

COMMERCIAL SECURITY AND UNIFORMITY THROUGH EXPRESS STIPULATIONS IN CONTRACTS AS TO GOVERNING LAW. — The resigned conclusion of commentators<sup>1</sup> and courts<sup>2</sup> alike is that the branch of the conflict of laws dealing with contracts<sup>3</sup> is probably the most confused field in American law. The language and rationalizations of the decisions, often exhibiting inconsistencies within the same jurisdiction,<sup>4</sup> are based, in the main, on three theories. The "place of making" or *lex loci contractus* theory espoused by Professor Beale<sup>5</sup> and the *Restatement*<sup>6</sup> is based upon the territorial concept of conflicts. Attacked as formalistic and as producing results determined largely by chance,<sup>7</sup> this theory has never commanded general acceptance.<sup>8</sup> An even less widely adopted rationale is the law of the "place of performance" or *lex loci solutionis* rule now most often found combined with the place-of-making rule into a composite theory<sup>9</sup> usually found embodied in a statute.<sup>10</sup> The major difficulty of this theory is its total inadequacy in multistate-performance cases.<sup>11</sup> Finally, there is the intention or "party autonomy" theory which permits the parties to select within certain limits the law of the contract.<sup>12</sup> To some extent every state has given recognition to the expressed or implied intent of the parties.<sup>13</sup> This view has suffered critical repudiation in some quarters, however, because it establishes the parties as a private legislature above all laws.<sup>14</sup>

<sup>1</sup> See GOODRICH, *CONFLICT OF LAWS* 273 (2d ed. 1938); Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L. J. 565 (1921); Morris and Cheshire, *The Proper Law of a Contract in the Conflict of Laws*, 56 L. Q. REV. 320 (1940); Rabel, *An Interim Account on Comparative Conflicts Law*, 46 MICH. L. REV. 625, 634 (1948).

<sup>2</sup> See, e.g., Deaton v. Vise, 210 S. W.2d 665, 668 (Tenn. 1948).

<sup>3</sup> Problems of a similar nature often arise in trust cases. See LAND, *TRUSTS IN THE CONFLICT OF LAWS* 36, 118 (1940); Cavers, *Trusts Inter Vivos and the Conflict of Laws*, 44 HARV. L. REV. 161 (1930).

<sup>4</sup> The language of the leading United States Supreme Court cases is difficult to rationalize into a logical pattern. See 2 BEALE, *CONFLICT OF LAWS* § 332.1 (1935) (hereinafter cited BEALE); Nussbaum, *Conflict Theories of Contracts: Cases versus Restatement*, 51 YALE L. J. 893, 919 (1942); Note, 55 HARV. L. REV. 1181, 1184-85 (1942).

<sup>5</sup> See Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260 (1910).

<sup>6</sup> See RESTATEMENT, *CONFLICT OF LAWS* § 311 (1934).

<sup>7</sup> See Cook, "Contracts" and the Conflict of Laws, 31 ILL. L. REV. 143, 162 (1936); Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L. J. 655, 663 (1921).

<sup>8</sup> See 2 BEALE 1172 (classification of states by theories); Nussbaum, *supra* note 4, at 905.

<sup>9</sup> An often-cited rule states that the place of making governs unless performance is to be elsewhere, in which case the place of performance will govern the contract. See STORK, *CONFLICT OF LAWS* 233 (1834); RESTATEMENT, *CONFLICT OF LAWS* §§ 311, 358 (1934); CLARK, *CONTRACTS* § 190 (4th ed. 1931).

<sup>10</sup> E.g., CAL. CIV. CODE § 1646 (1941); OKLA. STAT. ANN. tit. 15, § 162 (1941).

<sup>11</sup> See STUMBERG, *CONFLICT OF LAWS* 208 (1937).

<sup>12</sup> See Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899 (1938).

<sup>13</sup> See Nussbaum, *supra* note 4, at 897; Rheinstein, Book Review, 37 COL. L. REV. 327 (1937).

<sup>14</sup> See 2 BEALE § 332.2; GOODRICH, *op. cit. supra* note 1, at 278. But see WOLFF, *PRIVATE INTERNATIONAL LAW* § 395 (1945) (hereinafter cited WOLFF); Lorenzen,

The chaotic state of the American conflicts law unquestionably introduces a lack of certainty and of uniformity of rights and obligations into commercial dealings which hampers our interstate and international trade. Judicial and legislative attempts to resolve this recognized problem have met with only limited success. Control over the states by the United States Supreme Court, under the due process and full faith and credit clauses, is limited to enforcing a minimum standard of recognition where the interfering state's interests are nonexistent or manifestly subordinate.<sup>15</sup> The Uniform State Laws also fall short of full efficacy because of limited acceptance<sup>16</sup> and wide variation in construction.<sup>17</sup> International conventions in a few isolated fields, such as bills of exchange<sup>18</sup> and shipping contracts,<sup>19</sup> have produced only a modicum of commercial security.

In the light of these circumstances, the one solution that offers the most hope for imparting a substantial amount of stability to interstate and international commerce is the increased use of express stipulations by the parties as to the law which they desire to govern their contract. Professor Cook was probably the first to point out that beneath the erratic language of the cases there ran a pattern of judicial performance cognizable by some form of the intent theory.<sup>20</sup> In the last decade a considerable amount of legal scholarship has culminated in a similar conclusion.<sup>21</sup> Because of the frequent multistate aspects of modern commercial activity, contracts involving these transactions afford a logical field for the fullest application of the intent theory of choice of laws. An analysis of the results obtained in American and British cases and a reference to the leading authorities on the laws of other important

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*Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L. J. 565 (1921).

The ease of movement afforded by modern transportation methods has undermined the inexorable objectivity in application of the place-of-making and place-of-performance rules. Long ago the courts recognized that by a little effort the parties could execute their contract in the desired jurisdiction. See, e.g., *Smith v. Parsons*, 55 Minn. 520, 529, 57 N. W. 311, 313 (1893). Rarely will a court frustrate such a deliberate attempt to determine the applicable law. *But cf.* *Horning v. District of Columbia*, 254 U. S. 135 (1920).

