

CONFLICT THEORIES OF CONTRACTS:  
CASES VERSUS RESTATEMENT

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## THE THEORY OF THE RESTATEMENT

AMERICAN conflict cases on contracts have had a bad press in this country, primarily, it seems, as a result of the strong criticism of the cases by Professor Beale,<sup>1</sup> Reporter of the Restatement of the Law of Conflict of Laws and author of the famous and most comprehensive treatise on the Conflict of Laws. Professor Beale's doctrines on the Conflict aspects of contracts have been embodied in the Restatement, and the resulting semi-official repudiation of a great many cases has further influenced the judgment of the legal profession. It is submitted that the unfavorable estimate of the cases is caused by doctrinal preconceptions; perhaps a comparative approach will facilitate a fairer appraisal. Noteworthy is a remark by Professor Batiffol of the University of Lille, author of the leading comparative treatise on the Conflict law of contracts, in the preface to his work: "We must say that it is the study of the American cases ['jurisprudence américaine'], incidentally at first blush just as confused as the others, which has definitely enlightened us, in comparison with the French cases . . ."<sup>2</sup> In fact his treatise clearly reveals the manifold insights which Professor Batiffol has received from the American cases. The present writer's experience has been similar.

While the writer's primary objective is to outline what he found in the cases, it is necessary to devote a considerable part of the discussion to the contracts chapter of the Restatement of the Law of Conflict of Laws. There has been already much penetrating criticism of this chapter;<sup>3</sup>

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1. See p. 897 *infra*.

2. BATIFFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938) 3.

3. See Lorenzen & Heilman, *The Restatement and the Conflict of Laws* (1933) 83 U. OF PA. L. REV. 555, 573; Cook, *'Contracts' and the Conflict of Laws* (1936) 31 ILL. L. REV. 143; Willis, *Two Approaches to the Conflict of Laws* (1936) 14 CAN. B. REV. 1; Harper, *Das 'Restatement of Conflict of Laws'* (1935) ZEITSCHRIFT FÜR AUSLÄND. UND INT. PRIVATRECHT 844; see also Yntema, *The Restatement of the Law of Conflict of Laws* (1936) 36 COL. L. REV. 183. The general criticism of the territoriality doctrine, *infra* note 39, has an indirect bearing upon the Restatement.

perhaps more so than of any other single part of the great work of the American Law Institute. But this criticism has been mainly directed against certain theoretical phases of the chapter, so that the present inquiry into the cases is in a sense supplementary. Moreover, since the Restatement's conception of the matter at hand still dominates the legal mind, the Restatement presents a natural background against which divergent views may be properly set.

It is well known that this conception is based on the law of the place-of-contracting (*lex loci contractus*) theory,<sup>4</sup> a theory which has been championed by Professor Beale. Theories which focus on the place of contracting are not unfamiliar in Private International Law. Many courts and writers, both American<sup>5</sup> and foreign,<sup>6</sup> favor the application of the *lex loci contractus* in case of doubt. Moreover, the idea is time-honored and common that parties acting in a given territory must not violate the law of that territory lest their transaction be invalidated.<sup>7</sup> Hence, there is no reason for rejecting the place-of-contracting theory altogether. However, the Restatement's version of the theory has certain extraordinary features, namely:

(1) the courts are considered powerless to depart, through their Conflict rules, from the control of the *lex loci contractus*; and in no case may the contrary intent of the parties be taken into account (the inflexible character of the doctrine);

(2) this solution is made even more rigid by the postulate that the place of contracting be determined by the internal rules on offer and acceptance, with no regard to the essential materiality of the contacts contemplated;

(3) the inflexible rule is extended to the effects of the contract;

(4) intrinsic and extrinsic validity are treated in the same way; and

(5) the primary place-of-contracting theory is supplemented by a secondary, again inflexible, place-of-performance theory, with an inordinately wide and ill-defined orbit.

The extension of the place-of-contracting theory to the effects of the contract, *supra* number 3, is not easy to discover. While systematic discussion of Private International Law ordinarily separates the issues of

4. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) c. 8, topics 1 & 2 (hereinafter cited as RESTATEMENT).

5. Many instances from American cases are cited throughout Professor Beale's treatise. See 2 BEALE, CONFLICT OF LAWS (1935) 1107, 1108 (Supreme Court), 1157 (New York). This treatise is hereinafter cited as BEALE.

6. See, e.g., CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 261.

7. See note 93 *infra*.

validity and effects,<sup>8</sup> the Restatement treats the latter topic in the second part of the Contracts chapter called "Creation of a Contract", a title which does not reflect its real contents. Moreover, the topic of the effects of contracts is dealt with in a rather perfunctory way.<sup>9</sup> Obviously, the Reporter's attention was focused upon the validity issue.<sup>10</sup> Now it is true that in the American interstate scene invalidity cases are to the fore due to the impact of usury laws and other prohibitive state enactments. But the Conflict problems touching the effects of contracts are hardly less important. The indiscrimination involved is something more than a flaw of organization.

The salient point in the Restatement doctrine is its rejection of the intent theory, that is, the idea that the law governing a contract must principally be ascertained from the express or implied common intention of the parties.<sup>11</sup> In Private International Law few ideas are as time-honored and as universally adopted by courts as this one. While some vestiges of the intent theory may be found as early as the medieval "Statutists",<sup>12</sup> who, however, were more concerned with inheritance and familial questions than with contracts, the intent theory was first elaborated by the great French jurist Molinaeus (1500-1566).<sup>13</sup> Frequently called the theory of "autonomy of the parties", it became dominant on the continent in the nineteenth century. French, German, Belgian, Dutch,

8. As done, e.g., in the English treatises. See DICEY, *CONFLICT OF LAWS* (5th ed. 1932), CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2d ed. 1938).

9. Namely, through § 346: "Except as stated in § 358, the law of the place of contracting determines what are the obligations of a sealed instrument, a mercantile instrument or any other contract." (italics added). §§ 337, 341, and 342-45 are concerned with obligations arising out of particular types of contract.

10. In his treatise no general discussion of the effects of a contract is found. Pertinent instances, not neatly distinguished from cases on validity, are presented in the sections on agency or partnership, negotiable instruments, insurance, contracts to sell, etc. See 2 BEALE 1192-99, 1205 *et seq.*

11. Writings on the "intent theory" form one of the most valuable parts of the literature on the Conflict of Laws. The leading work is BATIFFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938), a comparative study with a thorough treatment of the American and English as well as the continental cases. An excellent analysis of German and other continental cases is offered by HAUBER, *DIE BEDEUTUNG DES PARTIWIILLENS IM INT. PRIVATRECHT* (1931), with ample bibliography. CALEB, *ESSAI SUR LE PRINCIPE DE L'AUTONOMIE DE LA VOLONTÉ EN DROIT INT. PRIVÉ* (1927); Niboyet, *La théorie de l'autonomie de la volonté* (1927) 16 *RECUEIL DES COURS* 5; Wolff, *The Choice of Law by the Parties in International Contracts* (1937) *JUDICIAL REVIEW* 110; and Schmitzer, *Parteiautonomie* (1939) 35 *SCHWEIZERISCHE JURISTENZEITUNG* 305, 323 are likewise helpful comparative contributions to the problem of this section. Wolff's article will be particularly informative to the common law jurist. Touching American law see Cook, *'Contracts' and the Conflict of Laws: Intention of the Parties* (1938) 32 *ILL. L. REV.* 899.

12. See BATIFFOL, *op. cit. supra* note 11, at 19; CALEB, *op. cit. supra* note 11, at 135.

13. See CALEB, *op. cit. supra* note 11, at 134.

Swiss, and other continental courts<sup>14</sup> profess it consistently, and it has been incorporated in the Italian Disposizioni Preliminari, liberal and Fascist brand,<sup>15</sup> and in other legislation.<sup>16</sup> Lord Mansfield introduced it into the common law<sup>17</sup> and since then it has been consistently applied by the English courts.<sup>18</sup> It was recognized by Story<sup>19</sup> as well as by Chancellor Kent,<sup>20</sup> and it became familiar to the highest courts of this country, particularly to the Supreme Court of the United States under the leadership of Chief Justice Marshall.<sup>21</sup> Business has joined courts and legislatures in this instance. Stipulations determining the applicable law to a contract have become common especially in standard forms of insurance, banking, and shipping enterprises.<sup>22</sup> Where the law governing the contract is not expressly agreed upon by the parties, courts have been eager to infer from the surrounding circumstances an "implied" or "hypothetical" intent of the parties. The generally followed view is that the law of the country, with which in the expressed or presumed intent of the parties the contract had its most important connection, shall govern, taking into account the various territorial "contacts" of the contract, such as the place of contracting, place of performance, domicile of the parties, situs of the res, etc. Recently, the intent theory has been carried over to trusts.<sup>23</sup>

14. Documentation is found in the writings of Batiffol and Haudek. Regarding Dutch cases, reference may be made to van der Flier, *Aperçu de la jurisprudence néerlandaise* (1934) J. DR. INT. 208.

15. DISPOSIZIONI PRELIMINARI 1865, Art. 9 (2) (3); 1939 Art. 15 (1) (2).

16. See CIVIL CODE LOWER CANADA (1939) Art. 8; 3 JOHNSON, CONFLICT OF LAWS (1937) 418. For further references see HAUDEK, *op. cit. supra* note 11, at 43.

17. *Robinson v. Bland*, 2 Burr. 1077, 97 Eng. Rep. 717 (1760).

18. See CHESHIRE, *op. cit. supra* note 8, at 249.

19. CONFLICT OF LAWS (Bigelow's ed. 1883) § 280.

20. 3 KENT COMM. (1828) 48; *Thompson v. Ketcham*, 8 Johns. 146 (N. Y. 1811).

21. See *Wayman v. Southard*, 10 Wheat. 1 (U. S. 1825). The same theory was enunciated in numerous later cases, for instance recently in *Boseman v. Conn. Gen. Life Ins. Co.*, 301 U. S. 196 (1937). Decisions of state courts are collected in 2 BEALE, *e.g.*, for New York at 1157, n. 1-3.

22. Many insurance cases exhibiting such clauses are listed in Note (1938) 112 A. L. R. 124, 130. Instances of pertinent shipping cases are *The Kensington*, 183 U. S. 263 (1901); *Oceanic Steam Nav. Co. v. Corcoran*, 9 F. (2d) 724 (C. C. A. 2d, 1925); *Gerli and Co. v. Cunard S. S. Co.*, 48 F. (2d) 115 (C. C. A. 2d, 1931). Moneylenders frequently insert such clauses in their contracts, see Note (1938) 112 A. L. R. 124, 133. On the continent agreements as to the applicable law are even more frequent. They are found everywhere in standard contracts of banks and other commercial and industrial enterprises. In general, see HAUDEK, *op. cit. supra* note 11, at 100.

23. Instances are found in LAND, TRUSTS IN THE CONFLICT OF LAWS (1940) 36, 95, 118, 186, 187, 242, 244. A more recent case is *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A. (2d) 153 (Del. 1940). The matter, which deserves special inquiry with an eye to analogous developments in the contract area, is not mentioned in the various comprehensive treatises on Trusts or Conflict of Laws. A brief reference to "intention" in 2 BEALE at 1024 may be registered as a matter of accuracy.

