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Conflicts—Statute of Frauds—Substance or Procedure

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case acquired a fixed, "vested" right upon the formulation of the contract, since the beneficiary could not add or change the contingent payees. *Mutual Ben. Ins. Co. v. Ellis*, 125 F. 2d 127, 131 (2d Cir. 1942). *In re Deyo's Estate*, 180 Misc. 32, 42 N. Y. S. 2d 379, 388 (Surr. Ct. 1943). When such a present interest is transferred, it is immaterial that its enjoyment be subject to postponement, conditions, or complete defeasance (via the beneficiary's exercise of her right to withdraw the principal sum). *Ga Nun v. Palmer*, 216 N. Y. 603, 609, 111 N. E. 223, 225 (1916). *Matter of Tilley's Estate*, *supra*. *Chase Nat'l. Bank v. Manufac. Trust Co.*, *supra*. The payee, as a third-party beneficiary, may enforce the conditional right, since the contingency has taken place. *Mutual Ben. Ins. Co. v. Ellis*, *supra*. *Glandziz et al., v. Callinicos*, 48 F. Supp. 732, 733 (S. D. N. Y. 1942). Restatement, Contracts, §134 (1932).

In the *Ellis* case, *supra*, the factual situation was almost identical with the instant case, and the defendant raised the similar contention that the agreement was invalid as an attempted testamentary disposition. As in the principal case, the court ruled that no trust existed, and that the beneficiary's counter-offer had resulted in a contract unconnected with one of insurance. Nevertheless, the court held against defendant, and ruled that since plaintiff had acquired a fixed, vested right upon the formulation of the contract, plaintiff was entitled to the proceeds as a third-party donee-beneficiary, citing *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918). *Accord: In re Koss' Estate*, 106 N. J. Eq. 323, 150 Atl. 360 (1930).

Since, in the instant case, the right was vested in the plaintiff *inter vivos*, its enjoyment contingent upon the death of the beneficiary, it is submitted that the property did not pass by reason of the death, and thus did not violate the Statute of Wills.

Robert Alan Thompson

CONFLICTS—STATUTE OF FRAUDS—SUBSTANCE OR PROCEDURE

Plaintiff brought an action in N. Y. for specific performance against the executor of Harold Rubin and others to enforce an oral agreement by which the decedent had agreed not to change his existing will. The agreement was made in Florida, decedent's domicile, and the contract was valid by Florida law. The N. Y. Pers. Prop. Law Sec. 31(7) requires such contracts to be in writing. Held: the Statute of Frauds is substantive as to cases involving conflicts of law, and consequently does not preclude enforcement of a contract valid according to the law of the place in which it was made unless it violates the forum's paramount public policy. *Rubin v. Irving Trust Co. et al.*, ————Misc.———, 107 N. Y. S. 2d 847 (Sup. Ct. 1951).

RECENT DECISIONS

The question of choice of law involves the problem of characterization. If a statute is procedural the applicable law is that of the forum, if substantive, the law of the place of making applies. Stumberg, *Conflict of Laws* 134 (2d ed. 1951). If it is found that the foreign Statute of Frauds is applicable it is clear that its enforcement will not be a violation of New York's paramount public policy. *Crane v. Powell* 139 N. Y. 379, 34 N. E. 911 (1893).

Heretofore the question of forms of action, *Nowell v. Waterman*, 53 R. I. 16, 163 Atl. 402 (1932); parties to a suit, *Rube v. Buck* 124 Mo. 178, 27 S. W. 412 (1894), *Fryklund v. Great Northern R. Co.* 101 Minn. 37, 111 N. W. 727 (1907); venue, Restatement, *Conflict of Laws* Sec. 586 (1934); rules of practice and pleading, Restatement, *Conflict of Laws* Sec. 592 (1934); and *res ipsa loquitur*, *Judd v. Sams*, 270 App. Div. 981, 68 N. Y. S. 2d 678 (4th Dept. 1946), *Lobel v. American Airlines Inc.* 192 F. 2d 217 (2nd Cir., 1951) have been characterized as procedural and, therefore, controlled by the law of the forum.