<sup>15</sup> See Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1232-33 (1946) (choice of law of state court will be affirmed unless it has no plausible connection with events); Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); cf. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1 (1945) (urging more vigorous use of clause to effect a truly national system of justice).

<sup>16</sup> For example, the Uniform Conditional Sales Act has been adopted by only six states.

<sup>17</sup> See BRITTON, *BILLS AND NOTES* 19 (1943).

<sup>18</sup> See note 63 *infra*. For a discussion of leading international conventions on unification of laws, see CHESHIRE, *PRIVATE INTERNATIONAL LAW* 14 *et seq.* (3d ed. 1947).

<sup>19</sup> See 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 416 *et seq.* (1947).

<sup>20</sup> See Cook, "Contracts" and the Conflict of Laws, 31 ILL. L. REV. 143, 170 (1936).

<sup>21</sup> See SCHMITTHOFF, *ENGLISH CONFLICT OF LAWS* 107 (1945); WOLFF § 400; Nussbaum, *supra* note 4, at 911; Rabel, *An Interim Account on Comparative Conflicts Law*, 46 MICH. L. REV. 625, 635 (1948).

commercial countries indicate an unmistakable tendency toward accepting express stipulations when shown to be commercially reasonable and in furtherance of business convenience or necessity.

*Construction of Contract.*—When the issue concerns only the construction or interpretation of the contract, there is no valid reason for denying full effect to the expressed intent of the parties. For once, the authorities are in unanimous accord.<sup>22</sup> The parties may freely select any law,<sup>23</sup> even if totally unconnected with their contract.<sup>24</sup> Only one American court, by blindly following a dogma it applies in validity cases, voided such a stipulation.<sup>25</sup> There is no justification for such a result. The reference to the selected law is merely a shorthand way of incorporating statutes and decisions which would clearly control if written verbatim into the contract.<sup>26</sup> Closely analogous is the frequent practice of stipulating for the inclusion of trade association rules<sup>27</sup> and well-known commercial customs.<sup>28</sup> By definition legal rules as to construction belong to the class of optional laws<sup>29</sup> subject to variation by the parties. Only the inconvenience of the court's having to deal with foreign law can be raised as an objection, and such an objection is hardly tenable in this age of globe-spanning commerce.<sup>30</sup> For the draftsman of commercial contracts, the benefits of a predictable and uniform construction of the contract are alone justification for the inclusion of an express clause as to the controlling law.

*Essential Validity of Contract.*<sup>31</sup>—Most of the litigated cases concern contracts which, if not governed by the stipulated law, would be invalidated by some positive rule of law. The earliest decisions in-

<sup>22</sup> Even Professor Beale, who so vigorously attacked the intent theory in validity cases, agreed that the interpretation of the contract follows the intent of the parties. 2 BEALE § 346.2. See GOODRICH, *op. cit. supra* note 1, § 109 (no doubt that parties can stipulate as to the law to control interpretation); 6 PAGE, CONTRACTS § 3571 (2d ed. 1922); WOLFF § 399 (only compulsory rules of law limit party autonomy).

<sup>23</sup> *E.g.*, Ragsdale v. Brotherhood of R. R. Trainmen, 157 S. W.2d 785 (Mo. App. 1941) (definition of disability in insurance contract); Boole v. Union Marine Ins. Co., 52 Cal. App. 207, 198 Pac. 416 (1921) (constructive total loss determined by stipulated law); Burns v. Burns, 190 N. Y. 211, 82 N. E. 1107 (1907) (meaning of heirs).

<sup>24</sup> See WOLFF § 402; Falconbridge, *Contract and Conveyance in the Conflict of Laws*, 81 U. OF PA. L. REV. 661, 671 (1933).

<sup>25</sup> Owens v. Hagenbeck-Wallace Shows Co., 58 R. I. 162, 192 Atl. 158 (1937).

<sup>26</sup> See Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899, 915 (1938).

<sup>27</sup> See CHESHIRE, PRIVATE INTERNATIONAL LAW 327 (3d ed. 1947); WOLFF § 427.

<sup>28</sup> For example, Customs of English Lloyds. See Boole v. Union Marine Ins. Co., 52 Cal. App. 207, 198 Pac. 416 (1921); London Assurance v. Companhia de Moagens, 167 U. S. 149 (1897).

<sup>29</sup> See Wolff, *Choice of Law by the Parties in International Contracts*, 73 U. S. L. REV. 203 (1939).

<sup>30</sup> The doctrine of *forum non conveniens*, dealing with the appropriateness of parties' bringing their action in the particular forum apart from the difficulty involved in determining foreign law, is not relevant to this discussion.

<sup>31</sup> The formal validity of contracts is usually controlled by the place of execution or the forum, see GOODRICH, *op. cit. supra* note 1, § 106, and is seldom a source of commercial litigation.

volved usury<sup>32</sup> and insurance. In the usury cases the courts favored commerce by a marked hostility toward invalidation,<sup>33</sup> even as to notorious building-and-loan association stock-loan schemes.<sup>34</sup> The oft-repeated standard was that the parties could stipulate, provided they acted in good faith and the stipulation was not a mere subterfuge for evading usury laws.<sup>35</sup> Thus a court could readily shift to the evasion ground to void a stipulation whenever it desired.<sup>36</sup> However, only six cases decided since 1902 have rejected the stipulated law. Even in these cases, the law adopted by the court was that of the state wherein the lender had its principal office, and in the four most recent cases that choice resulted in an upholding of the contract just as the stipulated law would have done.<sup>37</sup> Thus a reference to the law of the lender's commercial domicile, the most common stipulation, would be readily acceptable to the courts. The only other commercially reasonable references would be to the borrower's domicile or to the situs of the security. Frequently these two places coincide,<sup>38</sup> and in such a case there should be no question as to the effectiveness of the stipulation. Where this coincidence does not occur, either reference alone should be valid.<sup>39</sup>

<sup>32</sup> For a collection of early usury cases, see 62 L. R. A. 33 (1904).