This theory, so universal and so well supported in American law and practice, is not even referred to in the Restatement or its Comment. The Reporter considers it "theoretically indefensible" and "absolutely impracticable".<sup>24</sup> Likewise the commercial habit of "express stipulation" is consistently ignored by the Restatement and the Comment.<sup>25</sup>

Despite the dominance of the intent theory in the courts, the Restatement's opposition to it is by no means surprising. Writers have long objected to the intent theory that there must be first a law on the basis of which the parties may validly contract, and that this law is imposed upon the parties by the superior power of the state independently of their intent. For this reason, it has been suggested by the objectors, especially in England and America, that the "subjective" intent theory be replaced by an "objective theory" holding applicable to the contract the law of that place to which the most important spatial "contacts" of the contract go.<sup>26</sup> The controversy, then, turns, not around flexibility as opposed to inflexibility, but around the somewhat academic problem of the rationale of the flexibility rule. Also, under the objective theory, the so-called "proper law of the contract"<sup>27</sup> would control, namely, the law with which, according to the circumstances of the case, the contract is most closely connected.

The objective theory would do away with the Reporter's view that the parties cannot make the law, that they cannot "legislate".<sup>28</sup> But the objective theory was not considered, it seems, in the preparation of the Restatement and it is not referred to in the Reporter's treatise.

24. 2 BEALE at 1083, 1084.

25. The question was raised in the debates of the Law Institute by one of its members. The Reporter asserted that such agreements are absolutely ineffective under the decisions of the Supreme Court. (1928) 6 PROC. A. L. I. 460. But at least in *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262 (1900) and *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551 (1904) the Supreme Court has recognized express stipulations, and this is admitted in 2 BEALE at 1108. They are ineffective insofar as the rules of the chosen law run counter to the public policy of the forum. See, e.g., *New York Life Ins. Co. v. Craven*, 178 U. S. 339 (1900); *Knott v. Botany Mills*, 179 U. S. 69 (1900). Or insofar as they would render the contract illegal under the *lex loci contractus*. *Mutual Life Ins. Co. v. Hill*, *supra*; *United Divers Supply Co. v. Commercial Credit Co.*, 289 Fed. 316, (C. C. A. 5th, 1923); see p. 908 *infra*. The language of Judge Learned Hand, in *Gerli & Co. v. Cunard S. S. Co.*, 48 F. (2d) 115 (C. C. A. 2d, 1931) that "people cannot by agreement substitute the law of another place . . ." is isolated. And see note 30 *infra*. For an illuminating discussion of the "express stipulation" problem, see *Cook*, *supra* note 11.

26. The "objective" theory has been advocated particularly by WESTLAKE, *PRIVATE INT. LAW* (7th ed. 1925) 302, 304 and by *Cook*, *supra* note 11, at 918. See also *Green v. Northwestern Trust Co.*, 128 Minn. 30, 150 N. W. 229 (1914).

27. This seasoned term of English legal nomenclature has not yet been adopted by the American courts. Instead they employ not infrequently the term "law of the place of contracting" synonymously, especially where the law of the place of performance governs. See note 63 *infra*; 2 BEALE at 1045.

28. 2 BEALE at 1079.

It is not within the scope of the present essay to take sides in the controversy over the subjective and objective theory. However, the subjective theory holds a particularly strong position within the wide range of what in civil law is called *jus dispositivum* (law at the disposal of the parties) or in apt German terminology *nachgiebige Regeln* "pliable rules".<sup>29</sup> Though the common law has not yet developed a general doctrine of pliable rules, the notion exists there as well. Whether the seller warrants quality of the goods, or what the effects of an acceptance of the goods by the buyer are, or to what extent an employee is responsible to his employer for negligent acts, or whether co-contractors are liable severally or jointly and severally, the rules of the law are ordinarily "pliable", conspicuously so in the commercial area. No plausible reason exists why within the orbit of pliable rules the parties should not be at liberty to determine their reciprocal rights and duties by a wholesale reference to a definite legal system,<sup>30</sup> or, to put it otherwise: why the familiar "express stipulation" should not be recognized, albeit within certain limits. But again, the Restatement and the Comment are silent. There is only the all-embracing, ironclad rule of the *lex loci contractus*.

In favor of this rule the Reporter of the Restatement asserts that there is no uncertainty in its application. However, it has been repeatedly pointed out<sup>31</sup> that the application of the rule is utterly uncertain wherever the contract is made between absent parties, which is of ordinary occurrence in interstate and international transactions.<sup>32</sup> The Restatement, in order to bridge the uncertainty, simply carries over into the Conflict area the internal rules on offer and acceptance which culminate in the well-known holding that a contract between absent parties is ordinarily perfected as soon as the letter of acceptance is deposited in the mailbox. According to the Restatement this mailbox theory,<sup>33</sup> elaborated for determining the time of contracting, also determines the place of con-

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29. Compare Cook, *supra* note 11, at 903. The term "directory" is sometimes used to designate pliable rules. See *Equitable Life Ass'n v. Clements*, 140 U. S. 226, 233 (1891); *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A. C. 277, 289. But it hardly conveys the idea.

30. This is, in a measure, admitted by Judge Learned Hand in *Gerli & Co. v. Cunard S. S. Co.*, 48 F. (2d) 115 (C. C. A. 2d, 1931); so there is no authority at all for the Restatement's entirely negative attitude. 2 BEALE at 1201 recognizes a certain significance of the parties' intent in respect to the significance of words, without considering, however, the import of express agreements in this connection.

31. See BATIFFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938) 77.

32. For this very reason Professor Lerebours-Pigeonnière, who in his *PRÉCIS DE DROIT INT. PRIVÉ* (3d ed. 1927) has adopted the presumption in favor of the *lex loci contractus*, has exempted from it contracts between absent parties.

33. Hereafter this term is used as a convenient abbreviation for the common law offer-and-acceptance doctrine in its application to the Conflict situation. No judgment is passed here on the internal use of that theory in this respect. The writer has stated his views in *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine* (1936) 36 *Col. L. Rev.* 920.

tracting and thereby the applicable law.<sup>34</sup> The conclusion is unfounded, however. As has been shown by other writers, one should not mechanically transplant internal law rules into the Conflict field; the problems involved in the internal and the Conflict field are markedly different.<sup>35</sup> Touching the issue at hand, the mailbox theory, when applied to the Conflict situation, means the utmost aggravation of the objection which since Savigny's times has invariably been raised against any place-of-contracting theory in private international law; namely, the objection that the place of contracting is "accidental" to the contract and therefore irrelevant to the determination of the law to govern the contract.<sup>36</sup> Such determination requires a spatial contact more material than the location of the mailbox in which the answering letter was deposited.<sup>37</sup>

In fact, the place-of-contracting tenet of the Restatement is first of all based on theoretical considerations flowing from the learned Reporter's "territoriality" doctrine. According to this theory the legal effects of an act done in a certain territory are under the exclusive control of the law of that territory, and this is particularly true in respect to the acts creating a contract.<sup>38</sup> Consequently, exclusive control of the law of the place of contracting over the contract must be recognized by all other countries and their courts. The territoriality doctrine which has found much opposition<sup>39</sup> and very little, if any, approval,<sup>40</sup> offers an interesting

34. RESTATEMENT § 326.

35. Compare Stumberg, *Conflict of Laws—Validity of Contracts—Texas Cases* (1932) 10 TEX. L. REV. 163, 171; Cheatham, *International Law Distinctions in the Conflict of Laws* (1936) 21 CORN. L. Q. 570, 583, and other writers cited there at n. 50. That the mailbox theory does not afford the promised certainty is convincingly shown by Cook, *Contracts and the Conflict of Laws* (1936) 31 ILL. L. REV. 143, 157, 174, 175; cf. also CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2d ed. 1933) 263.

36. See SAVIGNY, *PRIVATE INTERNATIONAL LAW* (Guthrie's trans. 1889) § 370; Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565, 574.

37. The legislative evolution toward the demise of consideration and its repercussions upon the rules of offer and acceptance may give the quietus to the Restatement's approach. The new policies involved are strikingly irrelevant to the Conflict situation. See the New York law on the irrevocability of certain offers, Laws 1941, c. 328; State of N. Y. Legisl. Doc. (1941) No. 65 [Report of the Law Revision Commission] 345; Symposium on Consideration in (1941) 41 COL. L. REV. 777.

38. 2 BEALE at 1091; 3 *id.* at 1969, 1974.

39. See Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736; Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; Yntema, *The Hornbook Method and the Conflict of Laws* (1923) 37 YALE L. J. 468; Heilman, *Judicial Method and Economic Objectives* (1934) 43 YALE L. J. 1033; Stumberg, *Conflict of Laws, Foreign Created Rights* (1930) 8 TEX. L. REV. 173; STUMBERG, *CONFLICT OF LAWS* (1937) 8; WIGNY, *ESSAI SUR LE DROIT INT. PRIVÉ. AMÉRICAIN* (1932) 168; Arminjon, *La Notion des Droits Acquis en Droit Int. Privé*, 44 RECUEIL DES COURS (1933) 5, 46.

40. It underlies GOODRICE, *CONFLICT OF LAWS* (2d ed. 1938) at *op.*, 274. But even this author who had been Special Adviser to the Reporter of the Restatement avoided

parallel to the continental law-of-nations doctrine of private international law which tries to derive from the law of nations Conflict rules of a universally binding character. Professor Beale explicitly bars recourse to international law, but apart from a vague reference to civilization,<sup>41</sup> he does not offer an explanation for the allegedly supranational feature of his propositions which underlies not only the Restatement's place-of-contracting, but also its secondary place-of-performance theory.<sup>42</sup> In other words, there is no convincing force in these propositions.

#### THE METHOD OF APPRAISING THE CASES

The case material used in the preparation of the Restatement is probably fully canvassed in the copious references found in the Reporter's treatise.<sup>43</sup> His discussion of this vast material is characterized by a strong and ever recurrent criticism. After having defined, on the basis of the internal law, his concept of the place of contracting, his first word, when turning to the Conflict cases proper, is "Confusion".<sup>44</sup> No topic, he points out, is more confused than that of the validity of contracts. "We find irreconcilable principles laid down in the decisions of the same jurisdiction; and not infrequently several irreconcilable doctrines propounded in the same case as undoubted statements of general rules of law. It is in this respect that the confusion of authority on the point is unusual."<sup>45</sup> This criticism which is particularly addressed to the Supreme Court of the United States permeates the whole chapter on contracts.

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express commitment to the territoriality doctrine and in a footnote seems rather to intimate a doubt. *Id.* at 220; see particularly n. 2. De Sloovere; *The Local-Law Theory and Its Implications in the Conflict of Laws* (1928) 41 HARV. L. REV. 421 criticizes the "local law" theory somewhat in the spirit of the territoriality doctrine, without, however, taking a definite stand on the latter. In continental literature the term "territoriality" is being used with the most diverse meanings; but to this writer's knowledge there is neither continental precedent for nor adherence to Professor Beale's conception.

41. 3 BEALE at 1974.

