

2-1938

Conflict of Laws-Qualifications

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Recommended Citation

(1938) "Conflict of Laws-Qualifications," *Indiana Law Journal*: Vol. 13: Iss. 3, Article 7.
Available at: <http://www.repository.law.indiana.edu/ilj/vol13/iss3/7>

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CONFLICT OF LAWS—QUALIFICATION—The Burns Mortgage Company brings an action on a promissory note, dated October 10, 1925, given by the defendant Hardy in the state of Florida, and so executed under the laws of that state to constitute a sealed instrument. Under the law of New Hampshire, the state in which the action is brought, the instrument is not a contract under seal. Section 3 of the New Hampshire statute of limitations provides that personal actions shall be brought within six years after the cause of action has accrued. The following section provides for a twenty-year period in which to bring actions on contracts under seal. Defendant demurs on the ground that the action is barred by Section 3 of the statute. HELD: Statutes of limitation are local in character, and the statute of the forum, not that of the place of contracting, governs. The note in suit, being a simple contract, and not a specialty, falls under the six-year limitation provided by the New Hampshire statute, and therefore action is barred in this jurisdiction.¹

The court determined that the New Hampshire statute of limitations should apply to the action, as the *lex fori* governs in matters local in character.² For purposes of this discussion, that much of the decision will be assumed to be

⁸ *Washington Township Board v. American Surety Co.* (1932), 97 Ind. App. 45, 183 N. E. 492; *Bank of Fayetteville v. Lorwein* (1905), 76 Ark. 245, 88 S. W. 919; *Knaff v. Knoxville Bank & Trust Co.* (1916), 133 Tenn. 655, 182 S. W. 232.

⁹ A partial payment of the debt even though it may be the full amount for which the surety is bound does not give rise to a right of subrogation. *Washington Township Board v. American Surety Co.* (1932), 97 Ind. App. 45, 183 N. E. 492; *United States v. National Surety Co.* (1920), 254 U. S. 73, 41 S. Ct. 29; *McGrath v. Carnegie Trust Co.* (1917), 221 N. Y. 92, 116 N. E. 787; *Rice v. Morris* (1882), 82 Ind. 204.

¹⁰ *Browder & Co. v. Hill* (1905), 69 C. C. A. 499, 136 F. 821; *Bank of Fayetteville v. Lorwein* (1905), 76 Ark. 245, 88 S. W. 919.

¹¹ In the case of *Walters' Palm Toffee, Ltd. v. Walters* (1933), Ch. Div. 321, the court said that plaintiff who had guaranteed payment of dividends could be subrogated to the claim of the preferred stockholders who were paid with his money. In this case, however, the preferred stockholders would not be prejudiced; for there appeared to be sufficient earnings to pay the dividend claim in full. Moreover, the statement was *dicta*.

¹ *Burns Mortgage Company, Inc., v. Hardy* (District Court, D. New Hampshire, 1937), 19 F. Supp. 287.

² 5 R. C. L. Sec. 197, p. 11.

correct.³ The application by the court at the forum of a local remedial device, however, presupposes a situation to which it is appropriate. The statute of limitations of New Hampshire has, like most statutes of limitation, two provisions, one of which provides for a six-year period in which to bring actions on simple contracts, the other for a twenty-year period in which to bring actions on contracts under seal.⁴ Thus, the contract in the principal case must be qualified—placed in its proper juristic pigeonhole—so that the pertinent provision of the local statute can be applied.

The court apparently experienced no difficulty in taking care of this prerequisite. It applied the law of New Hampshire to the contract to determine whether it was a sealed instrument or a simple contract, found it to be a simple contract under that law, and applied the local statute of limitations to it as such. The decision that the instrument was a simple contract, and that the six-year section of the statute applied was evidently thought to be a necessary result of the conclusion that the New Hampshire statute of limitations governed the action. It is submitted that this is an over-simplification of the problem. The fact that a rule of law of the forum is characterized as procedural, or local, justifies the court in applying it,⁵ but it does not explain the application of the local law when it seeks qualification of the legal character of the situation to which the local law is applied.⁶

It is necessary, in determining which of the provisions of the local statute of limitations is to be applied to the instrument involved, first to determine, according to the proper law, whether the contract is to be treated as a contract under seal or as a simple contract.⁷ To determine what is the "proper" law to deal with this question, it is first necessary to decide whether the distinction between contracts under seal and simple contracts is one of procedure or one of substance.⁸ If the New Hampshire law and the Florida law treat the distinction differently, the court must determine which law is applicable to decide this preliminary question.⁹ The majority of courts, it seems, adopt the criteria

³ It is interesting to note, however, that all statutes of limitation are not considered as being procedural. See Story, *Conflict of Laws* (8th Ed., 1883), Sec. 582; Goodrich, *Conflict of Laws* (1927), Secs. 86 and 87.