<sup>33</sup> *E.g.*, *Andrews v. Pond*, 13 Pet. 65 (U. S. 1839); *Townsend v. Riley*, 46 N. H. 300 (1865).

<sup>34</sup> *E.g.*, *Fidelity Sav. Ass'n v. Shea*, 6 Idaho 405, 55 Pac. 1022 (1899) (unconscionably usurious scheme to "rob unwary and unsuspecting").

<sup>35</sup> *E.g.*, *Steinman v. Midland Sav. & Loan Co.*, 78 Kan. 479, 96 Pac. 860 (1908); *Lanier v. Union Mortgage, Banking & Trust Co.*, 64 Ark. 39, 40 S. W. 466 (1897). The good faith requirement apparently means no more than that the stipulated law have some relation to the contract. See *Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403, 408 (1927).

<sup>36</sup> *E.g.*, *Locknane v. United States Sav. & Loan Co.*, 103 Ky. 265, 44 S. W. 977 (1898); *Meroney v. Atlanta Nat. Bldg. & Loan Ass'n*, 116 N. C. 882, 21 S. E. 924 (1895); *cf. Personal Finance Co. v. Gilinsky Fruit Co.*, 127 Neb. 450, 256 N. W. 511 (1934) (small loans statute case involving no express stipulation).

<sup>37</sup> *Manufacturers Finance Co. v. B. L. Johnson & Co.*, 15 Tenn. App. 236 (1932) (rejected references to Delaware but followed the references to Maryland law); *Bundy v. Commercial Credit Co.*, 200 N. C. 511, 157 S. E. 860 (1931); *Brierley v. Commercial Credit Co.*, 43 F.2d 730 (3d Cir. 1930); *United Divers Supply Co. v. Commercial Credit Co.*, 289 Fed. 316 (5th Cir. 1923); *Stoddard v. Thomas*, 60 Pa. Super. 177 (1915); *Washington Nat. Bldg. & Loan Ass'n v. Pifer*, 31 App. D. C. 434 (1908). See 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 410 (1947) for a list of 26 American usury cases, in twelve of which the stipulation was followed. About a dozen more cases upholding or approving the use of stipulations have been found.

The Commercial Credit Company, the lender in three of the cases above cited, by 1948 had changed its stipulated reference from Delaware, its place of incorporation, to the state "where [loan] accepted" by the company, usually the home office in Maryland. This latest stipulation was upheld recently. *Big Four Mills, Ltd. v. Commercial Credit Co.*, 307 Ky. 612, 211 S. W.2d 831 (1948).

<sup>38</sup> See, *e.g.*, *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311 (1893); *Lanier v. Union Mortgage, Banking & Trust Co.*, 64 Ark. 39, 40 S. W. 466 (1897).

<sup>39</sup> *Union & Planter's Bank & Trust Co. v. Evans*, 8 Tenn. App. 63 (1928) (not clear where borrower domiciled). There are some old cases which would seem to require that the law of the situs of the security control. *E.g.*, *Snyder v. Fidelity Sav. Ass'n*, 23 Utah 291, 64 Pac. 870 (1901) (land as security). On the other hand, a reference to the situs state which was also the forum has been anomalously rejected. *American Freehold Land & Mortgage Co. v. Jefferson*, 69 Miss. 770, 12 So. 464 (1892).

The complete range of commercially desirable laws is therefore open to the parties even within the stringent good faith standard.

In insurance contract cases, as a logical consequence of the unequal bargaining atmosphere,<sup>40</sup> the courts have shown unusual solicitude for the interest in protecting the resident insured from foreign insurance corporations.<sup>41</sup> This position is reinforced by an implicit recognition of a policy protecting local insurance companies, which finds expression in various legislative and judicial barriers to doing business<sup>42</sup> and is justified by assertions that foreign corporations are not entitled to better treatment than their domestic counterparts.<sup>43</sup> The advantages to the state in providing its citizens the benefits of convenient access to the services of foreign corporations have completely escaped notice. As a result, the favorable language of the usury cases toward commercial facility is absent. Express stipulations, nevertheless, are given effect,<sup>44</sup> except perhaps when contrary to an express provision of a statute of the insured's state.<sup>45</sup> Drastically restrictive statutes, which strive to localize the maximum number of policies, exist in a number of states and usually provide that all insurance on life, property, and interests located in the state,<sup>46</sup> or for which the application is made within the state,<sup>47</sup> shall be deemed contracts referable to the local law. The drastic effects of such statutes have been mitigated by the United States Supreme Court's decision under the due process clause that the Mississippi localizing statute was inapplicable to a contract within its terms because the contacts with Mississippi, although recognizable,

<sup>40</sup> See CARNAHAN, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS* § 98 (1942), drawing the conclusion that when the forum's law favors its insured-resident the stipulation will be disregarded. This comprehensive work on all phases of the problem contains references to numerous express-stipulation cases, especially in §§ 49, 50, and 98.

<sup>41</sup> See note 40 *supra*.

<sup>42</sup> Missouri has, for example, maintained a long-standing struggle with foreign insurance companies. See, e.g., *Hoffman v. North American Union*, 56 S. W.2d 599 (Mo. App. 1933); *New York Life Ins. Co. v. Dodge*, 246 U. S. 357 (1918).

<sup>43</sup> This uncivil attitude toward foreign corporations has been deplored, and American courts are found instinctively refraining from its manifestation. See Rabel, *An Interim Account on Comparative Conflicts Law*, 46 MICH. L. REV. 625, 628 (1948).

<sup>44</sup> E.g., *Dougherty v. Equitable Life Assurance Soc'y*, 266 N. Y. 71, 193 N. E. 897 (1934); *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421 (1896). See 1 COUCH, *INSURANCE* § 199 (1929, Supp. 1945) (extensive compilation of express-stipulation cases); cf. 12 APPLEMAN, *INSURANCE* §§ 7074-75 (1943) (finds sharp conflict in express-stipulation cases). See note 40 *supra*.

