were both executed in Tennessee by a resident of Arkansas who was, at the time, in Tennessee and the note was payable in New York. The court reasoned that as Lanier was a resident of Arkansas; the land used as security was located there; and the money from the loan was to be used in Arkansas; the law of Arkansas should apply since it had the most vital contact relationship with the entire transaction.

25 43 F. (2d) 730 (1930).
26 64 Ark. 39, 40 S. W. 466 (1897).
27 The trust deed recited that it was "made" in Arkansas.
Somewhat comparable holdings have been achieved in two other real estate lending situations. In *Smith v. Parsons*, validity and effect was given to an express stipulation that the notes were made and executed under, and were to be construed by the Minnesota law, in a case where the makers of the notes were residents of Minnesota; the notes were secured by a mortgage on real estate in Minnesota; and the instruments were signed in Minnesota; although the notes were accepted and the money actually advanced in Connecticut, where the notes were payable. In *Ashurst v. Ashurst*, the land given in security for the loan was located in Alabama, and the notes and mortgage, executed in Alabama, were forwarded to the agent of the borrower in New York. The agent delivered the papers to the loan company in New York and there received the money, which he later transmitted to the mortgagor in Alabama. The mortgage contained a provision waiving exemptions under the laws and constitution of Alabama. Further, the stipulation in the contract indicated that the mortgage and notes were to be governed by the laws of Alabama even though the notes were payable in New York. The court held that this was an Alabama contract.

In still another case, that of *Washington National Building & Loan Association v. Pifer*, the usurious character of a loan transaction made by a Virginia corporation which had its principal offices in the District of Columbia to a resident of West Virginia, where the land security for the loan was located, was said not to be controlled by the laws of Virginia, since Virginia was neither the place of making nor the place of performance of the agreement. This result was achieved despite the fact the contract expressly

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28 55 Minn. 520, 57 N. W. 311 (1893).
29 119 Ala. 219, 24 So. 760 (1898).
30 It is often most difficult to be certain what effect the stipulated intent had upon the decision of the court. See Lefflar, *Conflict of Laws* (U. of Ark. Press, Fayetteville, Ark., 1938), § 93; Pollard, "Conflict of Laws—Usurious Contracts," 4 Ark. L. Rev. 88 (1949). On the effect to be given to a stipulated intent in general, see note in 69 Harv. L. Rev. 563 commenting on the more recent case of Siegelman v. Cunard White Star, Ltd., 221 F. (2d) 189 (1955), not, of course, a usury case. An earlier note in 62 Harv. L. Rev. 647 suggests that, in the usury cases, the courts "favored commerce by a marked hostility toward invalidation."
provided that it should be governed by the laws of Virginia. Possibly, the decisive factor in the court's ruling was its desire to assist, by the use of its own law, what it seems to have considered to be an oppressed borrower who did not have economic equality in dealing with the corporation. In any event, the court, in essence, treated the lending corporation as a corporation domiciled in the District of Columbia even though it was incorporated in Virginia.

Only a very insignificant ratio, however, of court decisions since 1902 have rejected the stipulated law of the parties and, even in these decisions, the law adopted by the bench was that of the place wherein the lender had its principal office. In four more recent decisions, that choice resulted in sustaining the contract, as the stipulated law itself would have done.\(^{32}\)

**B. THE CARRIER CONTRACT CASES**

1. **General Rules**

Usually, the intention of the parties, either expressed\(^{33}\) or presumed,\(^{34}\) is the ultimate criterion of the governing law for conflict-of-laws carrier contracts. The law chosen to govern the contract must, of course, not conflict with the public policy of the forum,\(^{35}\)


\(^{34}\) In addition to annotations in 112 A. L. R. 124, 72 A. L. R. 250, 57 A. L. R. 175, 63 L. R. A. 513, and 18 L. R. A. (N. S.) 874, see 9 Am. Jur., Carriers, §§ 385, 660-1.

\(^{35}\) The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. Ed. 190 (1902); Siegelman v. Cunard White Star, Ltd., 221 F. (2d) 189 (1955); Oceanic Steam Navigation Co. v. Corcoran, 9 F. (2d) 724 (1925); The Fri, 154 F. 333 (1907); Monroe v. The Iowa, 50 F. 561 (1892); Hathaway v. The Brantford City, 29 F. 373 (1886); The
nor with the public policy of a place having the most vital or natural connection with an essential element of the transaction as viewed by the forum. Nevertheless, as observed in the usury cases, use by the forum of its own public policy has certain constitutional limitations.

Two brief illustrations will serve the purpose. In the case of *Liverpool & Great Western Steam Company v. Phenix Insurance Company*, the contract of shipment involved a voyage from New York to Liverpool. There was no express stipulation in the contract as to the governing law. The court took the view that the proper law governing the contract was that of the place where the agreement was made and the transportation begun unless it was made to appear that the parties, "when entering into the contract, intended to be bound by the law of some other country." However, in that case, the court arrived at the conclusion that the contract was an American one so it gave effect to the rule of American public policy invalidating provisions in an agreement designed to limit the liability of the carrier. The vital and substantial contacts of the transaction, as the court saw it were in America where the contract was made and where part performance began.

The second case, that of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Sheppard*, was one in which the court used the rule of the place of destination as the basic reason to invalidate the carrier’s attempted limitations on liability. Although the transportation began and the contract was made in another

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38 129 U. S. 397 at 458, 9 S. Ct. 469, 32 L. Ed. 788 at 798.

state where it would have been valid, the court referred the con-
tract to the law of the place of destination as the sole place of per-
formance for its governance and, by that law, it was invalid.