42. Commenting upon the RESTATEMENT rules on the law of the place of performance (§§ 358, 370, 372, see note 137 *infra*), Professor Beale states that only in case the law of the place of performance allows an action for breach of performance can courts of other jurisdictions allow such an action. 2 BEALE at 1263, 1272. *Peake v. International Harv. Co.*, 194 Mo. App. 128, 186 S. W. 574 (1916), assuming venue on the ground that the contract was broken in the court's precinct, is adduced in some vague way as supporting the supranationally binding character of the law there in force. Regarding the place of performance rule as such, see p. 915 *infra*.

43. The cases cited in RESTATEMENT, CONFLICT OF LAWS, EXPLANATORY NOTES (Tent. Draft No. 4, 1928), which are devoted to the law of contracts, have been checked against the treatise. No additional cases worth mentioning have been found in the EXPLANATORY NOTES, although the latter exhibit a great number of inaccurate citations giving a contrary impression.

44. 2 BEALE at 1077.

45. *Id.* at 1078.

The Reporter's dissatisfaction is in itself indicative of a deep contrariety between the cases and his own tenets, which have been adopted by the Restatement. In fact, he does not contend that the theories of the Restatement are supported by the majority of the cases. Rather is it his opinion that in a contradictory and confused situation the Restatement should show the way to a sound solution, that is, in his view, to the place-of-contracting rule; but he also thinks that the prevailing trend in the courts is towards that rule.<sup>46</sup>

In order to prove the existing confusion, Professor Beale classifies the cases as adopting (1) the law of the place of contracting, (2) the law of the place of performance, (3) the law intended by the parties. He then draws a perplexing picture indeed, showing how in each jurisdiction courts seemingly in a haphazard way at times resort to one theory, at times to another, and at times to a third, if not to a fourth theory.<sup>47</sup> But this impression is the result of the method chosen by the critic rather than of the actual holdings of the cases.

Professor W. W. Cook has eloquently warned against "accepting at its face value the vague, careless, and misleading language often found in opinions, and assuming that this gives an accurate description of what is being done . . ." <sup>48</sup> Apart from this general observation, it should be noted that, generally, no contradiction exists between the intent theory and the resort to the *lex loci contractus* or to the *lex loci solutionis*. This is illustrated by decisions which Professor Beale claims for his place-of-contracting doctrine, and which, although indeed applying the law of that place, at the same time refer to the intent theory.<sup>49</sup> Even where such a reference is missing, the application of the *lex loci contractus* should generally be understood in the light of the intent theory, which is supported by the Supreme Court<sup>50</sup> and for which there is authority in practically all major states,<sup>51</sup> rather than in the light of the inflexible rule of the Restatement for which there is no such authority. And, of course, on the basis of the intent theory, there is no inconsistency in applying,

46. *Id.* at 1100, 1171.

47. *Id.* at 1173 (summary).

48. Cook, *'Contracts' and the Conflict of Laws* (1936) 31 *ILL. L. REV.* 143, 170.

49. Some instances are given in notes 57 and 135 *infra*. See also *China Mutual Ins. Co. v. Force*, 142 N. Y. 90, 36 N. E. 874 (1894), cited by 2 BEALE at 1156, n. 2, and *Illinois Fuel Co. v. Mobile & Ohio R. R.*, 319 Mo. 899, 8 S.W. (2d) 834 (1928), cited *id.* at 1071, n. 5. The presumption enunciated by many courts in favor of the *lex loci contractus* is likewise a logically unobjectionable fusion of the two theories. See *e.g.*, *Cox v. United States*, 6 Pet. 172 (U. S. 1832); *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397 (1889); *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262 (1900).

50. See note 21 *supra* and p. 919 *infra*.

51. See, *e.g.*, as to Massachusetts, which is claimed by Professor Beale as an adherent of the pure *lex loci contractus* theory, the cases referred to in note 135 *infra*, and those cited by 2 BEALE at 1143, n. 1.

according to circumstances, either the *lex loci contractus* or the *lex loci solutionis*.<sup>52</sup>

Objections must also be raised to Professor Beale's method in proving the trend of the cases towards the law of the place of contracting.<sup>53</sup> First of all, a tremendous number, if not the majority, of the cases cited by Professor Beale in favor of the place-of-contracting rule are inconclusive because of the presence of additional and material contacts with the place of contracting. This is evident where the place of contracting is at the same time the place of performance, and such cases are frequent among those cited.<sup>54</sup> In other instances the additional contacts are different, but still important. Thus in one of the New York cases alleged to bear out the place of contracting theory, the New York law was applied to an affreightment contract made in New York through a New York broker and a New York agent for a transportation from New York to Rangoon, the financing having been done in New York by the defendant, apparently a New York firm.<sup>55</sup> Generally in cases involving shipment of goods the place of contracting is often at the same time the place of the carrier's (or seller's) business and of the beginning of the transportation.<sup>56</sup> The presence of additional major contacts is also ordinarily found in the cases which are supposed to support the "mailbox" theory.<sup>57</sup>

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52. In *Mutual Life Ins. Co. v. Liebing*, 259 U. S. 209 (1922), see note 177 *infra*, Holmes, J., wrote that "the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act," but that was a constitutional case and Holmes' point, which was not relevant to the decision, does not appear in later cases. Rightly the opinion is not referred to by Professor Beale.

53. For the purpose of the following inquiry this writer has especially checked the Supreme Court cases, p. 919 *infra*, the cases in 2 BEALE at 1071, n. 5 and 6 ("mailbox theory"), the New York cases, *id.* at 1156, n. 2 and 3 (alleged to prove the confusion in New York), and the Massachusetts cases, *id.* at 1142, n. 4 (alleged to prove the adoption of the *lex loci contractus* rule in Massachusetts). These 150 cases undoubtedly give a typical cross-section of the whole.

54. See as to Massachusetts, note 132 *infra*. Another instance would be *Ward Lumber Co. v. American Lumber Co.*, 247 Pa. 267, 93 Atl. 470 (1915), cited in 2 BEALE at 1071, n. 5.

55. *China Mutual Ins. Co. v. Force*, 142 N. Y. 90, 36 N. E. 874 (1894), cited in 2 BEALE at 1156, n. 2; the opinion quotes *Dike v. Railway*, 45 N. Y. 113 (1871), expressing the intent theory.

56. Compare the four cases cited by 2 BEALE at 1143 at the end of n. 4. Similarly, *Miles v. Vermont Fruit Co.*, 98 Vt. 1, 124 Atl. 559 (1924) (f.o.b. contract), cited by 2 BEALE at 1070, n. 7, 1071, n. 6; in this case a foreign standard of quality, rather than foreign law, was involved.

57. 2 BEALE at 1071, n. 5, cites 18 cases in its favor. Three are not Conflict cases, namely *Michelin Tire Co. v. Coleman & Bentel Co.*, 179 Cal. 598, 178 Pac. 507 (1919); *International T. Assoc. v. Des Moines M. P. Co.*, 215 Ia. 268, 245 N. W. 244 (1932); *Peters v. Painters Fert. Co.*, 73 Fla. 1001, 75 So. 749 (1917); see notes 58-60 *infra*. Three cases refer to the intent of the parties, namely *Brierly v. Commercial Credit Co.*,

Moreover, Professor Beale frequently introduces, as proof of the Restatement's theory, cases which, though bearing upon the "place of contracting", do not deal with the choice of law. Thus he lists in favor of that theory, without any indication of the real issues involved, cases which refer to the place of contracting in order to determine the jurisdiction (venue) of the court;<sup>58</sup> or in order to construe a domestic statute prescribing a special period of limitation in respect to documents executed outside the state;<sup>59</sup> or in order to ascertain whether a foreign corporation is "doing business" within the state according to the meaning of the domestic statute;<sup>60</sup> or in order to construe any other domestic statute in regard to which the place of contracting may be relevant.<sup>61</sup> It need not be said that in all those cases the outcome will depend on local policies which may widely differ from the views guiding in the solution of Conflict situations.

On the other hand, throughout the chapter on contracts, Professor Beale recognizes again and again that the cases often hold the law of the place of performance to govern the contract;<sup>62</sup> be it understood, not only the mode of performance but the contract as a whole. Character-

43 F. (2d) 730 (C. C. A. 3d, 1930), *Illinois Fuel Co. v. Mobile & O. R. R.*, 319 Mo. 899, 8 S. W. (2d) 834 (1928) and *Le Sueur v. Manufacturers' Finance Co.*, 285 Fed. 490 (C. C. A. 6th, 1922). The latter case, in addition to *Netherwood v. Raymer*, 253 Fed. 515 (W. D. Wis. 1918), determines the question of whether a contract was made, on the basis of the *lex fori* (*Cf.* RESTATEMENT, §311), the *Netherwood* case calling this a "question of fact." In the following cases the court itself stresses other important contacts with the place of the mailbox: *H. Muchlstein & Co. v. Hickman*, 26 F. (2d) 40 (C. C. A. 8th, 1928); *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722 (1912); *Bernhardt Lumber Co. v. Metzloff*, 113 Misc. 288, 184 N. Y. S. 289 (1920); *Franklin Sugar Refining Co. v. Lipowicz*, 247 N. Y. 495, 160 N. E. 916 (1928); *Roylance Co. v. Descalzi*, 243 Pa. 180, 90 Atl. 55 (1914) (an instance unfit also for other reasons); *Ward Lumber Co. v. American Lumber Co.*, 247 Pa. 267, 93 Atl. 470 (1915) ("made and performed" in Ohio). *Wayne County Savings Bank v. Low*, 81 N. Y. 566 (1880) even rejects the mailbox theory. The remaining cases use mailbox language, but even most of these exhibit additional contacts with the place of the mailbox.

58. *Peters v. Painters Fert. Co.*, 73 Fla. 1001, 75 So. 749 (1917); *Tillinghast v. Boston & P. R. Lumber Co.*, 39 S. C. 484, 18 S. E. 120 (1893); *Three States Coal Co. v. Superior Elkhorn By-Prod. Coal Co.*, 110 W. Va. 455, 158 S. E. 601 (1931). The same error was found by Cook, *'Contracts' and the Conflict of Laws* (1936) 31 *Int. L. Rev.* 143, 176, in the examination of the cases cited by 2 BEALE at 1073, n. 1. See also note 42 *supra*.

59. *Michelin Tire Co. v. Coleman & Bentel Co.*, 179 Cal. 598, 178 Pac. 507 (1919).

60. *International T. Assoc. v. Des Moines M. P. Co.*, 215 Ia. 268, 245 N. W. 244 (1932); *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59 (1894).

61. *Great Southern Life Ins. Co. v. Burvell*, 12 F. (2d) 244 (C. C. A. 5th, 1929); *New York Life Ins. Co. v. Long*, 177 Ky. 445, 197 S. W. 948 (1917).

