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Almost a century ago, a Will County, Illinois, defendant, sued as acceptor of five bills of exchange, pleaded usury as a defense, relying on the law of New York which the parties to the suit had agreed should control the outcome of the case. When a trial court order striking the plea for immateriality reached the Illinois Supreme Court on appeal, Chief Justice Scates reviewed the basic conflicts rule involved and then commented:

This is the general rule, and apparently of great simplicity in the abstract. Its application however, under certain states of facts and circumstances, becomes exceedingly difficult, and is left inextricably confused, by the authorities. 1

The Illinois lawyer of today will no doubt readily agree that the dramatic changes of the past century have done nothing to alleviate the difficulty so noted by the Chief Justice. 2 The conflict of laws rules remain in disagreement and disorder, a puzzle to lawyer and judge alike. This unhappy state of the law has not stemmed the flow of cases but, while a chief justice of a century

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1 McAllister v. Smith, 17 Ill. 328 at 333, 65 Am. Dec. 651 at 654 (1856). The "general rule" referred to was there stated to be as follows: "... the lex loci contractus, and the lex loci contractus rei sitae, when respectively applicable, enter into and form part of every civil contract, respecting rights of property, in things, and choses in action, and so of lex domicilii, respecting mere personal contracts such as marriages."

ago was relatively unhampered by local precedents, and many of the "certain states of facts and circumstances" were, as he noted, still in the abstract, the present day judge or lawyer, with a conflict of laws question, is now confronted by a disorderly and growing hedge of local authority with which he must reckon. Peering into that hedge, he can discern no clear pattern of decision. Instead, he will find rules which seem inconsistent with each other; language far broader than is justified by actual holdings on the facts; and loose phrases operating to rob the "rules" of certainty and predictability. "Comity," on the one hand, "public policy" on the other, and a possible finding of what the parties "must have intended" in any event, all combine to prevent an accurate forecast as to the outcome of a given case. Most important and most provocative are the contract cases in this field.

It is the purpose of this article to present a systematic review of, and comment upon, only those Illinois cases which deal with the conflict of laws with respect to contract matters. In that connection, the method of procedure will be fourfold. First, a primary classification and comparison of the cases will be made on the basis of the issues involved, for it will be seen that different laws may properly control different phases of a single contractual transaction. Second, a distribution of the relevant events among the various jurisdictions whose laws are considered may prove to be of basic importance. Wherever possible, therefore, a major

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3 Beale, op. cit., Vol. 2, p. 1131, states, in general, that the law of the place of contracting, the law of the place of performance, and the law intended by the parties have, from time to time, been applied.

4 See, for example, the opinion written in Adams v. Robertson, 37 Ill. 45 (1865).

5 For purpose of illustration, let it be supposed that a married woman, domiciled in Texas, should execute a note while temporarily in Florida and also there give a mortgage of her Illinois land to secure the payment of such note. Whether she has capacity to contract at all, and thus to give an enforceable note, would have to be determined by Florida law. Assuming the note to be valid by Florida law, Illinois law would still have to be consulted to determine the validity and effect of the mortgage as well as the construction to be given thereto. Whether the note could be negotiated would be controlled by the law of the place where it was delivered in endorsed form. Other phases of the putative contract would have to be considered. The law of some one state would form the basis of a determination as to whether the parties, in fact, agreed to the terms stated; whether their agreement was manifested with sufficient formality; whether it was legal in its purpose; was supported by legal consideration; gave rise to rights in third parties; had been effectively performed; or whether any given remedies for breach were available to the parties.
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subdivision of the cases has been made according to three groupings, to-wit: (1) those where all relevant events, except perhaps suit, occur in one state or country; (2) those where such events occur in two states or countries, usually, but not always, the place of "contracting" for one, and the place of "performance" for the other; and (3) those cases where the events have occurred in three or more jurisdictions. Third, language used by the court has been considered. Those rules which a court has said it was applying have been cataloged although alternative grounds for decision may have existed. Dicta and unreasoned decisions have been segregated, but not discarded, for even dicta may prove to be important. Last, where some further subdivision of the cases would appear necessary, cases have been divided according to the subject matter of the contract involved. To date, this procedure has been found to be necessary only with respect to issues concerning construction, but further case developments may render it useful in connection with other issues as time goes on.

This alignment of the cases according to issues, to distribution of the facts or "contacts" among the several jurisdictions, to stated rules, and to kinds of contracts should facilitate comparison and explanation of like cases, should remove many of the apparent contradictions, and should, for practical purposes, bring the case-in-point more readily available to the judge and the lawyer.

I. SUMMARY OF ILLINOIS CONTRACT CASES

A. CAPACITY TO CONTRACT

The sine qua non of any contractual relation lies in the capacity to contract. Whether a party has capacity to contract will depend upon whether or not the particular law governing his at-

6 That dicta may prove to be important is illustrated by the case of Scovill Mfg. Co. v. Cassidy, 275 Ill. 462 at 470, 114 N. E. 181 at 185 (1916), where the court said: "We do not think the rule laid down in this last case upon the question here involved was dictum, but even if it was, it was the expression of opinion upon a point in a case deliberately passed upon by the court and should be held as judicial dictum rather than mere obiter."

tempted contract deems him competent or incompetent to enter into contractual relations. The law recognizes that legal incompetence may attach to the attempted contractual negotiations of either natural or artificial persons.

Of the former, contracts by married women have provided much of the litigation. The power of married women to contract has now been established in many states, but such power is still limited in a considerable number of jurisdictions, so the problem is far from being obsolete. The Illinois cases hold that the question of whether or not a married woman is recognized in law as being capable of binding herself to a contract is to be determined according to the law of the place where the putative contract is made, her contractual capacity being considered "legal" rather than "domiciliary." Thus, where a married woman, domiciled in Illinois, executed a note and joined with her husband in a trust deed of Illinois land as security for the payment thereof while she was temporarily in Florida, the court held Florida law, which denied her the power to contract, was controlling.


2 Madden, op. cit., p. 142.

3 The clearest case is that of Burr v. Beckler, 264 Ill. 230, 106 N. E. 206 (1914), but several cases in which the domicile and place of contracting coincide serve to support the rule. In Burchard v. Dunbar, 82 Ill. 450 (1876), a suit on a note charging the married woman's separate estate as security for her husband's debts, the defendant's domicile was not disclosed, hence was apparently considered immaterial. The case of Nixon v. Halley, 78 Ill. 611 (1875), was a suit in contract for labor performed and goods furnished, and the defendant's domicile, whether one of choice or by operation of law is not clear, was apparently the same as the place of contracting. See also Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398 (1866), involving an attempted assignment of part of an interest as beneficiary under an insurance policy, and O'Dea v. Throm, 250 Ill. App. 577 (1928), reversed on other grounds in 332 Ill. 89, 163 N. E. 390 (1929). In Union Trust Co. v. Grosman, 245 U. S. 412, 38 S. Ct. 147, 62 L. Ed. 368 (1918), Mr. Justice Holmes upheld an application of Texas law, being the law of the domicile, to strike down a married woman's contract of suretyship for her husband's debts. The contract was valid by the law of Illinois where it was made, but was void by the law of Texas, which was the situs of her domicile and of her property, which had been attached at inception of the suit. The case should probably be treated as an exception because of the strong public policy of the form. In this way, the case could be reconciled with the holding in the Burr case.

4 Forsyth v. Barnes, 228 Ill. 326, 81 N. E. 1028 (1907), permitted a collateral attack to be made on an Ohio judgment, taken by confession, on the ground Ohio law prevented a married woman from making such a note, and her absence from the proceedings rendered them otherwise void for want of jurisdiction.

markable in that it applied the "lex loci contractus" rule in a situation where the momentary location of the parties was quite incidental to the whole transaction and could have been purely fortuitous.\(^6\) By way of contrast, a married woman’s contracts affecting title to real property, either by way of sale or encumbrance, as distinguished from collateral obligations, will, under the general rule, be governed by the "lex situs."\(^7\)

The rules relating to the contractual capacity of infants should be the same as those for married women,\(^8\) but, in addition, local licensing statutes may be viewed as restricting the capacity of even an adult natural person to do business, so that his attempted contract may be held void because of a lack of local authorization. Thus, the capacity to enter into contracts as a real estate broker will be governed by the "lex loci contractus,"\(^9\) but one case does exist in which a locally licensed doctor was not pre-
cluded from collecting for his services, contracted for locally, even though the same were rendered partially while in attendance upon the patient sojourning in another state where the doctor had no license. On the other hand, the capacity of a foreign appointed testamentary trustee to contract for the sale of Illinois realty is governed by the *lex situs,* in accordance with the well-recognized rule.

The contractual capacity of an artificial person may be affected by the law under which it was created, by the *lex loci contractus,* or both. Thus, the capacity of an inchoate corporation, in its pre-incorporation stages, is to be determined by the law of its domicile as a perfected corporation. If such law denies capacity, no contractual liability can arise, notwithstanding a contrary rule in the place of contracting. Under the same *lex domicilii* rule, transactions occurring after incorporation may likewise be held ineffectual. If, however, the capacity to contract has been given by the state of domicile, the corporation may then

wherein a real estate broker, licensed in Illinois, but not in Wisconsin as required by a statute of that jurisdiction, made and performed, in Illinois, a contract for the sale of Wisconsin land. On failure of the client to pay a commission, the broker sought recovery in a federal district court sitting in Wisconsin, but was denied recovery. Tacitly applying the rule of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), to the effect that a federal court must apply the conflict rules of the jurisdictions in which it sits, both the district court and the Court of Appeals found it to be the Wisconsin conflict of laws rule that such a contract was void and unenforceable, as against Wisconsin public policy, however valid it might have been under the law of Illinois, where made and performed.


11 *West v. Fitz*, 100 Ill. 425 (1884). The vendee, doubting title or capacity of a Massachusetts judicially appointed trustee, declined to perform. In the trustee's suit for specific performance, it was held, under Illinois law, that the judicially appointed foreign trustee had no power to pass title.

12 *Erd & Massey v. Rapid Transit Co. of Illinois*, 206 Ill. App. 351 (1917). Compare with *Eau Claire Canning Co. v. Western Brokerage Co.*, 213 Ill. 561, 73 N. E. 430 (1905), where the court considered the capacity of a dissolved corporation to sue on a contract made prior to dissolution. The Illinois Supreme Court applied the domiciliary law of Michigan, extending the power of a corporation to sue for a period of three years after its dissolution, finding the same to be harmonious with Illinois law on the point.

13 *Grimme v. Grimme*, 101 Ill. App. 389 (1902), affirmed without dispute as to the conflicts point in 198 Ill. 265, 64 N. E. 1088 (1902). A Missouri corporation apparently concluded a contract in Illinois, but when the insured changed beneficiaries to include a person not eligible to be paid under the corporate charter, domiciliary law was applied to avoid the contract. In *Equitable Life Assurance Society of the United States v. Frommhold*, 75 Ill. App. 43 (1897), the power of the company to
enter another state and contract there also unless denied such right by the second state. A foreign corporation which lacks authority to do business in Illinois may experience difficulty in securing the enforcement of its contracts here, but such contracts would, nevertheless, be enforced against the corporation.

declare a forfeiture for nonpayment of premiums under events which had occurred was denied in conformity with the law of the domicile. In another case, that of Barth v. Farmers & Traders Bank, 195 Ill. App. 318 (1915), involving the question as to whether a corporation had authority to invest in certificates of deposit, all relevant events except suit occurred in one state. See also Starkweather v. American Bible Society, 72 Ill. 50, 22 Am. Rep. 133 (1874), holding that domiciliary law, denying to a corporation the power to take real property by devise, would control and prevent a New York corporation from acquiring Illinois land in that manner. A mere excessive acquisition would not defeat title, the question of abuse of corporate power being left to be determined in a proceeding between the corporation and the state of its domicile: Barnes v. Suddard, 117 Ill. 237, 7 N. E. 677 (1886).

In Santa Clara Female Academy v. Sullivan, 116 Ill. 375 at 381, 6 N. E. 183 at 184-5 (1886), the court said: "It is the well settled doctrine that a corporation created in one State may, upon the principle of comity, exercise within another State the general powers conferred by its own charter and permitted by the law of its own State, provided the doing so be not inconsistent with the laws or public policy of such other State." See also Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 519 at 588, 10 L. Ed. 274 at 308 (1839), where the statement was made that it is "very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created ... Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in a State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed."

Carroll v. City of East St. Louis, 67 Ill. 567 (1873). This view has been carried to the length where it has been held that a foreign insurance company, not authorized to do business in Illinois, may not recover in an Illinois court on a contract made with an Illinois citizen, even though made outside of the state. Thus, in Buell v. Breese Mill & Grain Co., 65 Ill. App. 271 (1896), where a receiver of an insurance company sued to collect an assessment from an Illinois policy holder under an insurance contract entered into in Wisconsin with a Wisconsin company, not authorized to do business in Illinois, the court, at page 275, denying recovery, said: "Can the violator of our laws come into our courts, with a courteous bow, and enforce a contract which has been secured in disregard of the statutory prohibition? True it is, that the contract was made in Wisconsin; but true it is also, that the property insured is in Illinois." See also Swing v. Thomas, 120 Ill. App. 235 (1905), where an Illinois court refused to enforce an Ohio decree of assessment against policyholders in a company, not licensed to do business in Illinois, on the ground that the acts of the company were void ab initio as to Illinois citizens until the company was licensed in Illinois. An annotation in 75 A. L. R. 448 collects cases from Illinois and elsewhere dealing with the effect of the foreign corporation's subsequent compliance with local conditions for doing business on contracts made prior to compliance.


B. FORMATION OF THE CONTRACT

1. Contractual Intention

Assuming capacity to contract to exist, it would next be essential to ascertain whether the parties possessed the requisite contractual intention and sufficiently displayed evidence of that fact to produce a contract in law. In that regard, courts sometimes isolate the question as to whether or not the parties actually agreed to the terms of the contract and, finding no real agreement, achieve the result that no contract was made. This tends to be true where some vital matter has been omitted from a written contract, or where the written terms are oppressive or obscure. Although questions of this character are primarily matters of fact, they tend to generate issues of law when, at a given stage of the negotiations, one jurisdiction would recognize an agreement and another would not.

Where the contract has been made and is to be performed entirely within another state, Illinois courts will apply the law of that other state to find a solution to this question of agreement. Similarly, where a contract is made in one state but is to be performed in another, the lex loci contractus will control. Thus, in Coats v. Chicago, Rock Island & Pacific Railway Company, certain potatoes were shipped in Iowa to a Pennsylvania destination but were lost en route. The question presented was one as to what law should determine the effect of the shipper’s acceptance of a bill of lading containing a limitation of liability. Pennsylvania law was not considered. Illinois law placed upon the carrier

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1 Milwaukee & St. P. R. R. Co. v. Smith, 74 Ill. 197 (1874).
2 Coats v. Chicago, R. I. & P. R. R., 239 Ill. 154, 84 N. E. 929 (1909); Pennsylvania Co. v. Fairchild, 69 Ill. 260 (1873). In the last mentioned case, goods shipped in Indiana for Kansas were destroyed by fire in Chicago after the defendant railroad had delivered them into the custody of a connecting carrier. Under Indiana law, the carrier was liable only to the limit of its line. Under the law of Illinois, it was liable for the goods over the entire journey. The court applied the law of Indiana, where the bill of lading had been issued. See also Cohn v. Adams Express Co., 170 Ill. App. 174 (1912); Waxelbaum v. Southern R. R. Co., 165 Ill. App. 66 (1912); Fuller v. L. S. & M. S. R. R. Co., 165 Ill. App. 279 (1911); Clingan v. Cleveland, C., C. & St. L. R. R. Co., 163 Ill. App. 568 (1911); Chicago & West Michigan R. R. v. Hull, 76 Ill. App. 408 (1898).
3 239 Ill. 154, 87 N. E. 929 (1909).
the burden of showing that the shipper assented to the limitation. Iowa law, on the other hand, presumed assent to the limitation by the shipper's acceptance of the bill. The court, holding that Iowa law should control, said:

It is conclusively settled by the decisions of this court that the contract having been made in Iowa, and not, so far as it appears, with a view to the laws of any other State, it must be governed by the law of the State where it was made. The decisions are not all in harmony upon this question. Appellees cite many eminent and respectable authorities holding a contrary view, but the decisions in this State are uniform in support of the view we have announced.4

A scattering of dicta support the rule so stated,5 but in other cases the court has determined the question of assent simply as a matter of fact, either without stating any conflict of laws rule,6 or with some accompanying lip service to a general rule that the law of the place of contracting governs the existence of a contract.7

Two limitations upon an application of the rule of lex loci contractus appear in the decisions. First, the rule is subject to an exception that the contract will not be enforced where enforcement is contrary to the public policy of the forum.8 Secondly, a number of cases indicate that the lex loci contractus rule creates only a presumption, which may be rebutted by circumstances show-

4 239 Ill. 154 at 161, 87 N. E. 929 at 931.
7 O'Dea v. Throm, 250 Ill. App. 577 (1928), reversed on other grounds in 332 Ill. 89, 163 N. E. 390 (1929); Merchants' Dispatch Transportation Co. v. Furtmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265 (1893).
8 In Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66, 99 N. E. 893 (1912), a shipping receipt form limiting liability, valid in New York where made, was held unenforceable as against Illinois public policy. See also Mowery v. Washington National Insurance Co., 289 Ill. App. 443, 7 N. E. (2d) 334 (1937), as to contract conditions in fine print. The public policy exception will not be applied in favor of one who comes to this state seeking to repudiate his contract by bringing a tort action to recover discriminatory exactions under the contract: News Publishing Co. v. Associated Press, 190 Ill. App. 77 (1914).
ing that the parties intended the law of some other place, usually the place of performance, to determine this question of assent. One case, reaching a result based upon the *lex loci solutionis*, must also be rationalized on this ground although the court does not adequately consider the conflict of laws problem.

Two other cases involving questions of assent should be considered. While the aforementioned rules can reasonably be applied to natural persons, there is some indication that they are not the only rules which govern agreements made by artificial persons, which persons may have a limited power to assent. Thus, the question whether a pre-incorporation "agreement" will be implied and held binding upon a corporation subsequently formed will be determined by the law of the corporate domicile, and not by the law where the "agreement" was "made," according to the Appellate Court holding in the case of *Erd & Massey v. Rapid Transit Company of Illinois.*

9 Benedict v. Dakin, 243 Ill. 384, 90 N. E. 712 (1910); Coats v. Chicago, R. I. & P. R. R. Co., 239 Ill. 154, 57 N. E. 929 (1909). In Pennsylvania Co. v. Fairchild, 69 Ill. 260 at 263 (1873), the court said: "The rule upon that subject is well settled, and has often been recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the law of some other state. There is nothing in this case, either from the location of the parties, or the nature of the contract, to show that they could have had the law of Illinois in view, or any other law, than that of the place where it was made." Italics added. Indication that there is an initial presumption in favor of the *lex loci contractus* may be found in Illinois Central R. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019 (1898), and Altland v. A., T. & S. F. R. R. Co., 151 Ill. App. 291 (1909), both dealing with the legality of claimed exemptions from liability, and in the case of Adams v. Robertson, 37 Ill. 45 (1865), a usury case.

10 In North Packing & Provision Co. v. Western Union Telegraph Co., 70 Ill. App. 275 (1897), the plaintiff brought assumpsit for damages resulting from defendant's tardy delivery of a telegram. The message form stated that defendant's liability for incorrect transmission was limited to the telegraphic charges. As the message, sent from Boston, was to be delivered in Chicago, the court held the contract was one to be performed in Chicago, hence was governed by Illinois law, although no reasoning was given beyond the phrase "*lex loci solutiones*." On retrial and second appeal, 89 Ill. App. 301 (1899), the defendant argued that Massachusetts law should have been applied. This argument was at once rejected because concluded by the former decision, but also because it was immaterial on the ground the limitation of liability referred to inaccuracy in transmission, not delay in delivery. The latter decision was affirmed, without discussion of the conflicts point, in 188 Ill. 366, 58 N. E. 958 (1906). The presumption was shifted to the law of the place of performance in George v. Haas, a usury case, 311 Ill. 382, 143 N. E. 54 (1924), and dictum based thereon may be found in Oakes v. Chicago Fire Brick Co., 311 Ill. App. 111, 35 N. E. (2d) 522 (1941), affirmed in 388 Ill. 474, 58 N. E. (2d) 460 (1944), which involved a question arising under the statute of frauds.

11 206 Ill. App. 351 (1917).
of the corporation under domiciliary law, is harmonious with those cases which hold that domicile determines questions of capacity.\(^\text{12}\)

On the other hand, a failure to raise the conflict of laws question probably cost the defendant an adverse judgment in the case of *Delta Bag Company v. Leyland & Company, Ltd.*\(^\text{13}\) The plaintiff company there sought to recover from defendant, an Illinois resident, for damage done to merchandise on defendant's steamship operating between Liverpool, England, and New Orleans, Louisiana. The defendant pleaded that the bill of lading contained a limitation of liability, but the Illinois court held that Illinois law, placing the burden of showing assent upon the carrier, applied and that the defendant had failed to carry this burden. It would have been open to the defendant to plead and prove the law of England, or of Louisiana, to the contrary if it could do so but, in the absence of such proof, the court, even if it had recognized the conflicts problem, would have been obliged to apply a foreign common law which would have been presumed to be the same as that of Illinois.

In rare instances, contracts otherwise valid may be open to criticism because fraud, duress, or mistake may have been present at the moment of the making thereof. Only a few cases present any choice of law problem falling in that area. One such case applied the rule of *lex loci contractus*,\(^\text{14}\) and other cases indirectly involving questions of fraud seem to be in accord therewith.\(^\text{15}\) Where

\(^{12}\)See prior discussion of this case in the section dealing with capacity to contract.

\(^{13}\)173 I. App. 38 (1912).

\(^{14}\)Hartliep Transit Co. v. Central Mutual Ins. Co., 288 Ill. App. 140, 5 N. E. (2d) 879 (1937), concerned a suit on an insurance policy issued in Iowa to a trucking firm organized there, sending its vehicles through many other states and into Canada. Recovery was sought for an accident occurring in Illinois. It was held that Iowa law, which barred the defendant from pleading fraud unless a copy of the application was attached to the policy, was a matter relating to the substance of the contract and not simply remedial in character, hence called for an application of the *lex loci contractus*.

\(^{15}\)Woodbury v. U. S. Casualty Co., 284 Ill. 227, 120 N. E. 8 (1918), seemed to involve a question of fraud and duress, but the ultimate question was the sufficiency of a seal on a release. Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915 (1901), dealt with the question of waiver of fraud. As the local subordinate lodge of a Massachusetts benefit society had knowledge of the insured's fraud, its continued receipt of dues after such knowledge constituted a waiver of the fraud under Illinois law. Since the location of the home office of the organization supplied the only foreign element, the case is entitled to little weight.
the title to land is concerned, however, the *lex situs* will undoubtedly govern the point as to whether or not the contract may be reformed for mistake.\(^{16}\)

2. *Formal Validity*

At this point, the question becomes one as to whether the parties have sufficiently manifested their intentions to form a contract, either written or oral, which meets the test of law, since certain types of contracts must be in writing, or be evidenced by a written memorandum, to possess legal effect.\(^{17}\)

Illinois conflicts case law relating to formal validity deals chiefly with the statute of frauds, which has been held to relate to the "substance" of the obligation rather than to the "remedy."\(^{18}\) On that basis, the statute of that jurisdiction where the contract is made will operate to govern essential formalities both in those cases where all matters of contracting and performance are concentrated in one state\(^{19}\) as well as in those instances where the contract has been made in one state but is to be performed in several other states.\(^{20}\)

\(^{16}\) Post v. First National Bank of Springfield, 138 Ill. 559, 28 N. E. 978 (1891), involved a married woman who executed a mortgage in Texas on land in Illinois. In a suit to correct a mistake arising from an erroneous designation of the mortgagee, and to foreclose, the court, against defenses of undue influence and lack of evidence of mistake, applied Illinois law, found the evidence relating to the mistake to be sufficient, and treated the mortgage as being effective after it had been suitably reformed.

\(^{17}\) See, for example, Ill. Rev. Stat. 1951, Vol. 1, Ch. 59, §§ 1-2, and Vol. 2, Ch. 121-12, §4.

\(^{18}\) Oakes v. Chicago Fire Brick Co., 311 Ill. App. 111, 35 N. E. (2d) 522 (1941), affirmed in 388 Ill. 474, 58 N. E. (2d) 460 (1945). Although prior cases had clearly rejected the rule of Leroux v. Brown, 12 C. B. 801, 138 Eng. Rep. 1119 (1852), which treated the statute of frauds to be "procedural" in character, the Illinois Supreme Court here took strange comfort in finding that case to be similar to the one before it. Murdock v. Calgary Colonization Co., 193 Ill. App. 295 (1915), also holds the statute of frauds to be "substantive." See annotation in 161 A. L. R. 820, particularly p. 823.

\(^{19}\) Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111 (1893); Reid, Murdoch & Co. v. The Northern Lumber Co., 146 Ill. App. 371 (1909). The case of Brinker v. Scheunemann, 43 Ill. App. 659 (1891), involved a battle of counter-offers sufficient to create a doubt as to any real agreement, hence the court probably did not need to discuss issues arising under the statute of frauds.

\(^{20}\) Oakes v. Chicago Fire Brick Co., 311 Ill. App. 111, 35 N. E. (2d) 522 (1941), affirmed in 388 Ill. 474, 58 N. E. (2d) 460 (1945). As a defense to an action for breach of an oral contract relating to employment, the defendant pleaded the Illinois statute, insisting on an application of the *lex loci solutionis*. But the court
Although few cases are to be found where the contract has been made in one state but is to be performed in another, divergent rules do appear. A place-of-contracting rule may be derived from the case of *Scudder v. Union National Bank of Chicago.*

There, a parol acceptance, given in Chicago, of a bill of exchange drawn in Missouri by a Chicago firm on a Missouri firm, was held governed by Illinois law, notwithstanding the fact that the law of the place of payment, to-wit: Missouri, required a written acceptance. Two other cases stand on the rule that the law of the place of performance, or payment, should control formal validity. In the first, that of *Mason v. Dousay,* a bill of exchange was drawn in Michigan, in favor of a resident there, upon a Chicago drawee, payable and accepted in Chicago. The Illinois Supreme Court applied the law of the place of performance, i.e., payment, at the time it enforced the oral acceptance. In the other, that of *Hall v. Cordell,* the defendant orally promised in Missouri to accept a bill to be drawn upon him in the future. The bill was afterwards drawn, in Illinois, upon the defendant drawee, an Illinois resident, and was made payable in Illinois. Against the plea that Missouri law required the acceptance to be in writing, the United States Supreme Court held that Illinois law governed this formality, and it enforced the agreement under Illinois law permitting an oral acceptance.