Other courts have regarded the contract as divisible into as
many parts as there may be nations or states in which any part
of the transportation takes place. Accordingly, reference has been
made to the law of the particular place where the loss or damage
occurred as furnishing the governing law.\textsuperscript{40}

It should be borne in mind, however, that shipments from a
foreign nation to the United States, or from the United States to
a foreign nation, or between the United States and any of its ter-
ritories or possessions, are subject to the terms of certain federal
statutes such as the Harter Act,\textsuperscript{41} and the statute relating to the
carriage of goods by sea,\textsuperscript{42} hence agreements with respect thereto
must not be contrary to the public policy evinced by such statutes.
In addition, if there is a conflict between strong policy determinants
of a forum which has some natural, vital or substantial contact with
the transaction and the exemption limitations of a contract which
is the subject of any of these acts, the exemption provisions will
not be enforced in the United States.\textsuperscript{43}

\textsuperscript{40} In particular, see Southern Exp. Co. v. Gibbs, 155 Ala. 303, 46 So. 465, 18
L. R. A. (N. S.) 874, 130 Am. St. Rep. 24 (1908). For further case comment on
interstate shipments and applicable law, see Chicago & N. W. R. Co. v. C. C. Whit-
nack Produce Co., 258 U. S. 369, 42 S. Ct. 328, 66 L. Ed. 665 (1922); Pennsylvania R.
Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268 (1903); Hart v. Pennsyl-
van ia R. Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717 (1884).

\textsuperscript{41} 27 Stat. at L. 445, U. S. C., Tit. 46, § 190. Knauth, op. cit., p. 122, suggests
that the statute “must derive its constitutional authority from the admiralty
clause, because it applies in domestic commerce to transactions which are not Inter-
state but merely maritime.” For a study of the early history of ocean bills of
lading, with special reference to American participation, see Knauth, op. cit., pp.
115-32. No distinct American practice existed until the United States Supreme Court
made the error of excusing a railroad from responsibility for the issuance of a
fraudulent bill of lading by its agent on the basis of ultra vires: Friedlander v. T.
& P. R. R. Co., 130 U. S. 418, 9 S. Ct. 570, 32 L. Ed. 901 (1889). In the northern
states, Union Uniform Bills of Lading thereafter came into being, but were not
followed in the Gulf states until 1916, with the enactment of the Pomerene Act.
For the present American public policy in this area, see Knauth, op. cit., pp. 115-56,
and Robinson, op. cit. In English and Continental courts, contracts of exoneration
of shipowners for nearly every fault under the sun were valid.

\textsuperscript{42} 49 Stat. at L. 1207-13; U. S. C. Tit. 46, §§ 1300-1915.

\textsuperscript{43} See Knott v. Botany Worsted Mills, 179 U. S. 69, 21 S. Ct. 30, 45 L. Ed. 90
(1900); The Chattahoochee, 173 U. S. 640, 19 S. Ct. 491, 45 L. Ed. 801 (1899); The
Silvia, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241 (1898).
2. Stipulated Limitations and Governing Law

Any detailed analysis of the carrier contract cases could best begin with the case of *Siegelman v. Cunard White Star Limited.*

The plaintiff and his wife had there contracted in New York with the defendant, a British corporation, to secure sea transportation for them to a foreign port. During the course of the trip, the wife was injured by the alleged negligence of the defendant. The printed contract on the reverse side of the ticket stipulated that all claims for injury were to be brought within one year from their occurrence and that any questions arising from the contract were to be decided according to the English law. Before the end of the one-year limitation period, the defendant’s New York agent purported to waive the limitation period by oral agreement. Promptly upon the expiration of the period of limitation, however, the defendant withdrew an offer of settlement it had previously made and denied liability. In the court actions which followed, it was held, applying the federal choice-of-law rule, that the parties intended to invoke English substantive law rather than English law in its entirety, including its conflict-of-laws rule, and that the purported waiver or estoppel did not apply under English law.

Although the law controlling the validity of the contract was

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44 221 F. (2d) 189 (1955). While the case did not actually involve the validity of contract, the court said the problem before it was very close to a validity case and reasoned much the same for either. A note on the case appearing in 58 W. Va. L. Rev. 53 says there are “certain limitations on the parties' privilege to stipulate the applicable law . . . The stipulation must be bona fide . . . The place stipulated must have some relationship to the contract . . . The stipulation must be one which will neither allow the parties to do some act or fail to do some act which would violate, nor allow the parties to do some act or fail to do some act which would evade or avoid, any statute of the place of contracting . . . In summary. no such provision will be given effect where it is regarded as violative of the ordre public.”

not in issue, the court found it very closely related to the points actually in issue in the case and said:

Here, of course, the question is neither one of interpretation nor one of validity, but instead involves the circumstances under which parties may be said to have partially rescinded their agreements, or to be barred from enforcing them. The question is, however, more akin to a question of validity. Nevertheless, we see no harm in letting the parties' intention control . . . Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsman-ship which relieves courts of problems of resolving ambiguities. To say that there may be no reduction in litigation because courts may not honor the provision is to reason backwards. A tendency toward certainty in commercial transactions should be encouraged by the courts. Furthermore, in England, where much of the litigation on these contracts might be expected to arise, the parties' stipulation would probably be respected.46

It then proceeded to examine into whether or not there had been good faith on the part of the parties, i.e., whether the law chosen by the parties was in conflict with policy determinants of a place having the most vital or natural connection with some essential element of the transaction, and as to whether there was any intent to evade or avoid the law of America in their choice of law. Finding no violation present, the court then observed that, although in England the parties' stipulated law would, most likely, be followed by the English courts, there was no evidence to indicate that in England the parties, making these stipulations with carriers, were in any manner oppressed. Instead, it found that the primary reason for making the stipulations in question was to promote uniformity in contract relations, a factor "often hailed as the chief

46 221 F. (2d) 189 at 195.
objective of the conflict of laws” since it served to promote “administrative simplicity” in the law.\textsuperscript{47}

Turn next to a triad of cases in which, though the choice-of-law problem did not arise since the courts there concerned presumed an intent from what the parties did and from the surrounding circumstances, it is possible to draw a natural inference of what the courts would have done had they been faced with an expressly stipulated intent of the parties. In the first case, that of Fonseca v. Cunard Steamship Company,\textsuperscript{48} the issue arose out of a ticket, treated as a contract, covering a voyage from Liverpool to Boston which contained provisions exempting the carrier from liability, even for negligence. The court observed that since the contract was valid where made, \textit{i.e.}, in England, and the plaintiff’s acquiescence to it under the conditions being deemed equivalent to an express assent, and since it was neither illegal nor immoral, the court could see no reason for not enforcing it in Massachusetts, even though a similar contract, if made in Massachusetts, would have been void as against the local public policy.