Fraternal benefit societies fall into a special class because of the mutual interdependence of their members, so that the laws of the state of incorporation largely control the rights of the members. See, e.g., *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U. S. 586 (1947); *Supreme Council of the Royal Arcanum v. Green*, 237 U. S. 531 (1915). See 12 APPLEMAN, *INSURANCE* § 7077 (1943).

<sup>45</sup> E.g., *New England Mut. Life Ins. Co. v. Olin*, 114 F.2d 131 (7th Cir. 1940); *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385 (1908).

<sup>46</sup> See CARNAHAN, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS* § 25 (1942); 1 COUCH, *INSURANCE* § 200 (1929, Supp. 1945).

<sup>47</sup> See note 46 *supra*.

were decidedly subordinate to the interests of another state.<sup>48</sup> Thus, despite the strongly held public policy notions underlying this social legislation and the apprehension that the laws of the few states wherein the largest companies are located will be imposed on states with more protective standards for the insured,<sup>49</sup> express stipulations can serve some useful purposes. The probability of judicial recognition of the stipulation is extremely high where these public policy objections are overridden by a clearly demonstrated interest in uniform coverage, as, for example, in group insurance plans created for large corporations the employees of which are scattered over many states.<sup>50</sup>

Protective legislation also dominates the field of workman's compensation.<sup>51</sup> The majority of the state statutes extend a measure of protection to extraterritorial injuries and contracts,<sup>52</sup> some expressly providing, however, for the intention of the parties in multistate contact situations.<sup>53</sup> The employee-protection motive has invalidated stipulations, especially in the early cases<sup>54</sup> when considerable disparity of statutory treatment existed. More recently, in the absence of very strong statutory prohibition, courts have regarded these stipulations with greater favor.<sup>55</sup> A case before the Court of Appeals for the Sixth Circuit in 1948<sup>56</sup> dramatically illustrates the complex problem of multi-state employment and exemplifies the growing alertness of the bench in accepting the advantages to commerce of following the expressed intent of the parties.<sup>57</sup> This airline accident case involved recognizable contacts with at least seven states.<sup>58</sup> Although reversing a summary

<sup>48</sup> *Hartford Acc. & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (1934), 34 COL. L. REV. 951, 82 U. OF PA. L. REV. 863. On the topic of localizing statutes in general, see Note, 13 N. C. L. REV. 213 (1935).

<sup>49</sup> See Note, 61 HARV. L. REV. 687, 691 (1948).

<sup>50</sup> See, e.g., *Connecticut Gen. Life Ins. Co. v. Hickman*, 150 S. W.2d 121 (Tex. Civ. App. 1941); *Boseman v. Connecticut Gen. Life Ins. Co.*, 301 U. S. 196 (1937) (advantages of uniformity to insurer and insured stressed).

<sup>51</sup> See HOBBS, *WORKMEN'S COMPENSATION INSURANCE* 61 (1939). For general discussions of conflicts problems in this field, see Dunlap, *The Conflict of Laws and Workmen's Compensation*, 23 CALIF. L. REV. 381 (1935); Dwan, *Workmen's Compensation and the Conflict of Laws—The Restatement and Other Recent Developments*, 20 MINN. L. REV. 19 (1935). Disagreement as to the exact nature of the action, whether sounding in tort or contract or involving a status relationship, has complicated the solution to the choice-of-law question.

<sup>52</sup> See 1 SCHEIDER, *WORKMEN'S COMPENSATION* § 155 *et seq.* (3d ed. 1941); Roos, *The Problem of Workmen's Compensation in Air Transportation*, 6 J. AIR L. 1, 13 (1935).

<sup>53</sup> See HOBBS, *op. cit. supra* note 51, at 135. Cf. *State ex rel. Weaver v. Missouri Workmen's Compensation Comm'n*, 339 Mo. 150, 95 S. W.2d 641 (1936).

<sup>54</sup> E.g., *Carl Hagenbeck & Great Wallace Show Co. v. Randall*, 75 Ind. App. 417, 126 N. E. 501 (1920); *American Radiator Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85 (1914) (stipulated jurisdiction had no statute on the subject at the time).

<sup>55</sup> E.g., *Johnson v. Industrial Comm'n*, 45 Ohio App. 125, 186 N. E. 509 (1932).

<sup>56</sup> *Duskin v. Pennsylvania-Central Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948).

<sup>57</sup> For choice of law difficulties in airline cases not involving express stipulations see *Severson v. Hanford Tri-State Airlines, Inc.*, 105 F.2d 622 (8th Cir. 1939).

<sup>58</sup> The airline, a Delaware corporation, had its main office in Washington, D. C., and maintained an important control center at Pittsburgh, Pennsylvania. Decedent, a pilot, who died in an Alabama crash, flew regularly more miles over Pennsylvania than any other state. At the time the contract of employment was made, he was a resident of Oklahoma but temporarily resided in Tennessee. At the time of his

judgment in favor of the airline,<sup>50</sup> the court unequivocally accepted the stipulated law for which the airline argued: There is no reason "for precluding parties . . . from stipulating that the laws of any jurisdiction, even if foreign to the elements of the contract, should govern the rights and obligations of the parties, where not against public policy."<sup>60</sup>

Personal service contracts requiring performance in many states are appropriate for the application of the stipulated law so that the obligations under the contract will not shift constantly. Contracts of circus performers and musical artists containing such stipulations have been upheld.<sup>61</sup> The broad field of negotiable instruments has already been touched upon in the discussion of the usury cases. Here the courts instinctively strive<sup>62</sup> to maintain the free circulation of commercial paper so vital to business relations. Thus, despite the fact that the Geneva Convention on Bills of Exchange and the Uniform Negotiable Instruments Law have removed many areas of uncertainty,<sup>63</sup> conflicting constructions of these enactments still render a stipulation of governing law profitable for the draftsman. Corporate bonds especially call for a definite agreement on the applicable law.<sup>64</sup> In the related field of surety contracts, the few cases favor the stipulation. One of the most recent cases upheld a reference to the law of the "place of building" in a construction contractor's bond.<sup>65</sup>

Express stipulations in sales and distribution contracts have generally

death he was domiciled in *Tennessee*, though temporarily residing in *New York*. His wife, the plaintiff in the case, was a resident of *Tennessee* where the suit was brought in the federal district court.