Some matters in connection with these three cases should be noted. First, each case presented a clear-cut attempt to avoid a said: "Where a contract is to be performed in various States, as in this case, the *lex loci contractus* must control. Otherwise, if the place of performance is to govern, the law would find itself in a hopeless tangle." See 388 Ill. 474 at 479, 58 N. E. (2d) 460 at 462. Other cases in which performance occurred, or might have occurred, in several states are the real estate brokers cases of *Vossler v. Earle,* 194 Ill. App. 522 (1915), abst. opin., affirmed on the evidence in 273 Ill. 367, 112 N. E. 687 (1916), and *Murdock v. Calgary Colonization Co.,* 193 Ill. App. 295 (1915). See also *Reid, Murdoch & Co. v. The Northern Lumber Co.,* 146 Ill. App. 371 (1909), and *Chicago & West Michigan R. R. Co. v. Hull,* 76 Ill. App. 408 (1888). In the last mentioned case, the court applied the Michigan statute of frauds to a shipping contract entered into in that state, holding that, under it, a condition limiting liability had to be in handwriting, not printed.

21 *91 U. S. 406, 23 L. Ed. 245 (1875).*

22 *35 Ill. 424, 85 Am. Dec. 368 (1864).*

23 *142 U. S. 116, 12 S. Ct. 154, 35 L. Ed. 956 (1891).*
promise on the technical defense of the statute of frauds but, in each, the court upheld the contract, perhaps under the belief that, by the general policy of contract law, promises once made should be kept. Second, it should be noted that each of these cases dealt with a formality required in the acceptance of a negotiable instrument. It has been suggested that cases of this nature should be segregated from those dealing with other contract matters because the necessity for uniformity in such cases has resulted in a rule which would be unduly rigid if given general application. If that suggestion were to be followed, the only authority remaining in Illinois would lie in those cases dealing with a one-state or a many-state situation, where it has been indicated that the lex loci contractus will control in accordance with the general rule on the subject.

Aside from the fundamental idea that the formal validity of a contract affecting title to land must be determined by the lex situs, and other laws will be held to be immaterial, a scattering of cases dealing with matters of form other than some aspect of the statute of frauds usually announce a lex loci contractus rule. Unfortunately, these cases are inconclusive on their facts, either because the place of making and the place of performance coin-


25 Nussbaum, "Conflict Theories in Contracts: Cases Versus Restatement," 51 Yale L. J. 893 (1942), particularly p. 918. The author's purpose, arguing for such segregation, would be to eliminate the weight of cases usually favoring a lex loci contractus rule in contract matters generally.

26 Goodrich, op. cit., pp. 270-1.

27 Post v. First National Bank of Springfield. 138 Ill. 550, 28 N. E. 978 (1891), dealt with the necessity for a separate acknowledgement by a married woman. Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111 (1893), is consistent therewith although it announces a lex loci contractus rule. An elaborate statement of the rule appears in Harrison v. Weatherby, 180 Ill. 418 at 435, 54 N. E. 237 at 239-40 (1899), where the court said: "The validity and construction, as well as the force and effect, of all instruments affecting the title to land, depend upon the law of the State where the land is situated. This rule includes wills, as well as deeds, contracts or agreements; and it includes the form and mode of the execution of the will, as well as the power of the testator to make the devise or disposition of property contained in the will."
cide, because there were several places for performance, or because, as in one case, the court simply applied Illinois law for the reason the contract was said to be an "Illinois" contract.

3. Essential Validity

Whether a contract has been made for an illegal purpose and is, therefore, unenforceable, will be determined according to the lex loci contractus if weight can be given to the majority of cases which have arisen in Illinois, both as to those in which the performance was to be rendered in several states as well as to those in which the place of contracting and the place of performance coincided.

Some cases merely assume the rule, thereby

28 Hakes v. Bank of Terre Haute, 164 Ill. 273, 45 N. E. 444 (1896), dealt with the question as to whether or not a note was negotiable in form. Pfieger v. Broadway Trust & Savings Bank, 265 Ill. 569 (1931), affirmed without contest on the conflicts point in 351 Ill. 170, 184 N. E. 318 (1933), considered whether negotiability was vitiated by a recital of the existence of a trust agreement in a bond. National Bank & Investment Co. v. Larsh, 262 Ill. App. 363 (1931), concerned a chattel mortgage properly recorded at the place where the mortgage was given. The cases of Doumas v. Mormella, 251 Ill. App. 397 (1929), and St. Paul Cattle Loan Company v. Hansman, 215 Ill. App. 190 (1919), each held that a recording of a chattel mortgage in a state other than where given and where the property was situated would be insufficient.

29 Woodbury v. U. S. Casualty Co., 284 Ill. 227, 120 N. E. 8 (1918). The question involved was the sufficiency in law of the symbol "L. S." as a seal. The instrument involved was a release, hence is here classified as "performable" in more than one state.

30 In Mowery v. Washington National Ins. Co., 289 Ill. App. 443, 7 N. E. (2d) 334 (1937), a life and accident insurance policy was issued in Missouri but was to take effect at the residence of the insured in Illinois. Some policy conditions in fine print violated Illinois law. The court had little trouble finding that the parties intended that the contract should be subject to all the legal regulations at the situs of the residence, hence was an "Illinois" contract.

31 Frankel v. Allied Mills, 369 Ill. 578, 17 N. E. (2d) 570 (1938), a contract by an unlicensed real estate broker; Vossler v. Earle, 194 Ill. App. 522 (1915), abst. opin., affirmed on other grounds in 273 Ill. 367, 112 N. E. 687 (1916), another unlicensed broker's case which rejected the lex situs rule; Zelger v. Illinois Trust & Savings Bank, 245 Ill. 180, 91 N. E. 1041 (1910), dealing with part performance in a state where the plaintiff physician was not licensed; Bell v. Farwell, 176 Ill. 489, 52 N. E. 346 (1898), involving a stockholder's liability to creditor where the law of the corporate domicile was equally available. See also Illinois Central R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019 (1898); Fuller v. L. S. & M. S. R. R. Co., 165 Ill. App. 279 (1911); Ginsburg v. Adams Express Co., 160 Ill. App. 566 (1911); and Aitland v. A., T. & S. F. R. R. Co., 151 Ill. App. 291 (1909), all dealing with a carrier's attempt to limit liability.

avoiding the law of the forum, or else yield only dictum. Federal courts sitting in Illinois have applied Illinois rules concerning legality to cases based on Illinois contracts and, conversely, Illinois courts, asked to apply federal law, have utilized federal tests on the point.

In those instances where the contract was made in one state and was to be performed in another, however, the courts have broken away from the simple place-of-contracting rule and have taken one or the other of two approaches, both measured in terms of the intentions of the parties. In Lewis v. Headley, for example, the plaintiff sued on notes made in Illinois, to be paid in Illinois, which had been given as collateral security covering certain small denomination bills of a New Jersey bank deposited in an Illinois bank pursuant to an agreement made in New Jersey. The deposit violated an Illinois law prohibiting the circulation of bills of this type. Denial of recovery could have been grounded on the lex loci contractus, to-wit: Illinois law, for the notes, and the deposit in consideration for which they had been given, were both made in this state. For that matter, the denial of recovery could have been grounded on an Illinois policy on the subject. But the court apparently saw fit to base the decision on a "place of performance" rule, for it said: "... the parties to the agreement are presumed to be informed in regard to the law of the place where performance is to be made, and to contract with a

33 Ellison v. Adams Express Co., 245 Ill. 410, 92 N. E. 277, L. R. A. 1915 A 502 (1910), dealt with a carrier's agreed-valuation limited liability. The Illinois statute was denied extra-territorial effect. Macomber & Whyte Rope Co. v. United Fruit Co., 225 Ill. App. 286 (1922), concerned a similar problem and both the Interstate Commerce Act and the Illinois statute were held inapplicable, the court applying "common law," without reference to the common law of Wisconsin where the contract was made. Dean & Son v. W. B. Conkey Co., 180 Ill. App. 162 (1913), involved a contract for royalties made by a corporation not duly authorized to do business in Illinois. The cases of Chicago & West Michigan R. R. v. Hull, 76 Ill. App. 408 (1898), and Thomas v. Wabash, St. L. & P. R. R. Co., 63 F. 200 (1894), also involved carrier's limitations as to liability.

34 See, for example, Bradshaw v. Newman, 1 Ill. 133 (1825).


37 36 Ill. 433, 87 Am. Dec. 227 (1865).
view to that law, unless it is otherwise expressed in the contract. *And this is a legal presumption that cannot be rebutted.*"  

Here is probably the most inflexible statement ever made in all of the Illinois conflicts cases dealing with contracts. Inasmuch as the case has often been cited, the remark is noteworthy; but inasmuch as no precedent was cited, and no reasoning given, to support it, the statement is entitled to little weight. In fact, in a later case of this type, one involving a contract made in one state but to be performed in another, it was held that the parties could make the law of another state, that of defendant's residence as well as the place of performance, a part of the contract, but that an express term in the contract, actually in conflict with particular provisions of the intended law, would be given effect under the *lex loci contractus.*

> Notwithstanding these rules, a contract clearly contrary to the public policy of the forum will not be enforced. This exception has been employed in cases where the contract was made and was to be performed outside of Illinois as well as in those cases where

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38 36 Ill. 433 at 436, 87 Am. Dec. 227 at 229. Italics added. See also Price v. Burns, 101 Ill. App. 418 (1902), where the court applied a "place of delivery" rule to a contract clearly against Illinois public policy, and annotation in 166 A. L. R. 1353 at 1370.

39 See Rose v. Mutual Life Insurance Co., 144 Ill. App. 434 (1908). In that case, a Kentucky resident applied for and received delivery of a policy, in Kentucky, from a New York insurance company. The policy provided that it was to be governed by New York law. The latter required the giving of certain notice as to premiums due before a company could declare a policy forfeited for non-payment of premiums. By the terms of the policy, this requirement was expressly waived. The Appellate Court for the Second District held quite clearly that this was a "Kentucky" contract and that the special waiver, valid under the law of that state, controlled the general reference to New York law. However, the affirmance given by the Illinois Supreme Court in 240 Ill. 45, 88 N. E. 204 (1909), serves to weaken this holding because it was based upon different reasons, to-wit: (1) that the policy was a "New York" contract and that the special waiver, valid under the law of that state, controlled the general reference to New York law. However, the affirmance given by the Illinois Supreme Court in 240 Ill. 45, 88 N. E. 204 (1909), serves to weaken this holding because it was based upon different reasons, to-wit: (1) that the policy was a "New York" contract, delivery not being determinative of the place of making; but (2) that the controlling New York law was not intended to have any effect upon contracts made outside of that state.

40 Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 (1894), concerned a note made, endorsed, and payable in Missouri. Israel v. Selman, 263 Ill. App. 351 (1931), dealt with a loan for gambling purposes, benefiting both parties, made and presumably performable in Ohio. In Judy v. Evans, 109 Ill. App. 154 (1903), an unrecorded conditional sale contract, valid where made, was held unenforceable in Illinois where it would have operated to the detriment of Illinois citizens. The Illinois policy in this respect has changed, see First National Bank of Nevada v. Swegler, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948).
the performance was to be rendered, at least partly, in Illinois.  

Where the contract has no connection whatever with Illinois, the public policy exception will not be employed to enable a party to come to this state in order to repudiate his contract by recovering in tort on the alleged illegal transaction, nor will a foreign judgment based upon an arbitration award, achieved in an illegal or gambling transaction, be open to collateral attack.

There is occasion to consider the question of usury, which may affect the legality of a loan contract, as a separate topic because courts have tended to apply a different rule in such instances, often utilizing the intentions of the parties, whether expressed, inferred, or presumed, as the basis for upholding the contract.

Where a contract has been made and is to be performed in the same jurisdiction, the laws of that jurisdiction will govern validity insofar as usury is concerned, whether leading to the up-

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41 Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66, 99 N. E. 893 (1912), dealing with a limitation of a carrier's liability to an agreed valuation, valid where made, but held unenforceable as contrary to Illinois public policy; Thomas v. First National Bank of Belleville, 213 Ill. 261, 72 N. E. 801 (1904), a gaming contract; Swing v. Thomas, 120 Ill. App. 233 (1905), concerning an assessment upon an Illinois policy holder in an insurance company not authorized to do business in Illinois, based upon a contract entered into in another state but presumably to be performed, that is: enforced, in Illinois. See also Price v. Burns, 101 Ill. App. 418 (1902), where the court applied a "place of delivery" rule to deny enforcement of an Iowa contract for the sale of a gambling machine and the delivery thereof in Illinois. In those cases where the contract of sale would merely violate some local option law, but would not violate a general policy of the state, recovery has been permitted: Joseph Schlitz Brewing Co. v. Miller, 200 Ill. App. 633 (1915); F. W. Cook Brewing Co. v. Vacarro, 188 Ill. App. 387 (1917). See also annotation in 166 A. L. R. 1353 at 1370.


44 In McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651 (1856), the law stipulated for by the parties was applied to defeat the contract. But note the legislative overruling of this case discussed below at note 51, post. See also Merchants' & Manufacturers' Securities Co. v. Johnson, 69 F. (2d) 940 at 943 (1934). The parties there stipulated that Illinois law should govern and the court, finding a preponderance of activity in Illinois, gave effect to the stipulation. Quoting from Wharton, The Conflict of Laws, the court said: "Assuming that their real, bona fide intention was to fix the situs of the contract at a certain place which has a natural and vital connection with the transaction, the fact that they were actuated in so doing by an intention to obtain a higher rate of interest than is allowable by the situs of some of the other elements of the transaction does not prevent the application of the law allowing the higher rate."


46 George v. Haas, 311 Ill. 382, 143 N. E. 54 (1924).
holding of the contract\textsuperscript{47} or tending to defeat it.\textsuperscript{48} Where the interest rate is in excess of the legal rate for such jurisdiction, and the laws thereof impose only a partial forfeiture to the state, but do not declare the contract to be utterly void, the courts of Illinois will permit recovery without imposing the foreign penalty.\textsuperscript{49}

In those instances where the contract has been made in one state but is to be performed in another, the rules may vary but an examination of the cases discloses that in no instance has the contract been denied enforcement. It could be assumed that if the contract were to be utterly void in both states because of the usury it would not be enforced here, but there is no Illinois case in point. Where the contract would be regarded as valid under the laws of the state where made, but void by the laws of the state where it was to be performed, the indications are that it would be held enforceable under the \textit{lex loci contractus}.\textsuperscript{50} If valid in Illinois, where made, but void under the laws of the state fixed as the place for performance, the obligation would be enforced by an Illinois court in conformity with an express statute on the subject.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{47} United States Mortgage Co. v. Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969 (1891); Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631 (1911); Dearlove v. Edwards, 166 Ill. 619, 46 N. E. 1081 (1897); Smith v. Whitaker, 23 Ill. 309 (1859); Phiney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62 (1854).
\item \textsuperscript{48} Granite City National Bank v. Cross, 188 Ill. App. 242 (1914). Actually, only interest was there held forfeited.
\item \textsuperscript{49} Barnes v. Whitaker, 22 Ill. 606 (1859), turned on an Iowa law punishing usury with partial forfeiture to the school fund in the Iowa county where suit should be brought. The Iowa statute was not enforced by the Illinois court. See also Sherman v. Gassett, 9 Ill. 321 (1847), where the Illinois court refused to enforce the Massachusetts law punishing usury with a forfeiture of three-fold the amount reserved. The case of Granite City National Bank v. Cross, 188 Ill. App. 242 (1914), is distinguishable on the ground that the statutory forfeiture there provided for was limited to the amount of the interest, hence was not considered to be punitive in character.
\item \textsuperscript{50} See Andrews v. Pond, 38 U. S. (13 Pet.) 65, 10 L. Ed. 61 (1839).
\item \textsuperscript{51} Ill. Laws 1857, p. 38, would appear to be a legislative overruling of the holding in the case of McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651 (1856), a suit based on bills of exchange drawn in Illinois, payable in New York, referring to New York law, with a rate of interest illegal in both states. Illinois law denied recovery of interest; New York law declared the entire contract to be utterly void. It was held, under a "rule of substitution," that the New York law controlled. The current version of the statute survives in the first part of Ill. Rev. Stat. 1951, Vol. 1, Ch. 74, § 8. See also Walker v. Lovitt, 250 Ill. 543 at 549, 95 N. E. 631 at 633 (1911), where the court said: "The object of the legislature has always been the same,—to enable citizens to borrow money outside the State at the highest rate permitted by law within the State, and to give valid obligations therefor, though such obligations may be invalid by the law of the State where
In the converse situation, that is one where the contract would be usurious and void where made but would be valid under the laws of the state where it was to be performed, there is some indication that a recovery might be denied under the *lex loci contractus*,\(^5\) although no Illinois case deciding the point has been found. If the state of performance should happen to be Illinois and one of the parties turns out to be an Illinois citizen, the aforementioned statute would apparently authorize enforcement.\(^5\) If, on the other hand, the contract should be usurious but not utterly void by the laws of the state where made, and valid by the laws of the state where it is to be performed, it would be enforced under the doctrine that the parties are to be presumed to have intended the law of the latter state to govern.\(^5\) Again, where the contract would be subject to a penalty or a partial forfeiture where made, but would be utterly void in the state where it was to be performed, the courts will seek to uphold it, either by discovering evidence that the parties intended the *lex loci contractus* to control,\(^5\) by recognizing that forfeitures are not to be favored.

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\(^5\) Ill. Rev. Stat. 1951, Vol. 1, Ch. 74, § 8, provides: "When any written contract, wherever payable, shall be made in this state, or [be made] between ... a citizen or corporation of this state and a citizen or corporation of any other state, territory or country ... such contract may bear any rate of interest allowed by law ... in this state."

\(^5\) George v. Haas, 311 Ill. 382, 143 N. E. 54 (1924). In that case, a note drawn in Chicago, Illinois, payable in the Isle of Pines, West Indies, was held governed as to its "nature, validity, interpretation and effect" by the law of the Isle of Pines, which allowed interest at the rate of 10%, a rate declared to be usurious in Illinois.

\(^5\) Tilden v. Blair, 88 U. S. (21 Wall.) 241, 22 L. Ed. 632 (1875). A draft drawn in Illinois, payable and accepted in New York, was returned to Illinois for negotiation. The court concluded, by the following reasoning, that the more favorable Illinois law should control: "It is, therefore, quite immaterial, under the facts of this case, that the defendants resided in New York, and that they there wrote their acceptance on the draft. *In legal effect they accepted the draft in Chicago*, when by their authority the drawer negotiated it, and thus caused effect to be given to their undertaking: Nor is the law of the contract changed by the fact that the acceptance was made payable in New York. The place of payment was doubtless designated for the convenience of the acceptors, or to facilitate the negotiation of the draft. But it is a controlling fact that before the acceptance had any operation—before the instrument became a bill, the defendants sent it to Illinois for the purpose of having it negotiated in that State—negotiated, it must
or by making analogy to the Illinois statute upholding contracts made in Illinois, performable elsewhere, and reserving a legal rate.56

One further case should be noted, that of Merchants' & Manufacturers' Securities Company v. Johnson,57 decided by the Circuit Court of Appeals for the Eighth Circuit. The contract there concerned was made in Illinois, contained a stipulation that the parties intended Illinois law to control, and was to be performed in several states, but mostly in Illinois. The court gave effect to the stipulation, but with the reservation that the law stipulated had to bear a "normal relation" to the contract.58

Usury, unlike true illegality, is not a defense per se but must be pleaded and proved.59 If the alleged usury arises under foreign law, the court will presume that the contract was made in conformity with its governing law,60 even where the rate reserved exceeds that allowable in Illinois.61 But if an amount of interest greater than that allowed in Illinois is sought to be recovered by virtue of some foreign law, rather than by the terms of a

be presumed, at such a rate of discount as by the law of that State was allowable. What more cogent evidence could there be than that it was intended to create an Illinois bill?" 88 U. S. (21 Wall.) 241 at 247, 22 L. Ed. 632 at 633. Italics added to emphasize the court's preoccupation with the parties' intentions, as the primary factor in the choice of law.


In Andrews v. Pond, 38 U. S. (13 Pet.) 65, 10 L. Ed. 61 (1839), the United States Supreme Court said that where the contract is made in one state to be performed in another, and the parties state no preference as to which law is to control, then the lex loci contractus is the law governing the question of usury. The case of Adams v. Robertson, 37 Ill. 45 (1865), another of this type, contains elaborate dicta on the right to stipulate the law which is to control. Actually, the case only held that a third party from whom no usury had been exacted had no standing to plead usury as a defense.

57 69 F. (2d) 940 (1934).

The court did not define "normal relation" further, but the term seems to indicate a more versatile qualification than that contained in the limitation found in Adams v. Robertson, 37 Ill. 45 (1865). The many cases found in this study which utilize the intentions of the parties as a basis for solving the choice of law problem would seem to indicate that the Illinois courts may take a hint from the Court of Appeals and may borrow the concept of "normal relation" to the contract from its apparent origin in the case of Seeman v. Philadelphia Warehouse Co., 274 U. S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1926).


59 Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631 (1911); Dearlove v. Edwards, 166 Ill. 619, 46 N. E. 1081 (1897); Smith v. Whitaker, 23 Ill. 309 (1860); Giddings v. McCumber, 51 Ill. App. 373 (1893).

60 Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631 (1911).
foreign contract, then the plaintiff must plead and prove the foreign interest law for, absent proof on the point, the court would presume the foreign law to be the same as that of the forum.62

Naturally, there can be no enforcible contract unless ordinary tests regarding the requirement for consideration have been met. Whether there is consideration to support a contract presents a question which may be divided into two parts. First, have the parties done an act sufficient to satisfy the orthodox test as to benefit conferred, detriment suffered, or presence of a seal? Second, will the consideration, deemed satisfactory under one of these, escape legal prohibition because of some policy of the controlling law? Where both questions can be resolved in the affirmative, the contract is enforcible, at least insofar as the question of consideration is concerned. As the second part of the question has already been discussed in the section relating to legality, only the first part remains to be dealt with.

Where the place of contracting and of performance coincide, a lex loci contractus rule would seem to be the one to be utilized to determine the sufficiency of the consideration, since the only rule to compete with it would be that of the lex fori.63 Where the contract has been made in one state but is to be performed in another, the leading case of Pritchard v. Norton64 gives no clear

63 Woodbury v. U. S. Casualty Co., 224 Ill. 227, 120 N. E. 8 (1918). Actually, the case arose out of a contract of the third type, one to be performed in several states, but it is considered here because the so-called “performance” was negative in character. The question actually before the court was whether, under the governing law, to-wit: the lex loci contractus, the symbol “L.S.” was sufficient to constitute a seal so as to bar an attack on the release for fraud in a court of law. It may be assumed that this would be the equivalent of the question as to whether the symbol “L.S.” was sufficient to obviate the necessity for consideration.
64 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104 (1882). Plaintiff's decedent had become surety on an appeal bond in Louisiana, in behalf of defendant, without the latter's express request. Defendant thereafter executed and delivered, in New York, an indemnity bond against losses on the appeal bond. Under Louisiana law, the decedent's pre-existing liability as surety was sufficient consideration for the indemnity, but not so in New York. The court, holding Louisiana law to govern, said: “The phrase lex loci contractus is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are
rule but speaks of the *lex loci contractus* in a double sense, as the law of the "seat of the obligation," and as "that which the parties have, either expressly or presumptively, incorporated into their contract." Where the contract is made in one jurisdiction but is to be performed in several, the most recent case indicates that, at least where the parties, recognizing the possibility of disputes in various jurisdictions, express their intention that its validity should be upheld, the court ought to apply the law which deems the consideration sufficient. Where performance is negative in character, however, as in the case of a release, the law of the place where the release has been given will govern the situation.

C. CONSTRUCTION OF THE CONTRACT

Assuming that the parties to a contract have assented to the express terms of the agreement, that it is lawful in its scope, and is adequately supported by consideration, the problem may yet arise as to what their intentions were, or rather what intentions will be ascribed to their manifestations, in those situations not precisely covered by express terms of the contract.

Those cases in which the important elements of the transaction coincide in one state should be segregated from the others.

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65 Reighley v. Continental Illinois Nat. Bank, 390 Ill. 242, 61 N. E. (2d) 29 (1945). A husband and wife entered into a support contract in Germany, providing for monthly payments for life, to be secured by a deposit of securities in a Chicago bank, at the wife's residence. Disputes were to be litigated wherever the plaintiff filed suit provided, under the law of that place, the contract was regarded as lawful, and the invalidity of any proviso was not to cause the entire contract to be declared void. Annulment of the marriage in Germany on the ground of impotency, execution of a "Chicago contract" in accordance with the "Berlin contract" and a deposit of securities followed. In a suit to enforce payments, the defendant argued, *inter alia*, that the effect of the German annulment was such as to declare that there had never been a marriage, hence there had been no duty to support to serve as consideration. Impotency being only a ground for divorce, not annulment, in Illinois, the argument could not have been made if the events had occurred in Illinois. Leaning on the expressed intention that the contract should not be held void, the court declared: "No contract should be held as intended to be made in violation of law, whenever, by any reasonable construction, it can be made consistent with law." 390 Ill. 242 at 251, 61 N. E. (2d) 29 at 34.

In this group, it has been held that where the situs,1 the corporate domicile,2 or the place of performance3 are situated in the same state as that in which the contract was "made," the law of that state, in force at the time,4 would govern the construction of the contract.

As might be expected, the most interesting group of cases, the one showing the greatest diversity in applicable rules, is that wherein the contract was made in one state but was to be performed in another, or possessed some important element, other than execution, in the second state. Because of this diversity, cases in this group, dealing with an issue of construction, are here further subdivided according to the subject matter of the contract. Rules thus derived with respect to contracts affecting title to land and marital property rights are clearly defined. Variance does appear, however, in the rules relating to insurance contracts as well as those bearing on certain other types of contracts.

Taking up the land contract cases first, it may be noted that agreements executed in one state but affecting title to land in another will be construed according to the law of the state where the land is situated.5 Personal covenants, however, executed

1 Garden City Sand Co. v. Miller, 157 Ill. 225, 41 N. E. 753 (1895). The question was one as to whether, where the contract was silent as to the state of the title, the vendee could be presumed to have satisfied himself that there were no defects in the title.

2 Grimme v. Grimme, 101 Ill. App. 389 (1902), affirmed in 198 Ill. 265, 64 N. E. 1088 (1902). The company was domiciled in Missouri and the insured was domiciled in Illinois. The place of execution was not made clear, hence was apparently considered immaterial.


5 In Alcorn v. Epler, 206 Ill. App. 140 (1917), a deed executed in Illinois but conveying land in Texas was governed by Texas law as to the construction to be given to general covenants of warranty, whether running with the land or as specific present covenants. The case of Crane v. Blackman, 126 Ill. App. 631 (1906), concerned an Illinois conveyance of Missouri land and the question was whether the words "convey and warrant" contained a special covenant. See also Dalton v. Taliaferro, 101 Ill. App. 592 (1901), involving the same question in relation to an Illinois conveyance of Iowa land. There is dictum in Harrison
collaterally with land contracts, will be construed under the laws of the state where such contracts are executed.\(^6\)

Contracts affecting marital property rights in the nature of ante-nuptial agreements will be construed by the law of the matrimonial domicile as to movables but by the law of the situs as to immovables. In the event the domicile should be changed, then the actual domicile of the couple will govern construction of their contracts respecting movables, but the \textit{lex situs} will remain effective as to immovables.\(^7\)

While contracts for the carriage of goods have been construed according to the \textit{lex loci contractus},\(^8\) one rather unusual case stated that a contract for the payment of royalties had to be construed in the light of the law found at the place of performance.\(^9\) It might be noted, however, that the statement could be classed as dictum, first because the court found there was no need to engage in an act of construction, and second because the applicable rules of the two states were similar in character.