The second case, that of O’Regan v. Cunard Steamship Company,\textsuperscript{49} was similar in character except that the contract was one made in Ireland for a passage from Ireland to Massachusetts. A stipulation relieving the carrier from liability for injuries due to negligence of the company’s servants, clearly opposed to the public policy of Massachusetts if the contract had been made in that state, was upheld as being valid where made. Again, the court could find nothing inherently illegal or immoral in such stipulations, provided they were entered into elsewhere than in the jurisdiction where the court sat.

In the third of these cases, one entitled The Fri,\textsuperscript{50} the court stated that it recognized that, by the federal decisions, a stipula-

\textsuperscript{47} The reference to “administrative simplicity” seems more nearly tied to the fact that, because of the express stipulation, the company was under an obligation to train its employees in only one set of legal rules rather than in many sets.


\textsuperscript{49} 160 Mass. 356, 35 N. E. 1070 (1894).

\textsuperscript{50} 154 F. 333 (1907), cert den. 210 U. S. 431, 28 S. Ct. 761, 52 L. Ed. 1135 (1908).
tion which exempted a carrier from liability for negligence in a contract made abroad and to be performed in the United States would be contrary to public policy in the United States, hence would be treated as unenforceable even though it might be valid by the law of the place of making. Nevertheless, the court was of the opinion that as to the particular contract before it, one made in the United States of Colombia for a trip to a point in Cuba, which was clearly valid under the laws of Colombia, there was no reason for applying an American public policy to produce an invalidation of the contract.

It may be observed that in each of these cases the court was not adverse to the use by the parties of an express stipulation as to the governing law of the contract as long as the law so chosen had a reasonable connection with some spatial contact, viewed by the court as the most vital or most natural contact, of the contract. American public policy was to be used only when that which the court viewed as the most vital or natural contact of an essential element of the contract was an American one. A reasonable interpretation of what the court did, therefore, in each case, and what it indirectly indicated it would do if the parties had expressly chosen a law to govern their contractual relations, places these cases in support of the use of the "expressed intention" theory, although the law chosen by the parties must, as the cases indicate, have some reasonable connection with a spatial contact of the transaction which the court would view as the most vital or natural. Until many of our courts awaken to the universal requirement of uniformity in conflict-of-laws contract norms, and until they recognize that balancing economic and social bargaining values may be arrived at by other means than by denying the parties to contracts their freedom to choose their own law, it is likely that we may still linger under some of the adverse effects of "the most vital and natural connection" theory. This will be so because all reasonable men, and judges are not essentially different here, do not arrive at the same or identical "vital and natural connections" with regard to any given contract element.
For illustration of this fact, one could turn to the Illinois case of *Delta Bag Company v. Frederick Leyland & Company.* In that case, the court seemed to view its own public policy so strongly as to condemn stipulations in the carrier’s contract even though the stipulations were valid where made and Illinois had no connection with the transaction except that it happened to be the place where the suit was brought, for the contract in question embraced a shipment between Liverpool and New Orleans. It is possible, however, to find a reason for the court’s action in that no direct proof was offered as to the law of either England or Louisiana. In such a situation, it would not be unreasonable for the court to incline toward the presumption that the law of these places would be the same as that of Illinois for a local contract. By contrast, mention could be made of at least five cases wherein the contract, valid both where made and to be performed, was said not to be negated by some contrary public policy of an American forum.

Public policy can, without question, have a powerful effect for, in the case of *Oceanic Steam Navigation Company v. Corcoran,* the court refused to enforce an exemption-from-negligence stipulation of the carrier on the ground of public policy even though the contract stipulated that all questions arising from the contract were to be governed by English law, by which law the

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51 173 Ill. App. 38 (1912).
52 Thus, in the case of the Miguel Di Larrinaga, 217 F. 678 (1914), involving a contract made in Liverpool covering transportation to Cuba and containing customary negligence exemption clauses, the contract was upheld despite an opposing American policy. The case of The Trinacria, 42 F. 863 (1890), achieved a similar result under a contract valid where made as well as where the loss occurred, even though the ultimate destination of the shipment was New York. In *Baetjer v. La Compagnie Generale Transatlantique,* 59 F. 789 (1894), on facts practically identical with the case last mentioned, stipulations against negligence on the part of the carrier were sustained. The case of *Shelton v. Canadian Northern R. Co.,* 189 F. 153 (1911), differs from the others only in the fact that the injured plaintiff was accompanying his cattle between points in Canada under a free pass which stipulated against liability for negligence. Strongest of all is the case of *Coats v. Chicago, R. I. & P. R. Co.,* 229 Ill. 154, 87 N. E. 929 (1909), where at least a minor point of contact between the contract and the state of the forum existed in the fact that the shipment was delivered to a connecting carrier within that state. Nevertheless, a stipulation limiting liability was upheld because valid where made and to be performed, despite a strong contrary public policy of the forum. See also *Cohn v. Adams Exp. Co.,* 170 Ill. App. 174 (1912); *Elbaum v. Southern R. Co.,* 168 Ill. App. 66 (1912); *Atland v. Atchison, T. & S. F. R. Co.,* 151 Ill. App. 291 (1909).
53 9 F. (2d) 724 (1925).
contract was valid. A possible explanation for the view taken by the court in this case may lie in the fact the contract was made in the United States, where it was invalid, although it called for passage from Montreal to Liverpool, with no part of the trip taking place within the United States. It could be said, as to still other cases wherein stipulations limiting liability were rejected, that at least part of the transportation or performance under the contract took place within the jurisdiction of the United States, or within the state whose public policy was enforced, so as to support resort to the public policy of the forum.

One illustration may be found in the case of The Kensington, arising under a steamship ticket from Antwerp to New York which contained a stipulation sharply restricting the carrier's liability. There was no proof specially tending to show that at the time the ticket was issued the attention of the traveller was called to the fact that the ticket embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to. The court found the ticket exemptions were void by the rule of the forum's public policy. Justification for this result might be found in the fact there was to be at least part performance within the United States as it was the country to which the steamer and her passengers were directed.