62. Thus in 2 BEALE at 1157, the seeming New York rule is stated to the effect that the law of the place of contract governs unless the parties clearly intended it to be governed by that of the place of performance.

istically, the *lex loci solutionis* is sometimes denominated *lex loci contractus* by American courts.<sup>63</sup>

In fact, even more than in the place-of-contracting cases, analysis reveals that in the place-of-performance cases this "place" was the "center of gravity" of the whole contract. Thus *London Assurance v. Companhia de Moagens*,<sup>64</sup> a marine insurance case, was decided on English law, London being the place of performance; but in addition the company was incorporated and domiciled in England, damages had to be reported to the company in England, payments were to be made in pounds sterling, claims had to be adjusted according to the usages of Lloyd. These circumstances evidently outweighed the fact that the contract was made in Philadelphia. In *Cox v. United States*,<sup>65</sup> an early Supreme Court case, a New Orleans navy agent of the United States had given the Federal Government a bond securing public moneys received by him, accountability being to the United States Treasury in Washington; federal laws were referred to in the bond. Despite the fact that the bond was signed in New Orleans, the law of the District of Columbia was held applicable under a place-of-performance theory. Though the opinion is not particularly well written, its wisdom is manifest: a transaction so closely connected with the central administration of the Federal Government must reasonably be conceived as having its "center of gravity" in Washington, D. C. This important phase of the cases, paralleling conspicuous continental development,<sup>66</sup> is nowhere reflected in the Restatement.

Not infrequently laws of places are judicially selected which are not the places of contracting or performance. According to the Restatement itself, informal unilateral contracts to guarantee future credits are governed by the law of the place where the credit is given in reliance upon the guaranty.<sup>67</sup> The Restatement calls it "place of contracting", but that is misnomer designed to save the face of the "place-of-contracting" theory.<sup>68</sup> Again, relations between the stockholder and the corporation or its creditors are governed by the law of the corporate domicile regardless of where the stockholder has entered into his contract with the corporation.<sup>69</sup> Direct and indirect transactions at stock or produce ex-

63. See *Pritchard v. Norton*, 106 U. S. 124, 136 (1882).

64. 167 U. S. 149 (1897).

65. 6 Pet. 172 (U. S. 1832).

66. German courts following Savigny's doctrine, generally apply in case of doubt the law of the place of performance. Cf. NUSSBAUM, *DEUTSCHES INT. PRIVATRECHT* (1932) 219.

67. Section 324.

68. In the case of stockholders' contracts Professor Beale objects to analogous language of the courts. 2 BEALE at 1051.

69. See RESTATEMENT, §§ 182, 183, 185, 187, 190. The relation between stockholder and corporation is contractual in nature, see, e.g., 11 FLETCHER, *LAW OF PRIVATE CORPORATIONS* (1932) § 5083. A pertinent case is cited as a contract proposition in 2 BEALE

changes are ordinarily governed by the law at the place of the exchange.<sup>70</sup> And these instances are not exhaustive.<sup>71</sup>

As will next be indicated,<sup>72</sup> the law of the place of contracting must be given great weight in the determination of the validity vel non of a contract, and is quite naturally often its proper law. Yet the examination of the cases under a proper method suggests neither the existence of an inflexible sway of that law over the whole of the contract, nor the existence of a judicial confusion sufficient to warrant the assumption of a more or less independent guidance by the Restatement.

It is true that American courts exhibit a certain ostensible propensity to shuttle between the *lex loci contractus* and the *lex loci solutionis*. Given to traditionalism they still cling to the device elaborated by Story whose authority, well deserved, was for decades so strong in the Conflict field. He showed the courts the place of contracting and the place of performance — doubtless the paramount spatial relations of contracts — as the poles of decision.<sup>73</sup> Under the influence of this tradition, American courts even sometimes use artificial reasoning to arrive at the one or the other place, whereas English and continental courts move more freely within the orbit of the various typical contacts involved in actual transactions. Basically, however, the course is the same; namely, to tend toward the "center of gravity" resulting from the weight of locally co-existent contacts. And this is probably in accord with Story's idea.

#### SOME MAJOR RULINGS OF THE COURTS

Although it is not possible within the framework of the present article to depict fully the divergence between the cases and the Restatement, some major points may be indicated.

at 1142, n. 4: *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942 (1911).

70. *Berry v. Chase*, 146 Fed. 625, 629 (C. C. A. 6th, 1906); *Hoyt v. Wickham*, 25 F. (2d) 777 (C. C. A. 8th, 1928); MEYER, *THE LAW OF STOCKBROKERS AND STOCK EXCHANGES* (1931) 677.

71. See, e.g., *Pacific States Savings & Loan Ass'n v. Green*, 123 Fed. 43 (C. C. A. 9th, 1903) (loan by a building and loan association subject to the law of the corporate domicile), citing numerous precedents; cases cited by 2 BEALE at 1218, n. 4 (obligation governed by the *lex rei sitae*).

72. See p. 908 *infra*.

73. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (Bigelow's ed. 1833) §§ 242-44, 261, 263, 280. Particularly § 263 emphasizes that the law of the place of the contract is to govern as to its nature, obligations, and interpretation; § 280, however, qualifies this statement as resting on the supposition that the place of performance is, expressly or by implication, in the place of contracting. Story then adds: "But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance." § 280. Judicial expression of his point of view may be found in *Bank of United States v. Donnelly*, 8 Pet. 361, 371 (U. S. 1834).

A. "The law of the place of contracting determines the formalities required for making a contract," says § 334 of the Restatement. This means not only that a contract is extrinsically valid, if complying with the formalities required by that law, but that in the reverse case the contract is invalid. In other words, the old rule "locus regit actum", epitomizing the control of the *lex loci contractus* as to formalities, is represented as being mandatory (compulsory) rather than optional (permissive). This proposition is not in accord with the cases.

On the continent it has long been recognized that the rationale of the rule lies only in the convenience of the parties and that no good reason exists why the parties, if they desire, should not abide by the formalities prescribed by the proper law of the contract.<sup>74</sup> The German Civil Code of 1900, for instance, expressly grants that choice.<sup>75</sup> In England, while the law is still unsettled, the trend in legal learning is unambiguously in favor of the permissive character of the rule.<sup>76</sup> A leading Canadian case has expressly so held.<sup>77</sup> As to the formalities of wills, the law of the place of making was made optional as early as 1861 by Lord Kingsdown's Act<sup>78</sup> which has been followed by American state legislation.<sup>79</sup> On this score, therefore, the permissive nature of the rule *locus regit actum* is well-known in common law countries. As to contracts, courts have reached the same result. *Hall v. Cordell*,<sup>80</sup> decided in 1891 by the Supreme Court, is conspicuous in this respect. The defendant, an Illinois firm, had in Missouri orally agreed with the plaintiff to accept and to pay bills to be drawn on the defendant and payable in Illinois. The Court found that Illinois being the place of performance and of the defendant's residence and domicile, and the parties having had in view no other law than that of Illinois, the latter must control. In modern phraseology, Illinois law was the proper law of the contract. Since the oral agreement was good under this law, it did not matter whether the formalities required by the *lex loci contractus* were satisfied.<sup>81</sup> The

74. See, e.g., VON BAR, *THEORY AND PRACTICE OF PRIVATE INT. LAW* (Gillespie's trans. 1892) § 123; BATIFFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938) 364.

75. *Introductory Law to the German Civil Code*, Art. 11 (1) (1).

76. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2d ed. 1938) 243.

77. *Ross v. Ross*, 25 Can. Sup. Ct. 307 (1894).

78. 24 & 25 VICT., c. 114 (1861).

79. The statutes are listed in 9 *UNIFORM LAWS ANN.* (1942) 277.

80. 142 U. S. 116 (1891).

81. State courts, too, have held transactions valid which would have been extrinsically invalid under the *lex loci contractus*. *Harwood v. Security Mut. Life Ins. Co.*, 263 Mass. 341, 161 N. E. 589 (1928); *D. Canale & Co. v. Pauly & Pauly Cheese Co.*, 155 Wis. 541, 145 N. W. 372 (1914) (in this instance the law of the place of performance, applied by the court, was probably not the proper law of the contract). In *Morson v. Second Nat. Bank*, 306 Mass. 588, 29 N. E. (2d) 19 (1940), see (1941) 54 *HARV. L. REV.* 331, a gift of Massachusetts shares, made in Italy and extrinsically invalid

Supreme Court, in *Pritchard v. Norton*,<sup>82</sup> has assimilated the Conflict treatment of "consideration" to the Conflict treatment of formalities,<sup>83</sup> upholding under the proper law of the contract an agreement which was invalid under the *lex loci contractus* because of lack of consideration. The assimilation to formalities is not in terms enunciated by the court, which relies simply on a place-of-performance theory, but the opinion characteristically adduces the adage *res magis valet quam pereat*, indicating thereby the permissive character of the Conflict rule which makes the *lex loci contractus* govern in the issue of formalities.<sup>84</sup>

Remarkably, nowhere in the Comment to the Restatement or in Professor Beale's treatise is the question posited whether in respect to formalities the inflexible place of contracting rule is or is not desirable. The problem of "permissive or mandatory" was not even contemplated in respect to wills. The sweeping formula that the law of the place of making "determines" the formalities led to the indiscriminate citation of cases holding the contract extrinsically valid or invalid under that law. In fact there seem to be no holdings for extrinsic invalidity on the ground of the *lex loci contractus*, except in the case of negotiable instruments,<sup>85</sup> a special situation.<sup>86</sup>

*Hall v. Cordell*,<sup>87</sup> which so distinctly tells against the inflexible place of contracting rule, is in Professor Beale's treatise contrasted with the earlier case, *Scudder v. Union Bank*.<sup>88</sup> Here a bill drawn in Missouri and payable in Illinois had been orally accepted in Illinois. The acceptance was held good under the law of Illinois, the place of contracting. This is, of course, not inconsistent with the permissive nature of the rule *locus regit actum*. But another difference between the facts of the two cases should be heeded. In the *Hall* case there was no acceptance of a bill of exchange; in fact, acceptance had been expressly refused. Litiga-

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under Italian law, was held valid under Massachusetts law. Repeatedly, contracts affecting land have been held valid for reasons not here in point under the Statute of Frauds of the *lex rei sitae*, although they did not fulfill the requirements of the local Statute of Frauds. See cases listed by GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 272, 273, n. 58.

82. 106 U. S. 124 (1882).

83. For a general examination of the formal character of the consideration rule, see Fuller, *Consideration and Form* (1941) 41 *COL. L. REV.* 799, and Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 *YALE L. J.* 621. *Contra*: WILLISTON, *CONTRACTS* (Rev. ed. 1936) § 100.

84. See CHESHIRE, *op. cit. supra* note 76, at 243. In *Coffin v. London & Edinburgh Ins. Co.*, 27 F. (2d) 616 (N. D. Ga. 1928), a case turning on a written form prescribed by state statute, the same idea appears.

85. *Security Holding Co. v. Christensen*, 53 S. D. 37, 219 N. W. 949 (1928); *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106 (1902) (lack of consideration).

86. See p. 918 *infra*.

87. See p. 906 *supra*.

88. 91 U. S. 406 (1875).

tion turned on a promise to accept bills in future. In the case, however, of a mere acceptance of a bill of exchange, and of similar transactions upon negotiable instruments, the rule *locus regit actum* should be considered as mandatory.<sup>89</sup> The two cases are sound and consistent. In Professor Beale's opinion, however, they form perhaps the most striking example of "conflict" and "unusual confusion" of authority.<sup>90</sup> He is not impressed by the fact that the *Scudder* case is expressly cited by the *Hall* case. His explanation is that the Justices of the Supreme Court "apparently did not notice that the decision was directly opposed . . . to that in the earlier case." "It is not often, of course," he says, "that so glaring a contradiction is found in the cases of the same jurisdiction."