<sup>50</sup> The court accepted the reference to the Pennsylvania law, but then instead of applying that law to a hypothetical domestic situation, decided that the Pennsylvania statute by its terms was inapplicable to a foreign death case.

<sup>60</sup> 167 F.2d 727, 730 (1948); see 16 U. OF CAL. L. REV. 157 (1948).

<sup>61</sup> *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F.2d 584 (9th Cir. 1941); *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425 (1903).

<sup>62</sup> Cf. Rabel, *An Interim Account on Comparative Conflicts Law*, 46 MICH. L. REV. 625, 635 (1948) (courts inarticulately realistic in conflicts cases); LORENZEN, *THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES* (1919) (comparative study).

See Note, 55 HARV. L. REV. 1181 (1942). This note finds the protection of the holder under commercially reasonable conditions the foremost factor in the decisions. *But cf.* *Bell v. Riggs*, 34 Okla. 834, 127 Pac. 427 (1912) (court followed the stipulation even though such action made the note non-negotiable).

It can be noted in passing that capacity-to-contract problems seldom plague commercial transactions now that married woman disabilities have largely been eliminated. A corporation's power to act within the state is occasionally challenged, but that power is determined by "doing business" statutes the effects of which cannot be discussed here. See Foley, *Incorporation, Multiple Incorporation, and the Conflict of Laws*, 42 HARV. L. REV. 516 (1929); Note, 79 U. OF PA. L. REV. 1119 (1931).

<sup>63</sup> On the Geneva Convention, see Hudson and Feller, *The International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333 (1931). Neither this country nor Great Britain has adopted this convention. Under the NIL, varying constructions result in conflicts problems.

<sup>64</sup> Cf. *Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509, 2 N. Y. S.2d 80 (Sup. Ct. 1938) (stipulation to German law in German corporation's bonds); *Rex v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] A. C. 500 (costly litigation over British government gold bonds without stipulation).

<sup>65</sup> *Philip Carey Co. v. Maryland Cas. Co.*, 201 Iowa 1063, 206 N. W. 808 (1926).

been approved despite the substantial claim of the situs to property within its borders.<sup>66</sup> Chattel mortgages and conditional sales of chattels draw into operation complex and variegated lien and recording acts which the situs state might reasonably regard as undisplaceable public law.<sup>67</sup> Yet a number of cases recognize the stipulations,<sup>68</sup> at times without discussion of the effect of such statutes upon them.<sup>69</sup> One conditional sales contract which was followed as to the governing law stated that the express intent was that it conform with laws of any state where enforcement was sought.<sup>70</sup> Although such a clause can hardly be said to promote commercial certainty, the case illustrates the lengths to which the courts may go in upholding stipulations. It is also significant to note that very recently the Court of Appeals for the Second Circuit approved a stipulation of New York law in a motion picture distribution contract.<sup>71</sup> The same court fifteen years before had remarked that the parties had nothing whatever to do with the applicable law.<sup>72</sup> Shipping contract cases are apparently an exception to the general judicial trend in favor of stipulations.<sup>73</sup> For an extreme example, an American court has barred an attempt to limit the liability of carriers even when a foreign ship was engaged in a wholly foreign trip.<sup>74</sup> However, the Harter Act, passed in 1893, and the Carriage of Goods by Sea Act of 1936,<sup>75</sup> defining carrier liability on trips to and from this country, have provided sufficient uniformity<sup>76</sup> so that stipulations to avoid their provisions would not be commercially reasonable in cases covered by the Acts.

*English Cases.*—The English law affords an extremely favorable

<sup>66</sup> See, e.g., *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (1919); *Rubin v. Gallagher*, 294 Mich. 124, 292 N. W. 584 (1940). It is doubtful whether the parties to a land sale contract can with commercial reasonableness specify any other law than the law of the situs of the land.

<sup>67</sup> *Maguire v. Gorbaty Bros.*, 133 F.2d 675 (2d Cir. 1943) (failure to comply with law of situs allowed creditors of conditional vendee to prevail over vendor in spite of express stipulation to law of another state); *Stern v. Drew*, 285 Fed. 925 (D. C. Cir. 1922). See *Falconbridge, Contract and Conveyance in the Conflict of Laws*, 81 U. OF PA. L. REV. 817, 830 (1933); 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 1154 (6th ed. 1933).

<sup>68</sup> E.g., *Rubin v. Gallagher*, 294 Mich. 124, 292 N. W. 584 (1940); *Chalmers & Williams v. Surprise*, 70 Ind. App. 646, 123 N. E. 841 (1919).

<sup>69</sup> E.g., *Igleheart Bros., Inc. v. John Deere Plow Co.*, 114 Ind. App. 182, 51 N. E.2d 498 (1943) (local common law applied because of failure to prove foreign law) *semble*; *John Deere Plow Co. v. Mowry*, 222 Fed. 1 (6th Cir. 1915).

<sup>70</sup> See *Stevenson v. Lima Locomotive Works, Inc.*, 180 Tenn. 137; 172 S. W.2d 812 (1943).

<sup>71</sup> *Hal Roach Studios, Inc. v. Film Classics, Inc.*, 156 F.2d 596 (2d Cir. 1946) (affirmed validity of rescission on default clause in contract under the stipulated law).

<sup>72</sup> *E. Gerli & Co. v. Cunard S. S. Co.*, 4 F.2d 115, 117 (2d Cir. 1931).

<sup>73</sup> E.g., *The Kensington*, 183 U. S. 263 (1902); *Knott v. Botany Mills*, 179 U. S. 69 (1900). For similar cases in Great Britain, see the discussion of English cases p. 655 *infra*.

<sup>74</sup> *Oceanic Steam Nav. Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925).

<sup>75</sup> 27 STAT. 445 (1893), 46 U. S. C. § 190 (1946); 49 STAT. 1207 (1936), 46 U. S. C. § 1300 (1946).