With respect to insurance contracts, it can only be said that no clear rule appears to have been formulated. Courts have appar-

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\(^6\) McCoy v. Griswold, 114 Ill. App. 556 (1904). An Illinois conveyance of Wisconsin land with an agreement collateral thereto to hold the vendor harmless in certain circumstances was held subject to construction according to Illinois law.

\(^7\) In Long v. Hess, 154 Ill. 482, 40 N. E. 335 (1895), an ante-nuptial contract made in Germany was held ineffective to prevent the husband's disposition of after-acquired Illinois realty. Besse v. Pellechoux, 73 Ill. 285, 24 Am. Rep. 242 (1874), dealt with an ante-nuptial contract and marriage formed in Switzerland with the parties later moving to Illinois. See also Davenport v. Karnes, 70 Ill. 465 (1873), involving the effect of a parol ante-nuptial agreement intended to preserve the wife's property rights as against her husband's creditors. Cases on settlement contracts are collected in an annotation in 18 A. L. R. (2d) 760.

\(^8\) The case of Pennsylvania Co. v. Fairchild, 69 Ill. 280 (1873), involving the question as to whether the parties assent to a bill of lading was implicit, was dealt with by the court as a case of construction.

\(^9\) Lemp Brewing Co. v. Ems Brewing Co., 164 F. (2d) 290 (1947).
ently employed the *lex loci contractus* principle in some instances, have stated, in others, that the law stipulated for by the parties, if not in conflict with express provisions of the contract, should govern issues of construction, and again, in still other cases, have relied simply upon what might be called general principles of construction.

Likewise, in an early negotiable instrument case involving a construction problem, the court declared that the parties could stipulate as to the law which should determine the meaning of their bill of exchange, and that whether the same was foreign or inland in character, but again the declarations appear to be broader than the case warranted.

Several cases appear where the contract, although made in one state, was to be performed in several states. A real estate broker’s contract of this type, for example, was construed according to the law prevailing where the contract was made, and the marital property contract cases mentioned above may be considered to fall in this category, thereby adding the “actual domicile” rule with respect to movables, and the *lex situs* rule relating to immovables, to the choice of available law.

10 In *Mutual Life Ins. Co. v. Devine*, 180 Ill. App. 422 (1913), a construction of the words “to their children” was necessary on the point as to whether a condition of survival was to be implied. The *lex loci contractus* rule was recognized and common law on the point was applied, absent proof as to the place where the contract was made or what the applicable foreign law might be. Ingersoll v. *Mutual Life Ins. Co.*, 156 Ill. App. 568 (1910), concerned an application for insurance made in Colorado, with defendant’s corporate domicile in New York and reference made to New York law. The court found a “Colorado” contract, apparently on the ground that Colorado was the place for delivery of the policy to the insured.

11 *Ford v. Mutual Life Ins. Co. of New York*, 283 Ill. App. 325 (1936), dealt with an Illinois application when defendant’s corporate domicile was in New York and reference had been made to New York law. Construction of a cash surrender provision was deemed governed by the law referred to since it was not contrary to any express term of the contract or to any Illinois policy on the subject.

12 *Rose v. Mutual Life Ins. Co. of New York*, 240 Ill. 45, 88 N. E. 204 (1909). No conflicts issue is made apparent in the opinion.


14 In *Benedict v. Dakin*, 243 Ill. 384, 90 N. E. 712 (1910), the question was one as to the customary amount of a broker’s commission in a case where the contract was silent on the point.
CHOICE OF LAW: CONTRACT CASES

D. RIGHTS AND POWERS OF THIRD PARTIES

1. Agency Problems

The introduction of a third party into the normal contract situation may well increase the likelihood that the several parts of the transaction will be affected by the laws of more than one jurisdiction, hence contracts made by and with agents ought to be considered, although presumably the principles stated heretofore should govern each phase of the agency contract, not only as between principal and agent but also as to each phase of any contract the agent might make, on behalf of the principal, with a third person.

The law of the place where the principal and agent enter into that relationship has usually been said to govern agency contracts,¹ and the Illinois cases concerning capacity,² formal validity,³ legality,⁴ and construction⁵ support this rule. These cases all dealt with the right of a real estate agent to recover commissions from his principal. The right of a third party to recover against the principal on a contract negotiated by the agent, however, could well be denied unless the agreement authorizing the agent to sell land complied with the formal requirements of the lex situs.⁶ Moreover, the capacity of an inchoate corporation to be

¹ See, for example, Dicey, Conflict of Laws (Stevens & Sons, London, 1949), 6th Ed., p. 710.
² O'Dea v. Throm, 250 Ill. App. 577 (1928), reversed on other grounds in 332 Ill. 89, 163 N. E. 390 (1929).
³ Vossler v. Earle, 194 Ill. App. 522 (1915), abst. opin., affirmed as to the evidence in 273 Ill. 367, 112 N. E. 687 (1916); Murdock v. Calgary Colonization Co., 193 Ill. App. 295 (1915). In the last mentioned case, the situs of the land and of the agency contract was in Indiana, but negotiations were carried on and a contract made with a third party in Illinois.
⁴ In Frankel v. Allied Mills, 369 Ill. 578, 17 N. E. (2d) 570 (1938), the agency contract was "made" in New York but, as the situs of the land, and apparently the procuring of a buyer, were in Illinois, this would appear to be a strong lex loci contractus case.
⁵ Benedict v. Dakin, 243 Ill. 384, 90 N. E. 712 (1910), involved an agency contract made in Louisiana, a buyer found in Illinois, and a sale concluded in Louisiana. Construction of the agency contract as to commissions was held to be determined by Louisiana Law.
⁶ Bissell v. Terry, 69 Ill. 184 (1873), concerned certain letters from a Louisville, Kentucky, principal to his Chicago agent. They were held insufficient, under the Illinois statute of frauds, to give the agent authority to sell the land, hence the third party's bill for specific performance was dismissed.
bound for pre-incorporation services rendered in its behalf by an "agent" has been determined by the law of the ultimate corporate domicile.\(^7\)

As between the third party and the principal, the binding effect upon the principal of the agent's contract is to be governed by the law of the place where the agency operates to conclude a contract,\(^8\) unless such contract would be contrary to the public policy of the forum.\(^9\) In that connection, the power of an agent to waive fraud on the part of the third party has been determined by the law of the place where the agent entered into the contract.\(^10\)

In all of the cases setting forth the \textit{lex loci contractus} rule, it is apparent that either the locus of the agency contract and that of the contract with the third party was in the same state;\(^11\) that the contract with the third party was clearly "made" and was to be performed in the same state;\(^12\) or that the contract with the third party was clearly "made" in one state but was to be performed in several.\(^13\) None of the cases found involved a contract

\(^7\) Erd & Massey v. Rapid Transit Co. of Illinois, 206 Ill. App. 351 (1917), dealing with an attorney's pre-incorporation services, performed in Missouri, for a corporation ultimately organized in Illinois.

\(^8\) Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76 (1878). The case of Clingan v. Cleveland, C., C. & St. L. R. R. Co., 163 Ill. App. 568 (1911), applied an Indiana presumption of authority on the part of an agent to bind the shipper to a contract limiting the carrier's liability, even though the agent was illiterate. See also Brown v. L. & N. R. R. Co., 36 Ill. App. 140 (1890), involving much the same proposition.

\(^9\) Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66, 99 N. E. 593 (1912). In that case, a New York consignor shipped goods to a Chicago consignee, upon order of the latter, via the defendant company, accepting a receipt form limiting the defendant's liability. The court applied an Illinois presumption of absence of authority to permit a limitation of liability. It was also held that such a contract, here made between an agent and a third party, would be contrary to an Illinois public policy on the point. It should be noted that, in applying the Illinois presumption, the court either (a) assumed a "place of delivery" rule, which appears to be unprecedented, or (b) misapplied cases upon which it relied for decision. The cited case of Merchants' Dispatch Transportation Co. v. Joesting, 89 Ill. 152 (1873), involved no conflict of laws problem but merely defined the Illinois requirement of a showing of assent on the part of the shipper. That of Plaff v. Pacific Express Co., 251 Ill. 243, 95 N. E. 1089 (1911), also cited, was one in which the court applied Illinois law, presumably the \textit{lex loci contractus}, to a liability limitation which had reference to a shipment from Illinois to Texas.

\(^10\) Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915 (1901).


\(^12\) Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915 (1901).

with a third party "made" in one state but to be performed in a second state only. It may be seriously doubted whether the *lex loci contractus* rule would be applicable in cases falling into this category.

### 2. Assignment or Transfer

In the event one party to a valid contract should attempt to assign rights thereunder to a third party, three types of problems could well arise. It would be necessary, first, to determine whether there actually was an agreement to assign, one manifested with all proper formalities, but as the rules governing these matters have already been discussed they will not be repeated. Second, assuming an agreement, the assignability of the contract right may well be brought into question. In the third place, supposing there has been proper execution of an assignable right, conflicting sets of laws may generate the problem as to whether that assignment should be given effect as against other, or fourth, persons. The second and third of these topics will now be considered.

With regard to the matter of assignability, it has been held that where the execution, delivery, and performance of a contract, as well as the assignment thereof, all occur in the same state, the law of that place will govern the assignability of rights under such a contract.\(^{14}\) Where, however, the contract is made in one state and the assignment is given in another, assignability is to be determined according to the law of the place of original obligation, under the most recent case in point,\(^{15}\) but this appears to be in conflict with an earlier *lex loci contractus* rule.\(^{16}\)

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\(^{14}\) Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398 (1866).

\(^{15}\) See Coleman for use of Haberman v. American Sheet & Tin Plate Co., 285 Ill. App. 542, 2 N. E. (2d) 349 (1936). An assignment given in Illinois, to an Illinois resident, of wages earned by an Indiana resident in Indiana was there held governed as to assignability by Indiana law. It would seem that the *lex loci contractus*, or place of assignment, rule was clearly rejected and the law of the original debt was applied.

\(^{16}\) In sharp contrast to the Coleman case mentioned in the preceding footnote is the earlier decision in Monarch Discount Co. v. C. & O. Ry. Co., 285 Ill. 233, 120 N. E. 743 (1918). In that case, wages earned in Indiana by a resident thereof were assigned in Illinois. Although the assignment was void under Indiana law, Illinois law was applied to uphold it. The explanation may lie in (1) the defendant's failure to show employment in Indiana at the time of the assignment, and
As to the effect of an assignment against other, or fourth, parties, it has been held that a foreign assignment, valid where made, of contract rights (debts) having their situs in Illinois, the place of the debtor’s residence, ought to be enforced by Illinois courts provided the rights of local creditors are not involved, but that such assignments should be denied enforcement, where the rights of local creditors have become involved, is borne out, at least by dicta. In one case, where the debts were presumably situated in various jurisdictions, the federal Court of Appeals drew upon the situs of a preponderance of the relevant events, as well as the stipulation of the parties, as decisive in the selection of the applicable law, thereby avoiding any necessity for reliance upon the place-of-contracting rule.

Independently of these matters, but generally related thereto, other questions will arise where the claim of the transferee grows

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(2) a failure to prove Indiana law for the record. Another case, that of Angelina County Lumber Co. v. Michigan Central Ry. Co., 252 Ill. App. 82 (1929), appears to be a logical and chronological intermediary between the Monarch and the Coleman cases, although inconclusive by itself. Lumber had there been sold in Texas and resold, subject to inspection in Illinois. The account due on the resale was assigned by the original Ohio purchaser, in Ohio, to a finance company. The vendee on resale rejected the lumber on inspection. When the unpaid original vendor asserted title, the question was presented as to whether or not the right to replevy was cut off by the assignment. Whether the assignee of the account had received all of the assignor’s rights in case of rejection was not made apparent. Without considering Ohio law, where the assignment had been given, the court, apparently persuaded by the fact that the original contract was made in Texas, held that Texas law, rather than the Illinois Sales Act, should control, but stated no specific rule.

17 Consolidated Tank Line Co. v. Collier, 148 Ill. 259, 35 N. E. 756 (1893), concerned an assignment validly made in Iowa, for the benefit of creditors, of debts situated in Illinois, which was upheld as against Ohio creditors, the same not being detrimental to Illinois citizens. Woodward v. Brooks, 128 Ill. 222, 20 N. E. 685, 15 Am. St. Rep. 104 (1889), involved an assignment in Pennsylvania, valid there, which was enforced in Illinois where no Illinois creditors were concerned.

18 There is dicta on the point in the cases listed in the preceding footnote. See also Heyer v. Alexander, 108 Ill. 385 (1884), where a deed of trust, executed in Missouri, purporting to pass an Illinois leasehold for the benefit of creditors, was held ineffective as against local attaching creditors.

19 See Merchants’ & Manufacturers’ Securities Co. v. Johnson, 69 F. (2d) 940 (1934). The plaintiff’s contractual right to receive an assignment of accounts receivable was upheld as against the receiver of the contemplated assignor on the basis the accounts were impressed with a trust in plaintiff’s favor. Although the contract to assign was executed in Chicago, and the parties stipulated that Illinois law should govern in order to obtain the advantage of Illinois interest laws, the court justified its choice of Illinois law on the preponderance of activity in that state rather than upon any precise “place-of-making” or “intention-of-the-parties” rule.
out of property made the subject of a chattel mortgage or a conditional sale contract entered into in another state.\textsuperscript{20} In that regard, it is fundamental law that, before the forum will enforce a foreign chattel mortgage, the requisite foreign formalities as to filing must have been observed,\textsuperscript{21} and compliance with such formalities must also be pleaded and proved.\textsuperscript{22} It is essential, for this purpose, that the filing of the chattel mortgage occur in the jurisdiction where the property is situated at the time,\textsuperscript{23} for the requirement will not be considered satisfied by any mere expectation of removal to that jurisdiction in the future.\textsuperscript{24} In the event the property subject to the chattel mortgage is situated in Illinois, a recording in that state will be sufficient and such recording would not be invalidated by the fact that the mortgage instrument was acknowledged in another state.\textsuperscript{25}

If the chattel mortgage is validly executed and recorded in another state upon property situated there, the subsequent removal of the property to this state, provided it is done without the consent of the mortgagee, will be held ineffective to form the basis for superior claims by a local creditor\textsuperscript{26} or by a local bona fide pur-

\textsuperscript{20}In general, see annotation in 13 A. L. R. (2d) 1312.

\textsuperscript{21}St. Paul Cattle Loan Co. v. Hansman, 215 Ill. App. 190 (1919). No attempt to comply with the foreign statute was shown in that case.

\textsuperscript{22}St. Paul Cattle Loan Co. v. Hansman, 215 Ill. App. 190 (1919); Clough v. Kyne, 40 Ill. App. 234 (1890).

\textsuperscript{23}Bridges v. Barrett, 126 Ill. App. 122 (1906), involved a chattel mortgage on a race horse which was properly executed, recorded, and filed in Tennessee, but which was held ineffective because the horse was not in Tennessee at the time.

\textsuperscript{24}The case of Doumas v. Mormella, 251 Ill. App. 397 (1929), concerned the filing, in Michigan, of a chattel mortgage on a motor bus located in Chicago, done in expectation that the motor bus would subsequently be removed to Michigan. The filing was held to be insufficient to create a valid Michigan mortgage. See also St. Paul Cattle Loan Co. v. Hansman, 215 Ill. App. 190 (1919), where a mortgage, executed in Minnesota, was filed in Wisconsin in expectation that the cattle would be removed to that state.


\textsuperscript{26}In Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525 (1889), a Missouri mortgage on mules, wagon, and harness was held valid as against a creditor who attached the goods after they had been temporarily brought into Illinois in the course of the debtor-mortgagor's work. Whether the mortgagee impliedly consented to the removal does not appear. See also Armitage-Herschell Co. v. Potter, 93 Ill. App. 602 (1900); Hoyt v. Zibell, 259 F. 186 (1919).
chaser without notice.\textsuperscript{27} A similar rule has been applied to uphold a security conveyance in trust as against a garnishing creditor.\textsuperscript{28}

Three cases apparently announcing a contrary rule should be noted and distinguished. In the first of them, that of \textit{Dawes v. Rosenbaum},\textsuperscript{29} certain cattle which had been mortgaged in Missouri were sold by the mortgagor in Chicago to a local merchant who, without actual notice of the facts, thereafter resold the cattle to others. The mortgagee then made formal demand on the merchant and followed up such demand with a suit in trover, but lost when the court held the demand insufficient.\textsuperscript{30} In the course of its opinion, however, the Supreme Court criticized the general rule in the following terms:

We cannot conclude this opinion, however, without some suggestions as to the rule, apparently supported by numerous adjudications, that the constructive notice of a mortgage resulting from its acknowledgment and recording in the State in which it is executed, is also constructive notice in other States, and to the citizens of other States to which the mortgaged property may be removed, thus giving to the law of the State in which the mortgage is executed extra-territorial effect. The courts base this rule on the doctrine of interstate comity, but it seems to us that the doctrine should not be extended to the detriment of citizens of the State. In many cases the rule that citizens of this State are bound by constructive notice of a chattel mortgage executed and recorded in another State, necessarily and inevitably operates to the detriment of such citizens. . . . Is it not a serious question whether

\textsuperscript{27}First National Bank of Nevada v. Swegler, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948); National Bond & Investment Co. v. Larsh, 262 Ill. App. 363 (1931); Armitage-Herschell Co. v. Potter, 93 Ill. App. 602 (1900). In the last mentioned case a New York mortgage was held valid as against a second mortgagee and judgment creditors whose claims arose in Illinois. Dicta may be found in Shannon v. Wolf, 173 Ill. 253, 50 N. E. 682 (1898), and Farmers & Merchants Bank v. Arnold, 58 Ill. App. 349 (1895).

\textsuperscript{28}The case of Michigan Central Ry. Co. v. Chicago & Michigan Lake Shore Ry. Co., 1 Ill. App. 399 (1878), dealt with rolling stock conveyed in trust, in Michigan, to secure a bondholders lien.

\textsuperscript{29}179 Ill. 112, 53 N. E. 585 (1909).

\textsuperscript{30}The basis for the distinction is pointed out in the case of First National Bank of Nevada v. Swegler, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948).
interstate comity should be extended when its extension may lead to such consequences?\textsuperscript{31}

The other two cases\textsuperscript{32} can best be explained on the basis of a misinterpretation there given to the rationale for the holding in the Dawes case.\textsuperscript{33} It is important to notice, however, that if the foreign mortgage would normally be treated as ineffective or fraudulent as to Illinois creditors or purchasers, the person relying on the foreign law in an effort to have the transaction declared valid must be prepared to plead and prove the foreign law.\textsuperscript{34}

Insofar as conditional sales contracts are concerned, the present rule is that a conditional sale contract, provided it is validly executed in another jurisdiction, will be entitled to enforcement against a local bona fide purchaser without notice, especially in those instances where the property has been removed to this state without the consent of the conditional vendor.\textsuperscript{35} The present rule reflects a change from the former rule, which declared such

\textsuperscript{31} 179 Ill. 112 at 123-4, 53 N. E. 585 at 589.

\textsuperscript{32} National Bond & Investment Co. v. Moss, 263 Ill. App. 187 (1931), and Snow for the use of Ainsworth v. Breene, 248 Ill. App. 518 (1928).

\textsuperscript{33} The decision in First National Bank of Nevada v. Swegler, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948), should prevent any further perpetuation of the error.

\textsuperscript{34} See In re Richheimer, 221 F. 16 (1915). London bankers, in New Orleans, had taken trust receipts on a cargo of Brazilian coffee belonging to an importer. The latter warehoused the coffee in Chicago and negotiated the warehouse receipts to holders without notice of the bankers' security title. Treating the trust receipts as being subject to the Illinois chattel mortgage recording statute, the court gave priority to the holders of the warehouse receipts on the ground that one who sends property into another state impliedly submits to the laws thereof. The case can be distinguished from the general rule either because the trust receipt holders apparently consented to removal of the coffee from Louisiana or else because Louisiana law had not been shown to validate the security interest as against third parties.

\textsuperscript{35} Commercial Credit Corp. v. Fatz, 346 Ill. App. 541, 105 N. E. (2d) 789 (1952), enforced a Kentucky conditional sale contract in Illinois, the court declaring the situation to be “almost identical” with that found in First National Bank of Nevada v. Swegler, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948). In Graver Bartlett Nash Co. v. Krans, 239 Ill. App. 522 (1925), judicial recognition was accorded to a change in the Illinois policy with respect to conditional sales. Although formerly considered fraudulent as to creditors of the vendee, Section 20 of the Sales Act of 1915 had been construed, in Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925), to permit such contracts. The earlier case of Waters v. Cox, 2 Ill. App. 129 (1878), similar in result, had treated a Michigan conditional sale contract the same as a bailment, so as to uphold it as against a later Illinois chattel mortgage.
contracts to be fraudulent as against local creditors unless they had been recorded here.36

3. Negotiation and its Effects

Whether or not an instrument is transferable as a negotiable instrument, with all the consequences attendant upon this fact, will be determined according to the law of the place where the purported assignment takes place, under the most recent case in point,37 rather than according to the law of the place where the instrument was originally issued. Earlier cases are in conflict, determining the question of negotiability variously upon general principles without reference to any particular law,38 by the law of the forum, referred to as the place of payment,39 or according to the law of the forum, referred to as concerning a matter of remedy.40

36 The cases of Merz v. Stewart, 211 Ill. App. 508 (1918), and Judy v. Evans, 109 Ill. App. 154 (1903), must be regarded as overthrown by reason of this change in policy.

37 See Pfieger v. Broadway Trust & Savings Bank, 285 Ill. App. 569 (1931), affirmed without contest on the conflicts point in 351 Ill. 170, 184 N. E. 318 (1933). Certain debentures, issued and made payable in New York, were accepted in Chicago as collateral security for a loan. Although, in a contest between the original holder and a third party claiming title, the court eventually concluded the debentures were negotiable under either New York or Illinois law, it first dealt with the conflicts problem, reviewed the English and American cases, distinguished the continental rule which uses the law of the place of issue to fix character, and aligned itself with the American doctrine that negotiability depends upon the law of the place where the transaction of negotiation takes place. According to Hakes v. Bank of Terre Haute, 164 Ill. 273, 45 N. E. 444 (1896), a note negotiable by the laws of Illinois will be presumed to be negotiable by the law of the place where made, where assigned, or where payable unless the contrary is pleaded and proved.

38 Smith v. Meyers, 207 Ill. 126, 69 N. E. 858 (1904), suit by an endorsee against an accommodation endorser.

39 The case of Farmers Trust Company v. Schenuit, 83 Ill. App. 297 (1898), concerned a note made in Nebraska and payable in Illinois, but the place of assignment was not made clear and, apparently, was considered to be immaterial. The court said that, since the note was to be paid in Illinois, it had to be presumed that the parties contracted with Illinois law in mind. Nevertheless, it went on to add that, if the defendant wished to show non-assignability, he had to plead and prove the foreign law. This latter statement, together with the omission to consider the place of assignment and the emphasis on the intention of the parties, weakens the court's statement as to a place-of-payment rule.

40 Roosa v. Crist, 17 Ill. 450, 65 Am. Dec. 679 (1856), a suit in debt on a note dated in New York, assigned there, and presumably payable there. The court considered the right of the assignee to sue in his own name as bearing on the matter of remedy, governed by the lex fori, and applied Illinois law, when that law denied the assignee the right to sue. Skinner, J., dissented from the holding, saying: "The effect of the negotiation by delivery in New York was to transfer the legal title to the plaintiff below, and by the law of comity, in my judgment, he may sue in this State in his own name, adopting the forms of remedy afforded by the local law."
Collateral matters as to the operation of an assignment ought also be considered. Several older cases, dealing with the question as to whether a check should operate as an assignment of a part of a fund, uniformly held that the law of the place of payment should govern.\textsuperscript{41} Far more provocative, because of its continuing importance and the divergent resulting decisions upon the point, is the question as to which law should govern an endorser’s liability to the endorsee, and the steps which must be taken to charge the endorser. Where all of the important elements of making, endorsement, and the intended place of payment fall within the same state, the law of that place will govern.\textsuperscript{42} These cases, of course, support the proposition that the forum will apply foreign law in the enforcement of foreign-created rights, rather than the law of the forum,\textsuperscript{43} but otherwise they are entitled to little weight for conflict of laws purposes as the statements therein do not reflect settled rules on this question. Once foreign law has been shown to be applicable, it is, of course, necessary to plead the existence thereof and to prove compliance therewith.\textsuperscript{44}

Where there has been a division of the elements of making, assignment, and place of payment between two states, the choice of law rules are far from uniform. Two cases indicate that the law of the place where the instrument was endorsed should determine the steps which an endorsee must take to charge an en-

\textsuperscript{41} Abt v. American Trust & Savings Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175 (1896), concerned a draft drawn in Illinois, upon a New York drawee, made payable in New York. The parties were held presumed to have contracted with reference to New York law. See also National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. 401 (1885); Union National Bank v. Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185 (1875); Pabst Brewing Co. v. Reeves, 42 Ill. App. 154 (1891).

\textsuperscript{42} Dunnigan v. Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496 (1887), dealt with notice of nonpayment. Gay v. Rainey, 89 Ill. 221, 51 Am. Rep. 76 (1878), involving the same question, concerned an accommodation endorsement, made in Louisiana, on a note delivered for negotiation in Illinois, where it was made and, presumably, was payable. In Schuttler v. Platt, 12 Ill. 417 (1851), the question was whether a lack of diligence against the maker could be excused. See also Humphreys v. Collier, 1 Ill. 297 (1829), and Belford v. Bangs, 15 Ill. App. 76 (1884).

\textsuperscript{43} See cases listed in the preceding footnote except for Schuttler v. Platt, 12 Ill. 417 (1851), where the events occurred in Illinois.

\textsuperscript{44} In Bond v. Bragg, 17 Ill. 69 (1855), plaintiff's proof of notarial protest was regarded as insufficient proof of demand and notice of nonpayment. Vaughan v. Potter, 131 Ill. App. 334 (1907), also treated a notarial protest as insufficient proof of presentment.
In one of them, that of Holbrook v. Vibbard, the note involved, made and endorsed in New York, was payable in Illinois. Addressing itself to the conflict of laws problem, the court held that New York law controlled the necessity of presentment at the place of payment, saying as it did so:

it is very clear that the law of the country where the endorsement was made is to determine the liability of the endorsers. Under this rule, the replication of the plaintiff, which attempted to put in issue the immaterial facts of residence of the makers and endorsers, and the place of payment, was properly held vicious. The drawer of a note or bill is liable according to the law of the place where the note or bill is drawn; and the endorser, according to the law of the place of endorsement. The endorsement is a new and substantive contract.

The court then followed this statement with the following corroboration, one which is rather puzzling in the light of subsequent cases, to-wit: "This has sometimes been suggested to be a departure from the rule that the law of the place of payment is to govern; but it is held to be in entire conformity to the rule."