B. As regards intrinsic validity, the law of the place of contracting has the power to destroy the contract (or a stipulation thereof),<sup>91</sup> by making it illegal. There is some truth in the centuries-old doctrine that parties contracting in a given territory must not disobey prohibitions set up by the law of that territory.<sup>92</sup> Invalidity attached there to contracts violative of local prohibition should ordinarily, at least, be recognized by foreign courts just as legal effects of torts originating in the *lex delicti communi* are so recognized. Though not a pre-existing obligation imposed upon courts, it is well-settled law<sup>93</sup> and, the writer believes, sound policy for the local courts ordinarily to hold a contract invalid where it is invalidated because illegal by the *lex loci contractus*.<sup>94</sup> To this extent no objection is raised against the place-of-contracting rule, barring, of course, the "mailbox" theory of the Restatement. There should be also a caveat in view of possibly conflicting public policies of the forum and the *lex loci contractus*.<sup>95</sup> Thus a stipulated limitation of

89. See p. 918 *infra*.

90. 2 BEALE at 1079.

91. Hereafter what is said about contracts should be understood to comprehend individual stipulations.

92. This notion appears as early as in GROTIUS, *DE JURE BELLI AC PACIS* (1625) II, 11, 5(2). Other early writers advancing similar views are listed by CERETTI, *LE OBBLIGAZIONI NEL DIRITTO INT. PRIVATO* (1925) 36.

93. *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551 (1904), *Allen v. Alleghany Co.*, 196 U. S. 458 (1904) and *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226 (1891) are pertinent examples; see p. 920 *infra*. STORY, *COMMENTARIES ON CONFLICT OF LAWS* (Bigelow's ed. 1883) §261, took the same view.

94. In this respect the view here taken probably dissents from the line of thought suggested by Cook, *'Contracts' and the Conflict of Laws* (1936) 31 ILL. L. REV. 143. The cases also support the tenet of RESTATEMENT §333 that the law of the place of contracting determines the capacity to enter into a contract. This point will therefore be omitted in the present article.

95. In RESTATEMENT §612 the public policy rule is erroneously stated only as obviating the "maintenance of actions", while public policy may just as well exclude defenses. The misstatement is probably occasioned by the adherence to the vested-right theory.

a sea carrier's liability, although illegal and ineffectual under the *lex loci contractus*, may be recognized as valid under a contrary public policy of the forum.<sup>96</sup>

While invalidity under the *lex loci contractus* means ordinarily invalidity everywhere, a corresponding rule does not follow in the case of validity. We leave aside the fact that it is of more frequent occurrence for contracts legal and valid under the *lex loci contractus* to be denied enforcement under an adverse local public policy, than for them to be recognized as legal contracts or stipulations albeit illegal under foreign law. In fact, denial of enforcement, despite occasional looseness of judicial language, is not tantamount to treating the contract as "invalid".<sup>97</sup> Still the contract, regardless of the law of the place of contracting, may be illegal and invalid under its "proper law";<sup>98</sup> for instance, where according to the proper law the contract is in restraint of trade or champertous, or involves prohibited "futures" or gambling transactions.<sup>99</sup> Professor Beale admits that in a number of cases the issue of illegality was decided on the basis of the law intended by the parties,<sup>100</sup> or under the law of the place of performance,<sup>101</sup> or under another law not that of the place of contracting.<sup>102</sup> In order to save in spite of these cases the inflexible place-of-contracting rule, he advances a dualistic theory, followed by the Comment of the Restatement: the law of the place of performance may "prohibit performance or excuse non-performance on account of illegality of performance,"<sup>103</sup> but this prohibition does not directly affect the contract since only the law of the place of contracting has power to determine what the effects of the illegality of performance

96. See *In re Missouri S. S. Co.*, 42 Ch. Div. 321, 335 (C. A. 1889).

97. Compare Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws* (1940) 49 *YALE L. J.* 1027, 1035. Legislative invalidation of a contract right acquired in a sister state is even declared unconstitutional in *Walker v. Lovitt*, 250 Ill. 543, 95 N. E. 631 (1911).

98. That is in the scheme propounded by Story, *loc. cit. supra* note 73, the law of the place of performance, where intended by the parties. Since Story at the same time holds that "that the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation" (*id.* at § 261), it appears that the view of the text is supported by Story's authority.

99. 2 BEALE at § 347.2 and .3 cites a number of pertinent cases. A more recent case involving a possible violation of foreign anti-trust law is *Byrd v. Crazy Water Co.*, 140 S. W. (2d) 334 (Tex. Civ. App. 1940).

100. 2 BEALE at 1231, n. 2, 1235, n. 6 to 9.

101. *Id.* at 1231, n. 5 and 7; 1236, n. 1-4; 1239, n. 1 and 2; 1241, n. 1-3.

102. *Id.* at 1238, n. 3 (stock market transactions; law of the place of the stock market). See note 70 *supra*.

103. RESTATEMENT § 332, comment *b*; 2 BEALE § 347.2. In comments *a* at § 347 and *b* at § 360 it is conceded that the contract is void where the illegality ordained by the law of the place of performance was known to the parties. The range of the "dualist" rule is thereby considerably narrowed.

will be. This subtle theory, however, is not supported by the cases.<sup>104</sup> Without any suggestion of a dualistic conception they subject the issue of initial illegality<sup>105</sup> to the law governing the contract, whatever that law is.<sup>106</sup> In some of Professor Beale's instances this law was the law of the place of performance, in which actually still other important contacts centered;<sup>107</sup> in at least one instance the law of the place involving the most weighty contacts was chosen without a place-of-performance theory (in fact, ostensibly on a place-of-making theory);<sup>108</sup> and still other cases are insignificant.<sup>109</sup> Definitely, the *lex loci contractus* has no monopoly over making contracts illegal.

Fraud, duress, mistake, and other legal or equitable defenses have again been subjected by the Restatement<sup>110</sup> to the inflexible place-of-contracting rule. Here Professor Beale's discussion<sup>111</sup> reveals that among the limited number of listed cases a considerable part does not use that law at all. In support of the Restatement's theory he lists a little more than a dozen decisions alleged to apply the *lex loci contractus* "no different place of performance or intention of the parties appearing." In view of this qualification, the citations are rather unimportant. Moreover, scrutiny of the cases shows that the Restatement's rule is supported only in respect to negotiable instruments.<sup>112</sup> In other instances, the place

104. The only case which lends some color to it is *Claiborne Commission Co. v. Stirlen*, 262 S. W. 387 (Mo. App. 1924), involving futures at the Chicago produce exchange. The court calls the agency contract sued upon a "Missouri contract", adding that the matter is to be governed by the law where the agent actually conducted the purchases and sales on his client's account. The term "Missouri contract" may simply mean that the contract was made in Missouri. Nor is there anything said on "performance" or "law of performance".

105. On subsequent illegality, see p. 917 *infra*.

106. The Reichsgericht has reached the same result. See NUSSBAUM, *DEUTSCHES INT. PRIVATRECHT* (1932) 245.

107. *Old Dominion Copper Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193 (1909); *Richardson v. Rowland*, 40 Conn. 565 (1873); *Pratt v. Sloan*, 41 Ga. App. 150, 152 S. E. 275 (1930). In *Denison v. Phipps*, 87 Okla. 299, 211 Pac. 83 (1922), and *Vandalia R. R. v. Kelley*, 187 Ind. 323, 119 N. E. 257 (1918), the place of performance rule, in Story's conception, is only briefly stated as dictum.

108. *Papadopoulos v. Bright*, 264 Mass. 42, 161 N. E. 799 (1928).

109. Several cases simply hold without employing a pertinent conflict theory that the outcome is the same under either law in question. *Oglesby v. Bank of New York*, 114 Va. 663, 77 S. E. 468 (1913); *Atwater v. A. G. Edwards Co.*, 147 Mo. App. 436, 126 S. W. 823 (1910) (the case, however, shows clearly that illegality of contract, not only of performance, was involved); *Gordon v. Andrews*, 222 Mo. App. 609, 2 S. W. (2d) 809 (1928); *Harris v. White*, 81 N. Y. 532 (1880); *Gilman v. Jones*, 87 Ala. 691, 5 So. 785 (1889); *Ormes v. Dauchy*, 82 N. Y. 443 (1880). In *Vititoc v. Shea*, 161 La. 984, 109 So. 785 (1926), and *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106 (1902), the points were different; in no case do they support the views of the RESTATEMENT.

110. Section 347.

111. 2 BEALE at 1225.

112. See p. 918 *infra*.

of contracting is the place in which the contacts of the case center;<sup>113</sup> and other instances are again irrelevant.<sup>114</sup>

The extension of the "proper law" to questions of validity and effectiveness has been objected to on the ground that such extension would mean having the parties "pull on their boot-straps",<sup>115</sup> at least where the proper law is derived from an intent of the parties. Generally courts have been bothered little by such scruples. They have felt that when the parties intend to have New York law govern their contract, the questions of invalidity or ineffectiveness are normally included in that intent. What is thus instinctively done by courts, may be theoretically described as separating, for Conflict purposes, the intent of the parties from the validity (or effectiveness) problem, and utilizing the intent per se for the ascertainment of the law best suitable to the situation. The process involved may be likened somewhat to the separability of arbitration agreements from the question of the validity of the main contract with which the arbitration agreement is connected.<sup>116</sup> The relatively independent significance of the parties' intent on the applicable

113. *Lewis v. New York Life Ins. Co.*, 201 Mo. App. 48, 209 S. W. 625 (1919); *Keenan v. John Hancock Mut. L. Ins. Co.*, 50 R. I. 158, 146 Atl. 401 (1929); *Pacific Mut. L. Ins. Co. v. Hale*, 267 S. W. 282 (Tex. Civ. App. 1924); *Fishbuck v. New York L. Ins. Co.*, 179 Wis. 369, 192 N. W. 170 (1923). *Furst & Thomas v. Sandlin*, 208 Ala. 490, 94 So. 740 (1922) is colorably in favor of the RESTATEMENT.

114. *Great Southern L. Ins. Co. v. Burwell*, 12 F. (2d) 244 (C. C. A. 5th, 1926), and *New York L. Ins. Co. v. Long*, 177 Ky. 445, 197 S. W. 948 (1917) (both cases merely involving construction of a local statute, in the first applicability of the *lex fori* being "conceded"); *Elbro Knitting Mills v. Schwartz*, 30 F. (2d) 10 (C. C. A. 6th, 1929); *Tuite v. Supreme Forest*, 193 Mo. App. 619, 187 S. W. 137 (1916) (uninformative as to the Conflict situation).

115. See language of Judge Learned Hand in *Gerli & Co. v. Cunard S. S. Co.*, 48 F. (2d) 115, 117 (C. C. A. 2d, 1931). Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 655, 658, and other writers are likewise opposed to a choice by the parties of the law governing the validity of their contract, but it is not sure that this opposition would extend to the cumulative consideration of the *lex loci contractus* and the proper law of the contract, as suggested by the present article.