54 See the cases of The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. Ed. 190 (1902); The Guildhall, 58 F. 796 (1893), aff. in 64 F. 867 (1894); The Hugo, 57 F. 403 (1893); Lewisohn v. National S. S. Co., 56 F. 602 (1893); The Energia, 56 F. 124 (1893); The Iowa, 50 F. 591 (1892); and The Brantford City, 29 F. 373 (1886). Some of these cases are discussed below. In addition thereto, see The New England, 110 F. 415 (1901); The Glenmavis, 69 F. 472 (1895); Adams Exp. Co. v. Mallchamp, 138 Ga. 443, 75 S. E. 596 (1912); Southern Exp. Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227 (1910); Lake Shore & Mich. So. R. Co. v. Teeters, 166 Ind. 338, 77 N. E. 599 (1906); Chicago B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508 (1897).

55 183 U. S. 263, 22 S. Ct. 102, 46 L. Ed. 190 (1902).

56 Liability for harm was purportedly conditioned by the following words, printed on the ticket, to-wit: "The shipowner . . . is not . . . liable for loss, death, injury, or delay to the passenger . . . arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the sea, rivers or navigation, accidents to or of machinery, boilers or steam, collisions, strikes, arrest or restraint of princes, courts of law, rulers or people, or from any act, neglect or default of the shipowner's servants, whether on board the steamer or not or on board any other vessel belonging to the shipowner, either in matters aforesaid or otherwise howsoever." Other restrictive language applied to the passenger's baggage.
In another case, that of *The Brantford City*,\(^5^7\) the shipment was to go from Boston to England under a contract found to have been made in the United States. In fact, the stowage of the goods, consisting of cattle, was wholly performed in Boston before the ship started on its trip. It is true that the navigation was to be chiefly performed on the high seas with delivery to be made in England, but the court was able to find that the negligence which caused the damage arose in the United States as well as on the high seas. With the major contacts of the transaction, except for delivery, occurring within the jurisdiction of the United States, it is understandable why the court should have felt that American public policy should prevail.

Something of the converse of the last mentioned situation is revealed in the case of *F. A. Straus & Company Inc. v. Canadian Pacific Railway Company*.\(^5^8\) The contract there concerned was made in Shanghai to transport silk to New York. Included therein was the usual stipulation for exemption from negligence\(^5^9\) together with a declaration that the contract was to be construed according to British law. The goods were to be routed by way of a Canadian steamer to Vancouver, B. C., and thence by the defendant's railway car to New York. The loss occurred before the silk ever got to Vancouver. In the light of the several British contacts with the transaction, it would be supposed the contract, valid by British law, would have been enforced. But the suit was conducted in New York; the purchaser corporation was a New York concern; and New York was also the place for delivery. After considering the entire transaction, the court decided that New York law should govern and thus the stipulations were held invalid. Possibly, the court was more interested in protecting its own residents and citizens than in making a proper choice of law but at least there were some important contacts of the transaction with New York.

\(^{5^7}\) 29 F. 373 (1886).
\(^{5^8}\) 254 N. Y. 407, 173 N. E. 564 (1930).
\(^{5^9}\) In the case of *Compania De Navigacion La Flecha v. Brauer*, 168 U. S. 104, 18 S. Ct. 12, 42 L. Ed. 398 (1897), the court observed the presence of gross negligence on the part of the carrier. It indicated that no stipulation could be considered as made to cover a default of this nature.
No discussion of this subject should overlook the case of *E. Gerli & Co., Inc. v. Cunard Steamship Company*[^60^], one where the contract of carriage had been made in Italy for the delivery of goods in New York. The goods went by rail from Italy to France, by boat to Southampton, and thence by boat to New York. Two bales of merchandise were missing on arrival in New York. The bill of lading contained an express stipulation that the contract was to be governed by English law and purported to limit recovery to a stated sum for each package, unless some greater value had been declared and extra freight paid[^61^]. The court found that the bill was drawn and delivered in Italy and that Italian law would normally govern the contract. It then went on to utter its famous dictum to the effect that "an agreement is not a contract, except as the law says it shall be and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes."[^62^]

Since the Italian law was not established, the court construed the terms of the agreement in order to arrive at a decision. The court observed that, in Italy, an agreement of carriage creates obligations generally measured by the language used. In that connection, it stated: "Prima facie, the agreement is a contract; he who maintains that in a given situation it is not, must prove the law of Italy. The libellant has not proved it, and he must lose." On this basis, the court gave a decision for the minimum amount stated in the bill of lading. Such decisions lend credence to the observations of some authorities that judges may, at times, decide a case from a "hunch."[^63^] To put it mildly, Professor Nussbaum considers the case as "isolated."[^64^]

[^60^]: 48 F. (2d) 115 (1931).

[^61^]: The British Carriage of Goods Act, art. III, sec. 6, provides that no clause in a bill of lading shall "lessen" the "liability" of a carrier except as the act allows. Section 5 of art. IV of the statute may, arguendo, be assumed to forbid anything below 100 pounds, English money, per package. The bill here concerned purported to limit recovery to 20 pounds per package: 48 F. (2d) 115 at 117.

[^62^]: 48 F. (2d) 115 at 117.


Whenever a contract could be considered immoral or illegal under some strong public policy of the forum and there are some vital contacts of the transaction with the forum, at least as viewed by the forum, the courts thereof will be likely to refuse to enforce the agreement. This may not, however, always be the case, witness the holding in the case of Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Druien. The common carrier involved in that case contracted in Illinois to carry freight into Kentucky. The contract was designed to relieve the carrier from liability for damages brought about by fire not arising from the negligence of the carrier. This common-law limitation was valid in Illinois but invalid in Kentucky. The freight, while in transit in Illinois to Kentucky, was destroyed by accidental fire. In an action brought in Kentucky, the shipper contended that the provisions of the Constitution of Kentucky, where suit was brought and where delivery was to be made, provided the most emphatic indication possible of the public policy of that state on that subject, to-wit: that no contract to carry freight in the state could limit the common-law liability of the carrier with respect thereto, regardless where made. He even insisted that a contract by a common carrier to carry freight anywhere, even if made and to be executed entirely outside of the state, provided liability under it was to be enforced in the state, would not be upheld in the face of the public policy forbidding enforcement if to do so would be to limit the common law liability.