If the court really meant what it said, it was certainly contemplating a "harmony" which was very close harmony indeed, at least for the pre-Civil War times. For, although the Holbrook case had an ineffectual following, serious doubts were cast upon the holding therein by the later case of Skelton v. Dustin, where the court clearly applied a place-of-payment rule to determine a question concerning days of grace. That case was a striking one indeed because the place of payment was isolated in one state,

45 Barber v. Bell, 77 Ill. 490 (1875), concerned makers residing in Ohio of a note made payable there but assigned in Illinois. The place of making was not made apparent. The court held that diligence against the makers was to be governed by Illinois law, where the note was assigned, but there is no indication of any conflict in the laws of the two states. See also Holbrook v. Vibbard, 3 Ill. 465 (1840).

46 3 Ill. 465 (1840).
47 3 Ill. 465 at 467.
48 Barber v. Bell, 77 Ill. 490 (1875).
49 92 Ill. 49 (1879).
Indiana, while all the other elements of making and endorsement were situated in Illinois. Subsequent, and less striking cases, have applied the place-of-payment rule to decide questions of notice to endorser\textsuperscript{50} as well as with regard to days of grace.\textsuperscript{51}

The question remains, then, as to whether or not the Holbrook case has been overruled by the decision in Skelton v. Dustin and its sequels. As both deal with requisite steps necessary to charge an endorser, the chronology of the cases would, at first glance, indicate an overruling, but there may be grounds for rationalizing and retaining the two holdings. In that regard, it should be noted first that the court in the Holbrook case considered the holding there to be in entire conformity with, rather than in opposition to, the place-of-payment rule. Second, if there is a material distinction to be drawn between necessity of presentment on the one hand and days of grace on the other, at least in respect to the governing law, the cases may be rationalized on that ground.

Such a distinction was suggested in a dictum achieved by the Appellate Court for the First District in the later case of Vaughan v. Potter\textsuperscript{52} for it there said:

The contract of the maker was a Missouri contract; that of the endorser—it being conceded that he made the endorsement in Illinois—is an Illinois contract. But the time of maturity of the paper enters into both contracts, and the law of the place of performance governs the question of the proper time of presentment and demand.\textsuperscript{53}

Assuming this distinction to be valid, the question is then one as to whether it can be extended, or used by way of analogy, to a case where the issue is as to the law which should govern the requisite notice of nonpayment to the endorser. The case of

\textsuperscript{50} Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867 (1886), a suit on a note made and payable in Illinois but endorsed in Michigan.

\textsuperscript{51} Although the case of Vaughan v. Potter, 131 Ill. App. 334 (1907), involved a note issued and endorsed in Illinois, payable in Missouri, the statement concerning a place-of-payment rule regarding days of grace is dictum.

\textsuperscript{52} 131 Ill. App. 334 (1907).

\textsuperscript{53} 131 Ill. App. 334 at 339.
Wooley v. Lyon applied the law of the place of payment to determine just such a question, but it seems doubtful whether the distinction suggested by the Vaughan case can be used to separate the holding in Wooley v. Lyon from that in Holbrook v. Vibbard, much as it might be possible to distinguish these cases on other grounds. As a consequence, the solution of the choice of law problem in the two-state transactions must be said to remain in an ambiguous state. For that matter, no case has been found in which the elements of making, endorsement, and place of payment occurred in a series of states, so uncertainty exists in this respect also.

Of course, the law regulating the defenses which an endorser may offer against the endorsee will be fixed by the place of endorsement whereas those of the maker against the endorsee will be governed by the law of the place where the note was made.

4. Third-Party Beneficiary Contracts

Several cases have arisen in Illinois involving contracts made for the benefit of third parties which have called for a consideration of conflict of laws rules but it can only be said that the facts in each case have operated to render all of them inconclusive as authority or precedent in other situations. Where the contract was both made and was to be performed in another state, Illinois courts have applied the law of that other state in deciding whether the contract right was enforceable in favor of the third-party beneficiary, paying lip service as they did so either to a "place of

54 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867 (1886).

55 In each case, the court applied the law of the state in which two of the three elements of making, assignment, and place of payment were situated.

56 The case of Crouch v. Hall, 15 Ill. 263 (1853), dealt with the availability of the defense of want of consideration offered against a note made, and presumably payable, in Kentucky which had been assigned in Illinois after it became due.

57 Evans v. Anderson, 78 Ill. 558 (1875). A concentration of important elements in one jurisdiction tends to weaken two other cases in point. In Scholten v. Barber, 217 Ill. 148, 75 N. E. 460 (1905), a mortgage note was made, presumably was assigned, and was payable in Missouri. The defendant failed to prove alleged Missouri law to the effect that a subsequent endorsement would operate to discharge the maker. Stacey v. Baker, 2 Ill. 417 (1837), dealt with notes executed in, and presumably payable in, Kentucky which had been assigned there.
making or performance” rule, or to a simple “place of making” rule. Two other cases deal with the question as to whether or not a right of sufficient dignity has been created in favor of the third-party beneficiary so as to preclude the original contracting parties from altering or revoking the contract without the beneficiary’s consent.

Although such contracts are potential trouble makers, in that the existence of the third party presents an opportunity for a scattering of the important elements of the case, it is likely that there will be relatively few conflict of laws cases dealing with basic questions as to whether or not such contracts should be recognized, for that question has been determined affirmatively in an almost unanimous fashion by most American courts.

58 Harris v. American Surety Co. of New York, 372 Ill. 361, 24 N. E. (2d) 42 (1939), concerned a suit on a construction bond brought for the use of a sub-contractor. A judgment for defendant, based upon Illinois law, was reversed on the ground that the law of Pennsylvania, where the contract had been made, was to have been performed, and where the defendant was organized, permitted enforcement of the contract, hence Illinois law was immaterial. The case is valuable as authority in choice of law problems only for its conclusion against the law of the forum. Following retrial, judgment for the plaintiff was affirmed in 314 Ill. App. 473, 41 N. E. (2d) 987 (1942).

59 See Reid, Murdoch & Co. v. The Northern Lumber Co., 146 Ill. App. 371 (1909), where the defendant agreed to pay plaintiff an amount owed by a third party, all events occurring in Michigan. Analogous cases may be found in Edwards v. Schil linger, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308 (1910), and Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804 (1898). The last mentioned case indicates that an Illinois court would enforce, in favor of a third party, a liability imposed upon the contracting parties by statute, absent any volitional act of their own.

60 The case of Ford v. Mutual Life Ins. Co., 283 Ill. App. 325 (1936), involved a suit by the insured to recover the cash surrender value of a policy. The company argued that the insured had no right to surrender without the consent of the beneficiary; relying on Illinois law rather than stipulated New York law. The court applied Illinois law, that state being the place of both making and performance, on the ground that the stipulation of the parties would have to yield to any Illinois policy or statute designed for the protection of its citizens. In Blackmore v. Randolph, 249 Ill. App. 121 (1928), a contract for the sale of stock, giving the vendee an option to re-sell to the vendor, was made in Missouri by a guardian of certain minors, the latter apparently residing in Illinois. Suit by vendee on the option was resisted by the vendor on the ground the rights of the minors would be violated. Missouri law, as the place of making and performance, was held to control in favor of the plaintiff. Both the facts and the vagueness of the conflict make the case weak authority.

61 In particular, see Harris v. American Surety Co. of New York, 372 Ill. 361 at 366, 24 N. E. (2d) 42 at 45 (1939).
E. PERFORMANCE AND BREACH

There is, generally, no discrepancy in American law on the point as to whether or not a party, once he has been shown to be obligated by the terms of a contract, has performed his obligation thereunder or has been guilty of a breach thereof. For that reason, there is little occasion to consider whether the law of any particular state would apply to resolve these questions, for the answer would be the same no matter which law was chosen. Some matters related to the contract or to its enforcement, however, are so closely connected with the place where performance is to be rendered that it would seem unreasonable to apply any law other than the lex loci solutionis in deciding them.\(^1\) While it is difficult to draw the line between matters of "obligation" and matters of "performance,"\(^2\) a number of Illinois cases have apparently attempted to make this distinction, hence this section is included.

In addition to dicta,\(^3\) numerous cases, including those in which an alternative ground was available because important events were concentrated in one state, as well as those in which the contract was made in one state and was to be performed in another,\(^4\) indicate that excuses for non-performance, validity of purpose, consideration or performance,\(^5\) matters of presentment, notice and

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1 See Goodrich, op. cit., p. 293.

2 Restatement, Conflict of Laws, § 358, comment b, discusses the practical line for separating questions of obligation from questions of performance.

3 Such dicta appears in Oakes v. Chicago Fire Brick Co., 311 Ill. App. 111, 35 N. E. (2d) 522 (1941), affirmed in 388 Ill. 474, 58 N. E. (2d) 460 (1944); Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245 (1875). Lemp Brewing Co. v. Ems Brewing Co., 164 F. (2d) 290 (1947), provides even more recent clear dictum that the law of the place of performance will prevail over that of the place where the contract was made, but no actual conflict appears therein.

4 The cases are segregated in succeeding footnotes.


6 Same state: Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738 (1899), writ of error dismissed 187 U. S. 651, 22 S. Ct. 841, 47 L. Ed. 349 (1902), dealing with a contract in general restraint of trade where the New Jersey domicile of the corporation was the only foreign element present. Made in one state, performable in another: George v. Haas, 311 Ill. 382,
payment of negotiable instruments, breach, and damages should be governed by the lex loci solutionis.

The presence of legality cases in this grouping may well be open to question inasmuch as matters of legality are generally considered to concern "essential validity" or "obligation" rather than "performance." However, an examination of these cases will disclose that an alternative ground existed in each case, making the usual rationale of the lex loci solutionis, to-wit: that matters of final detail must be controlled by the local law at the place of performance, inapplicable. Thus, in one case, involving usury, the court probably sought to uphold the contract under whatever law was available; another was decided on local policy grounds; while still another could just as well have been decided either on policy grounds or under the rule of lex loci contractus.

Negotiable instruments cases dealing with the steps necessary to charge an endorser have been discussed and will not be repeated but it seems clear that the lex loci solutionis will govern time for performance in matters of this nature, and it would also probably control in questions as to the notice to be given to the endorser before he could be charged on his endorsement.


7 Made in one state, performable in several: Zeigler v. Illinois Trust & Savings Bank, 245 Ill. 150, 91 N. E. 1041 (1910).

8 Made in one state, performable in another: Emerson v. North American Transportation Co., 303 Ill. 282, 135 N. E. 497 (1922); Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. St. Rep. 867 (1886); Skelton v. Dustin, 92 Ill. 49 (1879); Vaughan v. Potter, 131 Ill. App. 334 (1907); Dubuque Fire & Marine Ins. Co. v. Oster, 74 Ill. App. 139 (1897).

9 Made in one state, performable in the same state: Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895 (1908); Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837 (1896); Guignon v. Union Trust Co., 156 Ill. 135, 40 N. E. 556, 40 Am. St. Rep. 186 (1895).

10 George v. Haas, 311 Ill. 382, 143 N. E. 54 (1924).


13 Skelton v. Dustin, 92 Ill. 49 (1879); Vaughan v. Potter, 131 Ill. App. 334 (1907).

14 Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. St. Rep. 867 (1886).
F. MATTERS RELATING TO REMEDY

Suit for breach of contract having become necessary, it then becomes important to notice that there is a significant distinction between matters of remedy and matters of basic contractual obligation, which distinction has been widely accepted. In general, matters of remedy include the manner by which an aggrieved party goes about obtaining relief before the courts, but the scope of the concept of "remedy" can well vary from one jurisdiction to the next.

In Illinois, as elsewhere, the basic rule is that the law of the forum governs the time, extent, and mode of the remedy on claims arising within and without the state but that the criminal and penal laws of other jurisdictions will not be enforced. "Remedy," for this purpose, extends to include a determination of what constitutes the commencement of an action, whether the suit should be at law or in equity, the right to bring garnishment proceedings against allegedly exempt property, the scope of doctrines relating to joinder of parties, a defendant's right to a set-off, the capacity of a married woman,

1 The case of Sherman v. Gassett, 9 Ill. 521 (1847), clearly makes such a distinction. A note made in Massachusetts was usurious where made but an Illinois court, construing the Massachusetts law, found the forfeiture provision did not declare the note absolutely void but had bearing on the remedy only, hence was inoperative in the forum. In general, see Cook, "'Substance' and 'Procedure' in the Conflict of Laws," 42 Yale L. J. 333 (1933), particularly p. 344.


3 The Illinois rule was first announced in Sherman v. Gassett, 9 Ill. 521 (1847).

4 Collins v. Manville, 170 Ill. 614, 48 N. E. 914 (1897).

5 See, for example, McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651 (1856), where the court applied the Illinois law of evidence, as derived from various authorities, to determine the competency of witnesses.


7 Mineral Point R. R. Co. v. Barron, 83 Ill. 365 (1876).


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a third-party beneficiary, to bring suit in his or her name, and to issues arising under statutes providing for the limitation of actions. On the other hand, the amount of interest to be allowed as a part of the damages may be "substantive" rather than part of the remedy, and a statute providing that an insurance company should not plead fraud unless a copy of the application had been attached to the policy has been declared to be "substantive," rather than remedial or penal.

The general scope of "remedy" was once well described by Chief Justice Taney when he wrote:

Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by action on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. . . . It is difficult, perhaps to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference


13 On this point, see post, note 27.

14 In Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895 (1908), the foreign rate of interest was allowed upon enforcement of the foreign decree. See also Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837 (1896); Guignon v. Union Trust Co., 156 Ill. 135, 40 N. E. 556 (1895); Chumasero v. Gilbert, 24 Ill. 293 (1860). In the last mentioned case, the rule was assumed but the lex fori was applied since the foreign law had not been pleaded.

between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it.\textsuperscript{16}

Within these limits, a state is free to confine the remedy upon a foreign cause of action to the matrix it provides for its own citizens on their local claims.\textsuperscript{17}

The basic rule against local enforcement of foreign penal or criminal laws\textsuperscript{18} naturally gives rise to an inquiry as to what may be considered to be "penal" within the meaning of that rule. Several cases serve to indicate the scope of the term. One such case held that a contract upon condition, providing merely for liquidated damages in the event of the breach thereof, would not be penal in character.\textsuperscript{19} Others indicate that special statutory remedies against shareholders in foreign corporations may be regarded as arising from contract, rather than from foreign penal laws, under the more recent view on the subject,\textsuperscript{20} although earlier cases were to the contrary.\textsuperscript{21} A foreign law providing for the forfeiture of three-fold the interest reserved in a loan contract which was usurious in character would apparently be considered punitive,\textsuperscript{22} but one calling for the forfeiture of interest only, permitting a recovery on the principal, seems not to be so regarded.\textsuperscript{23}

\textsuperscript{16}Bronson v. Kinzie, 42 U. S. (1 How.) 311 at 316, 11 L. Ed. 143 at 145 (1843).
\textsuperscript{17}But see the case of First National Bank of Chicago v. United Air Lines, Inc., 342 U. S. 306, 72 S. Ct. 421, 96 L. Ed. 360 (1952), holding unconstitutional that part of Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2, which denies the right to sue in Illinois upon a foreign wrongful death if service of process can be had upon the defendant in the state where the death occurred. The statute was, in this respect, held to deny full faith and credit.
\textsuperscript{18}Sherman v. Gassett, 9 Ill. 521 (1847).
\textsuperscript{19}Smith v. Whitaker, 23 Ill. 309 (1860).
\textsuperscript{22}Sherman v. Gassett, 9 Ill. 521 (1847).
\textsuperscript{23}Granite City National Bank v. Cross, 188 Ill. App. 242 (1914).
Notwithstanding the rule against the enforcement of foreign penal laws, Illinois courts have given enforcement to remedies arising under federal statutes, whether considered penal or not,\textsuperscript{24} on the theory that such statutes were to be considered a part of Illinois law. In suits brought under the Federal Employers' Liability Act, therefore, federal procedural rules have been followed in state courts,\textsuperscript{25} although federal courts sitting in Illinois, while applying local "substantive" law,\textsuperscript{26} follow their own procedural system.

Special attention must be given to questions concerning limitations affecting the right to sue on the foreign cause for, while these generally bear on the remedy and would be governed by the \textit{lex fori} under the basic rule,\textsuperscript{27} an exception exists where the action rests upon a foreign statutory cause, not of common law origin, and the special foreign limitation relates to the right and not simply to the remedy.\textsuperscript{28}

Pursuant to the injunction of Section 20 of the Illinois Limi-

\textsuperscript{24} See Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N. E. (2d) 210 (1944). The court there said: "The result is that whether the act be regarded as penal or remedial makes no difference in this case. It is not a law of a foreign sovereignty. The Emergency Price Control Act is a law of Illinois and enforceable as such. The courts of Illinois have not been denied jurisdiction by the act. Such jurisdiction has been expressly granted to them, concurrent with the Federal courts." 386 Ill. 284 at 301, 54 N. E. (2d) 210 at 218. See also the annotation in 182 A. L. R. 373.


\textsuperscript{27} In Chenot v. Lefevre, S Ill. 637 (1846), an action based on notes made in France, the court held that evidence relating to the French statute of limitations was properly excluded. See also Metcalf v. Metcalf, 219 Ill. App. 96 (1920), and Harden v. Whitman, 209 Ill. App. 106 (1917). The case of Emerson v. North American Transportation & Trading Co., 303 Ill. 282, 135 N. E. 497 (1922), recognized the rule but avoided its use as a measuring stick to determine whether a cause of action had arisen growing out of the nonpayment of a certificate of deposit.

\textsuperscript{28} See, for example, the case of O'Neal v. National Cylinder Gas Co., 103 F. Supp. 720 (1952), where a federal court sitting in Illinois applied the two-year limitation of the Arizona wrongful death statute, where the action arose, rather than the Illinois one-year limitation.
tations Act, local courts have refused to enforce a cause which has become barred under the laws of the foreign jurisdiction, particularly where both the parties were nonresidents and continued to be such until after the cause of action had become barred. This section has frequently been applied both by express reference, and without reference, and it was apparently pursuant to this section that the court adopted a foreign "nonclaim" statute, or short statute of limitations, as the basis for barring a claim against a decedent's estate.

One seeking to invoke this section will find it necessary to plead and prove the foreign statute of limitations for, by the terms thereof, the party relying on the foreign law must show that a "cause of action has arisen" in the foreign jurisdiction. In that connection, the quoted phrase has been construed to mean that jurisdiction must have existed in a court somewhere to adjudicate the matter between the parties, if such jurisdiction had been invoked, without regard to the place where the cause of action had its origin, although this interpretation, of course, will be limited by the requirement already stated that both parties must

29 Ill. Rev. Stat. 1951, Vol. 2, Ch. 83, § 21, embodies the original act of 1872 which has been carried forward without change. Shortly after adoption, the statute was given retroactive effect in the case of Hyman v. Bayne, 83 Ill. 256 (1876).

30 Orschel v. Rothschild, 238 Ill. App. 353 (1925). The federal cases of Pond Creek Mill & Elevator Co. v. Clark, 270 F. 482 (1920), and Osgood v. Artt, 10 F. 366 (1882), erroneously apply the section to cases where one party is a resident. The Orschel case adheres to prior Illinois cases requiring both parties to be nonresidents.


33 Wernse v. Hall, Adm'r, 101 Ill. 423 (1882).

34 McGuigan v. Rolfe, 80 Ill. App. 256 (1898), holds that there is no presumption that a cause of action is barred by a foreign statute.

35 Ill. Rev. Stat. 1851, Vol. 2, Ch. 83, § 21, states: "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

36 Strong v. Lewis, 204 Ill. 35, 65 N. E. 556 (1900); Hyman v. Bayne, 83 Ill. 256 (1876); Delta Bag Co. v. Leyland & Co., Ltd., 173 Ill. App. 38 (1912); O'Donnell v. Lewis, 104 Ill. App. 198 (1902); National Bank of Denison v. Dannaby, 89 Ill. App. 92 (1899); Great Western Telegraph Co. v. Stubbs, 55 Ill. App. 210 (1894); Humphrey v. Cole, 14 Ill. App. 56 (1883).
have been nonresidents at the time.\textsuperscript{37} In the event an Illinois court adopts the foreign limitation act, it will then use Illinois standards to determine whether or not the action was sufficiently "commenced" within the time fixed.\textsuperscript{38} In contrast to the foregoing, the fact of a debtor's removal to another state, once a cause of action has arisen against him within this state, will not enable him to obtain the advantage of the foreign statute of limitations.\textsuperscript{39}

In the not too distant past, a party relying on foreign law for any purpose was expected to plead and prove such law as a matter of fact\textsuperscript{40} in the trial court, for it was not possible to introduce evidence with respect thereto on appeal.\textsuperscript{41} Necessity for the making of such proof might have been obviated if the alleged foreign law was admitted, as on demurrer,\textsuperscript{42} but if not, the burden of proving the foreign law fell upon the plaintiff if he relied on a right not accorded by Illinois common or statutory law, or upon the defendant in case he asserted non-enforceability under some governing foreign law.\textsuperscript{43} Since 1939, with the adoption in Illinois of the Uniform Judicial Notice of Foreign Law Act,\textsuperscript{44} proof of foreign law in conflicts cases has been greatly facilitated,\textsuperscript{45} witness the increasing use made of the statute in a number of recent


\textsuperscript{38} Collins v. Manville, 170 Ill. 614, 48 N. E. 914 (1897).

\textsuperscript{39} Hibernian Banking Ass'n v. Commercial Nat. Bank of Chicago, 157 Ill. 524, 41 N. E. 919 (1885); Wooley v. Yarnell, 157 Ill. 442, 32 N. E. 891 (1892).

\textsuperscript{40} Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111 (1893); Alcorn v. Epler, 206 Ill. App. 140 (1917); Barth v. Farmers & Traders Bank, 195 Ill. App. 318 (1915); Wald v. Pittsburg, Cincinnati, Chicago & St. Louis R. R. Co., 162 Ill. 545, 44 N. E. 888, 53 Am. St. Rep. 332 (1898); Robinson v. Holmes, 75 Ill. App. 203 (1897). See also Simpson Fruit Co. v. Southern Pacific Co., 157 Ill. App. 158 (1910), where an attempt was made to prove the wrong law.

\textsuperscript{41} Davis v. Mosbacher, 252 Ill. App. 536 (1928); Davis v. Wirth, 249 Ill. App. 544 (1928); Gunning System v. LaPointe, 113 Ill. App. 405 (1904).


\textsuperscript{43} Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631 (1911); Dearlove v. Edwards, 166 Ill. 619, 46 N. E. 1081 (1897); Deem v. Crume, 46 Ill. 69 (1867).

\textsuperscript{44} Laws 1939, p. 495; Ill. Rev. Stat. 1951, Vol. 1, Ch. 51, §§ 48g-48n.

\textsuperscript{45} See Commissioners' Prefatory Note, 9 Unif. Laws Anno. 399.
Illinois cases some of which indicate that the courts will now take judicial notice of the statutes as well as of the common law of the other states.

Although no Illinois case has yet decided the extent to which a court may or must go to take judicial notice of foreign law upon its own initiative, there is some indication that the chief effect of the uniform statute has been to relax the strict common-law rules of evidence with respect to proof of foreign law while retaining the necessity for pleading or the giving of some reasonable notice with respect thereto, and the making of at least some proof. It has also been held that the statute has operated to remove the former rule that, unless the matter had been finally determined by the highest court of the appropriate foreign jurisdiction, an Illinois court would presume the common law to be there in force, giving no weight whatsoever to a decision by an intermediate court. Particular applications heretofore made of choice of law principles in contract cases decided prior to the adoption of this statute may, therefore, be open to challenge in the future, but it is unlikely that basic principles will be changed in any material respect.


47 People v. Casey, 399 Ill. 374, 77 N. E. (2d) 812, 11 A. L. R. (2d) 865 (1948). In O'Neal v. Caffarello, 303 Ill. App. 574, 25 N. E. (2d) 534 (1940), the court noticed the non-existence of a Minnesota "guest" statute.

48 In particular, see Ill. Rev. Stat. 1951, Vol. 1, Ch. 51, § 48j.

49 In McCallum v. Baltimore & Ohio R. R., 379 Ill. 60 at 67, 39 N. E. (2d) 340 at 343 (1942), the court said: "In this case the parties have not pleaded or made proof of any Indiana statute which outlines the procedure of that State in the enforcement of an attorney's lien. In the absence of a pleading or proof of such a foreign statute, the courts of this State will, if it pertains to the common law, assume that the common law is in force in the sister State . . . Where the matter to be decided is not of common law origin and there has been no proof of the law of the foreign State, it will be assumed that the laws of the sister State are the same as in this State." Cases construing the uniform law have been collected in an annotation in 23 A. L. R. (2d) 1437.

II. Review and Conclusions

Before proceeding to general conclusions, it may prove useful to scan the entire field of cases examined in the preceding summary, to call particular attention to certain areas of difficulty disclosed thereby, and, most important of all, to consider the probable ingredients of those difficulties.

While it would be difficult, if not impossible, to discern any golden thread running through the case law, it can be seen that, in general, the law of the place of contracting has been applied to questions of capacity and formal validity. Unless contrary to local public policy, the same rule determines the choice of law for questions concerning the presence of an agreement, and those of legality, although several cases stating a place-of-performance rule were noted.1 Regarding the legality of loan contracts, and, apparently, the question as to what constitutes consideration, the court has been inclined to apply that law which would uphold the contract, generally looking to the intentions of the parties for support. The law to be used in the construction of a contract has been selected in a variety of ways, often according to the type of contract, the court sometimes paying lip service to the law which the parties had in view, or were presumed to have intended,2 but usually ending with an application of the lex loci contractus principle. Matters growing out of the assignment of negotiable instruments disclose a conflict in the rules announced, probably because of the increased complexity of the fact situation. Certainly, a majority of the cases dealing with matters of performance applied the lex loci solutionis rule, although a few hold to the lex loci contractus.3 Questions of remedy, of course, have typically been determined by the lex fori.

It is also apparent that an application of either the lex loci

1 Note particularly the case of North Packing & Provision Co. v. Western Union Telegraph Co., 70 Ill. App. 275 (1897), and the related case in 89 Ill. App. 301 (1899), affirmed without conflicts discussion in 188 Ill. 366, 58 N. E. 958 (1900), on the point of agreement, and Lewis v. Headley, 36 Ill. 433 (1865), as to legality.

2 Pennsylvania Co. v. Fairchild, 69 Ill. 260 (1873).

3 Barber v. Bell, 77 Ill. 490 (1875); Holbrook v. Vibbard, 3 Ill. 465 (1840).
contractus rule⁴ or the lex loci solutionis rule⁵ may be purely arbitrary and mechanical, without any particular attempt at justification. Again, with an eye primarily on the common sense and justice of the matter at hand, the court may refer to the presumed intention of the parties, whether that points to the law of the place where the contract was “made,”⁶ or to that of the place where it was to be performed.⁷ In one instance, seemingly overruled by statute, this approach lost its flexibility when it became crystallized into a rule of “substitution,” with the court, slavishly obedient to the expressed intention of the parties, applying the stipulated law to defeat a contract which could easily have been upheld under the law of the place of contracting.⁸ Subsequent thereto, it was indicated that the expressed intention of the parties would take precedence over a general stipulation incorporating the law of a particular jurisdiction.⁹ As if these variables were not enough, words and phrases such as “comity,” “public policy” and the like, together with that unpredictable procedure by which courts sometimes review all the facts and determine that, therefore, “the law of X must govern,”¹⁰ still remain to perplex the lawyer.

