

What Law Governs the Disposition of Insurance Proceeds

Guy B. Horton

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Guy B. Horton, *What Law Governs the Disposition of Insurance Proceeds*, 25 Cornell L. Rev. 169 (1940)
Available at: <http://scholarship.law.cornell.edu/clr/vol25/iss2/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

WHAT LAW GOVERNS THE DISPOSITION OF INSURANCE PROCEEDS?

GUY B. HORTON

I. BY LIFE COMPANIES*

The Maze and Suggested Ways Out

Few transactions may have contact with more states or countries than settlements of insurance proceeds by the life company itself or through a life insurance trust. The insurance company may be located in state *A*, the policy may be delivered and the first premium paid in state *B*, to a person domiciled in *C*. The settlement may be arranged later while the insured is a resident of *D* and when the policy matures by death or endowment he may be living in *E*. The beneficiaries may be scattered among *F*, *G*, and *H* when the agreement is entered into, be living in others when the policy is settled as a death claim, and remove to still others while the proceeds are being paid. If a settlement is made through a trust company—*i.e.*, as a life insurance trust—the domicile of the trustee introduces one more state with still others possible as trustees are changed. These states may, and generally do, differ radically in their views on perpetuities, restraints on alienation, and limitation of accumulation, to name a few of the matters that must be considered. To find our way through this maze, we must rely on a branch of the law so new that its rules have hardly been formulated, or at any rate, reduced to an accepted system. Furthermore, few of the decisions are directly to a point within the scope of this work and every lawyer knows the pitfalls in reasoning by analogy.

Our study may well begin with a consideration of the choice-of-law rules of contracts and trusts. After a general survey of them, we can consider how they apply to our particular problem. This is about all we can do in the present state of legal knowledge.

*Settlements of insurance in other than one sum are made by two alternate methods. By one, the payment in instalments or interest or some combination is made by the life company in accordance with a contract attached to the policy; by the other, the holding and distributing is by a trustee to whom the life company pays the proceeds in a lump sum.

As to contracts, the field of conflict of laws is one of the most uncertain in the law. Not only is there wide divergence in theory between different states and even different cases in the same state, but there sometimes is a confusion of theory within the same case.¹ It can be said easily that in no field of law is there so great opportunity for judges to make their own law or, to put it more accurately, is there such easy ability to find points upon which a rule of predetermined result can be hung.

Falconbridge has stated² that we may even have a conflict of conflict rules, or in other words, a difference between a rule of conflict of laws of the forum and the supposedly corresponding rule of conflict of laws of some other country, or a difference between the supposedly corresponding conflict rules of two countries other than the forum. This difference between the conflict rules of two countries is of course to be distinguished from a difference between the local laws of the two countries, which gives rise to a question of conflict of laws.

A question of choice of laws may arise with respect to the making of a contract, its construction, its performance, its enforcement, or its assignment. In each of these particulars it may be claimed that the law to govern the transaction in question is the law of the place where the contract was made (*lex loci contractus* or *lex loci celebrationis* as it is sometimes called), the law of the place fixed for its performance (*lex loci solutionis*), the law of the place where enforcement is sought (*lex loci fori*), or the law of the place of assignment.

One of the most difficult tasks confronting the student of the conflict of laws is to distinguish the several factors of a contract, *i.e.*, interpretation, obligation, and performance. Professor Beale has made this as clear as language permits.³

The process of determining first the meaning, then the existence, and then the performance of a contract is a continuous process from beginning to end. There is no distinction based on logic alone between the processes of determining the meaning of a contract, its initiation and obligation, and its performance. All questions which may arise in the interpretation, obligation, or performance of a contract are logically implicit in the will of the parties as expressed in their contract. Given the language of a contract, interpretation makes the language, as language, clear. Construction at this

¹Professor Beale has discussed this at length, *CONFLICT OF LAWS* (1935) (hereinafter called *Treatise*) § 332.1 *et seq.* See also GOODRICH, (1927) *CONFLICT OF LAWS* § 107. The classification and interpretation of cases in law journals and decisions vary greatly.

²*Characterization in the Conflict of Laws* (1927) 53 L. Q. REV. 235, 237; see also Cheatham, *Internal Law Distinctions in the Conflict of Laws* (1936) 21 CORNELL L. Q. 570.