<sup>76</sup> For general comment on carrier liability limitation and the conflict of laws, see Notes, 54 HARV. L. REV. 663 (1941), 35 COL. L. REV. 246 (1935); Comment, 35 YALE L. J. 997 (1926).

reception to express stipulations. Each contract is said to be governed by the "proper law of the contract,"<sup>77</sup> which is almost entirely determined by the expressed or implied intent of the parties.<sup>78</sup> The line of cases approving the principle of recognizing express stipulations<sup>79</sup> culminated when the Privy Council in the famous *Vita* case,<sup>80</sup> decided in 1939, ruled that there was no principle requiring any connection between the facts and the selected law.<sup>81</sup> However, the decision laid down the vague requirements that the stipulated law be bona fide, legal, and not against public policy.<sup>82</sup> The *Torni* case,<sup>83</sup> on closely similar facts, decided previously by the Court of Appeal in such a way as to negative the stipulation, was expressly disapproved.<sup>84</sup> It should be noted that in the *Vita* case the stipulated law led to a result in conformity with the Hague rules on international shipping, whereas in the *Torni* case the Rules would have been avoided had the stipulation been upheld. Thus the two cases can be reconciled on the theory that commercial convenience will support the stipulation unless it produces a result contrary to some compulsory rule of law,<sup>85</sup> and that no legitimate commercial purpose is served by a stipulation which attempts to circumvent an international convention formulated to introduce uniformity into shipping contracts. The British cases not only furnish the advocate with a source of precedent to persuade our courts to uphold stipulations, but also point up the usefulness to the draftsman of stipulations in Anglo-American contracts and in trade with the members of the British Commonwealth, which follow the "proper law" doctrine.<sup>86</sup>

<sup>77</sup> See SCHMITTHOFF, *op. cit. supra* note 21, at 99; DICEY, *CONFLICT OF LAWS* 962 (5th ed. 1932).

<sup>78</sup> See SCHMITTHOFF, *op. cit. supra* note 21, at 100 (when intent is expressed the proper law is easy to find); WOLFF § 425 (intent governs and parties have unlimited autonomy). *But cf.* CHESHIRE, *PRIVATE INTERNATIONAL LAW* 326 (3d ed. 1947) (proper law is the one with which the contract has the most connection and intent of parties is decisive only when proper law not obvious).

<sup>79</sup> The English law is traceable to the famous dictum of Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1077 (K. B. 1760), approving the implied intent of the parties. Later leading cases include *Hamlyn & Co. v. Talisker Distillery*, [1894] A. C. 202 (arbitration by London Corn Exchange); *Dobell & Co. v. Steamship Rossmore Co.*, [1895] 2 Q. B. 408; *Royal Exchange Assurance Corp. v. Sjöforsakrings Aktieföretaget Vega*, [1902] 2 K. B. 384.

<sup>80</sup> *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A. C. 277 (P. C.).

<sup>81</sup> *Id.* at 290.

<sup>82</sup> See *Morris and Cheshire, The Proper Law of a Contract in the Conflict of Laws*, 56 L. Q. REV. 320, 335 (1940) (discussion of the meanings of these limitations upon the intent of the parties).

<sup>83</sup> *The Torni*, [1932] P. 78 (C. A.), 5 C.A.M.B. L. J. 100 (1935).

<sup>84</sup> The cases have been reconciled on other grounds. See Falconbridge, *Bills of Lading: Proper Law and Renvoi*, 18 CAN. B. REV. 77, 81 n.14 (1940).

<sup>85</sup> *Cf.* WOLFF, § 424 (approves *Vita* case because of absence of contravening law). The *Vita* case has been subjected to much critical analysis both in England and in this country. See, e.g., CHESHIRE, *PRIVATE INTERNATIONAL LAW* 334 (3d ed. 1947); Falconbridge, *Bills of Lading: Proper Law and Renvoi*, 18 CAN. B. REV. 77 (1940); Note, 55 L. Q. REV. 323 (1939); 40 COL. L. REV. 518 (1940).

<sup>86</sup> See Falconbridge, *Contract and Conveyance in Conflict of Laws*, 81 U. OF PA. L. REV. 661, 672 (1933) (Canadian law); 11 AUST. L. J. 332 (1938); 14 N. Z. L. J. 17 (1938).

*Drafting Choice of Law Stipulations.*— Skillful drafting of the clause designating the governing law<sup>87</sup> enhances considerably the chances of its acceptance, especially before a court which is not satisfied with less than a manifest intent that a foreign law apply.<sup>88</sup> The unfair advantage obtainable by the party drafting a contract so as to include a well-hidden stipulation on controlling law accounts for the extreme hostility exhibited by courts in dealing with "illegible, fine print" clauses.<sup>89</sup> A naïve, though apparently effective, way of insuring the palatability of the clause for some courts is to specify that the contract is deemed to be made or deemed to be performed in a certain jurisdiction.<sup>90</sup> Incorporating a brief explanation of the business background motivating the particular choice of law more sensibly accomplishes a similar result.<sup>91</sup> Changes in the law of the chosen jurisdiction after the contract has been made create vexing problems.<sup>92</sup> At least as to matters of construction, more stability can safely be assured by specifying an existing law to govern throughout.<sup>93</sup> The dichotomy of constructional and validity issues generates another subtle distinction which can neutralize the effectiveness of the stipulation. Thus, if the contract is to be "construed" by a particular law (instead of "governed" by it), a restrictively-minded bench will limit the application of the clause to constructional issues alone.<sup>94</sup>

Not only may the parties stipulate a governing law, but they may

<sup>87</sup> For several types of clauses in use, see 3 NICHOLS, *CYCLOPEDIA OF LEGAL FORMS ANNOTATED* § 3.136 (1936). *Armstrong v. Alliance Trust Co.*, 88 F.2d 449, 451 (5th Cir. 1937), contains an unusually elaborate stipulation.

<sup>88</sup> See, e.g., *Reighley v. Continental Ill. Nat. Bank & Trust Co.*, 390 Ill. 242, 61 N. E.2d 29 (1945); *Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509, 2 N. Y. S.2d 80 (Sup. Ct. 1938) ("covered" by German law held insufficiently clear reference); *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930) (stipulation not definite enough to include French law of prescription). It should be noted that the ordinary stipulation will not control assignments of the contract. An express statement to cover such an event may be necessary. *Russell v. Grigsby*, 168 Fed. 577 (6th Cir. 1909).