Separation of the cases according to the issues presented in them undoubtedly operates to reduce the apparent contradictions but, in certain areas, even these groups of cases retain difficulties within themselves which call for study. In particular, with respect to the statute of frauds, the two-state case of Scudder v. Union National Bank of Chicago¹¹ applying the law of the place of contracting on the one hand, and the cases of Mason v. Dousay¹² and Hall v. Cordell,¹³ applying the law of the place of performance

⁴ As in Burr v. Beckler, 264 Ill. 230, 106 N. E. 206 (1914).
⁵ Lewis v. Headley, 36 Ill. 433 (1865); Price v. Burns, 101 Ill. App. 418 (1902).
⁶ Pennsylvania Co. v. Fairchild, 69 Ill. 260 (1873).
⁷ George v. Haas, 311 Ill. 382, 143 N. E. 54 (1924).
⁸ McAllister v. Smith, 17 Ill. 328 (1856).
¹⁰ See, for example, Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398 (1866).
¹¹ 91 U. S. 406, 23 L. Ed. 245 (1875).
on the other, seemingly present a direct conflict. When it becomes necessary to determine the applicable law governing the steps to be taken to charge an endorser on an assigned negotiable instrument, the two-state cases of Holbrook v. Vibbard\(^\text{14}\) and Wooley v. Lyon,\(^\text{15}\) adopting place-of-contracting and place-of-payment rules respectively, will prove troublesome. In construction matters, although a majority of the cases seem to apply the law of the place of contracting, others indicate that the law of the place of performance, or that intended by the parties, should control so that, even in the sub-group dealing with insurance contracts, contradictions remain. The difficulty of drawing the line between matters of basic contractual obligation and of performance also seems to be resting on the Illinois doorstep, inasmuch as a number of cases apparently apply the *lex loci solutionis* to control those matters closely connected with the place where performance is to be rendered. Finally, whether public policy will prove so strong in a particular case that it will serve to strike down a foreign-made contract has not always been made clear.\(^\text{16}\)

A study of the entire group of cases reveals certain weaknesses in the Illinois law of conflicts where buttressing is called for, as well as certain abuses which ought to be corrected, if the local system of case law is to be improved. These, in the main, constitute the ingredients for most of the difficulty. One such ingredient lies in the citation habits of the court. Occasionally, an Illinois court will confine itself to a consideration of only the Illinois cases on a conflict of laws point. It is submitted that this is wrong for, if it is the function of the conflict of laws to attain a uniformity of decision regardless of forum,\(^\text{17}\) it would be better for

\(^{14}\) 3 Ill. 465 (1840).

\(^{15}\) 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867 (1886).

\(^{16}\) This problem, latent in all groups, is most prominent of course in those cases dealing with legality and agreement.

\(^{17}\) Caton, C. J., in Barnes v. Whitaker, 22 Ill. 608 (1859), pointed out that the court should "enforce the obligation which the contract created between the parties... Otherwise a contract would be one thing in one jurisdiction and another in another jurisdiction." See Stumberg, op. cit., 2d Ed., p. 159. This purpose has not been unanimously agreed upon. See Harper, "Policy Bases of the Conflict of Laws," 54 Yale L. J. 1155 (1947), criticising the over-emphasis on uniformity and the under-emphasis with regard to social values. See also Cheatem, "Conflict of Laws Theories," 54 Harv. L. Rev. 361 (1945).
the court, when handling conflicts matters, to corroborate Illinois citations with leading American cases in point. Such cross-citation would tend to maintain the international character of conflict of laws rules.

The evil to be found in the "nationalization" of the rules of private international law is best illustrated in that glaring series of cases following upon the decision in *Dawes v. Rosenbaum.*\(^\text{18}\) That case held that the plaintiff, a chattel mortgagee under a Missouri contract, had not made a sufficient demand upon the Illinois resident to entitle him to maintain trover, but the court there saw fit, by way of dictum, to criticize the general American majority rule entitling the out-of-state chattel mortgagee to enforce his lien against a local creditor or bona fide purchaser. In the case of *St. Paul Cattle Loan Company v. Hansman,*\(^\text{19}\) the court achieved a similar decision, citing the Dawes case in a corroborating dictum. When the case of *Snow for the use of Ainsworth v. Breene*\(^\text{20}\) arose, the court treated the critical dictum in the Dawes case as the significant point thereof and made it the basis for decision, citing the two previous Illinois cases as the only authority on the conflicts question. The case of *National Bond & Investment Company v. Moss*\(^\text{21}\) followed suit, likewise citing only Illinois cases. It was not until the case of *First National Bank of Nevada v. Swegler,*\(^\text{22}\) wherein the Appellate Court for the First District carefully studied the cases, pointed out the mistake, and corroborated its conclusion with a reference to outside state and federal decisions, that the erroneous Dawes series of cases terminated. If, in either of these ill-founded cases, a quick comparison had been made with authority outside of Illinois, court and counsel would have been put on notice of the general rule, and a careful study of Illinois law would have disclosed the correct rule.\(^\text{23}\)

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18 179 Ill. 112, 53 N. E. 585 (1909).
22 336 Ill. App. 107, 82, N. E. (2d) 920 (1948).
By way of contrast, in *Oakes v. Chicago Fire Brick Company*, the Supreme Court displayed unusually fine respect for the various issues and fact situations involved in the cases offered as controlling authority. The question before the court was as to which of several statutes of frauds should control in the case of a contract of employment, entered into in Pennsylvania, to be performed in several states. Although the ultimate holding, applying the law of Pennsylvania, is consistent with the decision in *Miller v. Wilson*, a case wherein all the events were concentrated in one state, the court declined to base its decision on such weak grounds. It likewise stepped gingerly around *Walker v. Lovitt*, where the concentration of events precluded any real conflict of laws issue, and properly rejected the decisions in *Roundtree v. Baker* and *Pope v. Hanke*, since they involved issues of legality and public policy not encountered in a simple question involving formal validity. The holding in *George v. Haas*, one presuming that the parties intended the law of the place of performance to control, while approved, was also distinguished on the basis that it concerned a two-state situation with performance to be given in one jurisdiction only. The tacit approval which the court gave to the last mentioned case appears to overlook the further distinction that the issue there involved was one of legality, specifically usury in a loan contract, rather than one of formal validity, but the general approach to the entire problem is commendable. It offers the hope that, with increased accuracy in citation, Illinois courts may yet materially advance the refinement of the Illinois set of conflict of laws decisions.

A second ingredient concerns itself with the geographical "place" concept and its pitfalls. One of the more significant, or

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25 146 Ill. 523, 34 N. E. 1111 (1893).
26 250 Ill. 543, 95 N. E. 631 (1911).
27 52 Ill. 241, 4 Am. Rep. 597 (1869).
28 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 (1894).
29 311 Ill. 382, 143 N. E. 54 (1924).
at least often used, weapons in the judicial arsenal of terminology is the phrase “place of making” and its correlative “place of performance.” The decisions do not indicate how the latter place is to be found, possibly because it is so clear in many cases, but the place of “making” is clearly held to be that place where the last act necessary to consummate a binding contract takes place. The significance of this term as supplying an element of certainty is weakened, however, by a number of cases which do not seem to regard it as essential to discover the particular “place” but rather draw upon all the facts, attributing the contract generally to one jurisdiction or another. Perhaps this procedure is the outgrowth of doubt as to the validity of the “place” concept as a controlling factor in choice of law, or an outgrowth of the notorious uncertainty as to the state of the law. Whatever the reason, this approach does not clarify the law but only causes the rules of lex loci contractus and lex loci solutionis, in various fact situations, to lose whatever quality of certainty they had. The ad hoc process is somewhat akin to the English “proper law” system or to the “most substantial factor” approach, but Illinois courts have not been noticed to ground their decisions expressly on any such bases.

30 In Walker v. Lovitt, 250 Ill. 543 at 546, 95 N. E. 631 at 632 (1911), the court stated: “The place where a contract is made depends not upon the place where it is actually written, signed or dated, but upon the place where it is delivered, as consummating the bargain.” See also Smith v. Myers, 207 Ill. 126, 69 N. E. 858 (1917); City of Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831 (1903), an action in debt to recover a penalty for violation of an ordinance prohibiting the sale of liquor, which turned on the acceptance by delivery to a carrier in Iowa as creating a sale in Iowa; City of Carthage v. Duvall, 202 Ill. 234, 66 N. E. 1069 (1903); Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76 (1878); Davis v. Wirth, 249 Ill. App. 544 (1928); Tokheim Mfg. Co. v. Stoyles, 142 Ill. App. 198 (1908).

31 Hamilton v. Darley, 266 Ill. 542, 107 N. E. 798 (1915); O'Dea v. Throm, 250 Ill. App. 577 (1928), reversed on other grounds in 332 Ill. 89, 163 N. E. 390 (1929), dealing with negotiations between parties in Florida and Illinois, with the court deciding that an “Illinois” contract was involved; Dean & Son v. W. B. Conkey Co., 180 Ill. App. 162 (1913); Ingersoll v. Mutual Life Ins. Co., 156 Ill. App. 568 (1910); Rose v. Mutual Life Ins. Co., 144 Ill. App. 434 (1908), affirmed on different reasoning in 240 Ill. 45, 88 N. E. 204 (1909), where the Supreme Court held that delivery was not essential as the last act, but that a final acceptance and delivery into the hands of the acceptor's agent without condition would complete the contract.

The "last act necessary" approach itself possesses a serious weakness. If the law of the place of contracting is significant, the last act may occur in some purely fortuitous place, or in one arranged by one or both of the parties, with the result that an unexpected and unintended law would be applied. One of the traditional objections to the "place of making" phrase is that it may be difficult to define when the parties have negotiated from different places. A further objection lies in the fact that a finding as to the "place of contracting" becomes a condition precedent to a determination of the validity of the very contract in question. Put differently, one must presume a valid contract before one can determine its validity! Although there is some authority to indicate that the "last act necessary" approach will be utilized even in those cases where the place of making, as thus determined, constitutes the only foreign element, at least one case has expressly held, in a situation where it would be manifestly unjust to use that approach, that a finding of the place of contracting will not be conclusive as to which law should govern.

It is believed, then, that the "place of making" and "place of performance" concepts should have no significance independently of the fact situations in which they are employed, being

33 As in O'Dea v. Throm, 250 Ill. App. 577 (1928), reversed on other grounds in 332 Ill. 89, 163 N. E. 390 (1929).

34 One writer has objected to the fact that such a "contact" as the place of making could well be made the subject of arrangement by the parties: Kronstein, "Crisis of 'Conflict of Laws'", 37 Geo. L. J. 483 (1949).


36 In Burr v. Beckler, 264 Ill. 230, 106 N. E. 206 (1914), the court applied the law of the place of contracting in determining the question of capacity, although the party in question was in that place only temporarily. Barber v. Bell, 77 Ill. 490 (1875), seems to support this position. In a suit against an endorser, where the makers of the note resided in Ohio and the note was payable there, although it was endorsed in Illinois, it was held that requisite diligence against the makers was to be determined according to Illinois law. The case of Davis v. Mobarcher, 252 Ill. App. 536 (1928), one wherein all events except delivery occurred in Missouri, contains a strong statement that Illinois law should control, as delivery occurred in Illinois. The fact that Missouri law was not adequately proved on trial, however, provided an alternative ground for applying Illinois law.

37 Illinois Terra Cotta Lumber Co. v. Owen, 167 Ill. 360, 47 N. E. 722 (1897). The case would indicate that if a party seeks to avoid liability on some technical ground, as by arranging the "making" of the contract in a particular state, he would not be entitled to the benefit of the rule usually applied.
nothing more than convenient shorthand labels for indicating the conclusion of a particular court in a particular case. It would, at least, appear from the statute of frauds cases that a determination as to the "place of contracting" will not be conclusive, and the same thing is true in those cases involving steps to charge an endorser on an assigned negotiable instrument. These cases must be rationalized on some other ground.\textsuperscript{38}

Another ingredient of difficulty comes from the use of the term "presumed intention of the parties." Frequent reference has been made to the fact that the intentions of the parties as to the law which should govern ought to control. Although this reference is sometimes supported by an express stipulation of the parties,\textsuperscript{39} courts have more often relied upon what the parties must be presumed to have intended, even when they probably had no intention at all.\textsuperscript{40} If the latter approach is involved, the pre-

\textsuperscript{38} It may be noted that, in cases of this type, the court has applied the law of the state in which two of the three elements of making, assignment, and place of payment were situated: Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867 (1886); Holbrook v. Vibbard, 3 Ill. 465 (1849).

\textsuperscript{39} As in Reighley v. Continental Illinois Nat. Bank, 390 Ill. 242, 61 N. E. (2d) 29 (1945), where the contract involved recited that Illinois law was to govern, and in Mowery v. Washington Nat. Ins. Co., 289 Ill. App. 443, 7 N. E. (2d) 334 (1937), containing an express stipulation as to controlling law. Three cases recognize, to a greater or lesser degree, reference by the parties to laws of private institutions. Thus, in Benza v. New Era Association, 323 Ill. 297, 154 N. E. 129 (1926), reversing 288 Ill. App. 435 (1925), the court held that, in Illinois, members of a fraternal benefit society could contract to limit their right of appeal to the courts until after they had submitted the matter to a tribunal created by the association. In Stone v. Appel, 12 Ill. App. 582 (1883), the parties had agreed to marry on a certain day and in accordance with religious custom. When it appeared that religious custom forbade marriage on the day set, the court held the defendant not in breach for postponing the marriage, even though it would have been valid under state law if performed on that date. See also Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908), where claims arising out of a gambling transaction were submitted to arbitration and it was held that a Missouri judgment based on such arbitration had to be enforced by Mississippi under the full faith and credit clause.

\textsuperscript{40} George v. Haas, 311 Ill. 382, 143 N. E. 54 (1924), a usury case; Benedict v. Dakin, 243 Ill. 284, 90 N. E. 712 (1910); Illinois Central R. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019 (1898), where there was no evidence that the parties had a "view" to any law other than that of the state where the contract was made; Lewis v. Headley, 36 Ill. 433, 87 Am. Dec. 227 (1835); Oakes v. Chicago Fire Brick Co., 311 Ill. App. 111, 35 N. E. (2d) 522 (1941), affirmed in 388 Ill. 474, 58 N. E. (2d) 460 (1945); Altland v. A., T. & S. F. R. R. Co., 151 Ill. App. 291 (1900); Farmers Trust Co. v. Schenuit, 83 Ill. App. 287 (1898). Note also the case of Tilden v. Blair, 68 U. S. (21 Wall.) 241 at 247, 22 L. Ed. 632 at 633 (1875), a usury case, where the court, after discussing the events in the making of a bill of exchange, said: "What more cogent evidence could there be that it was intended to create an Illinois bill?" Italics added.
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sumption becomes subject to the limitation that the law presumed to be intended must be either that of the place where the contract was made or else that where it is to be performed,\(^4\) and there would seem to be some doubt as to which should first be presumed.\(^4\) A federal court decision suggests, as the only limitation, that the law stipulated must have a "normal relation" to the transaction, but the term "normal relation" was not there further defined.\(^4\)

Cases involving questions of usury, consideration, and construction, have been especially productive of this type of reasoning. There does not, however, appear to be such a trend, in those cases which have assumed the importance of the parties' intentions, as to warrant the conclusion that courts are establishing a rule for private autonomy in Illinois.\(^4\) Chief Justice Scates, in *McAllister v. Smith*,\(^4\) described with some particularity what he called a "rule of substitution" but his formulation has not been generally adopted. Because of this, it is believed that resort to the actual, or presumed, intention of the parties represents not an

\(^4\) Adams v. Robertson, 37 Ill. 45 (1865).

\(^4\) Adams v. Robertson, 37 Ill. 45 (1865), states it to be the *lex loci contractus*. This presumption was clearly assumed to be in force in the cases of Illinois Central R. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019 (1898), and Altland v. A., T. & S. F. R. R. Co., 151 Ill. App. 291 (1909), but in George v. Haas, 311 Ill. 382, 143 N. E. 54 (1924), a usury case, and in Oakes v. Chicago Fire Brick Co., 311 Ill. App. 111, 35 N. E. (2d) 522 (1941), affirmed in 388 Ill. 474, 58 N. E. (2d) 460 (1945), a statute of frauds case, the court looked first to the law of the place of performance.


\(^4\) A recent discussion of conflicting theories as to private autonomy appears in Yntema, "'Autonomy' in Choice of Law," 1 Am. J. of Comp. Law 341 (1952).

\(^4\) 17 Ill. 328, 65 Am. Dec. 651 (1856). Chief Justice Scates there said that the laws of this state "would, had the parties been silent, have become part of the contracts for the construction and meaning of the parties, in ascertaining and fixing their mutual rights and obligations. But parties may substitute the laws of another place or country . . . both in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties. . . . This is allowed in all civilized countries, and recognized as part of the *ius gentium* or law of nations respecting private and personal rights, and in all cases, where the subject matter of the contract is not *malum in se*, immoral, or contrary to the local policy, or dangerous to the peace and good order of the particular community, in which it is sought to be enforced." See 17 Ill. 328 at 332, 65 Am. Dec. 651 at 654-5. While the holding has been criticized and has, apparently, been overruled by statute, the views expressed are valuable with respect to other kinds of contracts than notes involving usury.
application of a definite theory or rule but rather an escape to a refuge, one adopted in preference to quagmires apt to be found in an ill-developed system of conflict of laws rules.

Further difficulty is encountered with respect to judicial expressions regarding public policy. It is familiar doctrine that courts will not apply the rule of comity, giving effect to foreign laws, if to do so would violate local public policy. While there is little occasion to question this attitude, the statement of the general principle naturally provokes the inquiry: What is the public policy of Illinois under which a court should refuse to enforce the foreign-made contract when, except for such policy, it would have enforced the same?

One of the better definitions appearing in the conflict cases is that provided by the Supreme Court in the case of Zeigler v. Illinois Trust & Savings Bank. In that case, the court said:

There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. Each case, as it arises, must be judged and determined according to its own peculiar circumstances. The public policy of the State or of the nation is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials. [Citations omitted] Courts will not look to other sources to determine the public policy of a State. As was said in Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Railroad Co., supra: "The public policy of a State or nation must be determined by its constitution, laws and judicial decisions,—

46 Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66, 99 N. E. 893 (1912). In Campbell v. Albers, 313 Ill. App. 152 at 158, 39 N. E. (2d) 672 at 676 (1942), the court stated: "How far foreign laws should be enforced under the doctrine of comity depends upon whether any wrong will be done a citizen of the domestic state, whether the policies of its laws will be contravened or impaired, or whether the court can do complete justice to those affected by the decree."

47 245 Ill. 180, 91 N. E. 1041 (1910).
not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public.'"48

The application of a local public policy, then, is subject to certain limitations. It is clear that the forum may not arbitrarily refuse to enforce a foreign contract, for the constitutional limits of full faith and credit, and of due process, lie in the background.49 Furthermore, the legislature may not prohibit the making of foreign contracts without violating due process.50

Drawing a line on public policy is, of course, difficult. It is not clear where that dividing line is with respect to contract cases. On the one hand, a mild public policy of the forum may declare a local contract illegal and void yet would not strike down a foreign contract if the same was valid where made. On the other hand, it is clear that, at times, a stringent public policy would strike down even a valid foreign contract. Fortunately, some Illinois decisions appear to border on the line so they may serve as guideposts.

Perhaps the most striking example of restraint in the use of the public policy exception to the comity rule may be found in *Roundtree v. Baker*,51 a case involving a suit on a note made, and presumably payable, in Kentucky which the defendant urged had

48 245 Ill. 180 at 193, 91 N. E. 1041 at 1045-6.

49 See Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1 (1945). On the question of due process, see Home Life Ins. Co. v. Dick, 231 U. S. 397, 50 S. Ct. 335, 74 L. Ed. 926, 74 A. L. R. 701 (1930), where it was held to be a denial of due process, under the Fourteenth Amendment, for a Texas court to apply a Texas statute to strike down a provision in a contract of which all elements were foreign. But see Buell v. Breese Mill & Grain Co., 65 Ill. App. 271 (1896), where a contract of insurance with respect to Illinois property was entered into by an Illinois resident, in Wisconsin, with a Wisconsin company not authorized to do business in Illinois, and the court refused to permit the company's receiver to enforce an assessment against the policyholder.

50 The case of Walker v. Lovitt, 250 Ill. 543 at 549, 95 N. E. 631 at 633 (1911), declared: "The legislature of a State has no power to prohibit its citizens from making, beyond the limits of the State, contracts lawful in the place where they are made, even though such contracts may concern property within the State." In support thereof, the court relied on the case of *Allgeyer v. State of Louisiana*, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427 (1897). See, however, the annotation in 1 A. L. R. 1665 on the constitutionality of statutes relating to insurance contracts.

51 52 Ill. 241, 4 Am. Rep. 597 (1869).
been given in connection with the sale of a slave, an act forbidden in Illinois. The court there said:

Our courts would not enforce a contract for the sale of a slave, whether made in this State, where slavery has always been prohibited, or in a State where such contracts are binding, because it is against public policy. But after the parties have fully executed their contract, and a note is given for the price, under this comity which exists between States of the republic, the note may be collected, and it is not for us, from caprice, or because we may abhor the system of slavery and the sale of human beings, to refuse to lend the aid of the courts for the collection of the money. It is not against the policy of our State to allow its collection, nor is it contrary to the interests of our citizens. Under the laws of Kentucky the sale was authorized, and there was a sufficient consideration. "

Thus the court applied a place-of-making rule without invoking the public policy exception.

Attempts to place limitations upon the liability of a common carrier have also apparently been close to the dividing line between a mild and a stringent public policy. In *Ginsburg v. Adams Express Company*, the Appellate Court for the First District held a carrier’s receipt limiting liability to $50, unless a special value was declared, not to be in violation of Illinois public policy, apparently limiting the scope of the policy to cases where enforcement would "contravene our criminal law, or would sanction vice or immorality, or be opposed to natural justice, or transgress a positive prohibition of law, or be opposed to the general interests of our citizens."

But, in *Nonotuck Silk Company v. Adams Express Company*, the Supreme Court, with respect to just such a receipt limiting liability, held that it would be "conflicting the established

52 52 Ill. 241 at 247, 4 Am. Rep. 597 at 601.
54 160 Ill. App. 566 at 569.
55 256 Ill. 66, 99 N. E. 893 (1912).
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public policy of this state to permit such a contract as this to be enforced.\textsuperscript{56} The Supreme Court opinion would normally be taken as controlling but, inasmuch as it was handed down only one year after, and failed to account for, the Ginsburg case, it would seem reasonable to assume that limitations as to liability of this character come close to the dividing line.

Far over on the stringent policy side of the line are the cases involving gambling contracts.\textsuperscript{57} In Pope v. Hanke,\textsuperscript{58} for example, the court refused to enforce a note given in connection with a wagering contract. The note was made, endorsed, and was to be paid, in St. Louis, Missouri. It was given for the difference between the contract and the market price of goods, pursuant to a futures contract under which the parties never delivered, nor intended to deliver, any goods but used the commodity market as a basis for their wager. Denying recovery, the court said: "We had held, that dealing in futures or options is productive of mischiefous results, and have characterized it as a 'dangerous evil,' and 'a vice that has in recent years grown to enormous proportions'."\textsuperscript{59}

It would seem that the only distinction between the Roundtree case and the holding in Pope v. Hanke would lie in the fact that, in the former case, enforcement of the contract would no longer operate to encourage the making of similar contracts for slavery had, by then, been abolished in Kentucky and elsewhere, hence there was no danger of a repetition likely to prove harmful to citizens of Illinois. On the other hand, a refusal to enforce the wagering contract would, to some degree, operate as a deterrent to further transactions of the sort or would tend to discourage the bringing of such actions in Illinois, thus operating to maintain the dignity of the law. The practical effect of a given decision,

\textsuperscript{56} 256 Ill. 66 at 76, 99 N. E. 893 at 897.

\textsuperscript{57} See McMath, Speculation and Gambling in Options, Futures and Stocks in Illinois (G. I. Jones, Chicago, 1921), and, in general, the annotation in 173 A. L. R. 695.

\textsuperscript{58} 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568 (1894).

\textsuperscript{59} 155 Ill. 517 at 629, 40 N. E. 839 at 843.
then, would seem to weigh at least as heavily as an abstract notion concerning policy or morals, for it can hardly be said that a wagering contract would be more repugnant to good morals and public policy than would be the case of a contract for the sale of human beings.

Recapitulating what has already been said, the foregoing study indicates that few general conclusions concerning the state of Illinois choice of law rules with respect to contracts would be warranted. First, the cases have long been considered to be in a confused state, a condition feared by some but perhaps cherished by others. Lack of any comprehensive synthesis or analysis has undoubtedly been the producing cause but unnecessary dicta and an occasional glaring miscitation have helped add to the confusion. Second, probably because of difficulties in achieving an understanding about the growing mass of cases, courts have tended to make more or less ad hoc determinations as to the law which "must govern." This, the nethermost in choice of law procedures from the standpoint of predictability, can do nothing to clarify the law and could be expected, if anything, to make matters worse than they are.

There seems, however, to be a parallel tendency to resort to the intentions of the parties, whether expressed, presumed, or inferred, a technique which has been employed in a considerable number of cases and which might be said to be the most significant characteristic of the decision. This technique may become the potential candidate for the job of giving a coherent theoretical basis to the Illinois decisions for, while courts do not generally expressly make the intention of the parties the basis for decision, resort to this device could become crystallized into a system for want of a better integrated scheme relating to conflicts in law. Public policy will certainly remain an important limiting factor, but only the constant production of new decisions will make it possible to plot the critical "line" with any degree of certainty on specific issues.
DISCUSSION OF RECENT DECISIONS

COMMERCIAL LICENSES AND PRIVILEGE TAXES—WHETHER OR NOT A MUNICIPAL LICENSE TAX IS VIOLATIVE OF THE COMMERCE CLAUSE WHEN LICENSEE'S INTERSTATE AND LOCAL BUSINESSES ARE INSEPARABLE—There is some reason to believe that the Supreme Court of the United States has recently decided to allow local taxation to invade previously prohibited territory, by an extension of the "home port" theory, judging by the
outcome of the case of City of Chicago v. Willett Company.\textsuperscript{1} In that case, a cartage company engaged in business within a city without first having obtained, and having paid for, a license required by a municipal ordinance.\textsuperscript{2} The city failed to secure a conviction for a violation of the ordinance and, on direct appeal to the Illinois Supreme Court because the validity of a municipal ordinance was involved,\textsuperscript{3} the judgment of acquittal was there affirmed when the court concluded that the defendant was not subject to the license tax since it could not separate its loads into interstate and intrastate business, nor could it discontinue any part of its service.\textsuperscript{4} The Supreme Court of the United States thereafter granted certiorari but, being uncertain as to whether the state court decision had been reached on the basis of a constitutional question, it remanded the case for clarification.\textsuperscript{5} After the state supreme court had clearly held that the ordinance ran afoul of the commerce clause of the federal constitution,\textsuperscript{6} the Supreme Court of the United States again took the case and this time it reversed the holding, declaring that the tax involved no violation of the federal commerce clause even though the defendant's interstate and local business operations were inseparable and the tax purported to apply only to the latter.\textsuperscript{7}

Settlement of the problem of determining whether or not local taxation places an unconstitutional burden on interstate commerce has always been a troublesome matter at best, as is well illustrated by the split of the judges in the instant case, but, since Brown v. Maryland,\textsuperscript{8} the principle that an occupational tax cannot be exacted for the privilege of engaging in interstate commerce has been firmly adhered to in American law.\textsuperscript{9} It was there that Chief Justice Marshall announced the firm rule to be that, in the

\textsuperscript{1} — U. S. —, 73 S. Ct. 460, 97 L. Ed. (adv.) 333 (1953). Justice Douglas wrote a dissenting opinion.