The court, citing several of the cases used by the plaintiff, nevertheless proceeded to its own conclusion that the limitation clause amounted to a valid defense. In that connection, it said it did not regard the cases to go so far as to say, or even to inti-
mate, that if the breach of a valid contract made in a foreign country had occurred there, so that the liability of the carrier had been both initiated and consummated there, that then the provisions of the contract would have to be rejected in a suit brought upon the contract in the courts of the United States, even though such provisions were against the public policy of the United States. Rather, it was of the opinion that the public policy of a state was necessarily confined to the regulation of its own affairs and transactions occurring within its sovereignty. No state can be said to have a public policy as to the administration of justice, or as to the service of quasi-public agencies, or as to contracts made with respect thereto, transpiring wholly abroad. The public policy of a state can no more have extra-territorial effect than can a statute of the state. 67

C. THE INSURANCE CONTRACT CASES

1. General Rules

As in the carrier cases, so in suits based on insurance contracts, provided the parties have expressly stipulated the law to govern the transaction, that law will usually be sustained by the forum 68 unless it is contrary to the public policy of the forum 69

67 118 Ky. 237 at 247-8, 80 S. W. 780 at 781.
69 Of course, all the theories are subject to the policy limitations imposed by the forum: Union Trust Co. v. Grossman, 245 U. S. 412, 38 S. Ct. 147, 62 L. Ed. 368
or such stipulation, as viewed by the forum, is contrary to the public policy of the law of the place most substantially connected with an essential element of the transaction.\(^7^0\) Again, as observed in the usury cases,\(^7^1\) the use by the forum of its public policy concepts has certain constitutional limitations but there is a tendency to uphold those contracts which are beneficial to the insured and to reject those which are against the interests of the insured.\(^7^2\)

In addition to these general propositions, and particularly with respect to insurance contracts, other doctrines have been invoked. Thus, a general rule appears to exist in some of the states to consider state statutes, at least those of the state in which the insurance contract was made, as being a part of the contract. One concerned with the controlling laws may not overlook this rule, because it may serve to override those rules which ordinarily would apply in the choice of law.\(^7^3\)

In some insurance cases one can find the rule laid down that the law of the place of making the contract governs.\(^7^4\) In that connection, it is the general rule of conflict of laws that a contract valid where made, or valid at the place of performance, is en-

\(^{70}\) In addition to the material set out in note 68, ante, see an excellent comment in 10 La. L. Rev. 346. The absence of a "contact" will probably lead to disregard of the governing-law stipulation: Owens v. Hagenbeck-Wallace Shows Co., 58 R. I. 162, 192 A. 158 (1937). See also Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 120 N. E. 198 (1918), where Cardozo, J., uses "common sense" in his approach to the issue.

\(^{71}\) See note 3 ante, at p. 88 hereof.

\(^{72}\) In fact, the author has been unable to find a case in which the agreement was upheld, in a stipulated choice of law situation, wherein the insured's interests would have been damaged by the upholding of the stipulation.


\(^{74}\) The place of making of the contract is usually said to be the place where it is delivered, unless the parties' stipulations are honored and they have chosen some other place. Absent proof as to this, there is a presumption that delivery was at the insured's residence: Pierkowskie v. New York Life Ins. Co., 147 F. (2d) 928 (1944).
forcible in the state of the forum even though the contract would not have been enforced there in the first instance if it had been made or was performable there. Accordingly, the substantive law of the state where the insurance contract is made and delivered will prevail over the law of the forum, subject to the exception that no legal right will be enforced which will contravene the public policy of the forum. For this purpose, it is often said that a federal court sitting in a state cannot enforce a rule of law which is contrary to the public policy of the state in which it sits.

In the fraternal benefit society cases, by contrast, the court may look to the law of the place of incorporation of the society for the governing law in the contract. The theory behind this rule seems to be that questions which arise under this type of policy pertain more nearly to a common fund and should, therefore, be governed, for administrative ease and uniformity, by a law of some place which has a collective interest in the whole of the fund.

Some discussions seem to indicate that the court may look to the law of the place of performance as well as to the law of the place of making as the governing law in insurance contracts. If


77 This exception is also subject to federal constitutional limitations such that, if the forum should act capriciously in the matter, the federal constitution would, in turn, check the forum in the use of its public policy. See Nutting, "Suggested Limitations of the Public Policy Doctrine," 19 Minn. L. Rev. 196 (1935); Goodrich, "Foreign Facts and Local Fancies," 25 Va. L. Rev. 26 (1939); Beach, "Uniform Interstate Enforcement of Vested Rights," 27 Yale L. J. 656 (1918).

78 The case of Griffin v. McCooch, 123 F. (2d) 550 (1941), cert. den. 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1841 (1941), presents the idea that a federal court would be bound by the public policy of the state where the court sat and in which the remedy was sought. See also Metropolitan Life Ins. Co. v. Haack, 50 F. Supp. 55 (1943).

the place of performance is the dominant factor in the spatial contacts of the transaction, the court may decide to use the law of that place to govern the contract. Other courts look to the law of the place of the most substantial contacts of the transaction to govern the contractual relation so the diverse laws of different places may come to have some contact with some one or more elements of the transaction. The question arises, however, as to which of these contacts is the most essential, vital, or dominant of the several involved and which, therefore, may be indicative of the intention of the parties in the case. This process may be described as one of balancing the factors; or, in other words, of trying to determine which essential element of the contract has the most important contacts and with what place. The factors themselves, of course, are the different items of the transaction that touch, by the parties’ activities, the several places in the negotiation and the closing of the contract obligation.

It would now seem both necessary and appropriate to make a few general comments on the aspects of the "intent" theory as the governing law in insurance contracts. Is it possible to control the law of insurance contracts by the intent of the parties? What are its limitations? We have observed that certain state statutes have their effect on the governing law of the contract. When these statutes are read into the agreement by the forum they may not be avoided. We may observe that public policy will, in turn, affect the governing law. We have observed that some courts endeavor to ascertain either the law of the place of making, the law of the place of performance, or that of the place having the most substantial connection with the contract, and then use the law of one of these spatial contacts to govern the contract.


Insurance, by its very nature, grew up as a local matter but, with the growth of the country, it expanded to national dimensions. Nevertheless, it is still often thought of in terms of "localization," particularly so when we speak of the place where the contract was made, where it was to be performed, where it was to be serviced, and the like. Possibly, therefore, these "localizing" effects still cling to the courts, causing their hesitancy in allowing that freedom of contract which some authorities think desirable. Logically, insurance contracts must not be forced to stand still when many phases of business enterprise seek broader perspective. Why, then, should insurance contracts be delimited in the freedom of the choice of law; are they so delimited; and, if so, by what means and under what theory?