The same characterization and the concomitant control of the law of the forum has been attributed to burden of proving negligence of the defendant and freedom from contributory negligence of plaintiff, *Wright v. Palmison* 237 App. Div. 22, 260 N. Y. Supp. 812 (2nd Dept. 1932), *Clark v. Harnischfeger Sales Corp.* 282 App. Div. 493, 264 N. Y. Supp. 873 (2nd Dept., 1933). *But see Fitzpatrick v. International R. Co.* 252 N. Y. 127, 169 N. E. 112 (1929). To the same effect are the questions of competency of witnesses and admissibility of evidence, *Brotherhood of Railroad Trainmen v. Long* 186 Ark. 320, 535 S. W. 2d 433 (1932), and to statutes of limitations in the absence of a borrowing statute. *U. S. Mortgage & Trust Co. v. Ruggles* 258 N. Y. 32, 179 N. E. 250 (1932).

The history of the characterization of the Statute of Frauds reveals that its treatment has been far from consistent. The leading English case, *Leroux v. Brown*, 12 C. B. 801 (1852) held that the question (as to whether it be of substance or of procedure) depended on the form in which the statute was drawn. (If the statute said "no action shall be brought" it was regarded as procedural, if it said the contract shall be "void" it was regarded as substantive). American decisions have characterized the Statute of Frauds alternately as procedural, *Townsend v. Hargreaves* 118 Mass. 325 (1875) and as substantive, *Cochran v. Ward* 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581 (1892), and some courts have held that the statute of the forum is applied as a matter of public policy. *Barboun v. Campbell* 101 Kan. 616, 168 Pac. 879 (1917). There has been a conflict of opinion in the New York courts. In *Turnow v. Hockstander* 7 Hun 80 (N. Y. 1876) the law of the place of performance was held to apply, while in *Smith v. Compania Litografica de la Habana* 220 App. Div. 782, 222 N. Y. Supp. 902 (2d Dept., 1926) it was held that the intention of the parties controlled. In 1916 the Court of

Appeals pointed out the irreconcilable conflict of the decisions in this regard, *Reilley v. Steinbart* 217 N. Y. 549, 112 N. E. 468 (1916) and subsequently refused to answer the question directly. *Franklin Sugar Refining Co. v. Lipowicz* 247 N. Y. 465, 160 N. E. 916 (1928). Only recently it has been held that in the absence of an express intention to the contrary the N. Y. Statute of Frauds (N. Y. Pers. Prop. Law Sec. 31(1) is to be characterized as substantive. *Silverman v. Indevco Inc.* 106 N. Y. S. 2d 699 (1951). It was Story's original position that the requirement of writing under the Statute of Frauds is substantive, Story, Conflict of Laws §262 (1st ed., 1834), and his views were urged upon the English court in *Leroux v. Brown*, *supra*.

Professor Morgan has expressed the view that the law of the locus should be applied even to matters of procedure if they are likely to have a material influence on the outcome of the case as long as its application would not violate the public policy of the forum. Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 195 (1944).

It is submitted that the court in the principal case follow the better rule in characterizing the N. Y. Statute of Frauds as substantive. Effect is thus given to the contract valid in the state where made, which has the closest connection with the contract, and the outcome of the case will not depend on the state in which it is tried but will be the same in the forum as well as in the place of the making of the contract.

Phyllis J. Hubbard

MONOPOLIES—INTERSTATE COMMERCE—ORGANIZED BASEBALL

Plaintiff, a professional baseball player, sued the defendant baseball clubs and leagues under the Sherman Act (26 Stat. 209, 15 U. S. C. A. §§1, 2) and Clayton Act (38 Stat. 731, 15 U. S. C. A. §15), alleging that he was deprived of his livelihood by the defendants. The complaint was dismissed for want of jurisdiction over the subject matter; the court holding that baseball was not interstate commerce and defendant's activity was not within the purview of the antitrust legislation. *Toolson v. New York Yankees, Inc. et al.*, 101 F. Supp. 93 (S. D. Cal. 1951).

The Sherman Act was enacted in 1890 in order to suppress devices and practices which tend toward monopolies in restraint of interstate commerce. *U. S. v. Colgate*, 250 U. S. 300 (1919); *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165 (1915); *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904). Early applications of the statute were limited to activities which were obviously interstate commerce. *U. S. v. Joint Traffic Association*, 171 U. S. 505