\textsuperscript{2} Municipal Code, Chicago, 1931, Ch. 163.

\textsuperscript{3} Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199, provides for direct appeal in such cases.

\textsuperscript{4} See 406 Ill. 286 at 295, 94 N. E. (2d) 195 at 200 (1950).

\textsuperscript{5} 341 U. S. 913, 71 S. Ct. 734, 95 L. Ed. 1349 (1951).

\textsuperscript{6} The clarifying opinion, which appears in 409 Ill. 480, 101 N. E. (2d) 205 (1951), was based on the proposition that a carter who engaged in both interstate and intrastate business could not validly be made subject to the ordinance when every load contained intrastate and interstate property, which could not be separated, and the carter could not continue either of its operations without the other.

\textsuperscript{7} Mr. Justice Reed, with whom the Chief Justice joined, wrote a separate concurring opinion, basing it on the fact that the carter did intrastate business on the streets of Chicago and vicinity. The dissenting opinion of Mr. Justice Douglas regarded the tax as unconstitutional as a burden on interstate commerce.

\textsuperscript{8} 25 U. S. (12 Wheat.) 419, 6 L. Ed. 675 (1827).

\textsuperscript{9} The opinion in the instant case, — U. S. — at —, 73 S. Ct. 460 at 464, 97 L. Ed. (adv.) 333 at 338, lists the cases.
interest of federal power over interstate commerce, neither a state nor an instrumentality thereof could tax interstate commerce in any form or manner which would impose a direct burden on such commerce.\textsuperscript{10}

Since taxation of any sort would, in some way, constitute an imposition upon interstate commerce, it became necessary to modify this rule to an extent sufficient to permit local taxation affecting interstate commerce in an incidental, rather than a direct, fashion; otherwise interstate commerce would enjoy an immunity from taxation while enjoying the benefit of state and local services. Various forms of indirect levy have, therefore, been upheld and the privilege has been extended to include the taxation of the occupation of interstate motor transportation so long as the tax proves to be reasonable and is fixed according to some uniform, fair, and practical standard.\textsuperscript{11} This extension, made necessary in order to allow the states to receive reasonable compensation for the expense entailed in providing and maintaining roads, has been classified as coming under the police power of the states, a power which the state may delegate to a municipality, entitling it to exact a tax or fee from the interstate motor carrier for the same purpose.\textsuperscript{12} The tax involved in the instant case, however, could not be justified as coming under the police power since it did not meet the aforementioned requirements. It was called an occupational tax by the Illinois Supreme Court,\textsuperscript{13} and this classification was accepted by the federal court.

While states may, in the exercise of the police power, regulate or affect the business of interstate transportation in a variety of ways without violating the commerce clause, they have not been permitted to withhold the right to engage in interstate commerce, nor have they been permitted to make the existence of that right depend upon the fulfillment of state-imposed requirements. Thus, in \textit{Spector v. O’Connor},\textsuperscript{14} a statute of:\

\textsuperscript{10} In the course of dealing with an argument made in Brown v. Maryland, 25 U. S. (12 Wheat.) 419 at 448, 6 L. Ed. 678 at 689, to the effect that a construction of the commerce power so as to prevent a state government from levying duties on imports would abridge the acknowledged power of a state to tax its citizens, Chief Justice Marshall said: "We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce."

\textsuperscript{11} Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385 (1915).

\textsuperscript{12} Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45 (1928). The police power was utilized, in the more recent case of Bode v. Barrett, — U. S. —, 73 S. Ct. 468, 97 L. Ed. (adv.) 343 (1953), to sustain a flat license fee, measured by the gross weight of a truck used both in interstate and intrastate commerce, assessed by Illinois for the privilege of using the state highways.

\textsuperscript{13} See 406 Ill. 288 at 305, 94 N. E. (2d) 185 at 200.

\textsuperscript{14} 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951).
necticut sought to impose a tax on the privilege of doing business within the state, which tax also fell upon motor carriers. The tax was held invalid, insofar as it related to exclusively interstate trucking operations, even though the tax was purported to be calculated only on the profits realized from local business. On the other hand, a state or one of its instrumentalities may, by appropriate legislation, require payment of an occupation tax on the part of one engaged in both interstate and intrastate commerce so long as (1) the tax is imposed solely on account of the intrastate business; (2) the amount exacted is not increased because of the interstate business done; (3) a person engaged exclusively in interstate commerce is not made subject to the imposition; and (4) a person taxed may discontinue intrastate business without being forced to withdraw from his interstate operations. The instant case fell short of this established pattern in the last respect.

Principles developed over a period of years in an attempt to harmonize the prohibition against burdening interstate commerce with the right of a state to place licensing taxes on occupations conducted within its borders help to sharpen the contrast provided by the case at hand. Take, for example, one of the earliest and clearest cases on this problem, that of Leloup v. City of Mobile. A New York telegraph company doing business in Alabama there failed to pay a license tax as required under the terms of a city ordinance relating to telegraph companies which did business in the city. Holding the tax invalid, the United States Supreme Court treated it as a general license tax affecting the entire business, interstate as well as local. Two years later, this principle was again invoked, in Crutcher v. Kentucky, at the instance of a foreign express company which did both local and interstate business and the court found the tax objectionable since it might also fall on one engaged only in interstate activity.

These cases found a logical sequitur in the decision achieved in the case of Western Union Telegraph Company v. Kansas, where it was held that a state could not exclude a foreign corporation from doing merely local business if such exclusion would unreasonably burden its non-excludable interstate business. Kansas there endeavored to collect a charter fee of a given percentage of the entire capital stock from all corporations doing local business, regardless of where the property was located. While the court felt that the tax might have been sustained if it had been imposed

16 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311 (1888).
18 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355 (1909).
on local property only, despite its use in connection with interstate commerce, and clearly indicated that the tax would have been upheld if it had been apportioned to that part of the capital utilized in intrastate activities, the primary basis for the decision rested on the fact that a burden could not be imposed on interstate activity through the guise of placing a burden on domestic commerce, when domestic and interstate transactions were inseparable.

Paralleling this line of development is another line of cases wherein local impositions have been upheld apparently because the tax fell exclusively on the intrastate portion of the business conducted. In Osborne v. Florida,¹⁹ for example, a Florida statute required the payment of a license fee before doing intrastate business. The agent of an express company engaged in both interstate and local business failed to pay as he felt the tax did not apply in his case. The state sued and won on the theory that the license was exacted only from intrastate business, was one which could have been avoided if the company had refrained from doing intrastate business, and because the levy was in no way increased by reason of the interstate activity. The same principle was relied upon in another case where the tax was measured by the gross receipts arising from domestic business and not influenced by receipts from interstate business.²⁰ Even so, the principle is not one which can be easily applied, judging by the case of Cooney v. Mountain State Telephone & Telegraph Company.²¹ The State of Montana there attempted to impose an annual license tax upon each telephone instrument used within the state which the taxpayer sought to restrain as an undue burden on interstate commerce. The court agreed, believing the tax to be improperly proportioned since, a larger number of instruments being in use because of the interstate business, the tax was increased because of the interstate activity.

Returning to the instant case, it is apparent that the case was not one which clearly met the requirements previously established in order to avoid a violation of the protection afforded by the commerce clause for the intrastate and interstate business could not be separated; the carter could not discontinue either operation without giving up the entire business; the amount of the tax was increased because of the interstate business; and there was no attempt to proportion the tax according to the amount of intrastate business done. The fact that the defendant engaged in interstate business obviously forced an increase in the number

of trucks used, increased the tax and placed a direct burden upon inter-state commerce via an occupational tax.

All of these considerations were disregarded when the court applied the "home port" theory to bring all of the trucks under state jurisdiction for purpose of taxation so as to make the flat license fee apply to all of them. Two outstanding cases expounding the "home port" theory were relied upon. In the first of them, that of *New York Central & Hudson River Railroad Company v. Miller*, the State of New York imposed a franchise tax on all New York corporations computed on the amount of capital stock employed in New York. It levied this tax against the railroad on the basis of the number of cars used by the company within the state. The taxpayer contended the assessment was unfair as the cars were constantly in and out of the state and that a proper assessment could be made only by using some proportional factor such as the average number of cars in the state throughout the taxing period or the relation between the track mileage within the state when compared to the mileage elsewhere. The court, however, held that the state of origin remained the state of permanent situs of the property, notwithstanding the occasional excursion of the cars to foreign parts. It was also indicated that, as the cars had not obtained a taxation situs elsewhere, they could properly be taxed by New York.

The "home port" theory was extended even further in the second case, that of *Northwest Airlines, Inc. v. State of Minnesota*, wherein the state was allowed to tax all of the airplanes used by the carrier, a Minnesota corporation, although the actual proportion of the mileage flown in Minnesota was only fourteen per cent. of the total. It was said that, with the presence of the "home port" in Minnesota, a relation existed between the carrier and the state which existed with no other state and the benefits ensuing from that relationship afforded the constitutional foundation for the property tax. While the case was not one concerning an occupational tax, it should be noted that a requirement calling for a determination of the exact proportion of property used within the state had previously been enforced.

Selection of the "home port" theory, as expounded in these two cases, produced the result attained in the Willett case for the carter was a local corporation and all of its trucks were based in Illinois, but, to accomplish that result in a case involving an occupational tax, it was

necessary to avoid the holding in *Barrett v. New York*. The city had there attempted to enforce a municipal ordinance requiring a local license as a condition precedent to conducting an express business within the city. The carrier, engaged in both intrastate and interstate transportation, was able to show that its strictly intrastate activity amounted to only two per cent. of its total business and, as a consequence, the court held the tax was invalid and unduly burdensome on interstate commerce. As no reference was made there to the Miller case, which had previously expounded the "home port" theory, the job of avoidance was not made very difficult.

The Willett case, then, now establishes the law to be that a local corporation, engaged in interstate and intrastate activities, with all of its property based within the state, can be subjected to an occupational tax without producing a violation of the commerce clause, unless it can discharge the burden of showing the proportion of its interstate activity and can demonstrate the fact that the tax constitutes an undue imposition thereon. Its mere inability to make the division will not be enough to avoid the levy. As the motor transport industry continues to grow, the problem of the degree to which interstate motor carriers may expect to receive protection under the commerce clause will grow more and more important. Until recently, the United States Supreme Court had greatly limited the right of a state government to tax such carriers, possibly because the economic interests of the country demanded that protection be afforded to fledgling corporations. The court seems to look at the problem differently today.

R. M. Schelly

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—WHETHER OR NOT CONGRESS MAY CONSTITUTIONALLY TAX ILLEGAL INTRASTATE GAMBLING AND COMPEL SELF-INCRIMINATING DISCLOSURES WITH REGARD THERETO—The Supreme Court of the United States, through the medium of the recent case of *United States v. Kahriger*, had occasion to pass upon the constitutionality of the highly controversial Gambler's Occupational Tax Act. An information, filed against Kahriger, alleged that he was in the business of accepting wagers, had willfully failed to register with the Collector of Internal Revenue, and had failed to pay the occupational

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2 U. S. Ct., 73 S. Ct. 510, 97 L. Ed. (adv.) 504 (1953), reversing 105 F. Supp. 322 (1952). Mr. Justice Frankfurter wrote a dissenting opinion as did Mr. Justice Black, with whom Mr. Justice Douglas concurred.
3 Ibid. § 3291.
tax in question. He moved to dismiss the information on the ground the statutory sections relied on were unconstitutional for two reasons, to-wit: (1) because Congress, under the pretense of exercising the taxing power, had attempted to penalize a form of intrastate activity thereby usurping a police power reserved to the states, and (2) because the registration provisions violated the privilege against self-incrimination. His motion having been sustained by the district court, upon a declaration that the tax measure was unconstitutional, the Supreme Court, on direct appeal, reversed that decision when a majority of the court concluded the tax statute was constitutional.

In order to reach this decision, the court had to determine three things, to-wit: (1) whether Congress could lawfully tax a specified business which was not within its power to regulate; (2) whether the penalty provisions in the tax statute were imposed for a breach of a regulation which concerned activities in themselves subject to state regulations; and (3) whether the information required by the registration provisions amounted to a denial of the privilege against self-incrimination. It answered the first question in the affirmative, indicating that an act of Congress which, "on its face," purports to be a proper exercise of the taxing power may not be regarded as any the less so because the tax tends to restrict, suppress, or discourage the thing or activity taxed. In such cases, the court said, it would refuse to inquire into unexpressed motives which may have impelled Congress to exercise a power constitutionally conferred upon it. On the second point, the court held that the regulatory provisions of the tax statute were directly and intimately related to the collection of a valid tax, hence were obviously supportable as in aid of the revenue provisions. With regard to the third question, the court decided that the privilege against self-incrimination applied only to past acts, not to future acts which may or may not be committed, and that the information required from the applicant did not force him to disclose that he had, in the past, been engaged in gambling activities but merely informed him that, to engage in future business of this type, he would have to comply with the conditions prescribed in the tax statutes.

Congress, of course, has been given the plenary power "to levy and collect taxes," which generic phraseology includes all species of taxation: duties, imposts, and excises, as well as other forms. The only express limitation upon this power to tax, insofar as excise taxes are concerned, lies in the fact that "all . . . excises shall be uniform throughout

4 Ibid., §3290.
5 Direct appeal, because of the constitutional issue, is authorized by 18 U. S. C. § 3731.
the United States," a limitation which has been interpreted to be measured merely in terms of geographical uniformity. Except for this limitation, it is axiomatic that Congress possesses complete discretionary power to subject every person, every occupation, and every form of property to such taxation as it may deem necessary and proper to impose and, while the primary purpose of taxation has been to obtain revenue, the power may also be used to accomplish incidental regulatory results. In fact, as it would be impossible to tax persons, things, and transactions without generating social and economic consequences of a non-fiscal nature, Congress has heretofore initiated taxation policies intended to discourage production, consumption, or the transfer of harmful, deleterious, or dangerous commodities or to protect domestic industries against foreign competition.

The absence of a general police power to regulate directly does not deny the possibility that regulation for ulterior purposes, through the exercise of a taxing power or some other delegated power, may not have been furnished to the federal government, providing it with a degree of police power incidentally derived therefrom. Thus, the United States Supreme Court has sustained tax measures, despite their regulatory features and even though they incidentally affected matters ordinarily considered state concern, with respect to a tariff to encourage domestic industries in competition with foreign producers, a tax on state bank notes which had the effect of driving them out of circulation, a license tax on dealers in firearms of the type used mainly by gangsters, a tax which discouraged the manufacture and sale of oleomargarine, a tax on the manufacture and sale of certain narcotic drugs, and a tax on the transfer of marihuana.

A different situation exists, however, when Congress attempts to use

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7 Knowlton v. Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969 (1900).
8 Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482 (1869).
11 The principal case on that point is Hampton v. United States, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1927).
12 The holding in Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482 (1869), depends in part on an alternative ground relating to the federal monetary power.
the taxing power for the purpose of regulating matters wholly outside the scope of any delegated federal power. In that connection, an attempt to levy a tax on the employment of children under a specified age,\textsuperscript{17} a tax on every bushel of grain involved in a contract of sale for future delivery,\textsuperscript{18} a tax on retail dealers in malt liquors predicated solely on a violation of state law,\textsuperscript{19} and a tax designed to regulate agricultural production,\textsuperscript{20} have been invalidated.

The question naturally generated by the foregoing observations concerns itself with the extent to which the Supreme Court will act to restrict Congress in the enactment of tax measures coupled with incidental regulatory features. In an effort to provide some semblance of an answer, the Supreme Court has evolved two directly contrary tests which appear to have been mutually intended to strike a balance between the current economic pattern of the country and the Constitution. The first of these tests, developed in the case of \textit{McCray v. United States},\textsuperscript{21} might be called the "on the face" test of constitutionality.

The \textit{McCray} case grew out of the levy, imposed by Congress, of a tax of ten cents per pound upon oleomargarine which had been artificially colored to look like butter. The contention was made that this rate was so high as to justify a presumption that the Congressional motive was not that a revenue should be secured but that manufacture should be prevented, thereby rendering the act unconstitutional. The statute was upheld as being, upon its face, a revenue measure with the United States Supreme Court saying that neither the motives of Congress nor the ultimate effect of the law could be judicially inquired into. The court then relied on four principles, to-wit: (1) there is a general presumption of constitutionality which attaches to all statutes; (2) there are no constitutional limits upon the mere rate of taxation; (3) Congress has unlimited discretion in the selection of the objects of taxation; and (4) the judiciary should not inquire into or explore the motives of Congress which led to the exercise of the delegated power. This more or less mechanically produced result was the one which could be expected to

\textsuperscript{17} Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 47 (1922). But see United States v. Darby Lumber Co., 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941), wherein the Fair Labor Standards Act, 29 U. S. C. § 201 et seq., was upheld as a valid exercise of the commerce power, leading to an extention of congressional control over sub-standard labor conditions.

\textsuperscript{18} Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 823 (1922). But see Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. Ed. 889 (1923), wherein the Commodities Exchange Act, 7 U. S. C. § 1 et seq., was upheld as a valid exercise of the interstate commerce power.

\textsuperscript{19} United States v. Constantine, 296 U. S. 287, 56 S. Ct. 223, 80 L. Ed. 233 (1935).

\textsuperscript{20} United States v. Butler, 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1935).

\textsuperscript{21} 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).
flow from the use of the label of "a revenue measure," whether the application was correct or not.

The second test, achieved in Bailey v. Drexel Furniture Company, might be dubbed the "purposes and effects" test. Congress once sought to prevent the employment in industry of children of tender years by providing for a tax of ten per cent on the net profits for the year earned by those who knowingly employed children within the prescribed age limits during any portion of the year. The Supreme Court decided that the act was unconstitutional because the various provisions of the statute indicated an intention to regulate matters over which Congress could claim no authority. The decision rested on several points, to-wit: (1) the tax was suggestive of a punitive purpose in that the amount of the tax did not vary with the amount of the thing being taxed; (2) the tax law drew a distinction between willful and unwitting employment of minors, a distinction more nearly appropriate in a criminal law rather than a revenue measure; (3) the statute provided for elaborate regulation of conduct over which Congress had no control; and (4) such regulation of conduct was paramount and dominant rather than the incidental regulation typical of a revenue measure. Under this test, the validity of a tax statute would be determined by its purposes and effects as disclosed by a sensible construction of all of its provisions.

There is no doubt that the tax statute involved in the instant could readily be sustained by an application of the "on the face" test of constitutionality, particularly since it was wrapped in the "verbal cellophane of a revenue measure," even though the holding would permit Congress to achieve results in an area where it had no direct power to act and where the attainment of social reform was the primary purpose with thought of revenue a secondary matter. This rather dim acknowledgment, however, leaves one in quest for a doctrine sufficient to sustain a regulatory tax which would fall within the precise limits of the taxing power. The wisdom of the legislature cannot be questioned, but the promotion of social reform could have been accomplished in another fashion without causing the guise of a regulatory tax measure to overshadow the police power of the states. Justification of the principle that Congress may use its powers to aid the states in the enforcement of criminal laws may be found in such instances as the provision for supplying information to state officers after the same has been gathered by the division of identification and

22 259 U. S. 29, 42 S. Ct. 449, 66 L. Ed. 817 (1922).
23 See dissenting opinion of Mr. Justice Frankfurter, — U. S. — at —, 73 S. Ct. 510 at 518, 97 L. Ed. (adv.) 504 at 513.
Corporations — Members and Stockholders — Whether Minority Shareholders who Disent at Time of Merger Lose Right to Question Correctness of Allotted Share Values by Surrender of Share Certificates and Acceptance of Sum Tendered — Certain minority stockholders, in the New York case of In re Silverman,¹ having duly objected to the consolidation of their corporation with another, thereafter filed a petition to secure a determination as to the valuation of their shares in the manner prescribed by the New York Stock Corporation Law.² Dissatisfied with the valuation placed on the stock by an appraiser, they then took the matter before the Supreme Court, Special Term, only to have the appraisal there affirmed. Pending an appeal to the Appellate Division of the Supreme Court, several of the dissenting shareholders voluntarily turned over their certificates to the corporation and were paid the adjudicated rate. Upon this showing, the Appellate Division granted a motion, filed on behalf of the corporation, to dismiss the appeal as to these individuals, relying on the idea that the dissenters had relinquished all their rights in the shares and had thereby turned the appeal into a moot case. On further appeal to the New York Court of Appeals, this holding was reversed when the high court concluded that awards made in stock valuation proceedings were to be regarded as among the listed exceptions to the general rule that a litigant may not accept the benefits of a judgment and also be permitted to appeal therefrom.³

² Thompson, N. Y. Consol. Laws, 1950 Supp., Stock Corporation Law, Art. 3, § 21. An interesting sidelight on statutes of this character is afforded by the decision in the case of Booma v. Bigelow-Sanford Carpet Co., — Mass. —, 111 N. E. (2d) 742 (1953). In that case, a person who owned no shares on the date notice was given of a special stockholders' meeting to vote on a proposed consolidation but who acquired and secured registration of shares prior to the date of the meeting, gave notice of dissent and demanded appraisal of his stock. Relief was denied on the ground that he was not a person entitled to have the benefit of the statute.
To offset the common law doctrine that no change could be effected in the form of a corporate organization except by the unanimous consent of all shareholders, forty-two states today have statutes regulating the procedure for corporate merger and consolidation upon the vote of less than all the outstanding stock. These statutes do, however, grant recognition to a right on the part of dissenting shareholders to withdraw from the enterprise and to have the value of their shares determined and repurchased by the corporation. Typically, these statutes provide for the appointment by a court of disinterested appraisers, usually three in number, who are directed to place a valuation on the stock. If the valuation so fixed is not objected to by either the shareholder or the corporation, it forms the basis upon which the shares are repurchased. If, however, either party is not satisfied with the appraisers’ determination, the right to secure judicial review thereof is made dependent upon the particular statute governing the merger or consolidation procedure.

In that regard, the New York statute involved in the instant case provided that, upon objection to the appraised valuation of the stock, the objector had the right to secure review only if action was taken to that end within a designated time. The initial utilization of this right by the dissenting shareholders concerned in the instant case gave rise to the particular problem under discussion. It should be noted, however, that the question as to whether or not this problem could arise in other jurisdictions would have to depend upon whether the particular statute makes provision for an appeal under similar circumstances. A survey of the various state statutes covering appraisal procedure would seem to indicate that such statutes fall into one or the other of three possible categories.

A small number of these statutes not only declare that the valuation of the appraisers is to be final and binding on all parties but also expressly deny any right of appeal therefrom. As a consequence, in these jurisdictions, the problem which faced the court in the instant case could never arise. In several other states, forming the second category, the statutes contain no expression with regard to the allowance or denial of a right to appeal, these statutes merely stating that the appraiser’s determination

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5 Statutes bearing on the subject appear to be lacking in the states of Miss., N. D., S. D., Tex., Utah, and W. Va.
7 See, for example, Mich. Comp. Laws 1948, § 450.54, which declares: "The appraisers shall submit their determination to the circuit court for confirmation and upon entry of an order confirming said report their determination shall be final and conclusive and from such order there shall be no appeal."
is to be "final and conclusive." Whether an appeal could, by implication, be had in these jurisdictions would have to depend entirely upon the interpretation which might be placed upon such language. A typical example of one possible interpretation is to be found in the Delaware case of Chicago Corporation v. Munds, where the court held that, under the language of the then Delaware statute, the appraisers' valuation would actually be final and binding upon all parties except for those reasons which would make any appraisal open to inquiry. It is true that the court there proceeded to modify the appraised value for the reason that the appraisers had considered only the market value of the stock in arriving at the determination, but it is doubtful whether further appeal from the modified appraisal would have been permitted. It is, therefore, unlikely that the instant problem could arise in these jurisdictions.

The third, and final, category includes by far a majority of the states, those possessing statutes wherein allowance of appeal to a higher court has been given legislative approval. In these jurisdictions, the problem under discussion could well arise and the holding in the instant case may provide persuasive authority for similar holdings. As the Illinois statute in point, except for the element of compulsory appraisal, is like that of New York, it becomes a matter of interest as to whether or not, given a set of facts similar to those of the instant case, an Illinois court would also permit a dissenting shareholder to accept the benefits of a judgment for the value of his shares and still pursue an appeal therefrom. A survey of Illinois decisions discloses no case directly in point, although cases do exist in which review has been had over the point of the correctness of the amount awarded.

The attitude of the Illinois courts in analogous situations, however, might be said to be revealed by the case of Holt v. Rees where the court said: "A party cannot accept money directed to be paid to him by decree, and then ask reversal on the ground that it did not give him enough."
This statement may be regarded as typical of a consistent position taken by the Illinois courts in denying to a litigant, after he has accepted an award or legal advantage under a judgment, a right to secure a review of such adjudication as might again put in issue his right to the benefit conferred.\(^{15}\)

Two principal exceptions do appear, but neither would appear to be helpful in this connection. One such exception notes that there is no waiver of the right to appeal where the benefit accepted under the judgment is conceded by all parties to be due.\(^{16}\) The second supposes that no waiver occurs where the appeal is taken from a separable part of the decree not involved in the payment made.\(^{17}\) While considerable latitude has been exercised in the application of these exceptions by the courts of other jurisdictions,\(^{18}\) they appear to have been narrowly construed in Illinois,\(^{19}\) hence it is unlikely that either would prove to be of assistance in a matter of the type under consideration.

While a contrary holding might seem to put the dissenting shareholder at a disadvantage, since he may be ill able to afford the expense and delay of prosecuting his appeal,\(^{20}\) the legislature may have considered the liberal provision for interest on the whole amount finally awarded\(^{21}\) as a sufficient offset to this burden. It is unlikely, therefore, that the Illinois court would follow the New York view expounded in the instant case. The decision does suggest, however, a possible point for further legislative consideration. The statute might be revised to provide for the deposit in court of the

\(^{15}\) Gridley v. Wood, 305 Ill. 376, 137 N. E. 251 (1922); Scott v. Scott, 304 Ill. 287, 136 N. E. 659 (1922); Langher v. Glos, 276 Ill. 342, 114 N. E. 590 (1916); Corwin v. Shoup, 76 Ill. 246 (1875); Ruckman v. Alwood, 44 Ill. 183 (1867); Thomas v. Negus, 7 Ill. 700 (1845); Morgan v. Ladd, 7 Ill. 414 (1845). See also Powell v. Amestoy, 337 Ill. App. 631, 86 N. E. (2d) 557 (1949).

\(^{16}\) In Schaeffer v. Ardery, 238 Ill. 557, 87 N. E. 343 (1909), for example, it was held that the acceptance of tax money admittedly due did not preclude the tax collector from appealing from an unfavorable decision concerning disputed taxes.