2. Stipulations as to Governing Law

Before proceeding, attention might well be given to some general language that has been used, albeit not in insurance cases, for the light such language may shed. In Owen v. Hagenbeck-Wallace Shows Company, a Rhode Island court said that the right of the parties to a contract to have their reciprocal duties and obligations under that contract governed by the law of some particular jurisdiction is "limited to the selection as stipulated by them of the law of a jurisdiction which has a real relation to the contract." By contrast, in the English case of Vita Food Products Company, Inc. v. Unus Shipping Company, Lord Wright stated that "the express words" of the bill of lading be-

84 Rabel, op. cit., Vol. 2, pp. 412-5. See also comment in 10 La. L. Rev. 346.
86 58 R. I. 162 at 174, 192 A. 158 at 164. As to whether there is any difference between a stipulation by the parties as to the governing law and the incorporation of the text of that law within the contract, see Morris, "The Eclipse of the Lex Loci Solutions—A Fallacy Exploded," 6 Vand. L. Rev. 505. The author indicates that any purported distinction between the cases on this ground is "nebulous." He argues that it should make no difference whether a party relies on a foreign law as such or on a contractual clause which would be valid by that law. From this suggestion, it might appear that the distinction made by Judge Learned Hand in the case cited at note 60, ante, between stipulations by the parties as to the overall governing law of the contract and having the foreign law embraced within the terms of the contract is somewhat nebulous also.
fore the court had to receive effect, with the result that the contract was governed by English law, saying that it "is difficult to see what qualifications are possible; provided the intention is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy." He added that connection "with English law is not as a matter of principle essential." After so stating, the court proceeded to apply English law to a Nova Scotia contract to ship goods from Newfoundland to New York.

Now compare these statements and holdings with the holdings achieved in two insurance cases. In one of them, that of Cravens v. New York Life Insurance Company, the Missouri court found that to give effect to a stipulation for resort to New York law would defeat the operation of a local statute of the forum providing for the issuance of extended insurance in the event of default in the payment of premiums, a statute which had obviously been enacted to prevent anyone from taking advantage of a person in an economically weak bargaining position. In the other, that of Griesemer v. Mutual Life Insurance Company, the State of Washington apparently had no statute requiring that extended policies of insurance should be issued whenever the main policy was forfeited for the non-payment of premiums, so the court permitted a stipulation for the application of the law of New York to stand.

Let us pause here and glance at these four cases and see what the courts were doing with regard to the parties' choice of law. The first two were selected because they were not insurance cases

88 Ibid., at pp. 289-90.
89 148 Mo. 583, 50 S. W. 519 (1898), affirmed in 178 U. S. 389, 20 S. Ct. 962, 44 L. Ed. 1116 (1900).
90 In the cases of Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 A. 385 (1908), and Dolan v. Mutual Reserve Fund Life Assoc., 173 Mass. 197, 53 N. E. 398 (1899), the courts struck down agreements for the application of the laws of other states, when, to sustain them, would enable the parties to evade the statutes of the insured's domicile which provided that only misrepresentations willfully and fraudulently made, or which were material to the risk, should invalidate the policy.
91 10 Wash. 202, 38 P. 1031 (1894).
92 The effect of this decision was to permit the insured to recover, for the New York law stated that a policy could not be forfeited for non-payment of premiums unless written notice had been given the insured, and this had not been done.
in order to contrast them with the other two which were. Is there a common policy underlying the scheme of the court decisions in these cases? If so, what is it?

All four courts would appear to be interested in upholding the stipulation of the parties provided they have complied with certain requirements. They must, at the outset, meet the test of "good faith,"\(^9\) for that is all the courts mean when they say that there must not be any intentional evasion, the stipulation must be bona fide, and must be legal. Why are courts so interested in "good faith"? Courts are instruments of justice in our social structure. As instruments of justice, the courts are always interested in protecting the weak and the oppressed from the wiles of the "schemers" who, often because of strong economic means, are in a much more favorable bargaining position than are those with whom they bargain. In essence, therefore, the terms "legal," "bona fide," "non-intentional evasion," or similar terms used by courts in their decisions, are equivalent to economic equations. There must be balance in any mathematical equation; why should there not be an equal balance in the human equation?

When there is no balance in the conflict-of-laws contract equation there can be no real freedom of contract. To permit the parties intentionally to evade the laws having a vital connection with the contract, the courts reason, would amount to dis-equilibrium in the human contract equation. But, if the courts are only interested in seeking a balance in the contract, so that no one will be unjustly oppressed economically, why play upon words that, to the ordinary layman, and to many professional men as well, are at best puzzling and at worst deceptive? Why talk of balancing factors in summing up contact points of the elements of the contract? Are there not means at hand for courts to suppress coercive contracts other than by delimiting the freedom of the parties to contract through such steps as those illustrated in these cases? These means are not peculiar to contract law; they exist in all forms of law and in all legal systems. The courts would,

\(^9\) See Part I hereof, 36 CHICAGO-KENT LAW REVIEW 34-59, particularly notes 79-84, and comment in 10 La. L. Rev. 346, together with the cases there cited.
therefore, be better advised to use these legal tools rather than placing confusing terms in case decisions that can mean many things to as many different readers.

Go back to the *Owens* case\(^\text{94}\) once more. The employment contract which was there to be interpreted by the court had been made in Indiana by a circus company which maintained its winter headquarters in Indiana, and which gave its permanent address as Chicago, Illinois. The contract provided that the agreement should be "localized" in Sarasota, Florida, the headquarters for several circus companies, and indicated that the contract should be governed by Florida law. The plaintiff-employee was given written notice of discharge in Massachusetts and he was dismissed there. Suit was brought in Rhode Island, where the company happened to be on a routine performance. In its rejection of Florida reference law, the Rhode Island court stated that Florida had no real connection with the contract. Instead, the court held that Indiana law, being the law of the place of making, should govern but, as the nature of the law of that state had not been established, it had to be eliminated. Nothing was said about Massachusetts law. Therefore, the Rhode Island court used its own law, which had absolutely no connection with the contract other than that it happened, by accident, to be the forum, even though the parties themselves had stipulated for the use of Florida law. What reason could the court adduce for such action? Rhode Island law had no relation to the contract or to any of its essential elements. On the other hand, Florida did have a subjective relation for people of the circus world, it being the headquarters for a good many of them. It could be assumed that the laws of Florida would, therefore, be known to the parties to the contract. But the Florida law would permit the plaintiff-employee to be dismissed practically at the defendant’s pleasure. The court, therefore, feared "economic coercion" would be the result if it permitted Florida law to govern. If there was evidence of undue influence, coercion, or the like, did not the court have at hand other

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and sufficient remedies to strike down the agreement? Then why strain for a result?