116. See Nussbaum, *The 'Separability Doctrine' in American and Foreign Arbitration* (1940) 17 N. Y. U. L. Q. REV. 609. As to the Conflict of Laws, the separability doctrine appears surprisingly, from a different point of view, in RESTATEMENT § 311 Comment (d). There it is said that the forum first examines the "facts of the transaction" in order to ascertain the place which would be the place of contracting "under the general law of contracts." If that place is found, its law will determine whether there is a contract. The phrase "facts of the transaction" means nothing but the acts done by the parties, severed from their binding effect. True, the infusion of the "general law of contracts" in this connection is out of place. See Cock, *'Contracts' and the Conflict of Laws* (1936) 31 ILL. L. REV. 143, 161. On the continent the separability doctrine was suggested by NUSSBAUM, *DEUTSCHES INT. PRIVATRECHT* (1932) 237. The same line is followed by BATHIFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938) 340. A similar result, on a different theoretical basis, is reached by Neuner, *Die Anknüpfung im Int. Privatrecht* (1934) ZEITSCHRIFT FÜR AUSLÄND. UND INT. PRIVATRECHT 102.

law is particularly plausible where under the intended law a contract valid in its inception has been perfected and only a question of voidability or rescindibility<sup>117</sup> arises. There is little reason to differentiate, for Conflict purposes, voidability or rescindibility from those effects of fraud, duress, or mistake which, as in the case of estoppel,<sup>118</sup> do not lead to the invalidation of the contract itself and which, therefore, are perforce subjected to the proper law of the contract.

A special problem is presented by usury. A usurious contract is illegal and, in part or wholly, void. Due to prolific state legislation in the field, usury cases constitute in this country the greater part of the illegality cases; in fact their quantity is so considerable that from a comparative point of view they form a distinctive feature of the American Conflict scene. Analytically, however, usury is, among the grounds of invalidity of contract, only one of their many subspecies. Now the Conflict law of usury has been developed in a peculiar way by the American courts. While in general a contract is void if it is illegal under the *lex loci contractus*, courts uphold contracts if the contractual rate of interest conforms either with the *lex loci contractus* or with the *lex loci solutionis* or with any other place with which the transaction has a "normal relation",<sup>119</sup> the policy being to give the parties a certain choice among the pertinent local maximum interest rates.<sup>120</sup> The rule is very similar to the one governing formalities;<sup>121</sup> the usury rule, however, unlike the formalities rule, enjoys an undisputed existence.<sup>122</sup> Being, however, incompatible with the inflexible place-of-contracting rule, it has been omitted in the Restatement<sup>123</sup> with the effect that another cleavage has opened between the cases and the Restatement.<sup>124</sup>

117. As to rescission, 2 BEALE at 1275 points out that in this country rescission is looked upon as a right inherent in the contract itself. The statement seems accurate, but it does not follow that the *lex loci contractus* determines the question of rescission. The cases cited by 2 BEALE at 1275, n. 2, do not bear out this contention. The *lex loci contractus* was applied to the issue of rescission in *Morgan v. New Orleans M. & T. R. Co.*, Fed. Cases 9,804 (C. C. La., 1876), but distinctly not under any "ironclad" rule; the law employed was in fact the proper law of the contract.

118. Compare AMER. JUR. vol. 19, *Estoppel* § 48.

119. Language of Stone, J., in *Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403, 408 (1927).

120. For a more detailed discussion of this policy, see NUSSBAUM, *MONEY IN THE LAW* (1939) 245.

121. Perhaps the trend in the usury cases goes less towards the "proper law of the contract", the interest rate of the place of payment *per se* being deemed eligible.

122. Also by 2 BEALE at 1241.

123. An omission, caused by a similar proceeding, in the RESTATEMENT's chapter on Jurisdiction, is discussed by Nussbaum, *Jurisdiction and Foreign Judgments* (1941) 41 *COL. L. REV.* 221, 228.

124. In the debates of the American Law Institute on the project of the Conflict Restatement, a hypothetical case was submitted to the Reporter in which a New Yorker borrowed from another New Yorker a sum at eight per cent interest, the loan to be

The extension of the inflexible rule to the effects of a contract is still less documented than is its original application to the issue of validity.<sup>125</sup> The instances adduced by Professor Beale plainly disclose the lack of sufficient authority for the position of the Restatement. Apart from the numerous cases cited which overtly rely on a law different from the *lex loci contractus*, the inflexible rule of the Restatement, as has been indicated, is not borne out by cases listed under the ever recurrent phrase that the law of the place of contracting was applied "no different place of performance or intention of the parties appearing."<sup>126</sup> But even where this qualification is omitted by the author of the treatise, the objections set out above<sup>127</sup> against the indiscriminating manner of citation hold good also in respect to the treatment of the effects of contracts.<sup>128</sup>

As a test, there have been especially examined fifty-seven Massachusetts cases cited by Professor Beale as "forcibly laying down as a general rule . . . in that state that the law of the place of contracting determines the validity of the contract."<sup>129</sup> These were chosen because Massachusetts is the only major state listed by Professor Beale as unquestionably following the place-of-contracting rule.<sup>130</sup> As the instances show, the issue of effects is again included in the issue of validity.<sup>131</sup> The examination of the fifty-seven cases confirm the weakness of the

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secured by a Colorado mortgage, application of Colorado law permitting that rate of interest being expressly stipulated. Since New York law permits only an interest rate of seven per cent, the Reporter considered the loan as invalid. (1928) 6 *PROC. A. L. L.* 463. Under usury law the answer was probably wrong, but it would have been accurate had a gambling or anti-trust transaction been chosen as an example. Hence the fact that the answer was unsatisfactory does not operate against the general proposition according to which a contract illegal under the *lex loci contractus* is invalid everywhere. *Contra*: Cook, 'Contracts' and the Conflict of Laws: Intention of the Parties (1938) 32 *ILL. L. REV.* 899, 908.

125. 2 BEALE at 1192-99, 1205 *et seq.*, see note 10 *supra*.

126. 2 BEALE at 1192, 1205, 1210, 1212, 1221.

127. See p. 901 *supra*.

128. Thus, *King v. Sarria*, 69 N. Y. 24 (1877), is cited in 2 BEALE at 1193, n. 5, as instancing, in respect to the relation of an alleged special or limited partner, the place-of-contracting rule, "when the places of contracting and performance differ." Defendant was a Cuban resident, limited partner of a Cuban firm, all partners being subjects of Spain and residents of Cuba. The business had always been conducted according to Spanish law. The plaintiff had contracted with the Cuban firm in New York, where the contract was also to be performed, hence he had contracted under New York law. But the court rightly held that the limited partner was only liable according to Spanish law. The citation of this case is hard to explain.

129. 2 BEALE at 1192.

130. *Id.* at 1172 (summary).

131. *E.g.*, *Carmen v. Higginson*, 245 Mass. 511, 140 N. E. 246 (1923) (protest of bill of exchange); *Shofi v. Rice*, 241 Mass. 211, 135 N. E. 141 (1922) (effects of acceptance of goods by the buyer); *Callender M. & T. Co. v. Flint*, 187 Mass. 104, 72 N. E. 345 (1906) (construction of guarantee); and other cases.

documentation offered.<sup>132</sup> The author himself seems indirectly to qualify his statement inasmuch as he cites elsewhere eight cases, *in which the places of making and performance were different*, as holding that "the nature and validity of the obligation" is "subject to the law of the place of making."<sup>133</sup> Eight other cases are cited as referring approvingly to the law of the place of performance or to the law intended by the parties,<sup>134</sup> but at least three cases listed among the fifty-seven must be added as enunciating the intent theory.<sup>135</sup> Cases concerned with negotiable

132. The following twelve cases have nothing to do with choice of law, but construe Massachusetts statutes. *Frank v. O'Neil*, 125 Mass. 473 (1878); *Lindsey v. Stone*, 123 Mass. 332 (1877); *Hotchkiss v. Finan*, 105 Mass. 86 (1870); *Ely v. Webster*, 102 Mass. 304 (1869); *Adams v. Couillard*, 102 Mass. 167 (1869); *Kellogg v. Moore*, 84 Mass. 266 (1861); *Orcutt v. Nelson*, 67 Mass. 536 (1854); *Dolan v. Green*, 110 Mass. 322 (1872), all relating to Massachusetts intoxicating liquor statutes; *Bearse v. McLean*, 199 Mass. 242, 85 N. E. 462 (1908) (Massachusetts stockjobbing statute); *Johnson v. Mut. L. Ins. Co.*, 180 Mass. 407, 62 N. E. 733 (1902); *Morris v. Penn. Mut. L. Ins. Co.*, 120 Mass. 503 (1876) (Massachusetts insurance statute); *Reliance M. L. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59 (1894) (foreign corporation doing business in Massachusetts). In the *Kellogg* case, the court incidentally remarks, "sale was lawful where it was made," but this had not been the point in dispute.

In the majority of the choice-of-law cases the place of contracting is also the place of performance and frequently the place of other material contacts. *E.g.*, *Stebbins v. Leowolf*, 57 Mass. 137 (1849), which invalidates a contract for stockjobbing at the New York Stock Exchange on the basis of the New York law, made by residents of New York and to be performed in New York. *Barkor v. U. S. Fidelity and Guaranty Co.*, 228 Mass. 421, 117 N. E. 894 (1917), subjects a surety to New York law because the main debt was under that law. [A New York firm undertook excavations in New York harbor and executed and delivered in New York its bond, basis of the main debt]. In three cases the intent theory is enunciated, note 135 *infra*. On similar grounds more than twenty cases must be eliminated as inconclusive. Among the remaining many give the facts in such an imperfect way as to make a helpful appraisal of the court's theory impossible. The following cases are probably good examples of application of the *lex loci contractus*: *Carmen v. Higginson*, 245 Mass. 511, 140 N. E. 246 (1923); *Perry v. Pye*, 215 Mass. 403, 102 N. E. 653 (1913); *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 69 N. E. 309 (1904); *Lawrence v. Bassett*, 87 Mass. 140 (1862); *Hebner v. Eagle Ins. Co.*, 76 Mass. 131 (1857); *Thwing v. Great W. Ins. Co.*, 111 Mass. 93 (1872); and perhaps *Lennon v. Cohen*, 264 Mass. 414, 163 N. E. 63 (1928); but all except the *Hebner* and *Thwing* cases (insurance suits) bear upon negotiable instruments. There is no indication in the Massachusetts cases of a "mailbox theory".

133. 2 BEALE at 1143, n. 2. The citations given there are again open to objection. Thus in *Powers v. Lynch*, 3 Mass. 77 (1807) the place of contracting (*viz.*, endorsing) coincided with the place of performance.

134. 2 BEALE at 1143, n. 1. We do not enter into the author's remark that the references were necessary to the decision.