\(^{17}\) Kerner v. Thompson, 365 Ill. 149, 6 N. E. (2d) 131 (1937).

\(^{18}\) Note the critical discussion of the case of Bass v. Ring, 210 Minn. 598, 299 N. W. 679 (1941), appearing in the annotation in 169 A. L. R. 985 at 1031.

\(^{19}\) Boylan v. Boylan, 349 Ill. 471, 182 N. E. 614 (1932). In that case, the court, concerned with an appeal from a decree of divorce, held the wife's acceptance of a sum awarded for attorney's fees was sufficient to preclude her from questioning other parts of the decree, first because the husband had not admitted liability for such fees, and second, because the decree was deemed to be a unit and not composed of separable parts.


\(^{21}\) Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, § 157.70, provides for interest on the amount fixed as fair value of the shares "to the date of such judgment." The judgment itself would draw interest at the rate of 5% from date of rendition: ibid., Ch. 74, § 3.
sum which the corporation is willing to pay for the dissenter's shares, freeing it from the obligation to pay interest thereon, with recognition of a right to the withdrawal thereof on the part of the dissenter without jeopardizing the right to appeal, but with further costs, expenses, and interest claims to abide the eventual result.\textsuperscript{2} Such a revision would embody the good features of the New York case without leaving its acceptance open to the chance of judicial views on the point.

H. Keil

**Divorce—Defenses—Whether or Not the Recriminatory Misconduct of Plaintiff Operates to Bar a Cause of Action for Divorce**—Construction of a statute relating to recrimination\textsuperscript{1} was required in the recent California case of DeBurgh v. DeBurgh.\textsuperscript{2} The plaintiff there sued her husband for divorce, charging extreme cruelty. In response thereto, the defendant filed a cross-complaint for divorce, also relying on the ground of extreme cruelty. The lower court, after receiving proof of the alleged facts, found that the acts of each party had been provoked by the other; that each had been guilty of a cause for divorce; that the doctrine of recrimination applied; and that neither party was entitled to a divorce. On appeal to the Supreme Court of California, the judgment was reversed principally because the court decided that cruelty which had been provoked would not give rise to a cause of action for divorce, hence would not afford a basis for the defense of recrimination, but it also interpreted the statute in question so as to permit the trial court to exercise a sound judicial discretion as to the effect to be given to recrimination. It thereby promulgated an opportunity for the application of the startling doctrine that a court could grant a divorce, even though both parties were at fault, provided the relationship of husband and wife had become such that the legitimate objects of matrimony had been destroyed and a continuation of the marriage would be against public policy.\textsuperscript{3}

\textsuperscript{2} Laws 1947, p. 905, held unconstitutional for reasons not here pertinent in Department of Public Works v. Gorbe, 400 Ill. 211, 98 N. E. (2d) 730 (1951), noted in 30 Chicago-Kent Law Review 142, could serve as an illustration for an acceptable model.

\textsuperscript{1} Deering Cal. Civ. Code 1941, § 111, provides that "divorces must be denied upon [a] showing . . . [of] recrimination." Section 122 thereof defines recrimination as a "showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce."

\textsuperscript{2} 39 Cal. (2d) 858, 250 P. (2d) 598 (1952), reversing 109 Cal. App. 335, 240 P. (2d) 625 (1952).

\textsuperscript{3} Edmonds, J., and Shenk, J., each wrote a dissenting opinion in which they concurred in the reversal because of the failure of the lower court to distinguish between recrimination and provocation, but voiced the opinion that the statute was mandatory in character so that, any time it appeared that both parties were at fault, the defense of recrimination would become absolute and the trial court would then lack power to do anything except to dismiss the action.
The doctrine of recrimination, originating in the twelfth century and centuries later when Lord Stowell, sitting in an English ecclesiastical court, Roman canon law, appears to have been designed solely for the purpose of protecting the property interests of the wife where both parties had been guilty of adultery. It did not appear on the English scene until decided the case of Forster v. Forster, applied the doctrine of recrimination, and denied a divorce to the parties on that ground. While later English courts appear to have realized the consequences of recrimination, in that cohabitation between the parties was usually discontinued and immorality was usually increased, such courts were reluctant to overrule the doctrine so established until the situation was remedied by the Matrimonial Causes Act and its subsequent amendments which operated to transfer divorce jurisdiction from ecclesiastical tribunals to the common law courts and empowered the judges thereof to exercise a discretion in the matter of granting a divorce where both parties were at fault.

One of the leading cases in the United States on the subject of recrimination as an absolute bar to divorce, oddly enough, is the California case of Conant v. Conant. It appears to have been instrumental in causing the enactment, in 1872, of the California statute here in question and it achieved the absolute bar to divorce result promulgated earlier by Lord Stowell. Since then, the doctrine of recrimination so developed has been explained on a number of theories. One theory, used most frequently, rests on the doctrine of unclean hands and is based on the equitable principle that the court should not aid one who has been guilty of inequitable conduct, at least in relation to the matter in which he seeks relief from the court. Another explanation follows the mutually dependent covenant theory. Under it, the marriage contract is considered as one of mutually dependent covenants so that, if both parties have been guilty of a breach of any of these covenants, neither can be granted relief in the form of divorce.

Still another theory, one likewise calling for a denial of divorce, has

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6 20 & 21 Vict., c. 85 (1857).
7 See 1 Edw. VIII, c. 31 (1936), and 1 Geo. VI, c. 57, § 4 (1937).
8 10 Cal. 249 (1858).
9 See, for example, Thorem v. Thorem, 188 Minn. 153, 246 N. W. 674 (1933), and Phillips v. Phillips, 48 Ohio App. 322, 193 N. E. 657 (1933).
10 MacMillan v. MacMillan, 113 Wash. 250, 193 P. 673 (1928). See, however, the cases of Flagg v. Flagg, 192 Wash. 679, 74 P. (2d) 189 (1937), and Huff v. Huff, 178 Wash. 634, 35 P. (2d) 56 (1934), applying the doctrine of comparative rectitude in a state where there is no statute on the point.
been designated as the *pari delicto*, or equal fault, doctrine\(^\text{11}\) from which there has appeared, by implication, a subordinate doctrine to the effect that, where the parties are not equally at fault, divorce may be granted to the one least guilty. This last mentioned doctrine, sometimes designated as the doctrine of comparative rectitude, although designed to eliminate some of the anomalous consequences of recrimination, has not yet received wide acceptance either in statutory or case form. It has, however, been adopted in Iowa through the medium of the case of *Smith v. Smith*,\(^\text{12}\) and the courts of several other states, by way of dictum, have stated that, in a sufficiently extreme case, a decree for divorce might be given to the least guilty party.\(^\text{13}\)

Independently of case-made law on the point, thirty-two American jurisdictions make some provision by statute with respect to recrimination while all others, with the exception of Connecticut, recognize some form of the concept by judicial decision.\(^\text{14}\) Twenty-nine of these states have statutes which seemingly make it mandatory to deny divorce when the defendant proves a recriminatory defense,\(^\text{15}\) but many call for a consideration of certain specific principles which must be complied with before recrimination may be established. In some instances, for example, recrimination only applies where the ground relied on is of the same statutory character as that asserted by the plaintiff.\(^\text{16}\) In others, the recriminatory charge is confined to adultery only and does not apply to other grounds for divorce,\(^\text{17}\) nor may it be applied where the prior adultery has been condoned.\(^\text{18}\) In

\(^{11}\) Johns *v.* Johns, 29 Ga. 718 (1860).

\(^{12}\) 64 Iowa 682, 21 N. W. 137 (1884). See also Innskeep *v.* Innskeep, 5 Iowa 204 (1857).

\(^{13}\) Hoagland *v.* Hoagland, 218 Ky. 636, 291 S. W. 1044 (1927); Kolaks *v.* Kolaks, 75 S. W (2d) 600 (Mo. App., 1934); Mueller *v.* Mueller, 165 Ore. 153, 105 P. (2d) 1095 (1940).


\(^{17}\) Ala. Stat. 1940, Tit. 34, § 26; Ariz. Stat. 1939, Ch. 27, § 806. See also Pavlevitch *v.* Pavlevitch, 50 N. M. 224, 174 P. (2d) 826 (1946), overruling Chavez *v.* Chavez, 39 N. M. 480, 50 P. (2d) 264 (1935).

most of these statutes, however, the bar is stated as being applicable only
to mutual charges of adultery although the ground may have been given
wider application as the result of judicial expansion upon statutory lan-
guage. In only three instances can it be said that legislatures have been
sufficiently impressed with the doctrine of comparative rectitude to make it
the statutory ground for decision in cases calling for the application
thereof.

Despite this, a slow trend toward the acceptance of that doctrine may
be noticed even in the face of certain evident reversals on the point.
Much as the instant holding may be open to criticism for its failure to fol-
low what would seem to be a positive statute on the point, the result
attained appears to be far more equitable and desirable than has been
true with respect to many of the earlier holdings. To say the least, it dis-
closes a degree of liberality in the matter of granting divorce more nearly
in accord with present day practices.

A. Silver

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that both parties have been guilty of adultery, when adultery is the ground of
complaint, then no divorce shall be decreed."

20 See, for example, the case of Grady v. Grady, 266 Ill. App. 271 (1931), where,
on a complaint for divorce charging adultery, the defendant recriminated by
charging cruelty and desertion and divorce was denied. See also Zacharias,
(1936).

21 See statutes cited in note 15, ante.

22 The Michigan Supreme Court, in Legatski v. Legatski, 230 Mich. 188, 203 N.W.
69 (1925), retreated from the position it had taken in the case of Weiss v. Weiss,
590, 18 N.W. (2d) 580 (1945), where a court, not yet committed either way,
refused to adopt the principle.

23 Nelson, Divorce and Annulment (Callaghan & Co., Chicago, 1945), 2d Ed.,
Vol. 1, p. 358, commenting on the California statute, states: "It is simple and
unambiguous and is fairly based on the reasoning given by the courts for the doc-
trine of recrimination. This type of statute provides that in a suit for divorce
for any cause a defendant may show recrimination by showing that the plaintiff
is guilty of any cause. It is the same rule as exists in states having no statutes
on the subject. Denial of the divorce is mandatory."

declares that "the manner in which present day divorces are handled is extremely
liberal. It is only in increasingly rare cases that the courts refuse to grant divorces.
Free consent divorce exists in the United States today as fact, not merely as a
phenomenon of the divorce mill, but as the standard practice throughout the
country."
ADOPTION—JUDICIAL PROCEEDINGS—WHETHER OR NOT COURT MAY WAIVE STATUTORY REQUIREMENT THAT CHILD TO BE ADOPTED MUST ACKNOWLEDGE HIS CONSENT THERETO IN OPEN COURT—The holding of the Appellate Court for the First District in the recent case of Noel v. Olszewski\(^1\) emphasizes the mandatory nature of the statutory requirement that a child over fourteen years of age who is to be adopted in an Illinois proceeding must appear in open court and there acknowledge his written consent\(^2\) if the court is to have jurisdiction to enter a valid decree of adoption. The action was one to establish title to realty in which the incompetent on whose behalf the action was being prosecuted died before a decree could be entered. Claiming to be sole heir of the incompetent, the intervening petitioner sought to be allowed to be substituted as plaintiff. The issue of heirship thereby presented was complicated by the fact that the incompetent, prior to his incompetency and death, had purported to adopt three other persons as his children and two of these, represented by a guardian \textit{ad litem}, actively opposed the petition. Evidence showed that the adoption decree on which they relied expressly waived the statutory requirement that they appear in open court for the purpose of consenting to the adoption inasmuch as they were then residing in Poland. The trial court held the adoption decree valid and dismissed the intervening petition for want of equity.

On appeal by the intervenor, directly placing the validity of the adoption decree in issue, the attention of the Appellate Court was focussed upon the absence of the allegedly adopted children from the proceeding, leading to the holding that the adoption decree was void. The opinion in the case, first of its kind since the enactment of the new statute regulating adoption proceedings, rests upon three points, to-wit: (1) the statutory language is clear, and there is nothing in Section 3--3 of the Adoption Act to permit or to justify a waiver of appearance in open court; (2) a proceeding in Illinois for the adoption of children is one of \textit{in personam} character wherein, absent proper consent as required by statute, the court may not obtain jurisdiction by substituted service; and (3) the consent given by a guardian \textit{ad litem} in an adoption proceeding will not provide the “substantial compliance” with statutory requirements called for by the decision in Hopkins v. Gifford.\(^3\) The instant holding, therefore, goes a long way toward establishing the mandatory nature of the statutory

\(^1\) 350 Ill. App. 264, 112 N. E. (2d) 727 (1953).
\(^3\) 309 Ill. 363, 141 N. E. 178 (1923). In that case, the children to be adopted had actually appeared in open court.
provisions and merits close attention for the effect it may have on other war-generated adoption decrees.

DIVORCE—CUSTODY AND SUPPORT OF CHILDREN—WHETHER JURISDICTION OF DIVORCE COURT TO MODIFY CUSTODY PROVISIONS OF DIVORCE DECREE CONTINUES AFTER DEATH OF PARENT TO WHOM CUSTODY WAS AWARDED—Increased flexibility in procedure in certain custody cases is very likely to result from the recent Illinois Supreme Court decision in the case of Jarrett v. Jarrett. A decree of absolute divorce had there awarded custody of a minor child to the wife. On her death two years later, the father filed a motion to amend the decree so as to provide that custody should be awarded to him. The maternal grandparent, with whom the child had lived prior to the divorce, filed an intervening petition seeking to secure custody. The Appellate Court for the Third District reversed a decree in favor of the intervenor and directed that custody be granted to the father. After petition for leave to appeal had been granted, the intervenor argued before the Supreme Court that the custody jurisdiction of the divorce court had terminated upon the death of the parent to whom custody had been awarded, hence the proper remedy of the father was by way of a petition for a writ of habeas corpus. The Supreme Court affirmed, rejecting the intervenor's argument, and holding that the custody jurisdiction of a divorce court survives the death of the parent, thereby permitting it to continue to deal with custody problems.

Decisions in other jurisdictions formed the chief base for the intervenor's argument that death of a party to a divorce case terminates the proceeding altogether, both with regard to divorce and with regard to matters of custody and the like, since the latter are merely incidental to the former. Looking to the Illinois statute, however, the Supreme Court found no express limitation upon the duration of the custody jurisdiction, but more nearly an implication that the jurisdiction should continue, for the statute states: "The court may, on application, from time to time, make such alterations in the . . . care, custody and support of the children, as shall appear reasonable and proper." While no Illinois decision appears

4 But see Dickholtz v. Littfin, 341 Ill. App. 400, 94 N. E. (2d) 89 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 183, dealing with the right of the natural parent to withdraw a consent to adoption prior to entry of the decree.


2 Although the intervenor did not raise this question until the filing of a petition for rehearing in the Appellate Court, the point was not waived as it is permissible to attack jurisdiction of the subject matter at any time during the proceeding.

3 See, for example, the cases of Stone v. Duffy, 219 Mass. 178, 106 N. E. 595 (1914), and Leclerc v. Leclerc, 85 N. H. 121, 155 A. 249 (1931).

to have limited this jurisdiction, there are persuasive statements in the case of *Stafford v. Stafford*\(^5\) tending to support jurisdiction, and some cases exist in which the divorce court actually exercised jurisdiction to modify custody provisions after the death of one of the parties, although doing so without directly considering its power in that regard.\(^6\) Indeed, although habeas corpus proceedings have been used under like circumstances,\(^7\) two cases commenced in that form indicate that modification of custody arrangements ought to come from the court by which the decree was rendered.\(^8\)

The Supreme Court has thus refused to follow the so-called "prevailing" view that custody jurisdiction must terminate along with divorce jurisdiction upon the death of one party to the proceedings.\(^9\) In so doing, the decision seems entirely proper on principle for, while it would take a divorce action to invoke the custody jurisdiction of the court, the problem of determining what would be best for the welfare of the child is one which necessarily continues throughout the minority of the child and should not be made to depend upon the continued existence of both parents.\(^10\) The instant decision, to say the least, possesses the virtue of giving an authoritative and definite declaration of law on the point.

**Public Service Commissions—Hearing and Rehearing—Whether Rehearing Provision in Illinois Public Utilities Act Operates to Create a Two-Year Period of Repose—Recently, in the case of *Illinois Bell Telephone Company v. Illinois Commerce Commission*,\(^1\) the City of Chicago charged that the Illinois Commerce Commission lacked jurisdiction to consider certain rate schedules filed by the telephone company inasmuch as less than two years had elapsed since the granting of an earlier rate order in favor of the utility. The contention so advanced was based on the concluding sentence of Section 67 of the Illinois Public Utilities Act,\(^2\)

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5 299 Ill. 438, 132 N. E. 452 (1921).


9 See annotation in 74 A. L. R. 1352 at 1357.

10 This distinction was carefully made in the recent case of *Cone v. Cone*, — Fla. —, 62 So. (2d) 907 (1953).


which reads: "Only one rehearing shall be granted by the Commission; but this shall not be construed to prevent any party from filing a petition setting up a new and different state of facts after two years, and invoking the action of the Commission thereon." The city had moved the commission to cancel certain rate schedules filed by the utility but its motion was denied. On appeal from such denial, the city was successful in the trial court but lost on further direct appeal to the Illinois Supreme Court when that court, considering the spirit and purpose of the Illinois Public Utilities Act as a whole, concluded that the language in question did not constitute a two-year limitation on the right of a utility to seek revision of its rate structure.

The Supreme Court, in arriving at that decision, while recognizing that no precise decision had previously been attained on the point, took into consideration the fact that objections of the type in question had been consistently overruled by the commission throughout a period of over thirty years and that the commission had never been directly reversed on that ground by any court. This pattern of conduct was deemed persuasive of an indication of the legislative intent in the matter since the legislature, although aware of these repeated rulings, had revised the Public Utilities Act once, and had amended it several times, without changing the language of the disputed sentence. The court also pointed out that this question had been passed upon, at least inferentially, in the case of Chicago Railways Company v. City of Chicago, where it must have been considered as rejected, even though not discussed, since it involved a jurisdictional question.

Despite this, the court, seeking for the legislative intent, approached the problem from a two-fold aspect. The first involved an analysis of the particular sentence when viewed in the light of the spirit and primary pur-

3 The commission did, however, suspend the proposed new rates on other grounds, and the utility appealed from such holding.
5 Ibid., § 73, provides for direct appeal.
6 Actually, the court decided the city had no right to seek review of a favorable order even though such order passed on other grounds than those urged by the city. This aspect of the decision was more than mere dictum, however, since the same issue came before the court on an appeal taken by the utility, progressing through other trial stages but consolidated with the city's appeal when the matter reached the Supreme Court. The case also deals with important aspects of public utility law concerning the applicable base for rate-making purposes. Treatment thereof has been reserved for discussion elsewhere in this publication.
7 292 Ill. 190, 126 N. E. 585 (1920).
8 At 414 Ill. 275, p. 280, 111 N. E. (2d) 329, p. 332, the court stated: "It was the rule then, as now, that it is the duty of this court to rule on a jurisdictional defect at any stage of the proceeding that such a defect became apparent."
pose of the Act itself. Since one such purpose was "to set up machinery for continuous regulation as changes in conditions require," it would seem obvious that a restrictive sentence such as the one in issue, if extended literally, would be directly opposed to the general purpose of maintaining a flexible system of regulation capable of coping with possible rapid and radical changes in conditions having bearing on a rate structure. The second aspect of approach had been utilized in the case of American Steel Foundries v. Gordon, where it was pointed out that any particular clause of a statute ought to be construed in the light of the entire statute. Accordingly, the court examined the whole statute, giving particular attention to two other sections thereof, leading to the conclusion that if the sentence in issue was to be construed in the manner contended for by the city it would then be in conflict therewith. Reasoning of the character under consideration well illustrates the paramount importance of considering and resolving statutory ambiguities with a breadth of vision capable of permitting an unbiased comparative analysis of the relative importance of particular statutory provisions observed in their proper perspective.

Social Security and Public Welfare—Unemployment Compensation—Whether Persons Forced into Unemployment Because of a Labor Dispute Are Entitled to Unemployment Compensation Benefits When Their Employer Replaces Them at Time of Resumption of Production—In the case of Robert S. Abbott Publishing Company v. Annunzio, certain composing room employees in a publishing plant left their jobs because of a labor dispute with their employer. Without any settlement of that dispute, the employer began hiring other workers, and, within a period of several months, had the composing room fully staffed with normal production resumed. The replaced employees then made claim to unemployment compensation benefits, but relief was denied by a deputy administrator on the ground the unemployment existed because of a labor dispute. Claimants then appealed to the Director of Labor who found that the circumstance of their continued unemployment had changed, that they were no longer unemployed due to a stoppage of work which existed.

9 414 Ill. 275 at 281, 111 N. E. (2d) 329 at 333.
10 404 Ill. 174, 88 N. E. (2d) 465 (1949).
11 See, in particular, 404 Ill. 174 at 180, 88 N. E. (2d) 465 at 468.
12 Ill. Rev. Stat. 1951, Vol. 2, Ch. 111-2/3, § 36, prescribing the only method by which a utility may change its rates, contains no time limitation as to when rate schedules may be filed. Ibid., § 75, impliedly permits a utility to file a rate schedule within one year or less after rates have gone into effect.
1 414 Ill. 559, 112 N. E. (2d) 101 (1953).
because of a labor dispute at the premises at which they were last employed, and were, therefore, entitled to the unemployment compensation benefits sought. This decision was affirmed on judicial review before a trial court and, on appeal by the employer to the Illinois Supreme Court, that court also affirmed when it held that on replacement of the former employees and resumption of normal operations, a work stoppage because of a labor dispute could be regarded as at an end even though the dispute had not been settled in the normal fashion.

The problem in the instant case, arising under former Section 7(d) of the Unemployment Compensation Act, appears to be one which has never before been passed upon by the Supreme Court of this state, although it has arisen elsewhere, and the view adopted accords with the majority view on the point. In only one case, that of Board of Review v. Mid-Continent Petroleum Corporation, has a different result been achieved, and the holding therein may be said to be discredited by the fact that the claimants there concerned were not represented by counsel, that two judges dissented from the holding therein, and because the statute involved was subsequently modified.

It should be noted, however, that previously, when construing the statutory phrase "stoppage of work which exists because of a labor dispute," the Illinois court has placed emphasis on the presence of a "labor dispute" as the ground for denial of benefits, particularly since it once expressed the belief that the legislature did not intend "to finance strikes out of unemployment compensation funds." The instant holding reflects a change, for the emphasis has now been placed on the presence, or

3 Ibid., Vol. 1, Ch. 48, § 230. See also Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 520.
4 See note 2, ante.
6 Board of Review v. Mid-Continent Petroleum Corporation, 193 Okla. 36, 141 P. (2d) 69 (1943).
9 Walgreen Company v. Murphy, 386 Ill. 32 at 36, 53 N.E. (2d) 390 at 393 (1944).
absence, of a ‘‘stoppage of work,’’ without regard to the fundamental cause thereof, so as to make the claimant ‘‘unemployed’’ if the plant or department is back in normal production. If the test of ineligibility for benefits lies in some ‘‘fault’’ on the part of the employee, it is rather strange to find that test being reversed merely because the employer has been able to resume production without the aid of the recalcitrant striking employee and where the strike continues, or has been abated, without an actual settlement.

WATER AND WATER COURSES—NATURAL WATER COURSES—WHETHER LESSOR OF LAND LEASED FOR PURPOSES OF DRILLING FOR OIL MAY RECOVER FOR CORRUPTION OF WATER SUPPLY WITHOUT PROOF OF NEGLIGENCE ON PART OF LESSEE—In the recent case of Phoenix v. Graham, plaintiff was the owner of a farm, part of which had been leased to the defendants for the purpose of mining oil and gas contained therein. After termination of the lease, accompanied by a plugging and abandonment of the oil wells drilled on the leased premises, plaintiff sued at law to recover damages allegedly caused by the contamination of the farm water supply by reason of the permeation thereof with salt water produced in connection with the drilling operations. Plaintiff relied principally upon a statute which declared it to be a public nuisance to permit salt water to escape into any underground fresh water supply and, on the basis thereof, recovered damages in the trial court for the injury done to the entire premises. On appeal by defendants to the Appellate Court for the Fourth District, that court reversed and remanded the cause for further proceedings on the ground that, at least as between lessor and lessee, the plaintiff was obliged to prove actionable negligence on the part of the defendants and could not recover simply upon a showing of a violation of the statute.

1 349 Ill. App. 326, 110 N. E. (2d) 669 (1953).

2 Salt water had first appeared within one year after the oil wells were brought in, but it had been run off into settling pits which occasionally overflowed. As the volume of salt water increased, defendants dug a large pit in a location approved by the lessor, but there was some dispute as to whether this excavation went down to sand or other porous material. As the farm water supply came from shallow wells filled with percolating surface waters, and not from artesian wells, the pollution may have been produced by either the overflow, by seepage from the larger pit, or by both.


4 The court, while agreeing that the correct measure of damage had been utilized, held the proof with regard to damages to be inadequate, since all tests for contamination had been conducted on the leased portion of the premises and did not to-wit: the difference between market value before and after the injury, also extend over the entire area of the farm.
In this case, the first of its type to reach a reviewing court in Illinois, the court relied primarily on six decisions achieved elsewhere to support the view that civil recovery could not rest simply on the statute in question, but an examination of these decisions raises an issue as to their applicability to the problem of negligence, rather than nuisance, in the lessor-lessee relationship. In one of the decisions relied on, the plaintiff was a stranger to the demised premises and no claim was advanced that a statute applied or could be made to apply, so it is of doubtful authority. In two other cases, originating in Texas, there is also no mention of any controlling statute and the debatable issue was one of causation rather than the basis for liability. The remaining three cases, all arising in Oklahoma, are similarly of doubtful value, one because it dealt with the matter of causation, another because there was a failure to show an escape of salt water from the pit in which it was confined, and the third because the lease was construed to grant to the lessee all those rights which might be deemed necessary to the extraction of oil and the court failed to find any proof to the effect that the pollution of the water supply was unnecessary to such production. The only Illinois case even closely approximating the instant situation, that of Benefiel v. Pure Oil Company, is likewise of little value since the plaintiff therein, who was denied recovery against the oil-well operator, had been an agricultural tenant whose estate had been created subsequent to the oil lease granted to the defendant and the alleged harm had arisen from the trespass of the injured cattle upon that part of the area used for oil-drilling purposes. It is plain, then, that the law is far from clear on the subject.

If the instant case may be said to be an expression, by the court, of what it believes to be a desirable public policy, to-wit: that there should be no liability without fault, then such policy would seem to be contradictory to the one expressed by the legislature, for the statute in question affords no exception by its language. The adoption of a policy compar-

7 Walters v. Prairie Oil & Gas Co., 85 Okla. 77, 204 P. 906 (1922).
8 Pure Oil Co. v. Gear, 183 Okla. 489, 83 P. (2d) 389 (1934).
9 Marland Oil Co. v. Hubbard, 168 Okla. 518, 34 P. (2d) 278 (1934).
11 The Appellate Court for the Fourth District, in People v. Hensley, 325 Ill. App. 291, 69 N. E. (2d) 114 (1945), acted to engraft an exception on the statute, at least with regard to criminal prosecutions, for it there required a showing of fault on the part of the defendant, charged with polluting a water supply by permitting oil to escape from a pipe-line, in order to sustain a conviction.
able to one which might justifiably exist in the more prominent oil states\textsuperscript{12} would hardly seem to befit this state, where present favorable agricultural and water conditions should be given protection.