Mention has been made of two insurance cases in which certain of the conflict of laws principles were applied. One case may serve to illustrate the rule as to statutory interpolation. In *Jones v. Prudential Insurance Company*, the court found that the local statutes of the forum could not be read into the contract when the policy, providing for disability benefits, had been executed and delivered in another state, even though, following that event, the insured had become a citizen of the forum state and had suffered his disability there.

If the place of performance is, or can be said to be, a dominant factor, the court may decide to use the law of that place in preference to that of the place of making. Thus, in *Ostroff v. New York Life Insurance Company*, a New York company issued a life insurance policy to the plaintiffs, being the insured and the beneficiaries thereunder, in California where the policy was delivered by the defendant. The question in the case turned on fraud in the procurement of the policy. In California, the policy would have been incontestable for lapse of time. In New York, the incontestability clause would not have precluded the defense. A federal court sitting in California proceeded to state that, normally, the law of the place of delivery would govern the contract in cases of this nature since delivery was the final act needed to complete the contract. But, said the court, here all the premiums as well as the benefits were to be paid at the home office in New York with the parties expressly agreeing that New York law should govern. Noting that the payment of premiums, being the consideration for the policy, and the payment of benefits, being the obligation to be performed by the defendant upon the happening of certain contingencies, would constitute the performance of the contract, the court found that, under the agreement of the

95 210 S. C. 264, 42 S. E. 331 (1947).
parties, these performances were to take place in New York. Then, said the court:

These clauses take the policy of insurance out of the general rule which calls for the application of the law of the state where the policy is delivered. They are specific provisions calling for performance at a particular place . . . Courts have applied, without deviation, the law of the place of performance where the parties, by their agreement, have designated a special place of performance . . . Public policy is not violated even by a specific provision making the law of another state or of a foreign country applicable to a policy of insurance . . . The courts of New York have ruled that incontestability clauses of this type do not preclude a contest upon the ground of fraud after the expiration of the contestable period . . . Hence a conflict exists between New York and California law. And we are bound to apply the law of New York.\(^{97}\)

The case illustrates an attitude on the part of courts to give application to the agreed stipulations of the parties to a contract as well as an indication that such stipulations will be honored provided they are not contrary to public policy and have a reasonable connection with some place whose law is chosen by the parties to govern their contractual relations.

This view would be the one which it could be expected would be applied in the absence of an express statutory declaration of a contrary public policy on the part of the forum. In *Boole v. Union Marine Insurance Company*,\(^{98}\) for example, the insured sought to recover under two policies of marine insurance, issued by defendant, covering chartered freight on his barges which sank in San Francisco Bay. The court found that the policies of insurance provided that all claims for loss should be adjusted according to the English law and practice, and that the settlement thereof should be made in conformity with the laws and customs of

\(^{97}\) 23 F. Supp. 724 at 726.

\(^{98}\) 52 Cal. App. 207, 198 P. 416 (1921).
England. The insured had contended that these stipulations did not, either expressly or by implication, exclude the California Code provisions as to what should constitute a constructive total loss but that, rather, claims under the policies were to be settled in accordance with the laws and customs of England only when such laws and customs were not in conflict with California provisions which, he contended, were part of the insurance contracts. If such was not to be the case, the insured then contended that the settlement clauses were void as being in contravention of the domestic policy of the state.

Despite these contentions, the court held otherwise on the ground that contracts of insurance were not different from other contracts. In that connection, the court said:

In the absence of statutory provisions to the contrary, insurance companies have the same right as an individual to limit their liability, and to impose whatever conditions they please upon their obligations, not inconsistent with public policy . . . In cases of contract, it is well settled that the parties, by their own act and will, may agree to be bound by the law of a foreign jurisdiction, and such law will be enforced in the forum where the parties reside . . . A contract by an insurance company made in one state and executed elsewhere may, by its terms, incorporate the law of another state and make its provisions controlling upon both the insurer and insured . . . The general rule is that, in the absence of statutory prohibitions, the parties may stipulate that the policy shall be construed and governed by the laws, usages, and customs of a foreign state, and such laws, usages, and customs as are applicable shall be deemed to be a part of the written contract.99

To much the same effect is the holding in the case of Aluminum Company of America v. Rulley,1 based upon an indemnity contract,


1 200 F. (2d) 257 (1952).
where the court pointed out that it was the rule in Iowa that the parties were free to agree upon the state whose law should govern the validity, construction, interpretation and effect of their contract and, finding nothing in the contract before it to make the same illegal or void, directed the trial court to apply the contract "according to the intention of the parties expressed in its terms." But note, however, that there was a point of contact between the contract and the State of Pennsylvania, whose law was used to govern the dispute therein.

Where the insurance policy is silent on the point as to applicable law, a court might, as it did in the case of *Davis v. Aetna Mutual Fire Insurance Company,* look to all the surrounding circumstances to arrive at what the parties might be presumed to have intended as the law to govern their contractual relations. But there is indication, in the case of *Mutual Life Insurance Company v. Cohen,* that a stipulation appearing in the application for insurance but not in the contract itself would be ineffective for the court there said that the rights of the parties were to be "measured alone by the terms of the contract." In the case of


3 200 F. (2d) 257 at 262.