135. *Papadopoulos v. Bright*, 264 Mass. 42, 161 N. E. 799 (1928); *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163 (1891); *Milliken v. Pratt*, 125 Mass. 374 (1878) (capacity: stressing the refutability of the presumption; see note 49 *supra*). In *Dolan v. Mutual R. F. L. Ass'n*, 173 Mass. 197, 53 N. E. 398 (1899) the parties had stipulated for the application of New York law. The court, applying a Massachusetts statute regulating activities of foreign insurance companies in Massachusetts, declared it at least

instruments, where a rigid place-of-contracting rule may be appropriate, seem to be comparatively frequent in the Massachusetts courts. There may be also a somewhat greater inclination of Massachusetts courts to use place-of-contracting language, but essentially the Massachusetts picture is not different from that found in other states.

C. The law of the place of performance has been attributed an inordinate significance by the Restatement. That law is universally recognized as governing the "mode" of performance, such as the technicalities, time and place of payment or of delivery.<sup>136</sup> Had the Restatement confined the law of performance to this modest, if unobjectionable rule, the contrast with the cases which stress the place of performance almost as much as the place of contracting would have become challenging. On the other hand, the inflexibility of the place-of-contracting rule adopted did not permit the authors of the Restatement to grant the law of the place of performance, albeit under particular circumstances, the full control of the contract, as the cases so frequently do. In this compass, and it may be by some subconscious process, it was resolved to indemnify the *lex loci solutionis* in some other way. Thus the Restatement assigns to this law, among other matters, the determination of whether the performance is sufficient, whether there is an excuse for non-performance, whether a breach has occurred, and whether there is a right to damages for a breach.<sup>137</sup> Now, contract litigation most frequently revolves around these points. The case of the buyer to whom the goods are not delivered or are delivered in defective condition is typical. According to the Restatement, the rights of this litigant will be determined exclusively by the *lex loci solutionis* rather than by the law generally governing his contract. But why so? Where should the line of demarcation be drawn between the two laws? How will they act upon each other? The Comment to the Restatement makes the good point that the law of the place of performance must not "extend to a regulation of the substance of the obligation."<sup>138</sup> Subsequent to the breach, however, damages are of the substance of the obligation—what else should be the substance? The Comment tries to explain: there is no distinction based on logic alone; the solution must depend upon the circumstances of each case and must be governed by the exercise of judgment.<sup>139</sup> These

doubtful whether the parties by such a stipulation may "nullify" Massachusetts laws "enacted under public policy . . ." This is the familiar and undisputed limitation of express stipulations, note 25 *supra*, but 2 BEALE at 1144, n. 1, asserts that the court "evidently" felt the stipulation to be ineffective even if there were no provision of the *lex loci* against it. The remark is characteristic of the author's reading of cases involving express agreements, note 25 *supra*.

136. See, e.g., BATHIFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938) 443.

137. Sections 358 (d) (e), 370, 372.

138. Section 358 comment *b*; quoted with approval in *McCormick v. Taft*, 61 Ohio App. 510, 22 N. E. (2d) 510 (1938).

139. Sections 332 comment *c*, 399, 179.

phrases only show that under the doctrine of the Restatement there is no principle by which to draw the line between the law of the place of contracting and the law of the place of performance. Practically, what remains in this respect to the *lex loci contractus* under the Restatement's theory is no more than a shell, a dignity.

The present study is not concerned with the conclusions which might be drawn from this situation in respect to the consistency of the Restatement's doctrine,<sup>140</sup> but with the question whether the propositions of the Restatement are borne out by the cases. In this respect only three cases are offered in support<sup>141</sup> of the proposition that the law of the place of performance determines whether a breach of the contract has occurred and whether a right to damages arises from the breach. So meager a documentation is puzzling at the outset in view of the great importance of contract litigation over breach; in fact one must almost strain one's imagination in order to find other instances. But not even the three cases cited by Professor Beale are in point. One of them contains a broad dictum colorably in favor of the Restatement's theory, yet the holding is merely to the effect that damages are to be measured by the standards of value, namely, the currency, prevailing at the place "where the breach occurs,"<sup>142</sup> an acceptable proposition. Another reference<sup>143</sup> again bears merely on the measure of damages, and, at that, not under a place of performance theory of the Restatement type; rather the law of the place of performance is applied as the *lex loci contractus*. The third instance<sup>144</sup> may be a miscitation.

Turning now to the Restatement's tenet that the law of place of performance also governs the matter of excuses for non-performance, "there should be no doubt," Professor Beale asserts,<sup>145</sup> as to the accuracy of this view. He admits, however, "that there is far more disagreement than one should expect." Listing three or four cases *contra*, he cites in favor of the Restatement's rule<sup>146</sup> one insignificant English case<sup>147</sup> and

140. See Cook, *Contracts and the Conflict of Laws* (1936) 31 ILL. L. REV. 143, 155.

141. 2 BEALE at 1272, n. 4. The footnote refers to "Chapter 9," obviously meaning § 413.1 (damages for breach of contract) and § 416.1 (breach of mercantile obligation), but the discussion and cases found there are irrelevant to the matter at hand.

142. *Richard v. American Union Bank*, 241 N. Y. 163, 149 N. E. 338 (1925).

143. *Denio Mill Co. v. Malin*, 25 Wyo. 143, 165 Pac. 1113 (1917).

144. *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58 (1901). The author also deals at some length with *Sliosberg v. New York Life Ins. Co.*, 125 Misc. 417, 211 N. Y. S. 270 (1925), a reversed decision of a lower New York court with no significance to the issue under discussion.

145. 2 BEALE at 1267.

146. Section 358(c). Professor Beale mentions that it has been so held "in a number of cases as will be seen in this and the succeeding sections." The present writer has been unable to verify this statement, as far as the succeeding sections are concerned.

147. *Doulton & Co. v. Corp. of Madras* [1920] Weekly Notes 221 (K. B. D.) holding, as a matter of internal law, that an English Emergency Act, allowing annulment

two American cases, one of them applying New York law, because the contract was consummated and to be performed in New York,<sup>148</sup> and the other not presenting a clear theory.<sup>149</sup>

The time-honored rule that impossibility due to change of foreign law is no excuse for breach of contract<sup>150</sup> does not appear in the Restatement. It does not fit into the "law of the place of contracting—law of the place of performance" scheme, and it did not meet with the approval of the Reporter.<sup>151</sup> Instead the Restatement<sup>152</sup> proclaims that if performance of a contract is illegal by the law of the place at the time of performance, "there is no obligation to perform so long as the illegality continues." The wording of this proposition reflects the dualistic illegality-theory of the Reporter: that despite the illegality, resulting from the law of the place of performance, the contract itself persists under the superior *lex loci contractus*, and that merely the "obligation to perform" is absent "so long as the illegality continues." In case of permanent illegality the obligation presumably expires; but characteristically this is not clearly stated either in the Restatement or in its Comment.<sup>153</sup> Much as these theoretical oddities impede the understanding of the Restatement they are less important than the fact that, substantially, the rule adopted by the Restatement is at loggerheads with the cases. "In most of the few cases in point," Professor Beale asserts,<sup>154</sup> "there is complete defense in an action for non-performance; although

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of certain pending contracts, applied to contracts partly to be performed in England. The scant opinion contains some questionable utterances on Conflicts of Laws, among them the proposition that where performance is to be made partly in England and partly elsewhere, the English part is "regulated" by English law. See notes 149 and 158 *infra*.

148. *N. Y. Life Ins. Co. v. Dodge*, 246 U. S. 357, 373 (1918). The emphasis upon the word "consummated" is stressed in *Mutual Life Ins. Co. v. Liebong*, 259 U. S. 209, 213 (1922). The *Dodge* case is not a good instance for the further reason that its problem is constitutional. See note 177 *infra*.

149. *Louis-Dreyfus v. Paterson Steamships*, 43 F. (2d) 824 (C. C. A. 2d, 1930). Grain was transported under a Minnesota contract from Duluth to Montreal, but lost in Canada through negligence of the shipper. The court, through Judge Learned Hand, held the shipper excused under Canadian law, rightly pointing out that the liabilities arising and the excuses for non-performance must be determined under the same law, but then the court in a somewhat obscure way turns to Canadian rather than to Minnesota law. This proceeding is doubly objectionable because only a part of the performance had to take place in Canada. The theory of the case is also gainsaid by 2 BEALE at 1274 and at 1158 (where the performance is to occur in various states, as in contracts of carriage, "of course" the *lex loci contractus* governs).

150. See cases listed by WILLISTON, *CONTRACTS* (Rev. ed. 1936) § 1938, n. 12.

151. 2 BEALE at 1263, 1264.

152. Section 360(1).

153. The inhibition to speak out is conspicuous in Comment *d* at § 360. Temporary illegality is discussed under *e*.

154. 2 BEALE at 1261.

there is some authority to the contrary." In reality he cites three American cases *contra*, and only two English cases *pro*. In one of the English cases<sup>155</sup> the owner of a Latvian forest had sold timber from that forest to the defendant; subsequently by Latvian legislation the forest was nationalized and the owner expropriated. The latter brought suit for the purchase price on the ground that according to the English Sales of Goods Act of 1893, property and risk had passed to the defendants previously to the nationalization, but the court, through a laborious construction of a certain rule of the English Act,<sup>156</sup> held for the defendant. Hence (1) the case is no Conflict proposition at all, (2) insofar as the case is indirectly in point, the holding is contrary to the view of the Restatement, the seller not being excused for non-performance. The other English case is concerned with a very peculiar situation which does not admit of generalization.<sup>157</sup>

The vague idea that the law of the place of performance perforce "regulates all matters of performance,"<sup>158</sup> seems to have contributed to the fallacies of the Restatement. It was not realized that any contract question can be related, in one or another sense, to the subject of performance.

D. A few words must still be said about the Conflict treatment of negotiable instruments. In respect to the making, endorsing, accepting of those instruments, and to similar acts directly creating negotiable obligations, the flexible "proper law of the contract" rule is not an appropriate tool. Standardization basic to the whole institution of negotiable instruments must be extended to the Conflicts situation. This has been done by the English Bill of Exchange Act of 1882<sup>159</sup> and, more elaborately, by various continental enactments now replaced by the Conventions for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes<sup>160</sup> which form a part of the Geneva Uniform Acts on these instruments. The Convention provides, for instance, that the formalities of as well as the effects (including validity) of signatures on bills and notes are governed by the *lex loci contractus*;<sup>161</sup> the effects of acceptance, however, and, in the case

155. *Kursell v. Timber Operators and Contractors* [1927] 1 K. B. 298.

156. The question was whether the contract at bar constituted a "sale of specific goods in a deliverable state . . .," see 18 r. 1 of the Act.

157. *Ralli Bros. v. Compania Naviera* [1920] 2 K. B. 287, discussed by NUSSBAUM, *MONEY IN THE LAW* (1939) 501, n. 55; 384, n. 16.

158. 2 BEALE at 1272. And see note 147 *supra*.

159. See DICEY, *CONFLICT OF LAWS* (5th ed. 1932) 699 *et seq.*

160. League of Nations, Documents No. M 15 (1930 II). A similar Convention was prepared for checks. *Id.* No. 294 M 137 (1931 II B). The material provisions of the Conventions are set out by LORENZEN, *CASES ON CONFLICT OF LAWS* (4th ed. 1937) 579.