<sup>89</sup> See, e.g., *Ocean S. S. Co. v. Queensland State Wheat Board*, [1941] 1 K. B. 402 (C. A.). Statutes in several states require the terms of insurance policies to be stated in bold type on the face of the policy. *Dolan v. Mutual Reserve Fund Life Ass'n*, 173 Mass. 197, 53 N. E. 398 (1899); *Mowery v. Washington Nat. Ins. Co.*, 289 Ill. App. 443, 7 N. E.2d 334 (1937).

<sup>90</sup> E.g., *LeSueur v. Manufacturers' Finance Co.*, 285 Fed. 490 (6th Cir. 1922); *Cook*, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899, 916 (1938).

<sup>91</sup> *Union & Planters Bank & Trust Co. v. Evans*, 8 Tenn. App. 63 (1928). *Contra*: *Carl Hagenbeck & Great Wallace Show Co. v. Randall*, 75 Ind. App. 417, 126 N. E. 501 (1920) (circus employee's contract).

<sup>92</sup> Cf. *Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509, 2 N. Y. S.2d 80 (Sup. Ct. 1938) (validity of contract interpreted by law at time contract made); WOLFF § 405 (submission to a law means to a living and changing law); 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 392 (1947).

<sup>93</sup> See, e.g., *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (1919).

<sup>94</sup> E.g., *Washington Life Ins. Co. v. Lovejoy*, 149 S. W. 398 (Tex. Civ. App. 1912); *accord*, *Great Southern Life Ins. Co. v. Burwell*, 12 F.2d 244 (5th Cir. 1926). *But cf.* *New England Mortgage Security Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. 81 (1901).

also stipulate several laws to govern various aspects of their contract.<sup>95</sup> For example, in a sale of French wine to American importers, French law might be selected to govern warranties of quality, British law (law of the flag) to cover damage to the goods enroute, and American law to fix the time and manner of inspection by the buyer.<sup>96</sup> Furthermore, the reference need not be couched in generic terms but can be descriptive. Stipulations to the "place of building" (in a contractor's bond),<sup>97</sup> to the "state where [loan] accepted by Commercial Credit Company,"<sup>98</sup> and to the place of injury in an insurance policy<sup>99</sup> have been followed.<sup>100</sup> Conflicts between the stipulated law and explicit terms of contracts do arise and, though the expressed term will generally override a general stipulation to a governing law,<sup>101</sup> a statement to that effect is worth inserting. A statement to the effect that the stipulated law refers to the domestic law of the particular jurisdiction without including its conflicts law is also desirable.<sup>102</sup>

*Conclusion.* — An analysis of the cases to ascertain what minimum contacts within the selected jurisdiction, if any, are required to validate the choice of the parties might seem desirable. But business men dealing in accepted trade channels seldom stipulate an unreasonable or wholly foreign law.<sup>103</sup> Thus it is common to find not only a coincidence of several of these contacts within the stipulated jurisdiction but also a characteristic lack of care on the part of the courts in delineating all the pertinent contacts of the particular case. It becomes hazardous, therefore, to rely on the court's designation of the decisive contact, and difficult to ascertain whether it existed alone or in conjunction with

<sup>95</sup> Cf. *Blair v. New York Life Ins. Co.*, 40 Cal. App.2d 494, 104 P.2d 1075 (1940); RESTATEMENT, CONFLICT OF LAWS §§ 311, 358 (1934) (different rules governing formation and performance); CHESHIRE, PRIVATE INTERNATIONAL LAW 336 (3d ed. 1947), and WOLFF § 404 (both collecting cases).

<sup>96</sup> See CHESHIRE, PRIVATE INTERNATIONAL LAW 309 (3d ed. 1947) (illustrations of international business operations).

<sup>97</sup> *Philip Carey Co. v. Maryland Cas. Co.*, 201 Iowa 1063, 206 N. W. 808 (1926).

<sup>98</sup> *Big Four Mills, Ltd. v. Commercial Credit Co.*, 307 Ky. 612, 211 S. W.2d 831 (1948).

<sup>99</sup> *Duncan v. Ashwander*, 16 F. Supp. 829 (W. D. La. 1936).

<sup>100</sup> References to the place of making or place of performance are undesirable because of the uncertainty often encountered in defining these terms.

<sup>101</sup> E.g., *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551 (1904); *Lange v. New York Life Ins. Co.*, 254 Mo. 488, 162 S. W. 589 (1913). The general reference to a governing law has, however, occasionally overridden a specific provision of the contract. E.g., *Columbian Nat. Life Ins. Co. v. Keyes*, 138 F.2d 382 (8th Cir. 1943); *Yeats v. Dodson*, 345 Mo. 196, 127 S. W.2d 652 (1939). See Note, 6 TULANE L. REV. 454, 457 (1932).

<sup>102</sup> Of course, the stipulation avails no one unless the foreign law is properly called to the attention of the court according to the pleading and proof requirements of the particular jurisdiction. See RESTATEMENT, CONFLICT OF LAWS § 621 (1934); Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018 (1941). An astonishing number of cases have been found where the expressly stipulated law was not properly brought to the court's attention.

<sup>103</sup> See 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 405 (1947). But cf. Note, 55 L. Q. REV. 323, 325 (1939) (arguing the commercial reasonableness in certain cases of a stipulation to law of state of neither party).

others.<sup>104</sup> Moreover, eminent authority has suggested the futility and illogic of counting contact "noses," and has suggested a more realistic theory which searches for the most substantial interest with which the contract is associated.<sup>105</sup> This interest may vary with the type of contract and issues before the court.