4 The reader may observe that there is, in the cases referred to, some contact of the elements of the transaction with the law of the place adopted by the court to govern the contract. The courts are not always clear upon what basis they formulate the decisions. Are we to take the bare mentioning by the court in its opinion that the contract was made in such and such a place and then its adoption of the law of that place as indicative that it used the "most vital and substantial contact" theory, or may we discount some of the court's "small talk" and accept that which appeals to our own mind's eye? To be fair, unless some special emphasis is placed by the court on some particular point, we must weigh all proportionately in the scales of fair reasoning. If no two men see the same accident in identical ways, how can two readers see the same printed facts alike? The English language is full of shades of meaning and is most difficult to use with any degree of exactness.

5 67 N. H. 218, 34 A. 464 (1892).

6 179 U. S. 262, 21 S. Ct. 106, 45 L. Ed. 181 (1900).

7 179 U. S. 262 at 270, 21 S. Ct. 106, 45 L. Ed. 181 at 186. As so qualified, the decision cannot be said to be one which is opposed to the idea of permitting the parties to enter into express stipulations provided their understanding is set out "in the contract." See, in that connection, the case of *Baxter v. Brooklyn Life Ins. Co.*, 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293 (1890).
Voorheis v. People's Mutual Benefit Society, however, the expressed stipulations of the parties were upheld in relation to an application for insurance made in Michigan even though the by-laws, endorsed upon the policy, were to the effect that the application was to have no effect until approved at the principal office situated in the state whose laws were chosen to govern the contract.

Illustrating the protection which may be provided for the benefit of the insured, deemed to be the weaker of the two bargaining parties, are the holdings to be found in two other conflicts cases. In Albro v. Manhattan Life Insurance Company, the contract of insurance was made in Massachusetts between a resident of Massachusetts and a foreign insurance company doing business in that state. It was held that the parties could not stipulate to avoid a Massachusetts statutory provision which declared a public policy rule of the state with respect to contracts made there. In essence, the contract included the local public policy doctrine of the state as so enunciated, and this policy was invoked to protect against what the court must have viewed as a degree of "economic oppression" or "economic coercion."

In the other case, that of Pietri v. Seguenot, the policy declared that it should be construed in accordance with New York laws. It was delivered, being the last act necessary to complete the contract, in Missouri, where the insured was then a resident. Because of the presence of a strong public policy on the part of Missouri to protect its own residents, and apparently because of a fear on the part of the court of the possibility of the "economic oppression" of the weaker of the two contracting parties, the Missouri law was deemed to govern the contract. Before proceeding to any summary, it might be noted that

8 91 Mich. 469, 51 N. W. 1109 (1892).
9 The explanation for the holding may lie in the fact that there was present a substantial contact between the law stipulated for and the contract elements.
10 119 F. 629 (1902).
11 96 Mo. App. 258, 69 S. W. 1055 (1902).
12 As the contract was "made" in Missouri, that state might be said to have had a "substantial" connection with the transaction, so the holding could be justified on that ground without regard to the rationale adopted in the opinion.
Professor Rabel is of the opinion that the courts, in insurance contract cases, are somewhat confused as to the part to be played by the stipulations of the parties to the contract regarding the applicable law. Thus, he notes that it has been held in Alabama that an assignment of a life insurance policy to a person with no insurable interest in the life of the insured was to be regarded as validly executed in New York, hence was to be enforced even against the law of the forum since it comprised nothing inherently bad, but that a contrary view has been expressed in Texas, with the Supreme Court of the United States recognizing a constitutional freedom in a public policy which protects citizens against the assumed dangers of insurance on their lives held by strangers. After so noting, Professor Rabel continues:

In a few instances, courts of this country have disregarded express contract stipulations determining the place of the contract and thereby the applicable law. It seems that all these decisions were rendered in Massachusetts and Missouri. The latter state has waged a long and gallant legislative battle, with repeated reverses in the Supreme Court of the United States, to protect its residents against forfeiture clauses and other contractual deteriorations of their insurance in New York companies. Certainly, if an insurance contract has all the characteristics of a Missouri contract, stipulations inserted in the policy providing, for example, for a different rule of computation from that prescribed by the statute or for waiver or surrender value, forbidden by the statute, would be recognized as ineffectual at present as it was in 1891 with the approval of the Supreme Court of the United States. If in such a case of an insurance contract belonging to the law of one state, the law of another state is stipulated for, it is a

14 Rabel, op. cit., Vol. 2, p. 577, citing Haase v. First Nat. Bank of Anniston, 203 Ala. 624, 84 So. 761 (1919), in contrast with Griffin v. McCoach, 123 F. (2d) 550 (1941). Rabel refers to Morgan, "Choice of Law Governing Proof," 58 Harv. L. Rev. 153 (1944), at p. 157, note 8, for authority that the "Supreme Court of the United States had previously recognized the constitutional freedom in 'public policy which protects citizens against the assumed dangers of insurance on their lives held by strangers.'"
question of public policy whether the statutory prohibition should be maintained nevertheless. A court, then, may qualify the agreements as an ineffectual attempt at evasion within the sphere of the prohibition.\(^5\)

He appears to think that this reasoning may be the basis of some of the Massachusetts decisions. While he contends that the agreement ought not to be considered void as a whole, he does state that the vastly prevailing doctrine respecting insurance contracts is summarized in the leading encyclopedia to the effect that, "if the policy or certificate does expressly provide that a specific state shall be the place of contract, the law of the state agreed upon as governing controls the nature, validity, interpretation, and effect of the contract, whether the specified state be the state wherein the contract was made, or a foreign state or country, and notwithstanding the insured resides, or the property is located in another state."\(^6\)

He concludes further that, the above being true, all reasonable exceptions can be fully explained by the effect given to a specified public policy.

D. SUMMARY AND CONCLUSIONS

Usually, in usury, carrier and insurance contracts in which the parties have expressly stipulated for a law with reasonable spatial connections to govern their transaction, the courts will endeavor to uphold the agreement. In arriving at their decisions where the law has been expressly stipulated by the parties to govern their agreement, the courts may look to policy determinants not only of the forum but of that place, as seen by the forum, having the most vital or substantial connections with the transaction. Constitutional limitations must be observed by the forum in the use of the choice of law to govern the contract lest an unreasonable, arbitrary or capricious use of the choice of law concept based upon forum concepts of policy determinants may be held unconstitutional for insufficient spatial contract contacts.

\(^5\) Ibid., pp. 412-3. Footnotes omitted.

\(^6\) Ibid., pp. 413-5.