161. CONVENTION, Art. 3(1), 4(2).

of a promissory note, of making are governed by the *lex loci solutionis*,<sup>162</sup> form and time limits for protest and for other measures necessary for the exercise or preservation of rights arising from the bills or notes are regulated by the law of the country "in which the protest must be drawn up or the measures in question taken."<sup>163</sup> No "proper law of the contract", no "intent of the parties" is considered. Along similar lines, cases on bills and notes form the main bulwark of a strict place-of-contracting theory, strict in the sense that the law of that place is held exclusively controlling with no regard to the intention of the parties.<sup>164</sup> Unfortunately, it seems that in the preparation of the Restatement the matter of bills and notes was not kept sufficiently separate from the general contracts matter, with the result that the bills and notes cases gave fallacious support to the Restatement's sweeping place-of-contracting theory and that the Restatement's propositions as to bills and notes did not there obtain the desired refinement.<sup>165</sup>

#### TESTING THE "CONFUSION" OF THE CASES

In the light of the foregoing analysis, the alleged basic inconsistencies of the American cases may be now tested by the decisions of the Supreme Court which have been so severely criticized by Professor Beale. It has been already shown that *Scudder v. Union Bank* and *Hall v. Cordell*, which have drawn his trenchant disapprobation, do not conflict at all. Both of them refer to formalities and should be associated, as was pointed out, with *Pritchard v. Norton* where, as in the *Hall* case, the contract was held good under the proper law of the contract.

The cases concerned with the substance of the contract are likewise easily explainable in terms of intent or of proper-law-of-the-contract theory. Chief Justice Marshall's recognition of the intent theory, though a dictum,<sup>166</sup> marked the way for the later cases. That theory was expressly referred to in *Cox v. United States*<sup>167</sup> and in *Liverpool and Great Western Steam Company v. Phenix Insurance Company*,<sup>168</sup> both estab-

162. *Id.* at Art. 4(1).

163. *Id.* at Art. 8; cf. the quoted passage with the inadequate place of performance language of RESTATEMENT, § 369.

164. See, e.g., regarding the Massachusetts cases cited note 132 *supra*. *Andrews v. Pond*, 13 Pet. 65 (U. S. 1839) and *Scudder v. Union Bank*, 91 U. S. 406 (1875), may also be mentioned in this connection. It ought to be said, however, that the American cases, so often indifferent to legal theory, sometimes use "intent" language also in cases on bills and notes. See, e.g., *Bank of Orange County v. Colby*, 12 N. H. 520 (1842).

165. Professor Lorenzen's admirable volume, *CONFLICT OF LAWS RELATING TO BILLS AND NOTES* (1919) would have offered ample material for the work of the Restatement.

166. *Wayman v. Southard*, 10 Wheat. 1 (U. S. 1825).

167. 6 Pet. 172 (U. S. 1832).

168. 129 U. S. 397 (1889).

lishing a presumption in favor of the *lex loci contractus*—which was applied in the *Liverpool* case. The ground of decision in that case was, however, not so much the presumption as the fact that the contacts had their center of gravity in New York, the place of contracting.<sup>169</sup> In the *Cox* case, however, the presumption was overcome because the connection with the place of performance was much stronger. In view of the Court's reference to the intent theory, it is difficult to understand Professor Beale's comment that the rule of the case is "of course" that "the law of the place of performance strictly governs the validity of a contract."<sup>170</sup>

In *Mutual Life Insurance Company v. Cohen*<sup>171</sup> the presumption in favor of the law of the place of contracting, which was the Montana law, is briefly reiterated; but in the main the Court points out that under either law referred to by the parties the outcome would be the same. In *Mutual Life Insurance Company v. Hill*<sup>172</sup> it was recognized by the Court, as in the *Cohen* case, that the parties may validly incorporate in their contract a reference to foreign law. The *Hill* case adds the caveat that the provisions of the law agreed upon must not conflict with the law or public policy of the state in which the contract is made; a sound limitation of the intent theory. In *London Assurance v. Companhia de Moagens*<sup>173</sup> English law was applied, though the contract was made in Philadelphia; but because of the surrounding circumstances<sup>174</sup> English law was the proper law of the contract, the court's line of thought being similar to that of the *Cox* case. Again, no difficulty is presented by *Selover, Bates & Company v. Walsh*<sup>175</sup> where the court used the law of the place which was both the place of contracting and of performance, rather than the place of the land contracted for; the coincidence of those two places generally determines in the American conception the center of gravity.

*Equitable Life Insurance Company v. Clements*<sup>176</sup> is a little more intricate. In error to the Supreme Court of Missouri the Supreme Court of the United States held ineffectual a clause of a life insurance policy as violating a Missouri statute which prohibited the incorporation of certain harsh provisions, prejudicial to defaulting policy-holders, in life insurance policies issued by any company doing business in Missouri.

169. Whether the court was justified in using a federal rule rather than the New York law is a question outside the scope of the present article. Cf. STUMBERG, *CONFLICT OF LAWS* (1937) 210, n. 46. See also note 185 *infra*.

170. 2 BEALE at 1106.

171. 179 U. S. 262 (1900).

172. 193 U. S. 551 (1904).

173. 167 U. S. 149 (1897).

174. See p. 904 *supra*.

175. 226 U. S. 112 (1912).

176. 140 U. S. 226 (1891).

Missouri being the forum, the court had to apply the Missouri statute which under its terms clearly reached policies issued by foreign companies doing business in Missouri. In view of the sweeping text of the statute, however, the question could have been raised whether the State of Missouri had exceeded the state's power under the Federal Constitution. As a matter of fact, in later cases, construing similar Missouri statutes, the Court has examined their effectiveness from the angle of constitutional theory,<sup>177</sup> an approach less in favor when the *Clements* case was decided. In that case the Court, considering the matter from a Conflict point of view, held that the contract was governed by Missouri law. In fact the insured resided there, the policy had been delivered there, the first premiums had been paid there; through the delivery, the Court stated, the contract had become binding. If this be ruling in favor of the *lex loci contractus*, it only states the well known limitation of the intent theory, which was more explicitly announced in the *Hill* case. In substance, however, a constitutional question was decided, and was accurately decided in the light of the later and more enlightened cases.<sup>178</sup> The facts stated by the Court clearly justified, from a constitutional point of view, the application of the Missouri statute.

Only usury cases remain. In *Andrews v. Pond*<sup>179</sup> a bill of exchange was held void under the law of New York, the place of contracting (drawing). This conforms to the general Conflict rule in matters of illegality, particularly since the drawing of a bill of exchange was in question. In addition, the case contributes to the law of usury in that the more liberal *lex loci solutionis* was ignored on the ground that the transaction was not a bona fide agreement inasmuch as it tried to conceal an evasion of the *lex loci contractus*. *Seeman v. Philadelphia Warehouse*,<sup>180</sup> decided almost a century later, makes it even clearer that in usury cases, on principle, the law of the place of contracting or of performance should be applied, whichever is more favorable to the maintenance of the contract; but the Court took care to exclude from that preferential treatment evasive agreements such as that denounced by

177. *New York Life Ins. Co. v. Dodge*, 246 U. S. 357 (1918); *Mutual Life Ins. Co. v. Liebong*, 259 U. S. 209 (1922). In the latter case the contract was likewise deemed to be made in Missouri, so the statute was applied. It is remarkable that Justice Holmes, writing the opinion, slid back into Conflict language. See note 52 *supra*. This indicates how closely constitutional and Conflict matters are interwoven. The difference is that much stronger contacts with Missouri are required to place the contract wholly under Missouri law, than constitutionally to warrant the application by a Missouri court of a single Missouri statute enacted to reach certain foreign transactions as a matter of public policy. In Professor Beale's treatise the impact of these and other constitutional questions upon the Conflict situation has not been considered.

178. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U. S. 532 (1935); *Pacific Empl. Ins. Co. v. Industrial Acc. Comm'n*, 306 U. S. 493 (1939).

179. 13 Pet. 65 (U. S. 1839).

180. 274 U. S. 403 (1927).

*Andrews v. Pond. Fowler v. Equitable Trust Company*<sup>181</sup> merely prevents a perversion of the lenient Conflict rule on usury, holding that:

the contract of loan in question having been made between a citizen of Illinois and a corporation of another state, and the bonds having been executed in Illinois and secured by mortgage upon real estate there situated, the defense of usury . . . cannot be sustained on the ground simply that the rate of interest . . . was in excess of that allowed by the law of the state in which the bonds were made payable.

According to Professor Beale<sup>182</sup> the case holds "that a contract is necessarily subject to the statutory provisions of the state of contracting." In reality the case announces a narrow rule of usury law, and in these boundaries it establishes the precedence of the proper law of the contract (not exactly of the law of the place of making as such) over the law of the place of performance.

These are all of the Supreme Court cases which form the particular object of Professor Beale's criticism. They do not reveal any material inconsistency or lack of soundness. Sometimes, as in the *Clements* case, the rationale or language used may be open to objection, but only within the limits of common juridical dissension. Vacillation of concept or language is more frequent with lower courts. From a theoretical point of view their main weakness consists in their proclivity, mentioned above, to commit themselves without necessity to place-of-contracting or to place-of-performance language.

It may be not amiss briefly to contrast the American with the German cases. In Germany, the courts have elaborated Savigny's place-of-performance theory to the effect that for each obligation arising out of a contract a separate place of performance is searched for which possibly involves the application of a separate legal system. Thus the seller's duties to ship the goods, or to notify the buyer of the shipment, and the buyer's duties to pay the purchase price, or to receive the goods, may all require the application of different laws.<sup>183</sup> This method, prompted by legal doctrine, has led to a kind of international dismemberment of the contracts, and to hairsplitting and medley.<sup>184</sup>

Against this background, the American cases, though perhaps theoretically less refined, stand out for simplicity and practical-mindedness. Their flexibility is in accord with the spirit of the universal intent doctrine as well as with the nature and infinite variety of contracts. Nor is this flexibility excessive since in its application the courts' objective

181. 141 U. S. 384 (1891).

182. 2 BEALE at 1107.

183. An approximation, fortunately harmless, to this line of thought may be found in *Deins' Adm'r v. Gibbs*, 257 Ky. 469, 78 S. W. (2d) 346 (1935).

184. For details see NUSSBAUM, DEUTSCHES INT. PRIVATRECHT (1932) 218, 238, 270.

has generally been to discover and apply the law of the place to which the most important contacts of the contract go.<sup>185</sup> No better solution is found in the Contracts doctrine of Private International Law.<sup>186</sup>

185. Certainly, such a broad principle may occasionally lead to divergent decisions on identical facts. Actually, however, there is in respect to the problem at hand surprisingly little evidence of such judicial dissonance. No pertinent evidence is proffered by Professor Beale whose criticism is focused on alleged inconsistencies of theory or language. The problem before us is briefly touched upon by STUMBERG, *CONFLICT OF LAWS* (1937) 210. He points to the conflicting results reached by English and American courts, respectively, in sea carriers' liability cases; specifically he mentions the disparity of *Liverpool & Great West. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397 (1889), and *In re Missouri S. S. Co.*, 42 Ch. Div. 321, 335 (C. A. 1889). In these cases, however, the language of the respective bills of lading differed greatly in relevant points, as was carefully pointed out by each court; and furthermore there was a collision of public policies. See note 96 *supra*.

186. This has been well pointed out by BATIFFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938) at 41.