⁴ Public Laws of New Hampshire (1926), Secs. 3, 4.

⁵ *Supra*, note 2.

⁶ *Supra*, Note 2.

⁷ P. Arminjon, *Precis de Droit International Prive*, Vol. 1 (2d Ed., 1927), Librairie Dalloz, p. 224 (Translation by Harper and Taintor in *Cases on Conflict of Laws*, p. 224); Ernest G. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920), 20 *Columbia L. Rev.* 247; Etienne Bartin, *De L'Impossibilite D'Arriver a la Suppression Definitive Des Conflicts de Lois*, Clunet (1897), pp. 225-255 (Translation by Harper and Taintor in *Cases on Conflict of Laws*, pp. 253-257); H. L. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930), 78 *University of Pennsylvania L. Rev.* 933. (Note that in *Bank of U. S. v. Donnally* (1834), 33 U. S. 361, 8 L. Ed. 974, and in *Alrope Corporation v. Rossee* (1936), 86 F. (2d) 118, relied upon by the court in the principal case, this question was decided according to the law of the forum, without treatment separate from that of the question of application of remedial law.)

⁸ McClintock, *supra*, note 7.

⁹ *St. Louis-San Francisco R. Co. v. Cox* (1926), 171 Ark. 103, 283 S. W. 31; *Wood and Selick v. Compagnie Generale Transatlantique* (1930), 43 F. (2d) 941; *Conflicts of Laws*, Tentative Draft No. 5, Sec. 613 (c), "The forum, in determining in accordance with its own law whether an element of a

of the forum to determine this question. Is it not rather anomalous, however, that the law of the forum should be applied to determine the classification of a rule of law which is to be made applicable to a transaction which was completely consummated in another state, and which was necessarily signed, sealed, and delivered according to the rules of law applicable in that state?¹⁰ If the law of the place of contracting, as is conceded in the principal case, determines the nature, validity, construction, and effect of the instrument,¹¹ should it not also determine whether the distinction which it makes between sealed instruments and simple contracts is substantive or procedural in nature?¹²

On the assumption that the law of Florida treats the distinction as one of substance, the next step is to look to the Florida law to determine the juristic category into which the instrument should be placed.¹³ Under the law of Florida, it is clear that the contract is to be treated as a sealed instrument.¹⁴ It seems, then, that it should be so considered by the court at the forum when the statute of limitations of New Hampshire is applied. If, on the other hand, the Florida law treats the distinction between simple contracts and contracts under seal as a matter of procedure, there could be no technical objection to a similar qualification under the New Hampshire law.

Since, by this process, uniformity in result can be obtained, it would appear to be a valid criticism of the instant case that the court ignored an important question, upon the solution of which may depend that uniformity which it is the function of Conflict of Laws to obtain.

R. W. W.

CRIMINAL LAW—EFFECT OF BREACH OF DUTY BY MINISTERIAL OFFICER—SENTENCES OF STATE AND FEDERAL COURTS—On June 2, 1930, the federal court convicted the petitioner of impersonating a federal officer, sentenced him to six years in prison, and issued a warrant for his commitment on the same day, directing the marshal to deliver him to the United States penitentiary "forthwith." The marshal neglected to carry out the order, retained custody of the prisoner, and later over the protests of the petitioner turned him over to state authorities who had previously filed an information (on May 14, 1930) charging forgery against him. The state arraigned him for trial, and on July 31, 1930,

foreign transaction is matter of substance or procedure, will examine the entire nature of the transaction, including the statute or principal of law which created the alleged right and the interpretation thereof; but will not inquire whether the foreign court will call the various rules involved in the transaction substantive or procedural." But observe in, note 10, the comment by McClintock on this section. The final draft of the Restatement materially rephrases this section.

¹⁰ McClintock, *supra*, note 7, says, "The statement of the comment that the forum 'will not enquire whether the foreign court would call the various rules involved in the transaction substantive or procedural' is manifestly contrary to the general theory of the Restatement that in the field of conflict of laws one deals principally with the jurisdiction of states to create rights and the enforcement of the rights so created in other jurisdictions."; *Burns Mortgage Co. v. Fried* (1934), 292 U. S. 487, 54 S. Ct. 813; *Precort v. Driscoll* (1931), 85 N. H. 280, 157 A. 525; *Halsey v. McLean* (1816), 94 Mass. 438.

¹¹ *Supra*, note 2.

¹² *Supra*, note 10.

¹³ *Supra*, note 2.

¹⁴ Compiled General Laws Florida, 1927, Secs. 5704, 5705.