It is clear that commercial convenience may be the most substantial claim in many interstate and international trade transactions. It is true, of course, that this claim of commercial convenience is subject to the overriding public policy of the forum embodied in its statutes and rules of law.<sup>106</sup> This local public policy element,<sup>107</sup> however, cannot be allowed to operate with the same vigor on interstate or international contracts over which the forum does not have an exclusive claim of control, as it does over purely local transactions. In the former case, the interest in commercial stability in a commercially integrated society precludes the imposition of local standards except where "some fundamental principle of justice, . . . some deep-rooted tradition of the common weal"<sup>108</sup> has been violated. Recognition of this interest has led in the interstate cases to a growing tendency to minimize if not to obliterate "affectations of superior virtue" more prevalent in the past.<sup>109</sup> Even in the international field the cases are encouraging, despite the recent upsurge in nationalism.<sup>110</sup> The courts of leading European and Latin American countries follow the intent of the parties

<sup>104</sup> See Note, 112 A. L. R. 124 (1938) for a comprehensive collection of cases in which the express stipulations apparently referred to a law other than the law of the place of making or the place of performance. The annotator notes the difficulty inherent in separating the various contacts and of ascertaining where each element was located by the court.

<sup>105</sup> See Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946); cf. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

<sup>106</sup> The objections to giving effect to the intent of the parties have been convincingly reduced to a public policy concept based on the essential public law of the forum. 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 549 (1947); cf. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 185 (3d ed. 1947). The specification of a foreign law in a purely domestic situation has been pointed to by critics of the autonomy theory as a case in which the intent of the parties obviously cannot be given effect. Under the analysis suggested here, such a stipulation would also be void, but only because the stipulation would ordinarily serve no commercial purpose since the contract would be unified, and therefore certain, to begin with.

<sup>107</sup> See Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 32 (1938).

<sup>108</sup> Judge Cardozo in *Loucks v. Standard Oil Co. of New York*, 224 N. Y. 99, 111, 120 N. E. 198, 202 (1918); accord, *International Harvester Co. v. McAdam*, 142 WIS. 114, 120, 124 N. W. 1042, 1044 (1910).

<sup>109</sup> Judge Beach in *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L. J. 656, 662 (1918). Cf. Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935). But cf. Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L. J. 1027 (1940).

<sup>110</sup> See 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 368 *et seq.* (1947) (the definitive work in this field covering the leading countries of the world); Rheinheim, *Book Review*, 37 COL. L. REV. 327 (1937). But cf. Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L. J. 1027 (1940); McChesney, *Book Review on RABEL, supra*, 62 HARV. L. REV. 535 (1949). The book is also reviewed by Dean Griswold in 57 YALE L. J. 1439 (1948).

with extraordinary consistency.<sup>111</sup> The marked deference granted express stipulations in commercial cases sharply contrasts with the summary treatment usually afforded their counterparts in noncommercial contracts.<sup>112</sup> It is surprising, then, that so relatively few American commercial contracts have in the past taken advantage of express stipulations.<sup>113</sup> Once the friendly attitude of the courts toward such stipulations and the value of these clauses in stabilizing commercial dealings are fully appreciated, an accelerated trend toward the full utilization of this device may confidently be expected.

**INJUNCTIVE PROTECTION OF POLITICAL RIGHTS IN THE FEDERAL COURTS.** — When *Minor v. Happersett*<sup>1</sup> was decided in 1874, the Supreme Court thought it obvious that there was no federal right of suffrage. In the last two decades, however, it has been recognized that federal protection of the franchise may be based on at least two constitutional sources. In a line of cases culminating in *Smith v. Allwright*,<sup>2</sup> the Court affirmed the proposition that the Fourteenth and Fifteenth Amendments, although limited in effect to "state action," forbade discrimination against Negroes, even by a "private" political party, in any portion of the electoral process regulated by statute, including primary elections. And a recent court of appeals decision<sup>3</sup> has applied this principle under those Amendments to outlaw discrimination where the primary controlled the result of the general election, even though all reference to the primary had been deliberately eliminated from the state constitution and statutes. On two other occasions, the Supreme Court, although denying relief on the facts before it, has apparently

<sup>111</sup> See WOLFF § 402; BARBEY, LE CONFLIT DES LOIS EN MATIÈRE DE CONTRATS 230 *et seq.* (1938) (French law); BATEFFOL, LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS 161 (1938) (comparative study); HAUDEK, DIE BEDEUTUNG DES PARTEIWIILLIGEN IM INTERNATIONALEN PRIVATRECHT 100 (1931).

<sup>112</sup> See, e.g., *King v. Bruce*, 145 Tex. 647, 201 S. W.2d 803 (1947), 60 HARV. L. REV. 1155 (community property separation agreement); *Commissioner v. Hyde*, 82 F.2d 174 (2d Cir. 1936) (divorce agreement trust in tax case); *cf.* *Carey v. Mackey*, 82 Me. 516, 20 Atl. 84 (1890) (suggesting that divorce agreements may not be controlled by the same rules as commercial contracts).

<sup>113</sup> See 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 376 (1947); Cavers, *supra* note 105, at 184-85. But see Nussbaum, *supra* note 4, at 893, 896 (finding stipulations common in standard American insurance, banking, and shipping forms). Stipulations are much more common in European contracts. See 2 RABEL, *supra* at 377 (1947); NUSSBAUM, PRINCIPLES OF THE CONFLICT OF LAWS 158 (1948).

<sup>1</sup> 21 Wall. 162 (U. S. 1874).

<sup>2</sup> 321 U. S. 649 (1944). Three cases laid the foundation for outlawing the "white primary." *Nixon v. Herndon*, 273 U. S. 536 (1927), invalidated a Texas statute expressly restricting the vote to white citizens. Then in *Nixon v. Condon*, 286 U. S. 73 (1932), a statute permitting the Democratic Party Executive Committee to pass a resolution excluding Negroes was declared unconstitutional. When the party passed the same rule in plenary convention the Court refused to interfere. *Grovey v. Townsend*, 295 U. S. 45 (1935). But nine years later, the *Grovey* case was expressly overruled in *Smith v. Allwright*, *supra*.

<sup>3</sup> *Rice v. Elmore*, 165 F.2d 337 (4th Cir. 1947), *cert. denied*, 333 U. S. 875 (1948), 61 HARV. L. REV. 1247 (discussion of substantive issues).