\textbf{Witnesses—Credibility, Impeachment, Contradiction, and Corroboration—Whether or Not Evidence of Conviction of a Crime, Infamous Where Committed but not Infamous Under Law of Forum, May be Admitted to Impeach Credibility—}

During the course of a trial in an Illinois state court on a charge of burglary, the prosecution, in the case of \textit{People v. \textit{Kirkpatrick}},\textsuperscript{1} over objection, was permitted to impeach the defendant's credibility by introducing the record of his conviction in a federal court for a violation of the Dyer Act.\textsuperscript{2} Following upon defendant's conviction, this ruling was made the basis of a writ of error to the Illinois Supreme Court, the defendant urging on that court that only evidence regarding the conviction of those crimes declared to be infamous by an Illinois statute\textsuperscript{3} could lawfully be used to impeach credibility.\textsuperscript{4} The Illinois Supreme Court, agreeing with the defendant's contention, held the admission of the federal criminal record amounted to a prejudicial error which required the remanding of the case for a new trial.\textsuperscript{5}

Under a common-law rule which had rendered a person convicted and sentenced for an infamous crime incompetent to testify, numerous cases arose wherein witnesses, convicted of crime in other jurisdictions, sought to testify despite laws which would have disqualified them had the prior offenses occurred within the boundaries of the forum.\textsuperscript{6} A majority of these cases held that these witnesses could testify since the denial of that privilege would, in effect, require the enforcement of the penal judgments of sister states,\textsuperscript{7} but a few courts did take an opposing position,

\textsuperscript{12} See \textit{Tidal Oil Co. v. Pease}, 153 Okla. 137, 5 P. (2d) 389 (1931), but note that the lease referred to therein permitted the passage of salt water over the surface of the leased premises.

\textsuperscript{1} 413 Ill. 595, 110 N. E. (2d) 519 (1953).


\textsuperscript{3} Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 587, lists the offenses regarded as being infamous in Illinois.

\textsuperscript{4} Ibid., Vol. 1, Ch. 38, § 734, provides that no person shall be disqualified as a witness by reason of his having been convicted of any crime but adds "such ... conviction may be shown for the purpose of affecting his credibility."

\textsuperscript{5} The court also held that it was prejudicial error to select the trial jury from the same panel which had, on a separate occasion, tried and convicted an alleged accomplice involved in the same offense.

\textsuperscript{6} An exhaustive treatment of this topic appears in an annotation in 2 A. L. R. (2d) 579. See also 58 Am. Jur., Witnesses, §§ 137-40.

\textsuperscript{7} A leading case for this view may be found in \textit{Commonwealth v. Green}, 17 Mass. 515 (1822).
reasoning that the objective of the rule was not to penalize the convict so much as it was intended to protect the courts of the forum from the possibility of perjury. 8

Numerous statutes have been enacted with a design to modify the common-law rule regarding incompetency of witnesses. They usually provide that no person may be excluded as a witness because of a criminal conviction but do allow the conviction to be shown so as to affect credibility. 9 As a consequence, earlier problems regarding disqualification have become almost obsolete 10 but there has been a shift in interest centering around the possibility of impeachment of credibility upon proof of a conviction obtained in another jurisdiction. While many courts have refused to allow the foreign record to operate to disqualify a witness, cases do exist in which the foreign record has been utilized to support a right to impeach credibility, 11 particularly where the earlier conviction could be regarded as being infamous in both of the jurisdictions. Even so, courts still reserve the right to apply their own local law in determining whether or not the particular crime relied on is infamous in nature. 12 As the Illinois legislature has specified the offenses it considers to be infamous, 13 the strict application of the statute given by the Supreme Court in the instant case makes possible a uniform treatment of the problem throughout the state, without taking into consideration possible variations existing elsewhere. It remains to be determined, however, whether the converse of the problem would produce a similar result. 14

8 The leading case taking the opposite view may be noted in the holding in Chase v. Blodgett, 10 N. H. 22 (1838). No criminal case has been located where a witness expressly declared competent under the law of the forum, but incompetent at the place of conviction, has been denied the right to testify. As to the view with regard to civil cases, see Bowers v. Southern Ry. Co., 10 Ga. App. 367, 73 S. E. 677 (1912), and Day v. Lusk, 219 S. W. 597 (Mo. App., 1920).

9 See, for example, Ill. Rev. Stat. 1851, Vol. 1, Ch. 38, § 734. For statutes in other states, see Wigmore, Evidence, 3d Ed., § 987.

10 The problem still remains in a few states which have retained the element of disqualification as to those witnesses convicted of perjury or related crimes: 58 Am. Jur., Witnesses, § 140.

11 Impeachment of credibility has been allowed in Nelson v. State, 35 Ala. App. 168, 44 So. (2d) 802 (1950); State v. Foxton, 166 Iowa 181, 147 N. W. 347 (1914); City of Boston v. Santosuosso, 307 Mass. 302, 30 N. E. (2d) 278 (1940).


14 If fear of perjury is the basis for decision, it would seem that one convicted elsewhere for an offense not infamous where committed, but classified as such by the Illinois legislature, should be exposed to impeachment in Illinois, for the conduct demonstrating probable testimonial unworthiness would be the same, regardless where committed.
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With the passage of time, publications intended for use by law students appear to have shifted from one extreme to the other. Early case-books contained little beyond selected reported decisions, out of which, by struggle and effort, students were expected to deduce applicable or controlling principles composing the body of the common law. Later works, with an eye to universal appeal, added footnotes of the catalog variety, tabulating the pertinent decisions of all jurisdictions, so that the student, whether from Maine or California, could prepare his own gloss for local use. Still later, explanatory footnotes were often used, amplifying upon the reported cases, intended to aid the novitiate in his effort to achieve understanding or to deal with side issues. The impact of statute law called for still further revision and supplementation in teaching materials, but the final step came with the publication of "materials," as well as cases, either to furnish a more comprehensive picture or to serve as an introduction to those problems handled in the selected cases. It has, however, been left to Professor Snyder to achieve the penultimate step, for his new book, designed to instruct the student in the basic principles of criminal law, consists more nearly of textual introduction and description than it does of selected cases.

If the book were to be shorn of the approximately one hundred illustrative decisions reproduced at length therein, each so labelled as to remove all elements of mystery, it could, more accurately, be designated as a text. Those who still believe in the "sink or swim" method of teaching will have little use for it. Others, not so drastic in their teaching approach, may find it useful but may have qualms as to whether beginning students will, from so much spoon-feeding, develop that toughness of mind which must be the concern of first-year instructors, particularly those charged with drilling students in legal method as well as the responsibility of providing instruction in basic courses. Except for these criticisms, Professor Snyder's work possesses an excellence beyond that normally found in books prepared for schoolroom use.

One area has, however, always been marked for attention, not only in the discussion of works bearing on the field of criminal law but also in the reports of bar association committees and the like. It has to do with
the matter of procedure in criminal cases. The distaste displayed on the part of many lawyers when asked to appear in court on behalf of persons accused of crime, often rationalized on the ground that the attorney prefers not to associate with such people, not infrequently stems from the fact that the civil lawyer, adept though he may be in the handling of civil trials, often feels a sense of loss when faced with the distinctive procedures utilized in a criminal case. Too frequently the real fault lies in the fact that many law schools, in circular fashion, seize upon this anticipated lack of interest as justification for giving only passing attention to criminal procedure. If that is not the source, then the fault lies in the fact that many casebook authors, from much the same motive, furnish only a modicum of material on the point. Professor Snyder's book, in this respect, does more than most others, but it still falls short of providing the full training the student should receive.

There is at hand, fortunately, still another book which can serve to fill the gaps. Professor Puttkammer, long a noted expert in the field of criminal law, through his engaging study entitled "Administration of Criminal Law," has now provided a sufficiently comprehensive account of a criminal case, from inception to conclusion, as will serve to supply all the knowledge every but the most exacting student would wish or expect to acquire short of entrance into actual practice. Written for the benefit of the interested layman as well as the student, but with thought in mind for the practicing lawyer who normally has little professional contact with the criminal law in operation, the book makes no pretension of being a technical work of the type expected from the customary legal text. It does, however, provide answers for most of the issues raised in the administration of criminal law.

One experienced in the philosophy behind this segment of law might be inclined to skip the first twenty-odd pages, although they do provide a well-stated commentary on the several theories advanced to support punishment for crime. The balance of the book should, by contrast, receive close attention, not because it is difficult to read for actually it is most lucid in its style but because, as is true with any condensed account, practically every word has been made to count. Those few digressions which do appear afford welcome relief against this need for close concentration. As the book contains both descriptive and analytic passages, it permits the author an opportunity to express his own ideas about some reforms which well could be made in an area of law long marked by a degree of irrational technicality. His thoughts on that score would alone make the book worthy of attention. The balance of its contents, therefore, represent a bonus originating from a long-distilled teaching experience.

Through an explanatory preface to this book emphasizing the need for organized study of contemporary statutes, state constitutions, and other forms of "written" law, Dean Stason describes the formation, development, and activity of one of the most significant institutions recently created to work in an area of law where opportunities for effective service are legion. Professor Estep, Director of the Legislative Research Center, in another preface, amplifies that description with a delineation of the purposes, methods, and objectives of the Center and its personnel, from the mere statement of which it is apparent that, over the years, a substantial void in the literature of the law regarding state statutory enactments will be filled. Specifically, it is the promise of the Center, not necessarily annually but at least periodically, to do much the same thing for the realm of statute law as has been done, in the past, with respect to legal developments accomplished by the courts. The emphasis, however, is not to be simply along the line of a reportorial statement as to statutes enacted or amended but is, rather, to be directed toward the production of critical analyses in those areas where legislation may be needed, or with existing statutory attempts intended, to fill notable deficiencies in private law. Written for legislators who must consider the need for, as well as the form of, statutory proposals and for lawyers who will have to advise clients who may be affected thereby, these studies in current trends in legislation should prove to be a most effective tool in the promotion of reasonableness, if not of uniformity, in written law.

Turning to the current volume, the first in what it is hoped will be an extended series of equally worthy successors, it may be noted that eleven topics here chosen for current study, involving the reproduction of an equivalent number of valuable monographs by six different authors, range through such wide-spread areas as to denote that neither issues of geography nor of relative importance will be permitted to reduce the series below the rank of national, if not even of international, interest. Aspects of tort law, family law, procedural law, corporation law, mortgage law, trust law, and of evidence law here considered serve to demonstrate that the Legislative Center will be catholic, to say the least, in its selections, while the treatment accorded to legislation originating in such diverse states as North Carolina, Montana, New Jersey, and New York

1 See, for example, any of the recent volumes of Annual Survey of American Law, prepared by New York University School of Law, written at the national level; the December issues of the CHICAGO-KENT LAW REVIEW for the last fifteen years, for changes in Illinois law; and comparable surveys published in the law reviews issued in a number of other states.
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reveals that issues of narrow parochialism will not be allowed to mar the output of the Center's personnel.

Examination of these monographs also discloses that there is much at hand which should concern the Illinois lawyer. Does this state, for example, have adequate statutory coverage for the problems involved in defamation by radio; for notice with respect to the approval of the accounts of trustees over common trust funds; for administrative enforcement of civil rights measures; or in relation to the protection of the rights of dissenting minority shareholders, especially with regard to the conduct of derivative suits or allocating the burden borne by the director in conducting a successful defense? Further study will reveal that the recently adopted statute designed to compel the defaulting and non-resident parent to bear the cost of support is far from complete; that the regulation concerning bank deposits made in trust is woefully inadequate; that reliance on judicially developed doctrines regarding the handling of interpleader suits or in the application of a discretionary policy concerning forum

2 The pertinent section of the Illinois Criminal Code, reputedly enacted because a careless master of ceremonies in a Chicago night-club once broadcast the statement that a prominent public official was present at a ring-side table when he was actually home in bed, would appear to be inadequate, not only with respect to civil liability but also for its relation to defamation via television, since it is confined to malicious defamation by means "of what is commonly known as the radio." Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 404.1. Italics added.

3 Contrast Ill. Rev. Stat. 1951, Vol. 1, Ch. 16-1/2, § 60, with the discussion of the Mullane doctrine, growing out of a comparable New York statute, to be found beginning at page 33 of the book under review.

4 Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 125 et seq., places enforcement in the hands of the courts. The provisions of ibid., Ch. 29, § 17, bearing on discrimination in connection with public contracts, and § 24a, as to defense work, are likewise limited in character.

5 There is a noticeable lack of stimulus to good-faith negotiation to arrive at a "fair value" for the dissenter's shares in the provisions of Ill. Rev. Stat. 1951, Vol. 1, Ch. 32, §§ 157.70 and 157.73, as well as an absence of coverage regarding the manner of distributing the burden of costs in suits based thereon. The discussion of the right of the dissenting shareholder to appraisal, beginning at page 145 of the book, demonstrates the existence of many other flaws.


7 Ill. Rev. Stat. 1951, Vol. 1, Ch. 68, § 50 et seq., enacted in 1949, does not provide for enforcement of the non-resident child's obligation to support an indigent parent, nor does it permit a public agency, on subrogation, to secure reimbursement for money advanced to a dependent person.

8 Ibid., Vol. 1, Ch. 16-1/2, § 23.

9 A crucial defect in relation thereto, insofar as it affects jurisdiction over a non-resident claimant to the fund, may be noted in the monograph entitled "Recent Legislation Designed to Eliminate Double Liability," appearing at pages 523-60.
non conveniens\textsuperscript{10} may be less than wise; and that the present limited statute regarding the giving of mortgages to secure future advances\textsuperscript{11} might well be expanded. The discussion relating to the use of photographic copies of business records as evidence, in lieu of the originals, also opens up interesting vistas concerning proof in civil cases.\textsuperscript{12}

Comment with respect to Illinois could readily be duplicated for practically every state in the union. Armed with material of the character to be found in this current survey, legislators and lawyers everywhere should be capable of dealing more intelligently with such matters as the constitutionality, the effectiveness, or the basic wisdom in statutory proposals; drafting bodies should be able to phrase enactments in more comprehensive or appropriate language; and schools should be in a position to do a much better job in the conduct of courses on legislation. The plaudits of the legal profession, in all its branches, should, therefore, be extended to Dean Stason and his colleagues for undertaking to do a job which sorely needed to be done and for initiating the project with a display of ability which, despite apprehensions concerning sailing over uncharted seas, speaks highly of the careful planning, extensive research, and excellent judgment revealed in these collected papers.

W. F. Zacharias


"Rhetorical techniques," says Professor Cooper, opening this new book designed to do something about popular complaints concerning lawyers' writing, "are as important to the lawyer as to any other writer. In every phase of practice, the successful lawyer must be an effective writer." Since that thesis is not open to contradiction, the prime concern of the reviewer, when dealing with a book of this character, must necessarily be confined to a testing of the techniques suggested, an examination

\textsuperscript{10} There would appear to be a striking inconsistency between upholding the right of a court to refuse to take jurisdiction because of a lack of convenience in the handling of a case, as evidenced by such decisions as the one attained in Whitney v. Madden, 400 Ill. 185, 79 N. E. (2d) 598 (1948), cert. den. 335 U. S. 828, 69 S. Ct. 55, 93 L. Ed. 382 (1948), and denying to the legislature, as by Ill. Rev. Stat. 1951, Vol. 1, Ch. 70, § 2, the right to limit suits in wrongful death actions to those cases which arise in the forum or where the suit must, for some other reason, necessarily be conducted there. See Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951), noted in 30 \textit{Chicago-Kent Law Review} 174, and First Nat. Bank v. United Air Lines, 342 U. S. 396, 72 S. Ct. 421, 96 L. Ed. 441 (1952).

\textsuperscript{11} The policy underlying Ill. Rev. Stat. 1951, Vol. 1, Ch. 51, § 3, authorizing the use of photographed or microfilmed business records, runs counter to Ill. Rev. Stat. 1951, Vol. 2, Ch. 120, § 446, which requires the preservation of original records for purpose of determining the extent of liability to pay a retailers' occupation tax.
BOOK REVIEWS

of the methods followed, and an estimation of the results which might be achieved from the materials thus supplied, for it goes without saying that there is much to be deplored in the written product turned out by most students, many lawyers, and even by some judges.

The place to begin correction probably lies quite early in the educational process, where spelling, syntax, rhetoric and grammar should be, but too frequently are not, stressed as much as they ought to be. For that matter, expansion in the use made of media for mass communication, such as the radio or television, has derogated against reading, the one time primary source for the acquisition of a broad vocabulary or for training in the art of conviction through effective word organization. Too frequently, therefore, the would-be lawyer is poorly equipped in terms of language knowledge and urgently in need of books on the subject under consideration. If they are not works on correct English usage, and this one is not, one thing an author could do would be to point out some glaring examples of language faults and leave the lessons to drive themselves home as best they may. Professor Cooper has done this, using some vivid illustrations drawn from judicial records for the purpose, offering other and model specimens to heighten the contrast. The author might also, as does Professor Cooper, place emphasis on words and phrases to be avoided, particularly those likely to drop from the lips of lawyers prone to follow the embalmed language of legal tradition. In other respects also, Professor Cooper, in his own style, repeats what has been said before in works of comparable character. To this point, then, the needful person has his choice and could gain equivalent benefits from the perusal of any one of several works listed in an accompanying bibliography.

The one principal difference, one which makes this book not only significant but also one of inestimable value, lies in the fact that it is a work book, full of exercises and assignments based on included materials calling for the development of a series of skills if the user is to produce acceptable forms of opinions, letters, pleadings, briefs, contracts, wills, statutes and registration statements. Undeniably useful in connection with a class in legal writing, where individual comment could be made regarding the degree of success achieved, the book could still be used by itself for, while it furnishes no model forms to be copied slavishly, it sets up its own criteria for evaluation. Since nothing like precision in the use of language can be gained without effort in its use, the student, lawyer, or judge, who realizes his own deficiencies is invited to work out a few of the assignments. He would soon find that the author's techniques and methods are capable of producing worth while results.
ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES, Revised Edition.

The appearance, in 1949, of the original edition of this work was noted by the comment that it was an "unconventional" book in arrangement, one that was "suggestive, instead of exhaustive" in character, but withal one that deserved attention.¹ The new edition departs but little from its progenitor, following generally upon the same arrangement and building upon much of the text originally there set forth, but it does contain considerable amplification in those areas where change has occurred and the footnotes have been brought up to date with many recent citations. One noticeable improvement lies in the fact that whereas the original edition appears to have been planographed from varitype, the revision has been printed, making it possible to reproduce a much larger volume of material in fewer pages. Any discrepancy, therefore, between the number of pages in the two editions should not be regarded as representing an undesirable condensation. If anything, the newer one actually contains more "meat" than was the case with the earlier edition for roughly one hundred pages previously devoted to tax and similar tables have been deleted in favor of an expansion of textual materials.


As no analysis of the legal profession would be complete without the giving of some attention to the manner by which most lawyers gain their training for professional service, it was to be expected that one of the topics included in the current monumental Survey of the Legal Profession would deal with an historical and critical evaluation of legal education in the United States. Selection of that topic almost inevitably led to the choice of Dean Harno of the University of Illinois College of Law as the person to report thereon for he has not only been well known to all law teachers, having presided over the affairs of the Association of American Law Schools, but he has also enjoyed a wide acquaintance with practicing lawyers through his official connections with many professional associations. His recently released masterly summary of the stages through which education in law has progressed, his penetrating analysis of the difficult task the law schools have been forced to perform, and his record of the achievements they have accomplished bear evidence to the fact that the choice was well made. Lest it be assumed that this report amounts to

no more than a paean for legal education as it is presently administered, it should be emphasized that there is much in these brief pages to prod the teaching side of the profession to a realization that not all is well in this best of all possible worlds.

In that regard, however, the practicing side of the profession is not without fault: first, for its insistence that the schools abide by quantitative, rather than qualitative, educational requirements; second, for its insistence that educational costs be kept at a low level, to preserve a democracy of the bar, without evidencing a willingness to provide the schools with adequate financial support to offset inevitable expense; third, for its unwillingness to comprehend what modern law schools are capable of accomplishing in the time allotted to them; and fourth, for an unwarranted insistence that the graduate of the law school room be prepared to perform, without hesitation and delay, those tasks which can be performed only after an apprentice-type period of training with actual, rather than theoretical, situations. The furnishing of money, the granting of an addition to the training time, will not alone provide the cure. Poor logic has been displayed, for example, in the demand that, to a large extent, the law school staff should devote its full time to instruction, cut off from the vitality of practice, while the bar bemoans the fact that the product of the law school, despite sound training in theory, emerges in far too green a state of practical ability. For that matter, organized insistence upon instruction in the ethics of the profession, based on the assumption that an ethical character can be developed simply from the perusal of some appropriate book, runs counter to those mores too frequently demonstrated in fields of practice.

It is time, therefore, that the law schools and the profession get together upon some understanding basis concerning the educational functions and capabilities of each. This book, despite its tendency to state briefly and to over-simplify, serves to mark out these fields. It provides the practicing lawyer, especially one not too well-versed in modern law school methods, with an adequate picture of what is, and what is not, within the scope of formal instruction. It marks, for the law schools, those areas wherein intensified effort or expanded development could produce desired results. While not too charitable toward part-time legal education, it nevertheless presents a reasonably comprehensive statement of the pro and con of the university, as opposed to the proprietary, school. For these and other reasons, the book is one which should command attention.

Except as the practicing lawyer may be fortunate enough to be able to hire an already well-trained competent legal secretary, one on whom he may safely rely for the handling of much of the routine activity around the law office, he will find it necessary to spend many, and frequently unfruitful, hours of valuable time educating the current incumbent of the stenographer's desk in the standard practices, forms, and usages of a well-run office. Too often, alas, the job of training must be done over again when Tillie, or whatever her name might happen to be, sees fit to trade the typewriter for a wedding ring and a new incumbent arrives to take over in her place. Let the lawyer faced with that problem now take heart for here, in straightforward but authentic fashion, is a running account of what the lawyer has a right to expect from one entitled to the designation of legal secretary, written so that she—the species is generally feminine in gender—can learn for herself the differences existing between a will, a deed, and a brief, and may then, quite rapidly, turn out an acceptable draft of each.

While not intended to make a lawyer out of a stenographer, the book contains an amazingly large amount of information of help to the uninformed. It should, if read understandingly, prevent the return to the employer of his choice dictated phrase, whether Latin or otherwise, in that garbled typewritten form which often inverts duces tecum into a poker hand where "deuces take 'em," or corrupts amicus curiae into a strange form of expletive. For that matter, the telephonic response "He ain't in" might, through recourse to this book and without too much prodding, be turned to something more appropriate for use around a refined office with an estimable clientele. It provides enough competent instruction to make a secretary into an adequate bookkeeper if not a certified public accountant. She should, after some study, to use a common expression, be able to tell a hawk from a handsaw. If, perchance, she still cannot remember all of these things, but is worth keeping around until someone better qualified appears, there is a well-compiled index to the book and a quick glance should put her in touch with what she ought to know.

Against the possibility that verbal instruction may not be enough, the author, with the aid of an advisory committee composed of members of legal secretaries associations working around the country, has provided an abundance of illustrations, charts, diagrams, and facsimile reproductions of common legal instruments to serve as working models. Some legal secretary may well be prompted to remark that she wished her employer knew as much about office practice as the author. It might be
wise, then, to read this book before passing it on to another. It should aid
the lawyer as well as his secretary.


Quite a few lawyers, perhaps not without pride for their authorship,
have caused their appellate briefs and records to be bound in substantial
volumes, backed with their names in gilt, and have thereafter placed the
same in prominent spots of their library shelves as permanent, if not
entirely valuable, mementos of their experiences in practice. Few such
lawyers would regard collections of this character as being significant
products of legal scholarship, much less consider them worth being digni-
fied as legal texts, although they might regard them highly for their worth
as form books open to use when the need for some particular specimen
should arise. It has remained for the author of the current work, by the
addition of necessary supplementation, to turn this not uncommon prac-
tice into an acceptable work for the guidance of those less experienced in
the techniques of preparing and presenting cases on appeal before the
reviewing tribunals.

The supplementation referred to takes the form of explanation, com-
ment, criticism, and precept offered by way of preface to those model
forms of appellate documents used by the author, often with success, in
his practice before a wide variety of courts. Following thereon, sample
forms are reproduced *in extenso* to make up the bulk of the book. Prac-
tically every problem which could arise, from the laying of the foundation
for appeal in the trial court to the presentation of a petition for rehearing
before the highest court, has been covered herein, yet the book falls short
of being an elaborate text on appellate procedure for it lacks the treat-
ment and documentation usually found in texts of that type. Despite this,
the work should have a wide appeal to local lawyers for many of the model
forms presented were successfully utilized in cases coming before the
courts of Illinois. The value of these forms might have been made more
apparent had the author provided appropriate citations, but these, if
needed, can be uncovered with little difficulty since case names are given
in connection with each. The longest, and incidentally the most effective,
piece of supplementation, a discussion filled with many practical pointers,
deals with oral argument on appeal. While preferring not to pose as an
expert on appellate processes, the author has, in this highly practical fash-
ion, benefited the bar and has acted to aid the courts, by making his com-
monplace book available to the profession.

Fictional works are rarely considered as suitable material for analysis in the columns of a law review, not because fiction has no bearing on law but rather because busy practitioners and overworked students have little time for anything but serious reading. Nevertheless, here is a novelette of purely fictional character which, although brief and quickly read, serves to point up a serious legal problem, to-wit: whether faith healers and the like should be held criminally responsible for the harm they have caused to the State and its citizens under the guise of religious practices or with respect to advice concerning purported religious beliefs. The line between charlatanism and religion could be hard to draw; the basis for responsibility with regard to criminal neglect might be difficult to establish; but the fact remains that much of that which has been done in the name of religion has possessed a profound impact on law and there is genuine occasion, at this time, to review all the applicable principles.

Mr. Cawley has not written a very good novel but he makes no secret of the fact that he believes unsuccessful faith healers are actually, if not in law, the equivalent of accessories before the fact to murder in case their misguided victims should die. Others may doubt the validity of his thesis, yet there can be no question as to the unique social significance of his ideas. His message, like a small pebble dropped in a pool, could well bring about some wide-spread repercussions, if not some worth-while reforms.

1 Many classical novels serve to enrich the study of law or throw light on legal operations. See a list of over three hundred such novels, compiled by the late Dean Wigmore and others, in 2 Ill. L. Rev. 574 (1908).


3 Ibid., Ch. 38, § 95, dealing with the endangering of the life or health of a child, requires that the conduct or omission must be “wilful” in character.

4 See, for example, People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769 (1952), cert. den. — U. S. —, 73 S. Ct. 24, 97 L. Ed. (adv.) 36 (1952), vindicating the right of the State to intervene, as parens patriae, when the parents of a new-born child, on religious grounds, refuse to permit the administration of vitally needed blood transfusions.
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