³TREATISE § 346.1. This appears to be an elaboration of RESTATEMENT, *CONFLICT OF LAWS* (1934) § 332 comment *c*, and § 358 comment *a* and *b*.

point determines the legal effect of the language in terms of obligation. When the obligation comes to be performed, a continuation of the same process determines whether the performance required by the contract is to be in one form or another form. There is no logical stopping-place from beginning to end of this process. It is clear, however, that the meaning of the words used must depend on the intention of the parties. It is likewise clear that the act which institutes a contract and all its immediate legal consequences are governed by the law of the place where this act is done. It is equally clear that the actual carrying out of the obligation is governed, as all acts are governed, by the law of the place where it is done. One law therefore applies to the initiation of a contract and another to its final performance. The point at which initiation ceases and performance begins is not a point which can be fixed by any rule of law. Like all questions of degree, it must depend on the circumstances of each case and must be determined by an exercise of legal judgment by the court of the forum.

The problems are further complicated by two circumstances. In a number of jurisdictions statutes have been passed providing that the "interpretation" or "construction" of contracts shall be governed by the law of some particular place.⁴ Obviously the legislatures did not mean in passing these statutes that the meaning of the language used, as language, should be determined by some rule of law apart from the intention of the parties, and this has been recognized frequently by the courts and has resulted in decisions⁵ that such words as "interpretation" in these statutes mean legal effect, not actual interpretation of the language used.

Moreover the obligation and effect, as well as the validity, of a transfer of property has often been confused by the courts with the obligation and effect of a contract to transfer property or of the contract by reason of which the property was at once transferred.⁶

A convenient criterion by which to distinguish the substance of the contract from the remedy has been given the bewildered student by Professor Minor.⁷

"Suppose the legislature of the *locus contractus* were to enact the law of the forum, making it applicable to the existing contract. If the result is that the obligation of the contract is either increased or impaired

⁴For example, CAL. CIV. CODE (Deering, 1933) § 1646; applied in *Ostroff v. New York Life Ins. Co.*, 23 F. Supp. 724 (S. D. Cal. 1938).

⁵See, for example, *Alcock v. Smith*, (1892) 1 Ch. 238, 256; *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 667.

⁶For examples, see *H. G. Craig & Co. v. Uncas Paper Board Co.*, 104 Conn. 559, 133 Atl. 673 (1926); *Motors Mort. Corp. v. Purchase-Money Note Co.*, 38 Ga. App. 222, 143 S. E. 459 (1928); *Caldwell & Co. v. Deschanel Inter. Corp.*, 6 La. App. 802 (1928).

⁷(1903) 16 HARV. L. REV. 262. See also Cook, "Substance" and "Procedure" in the *Conflict of Laws* (1933) 42 YALE L. J. 333; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933.

thereby, then the point to which the law of the forum relates is part of the obligation or substance of the contract, and is not merely a matter of remedy, and the *lex loci*, not the *lex fori*, should control. If, on the other hand, the result is that the obligation of the contract is not at all affected, being neither increased nor diminished, then the inquiry relates to a matter of remedy only, and the *lex fori* should govern."

Three principal theories or rules have found support in the cases.⁸ First, that the law of the place of performance governs. Second, that the parties may select, at least within the limits of good faith, the law to govern the contract.⁹ Third, the view accepted by the Restatement,¹⁰ that the law of the place of contracting governs such matters as the validity of the contract and the nature of the obligation, but that the law of the place of performance governs matters relating to performance. This view, despite its vulnerability on some points,¹¹ commends itself in so far as it brings into the field of commercial transactions at least a degree of certainty.

Validity and Its Determination

Thus it may be stated as a general rule, supported by numerous well considered decisions that, in the absence of a stipulation or other evidence of a contrary intent, the validity of a contract is to be determined by the law of the place where the contract is made.¹² Paul de Castro¹³ based the application of the *lex loci* on the fiction that it is the place where the contract was born, contracts like persons being subject, according to that writer, to the law of the place of their origin.

The place where the contract is made is the place where the last act is done that is necessary to make the promise complete and binding.¹⁴ Just what event is the final one necessary to make a contract is to be determined by the principles of the law of contract, and by the particular contract if it has anything to say about it.¹⁵ In the case of the life insurance contract which is to be in effect only on the "delivery" of the policy there is a wilderness of

⁸A fourth theory, based upon the rule most consistently applied in usury cases, is that "the law which upholds the contract" is controlling. See STUMBERG, PRINCIPLES OF CONFLICT OF LAWS (1937) 212; cf. Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565, 655, and (1922) 31 *id.* 53.

⁹But cf. *Commissioner v. Hyde*, 82 F. (2d) 174 (C. C. A. 2d 1936).

¹⁰CONFLICT OF LAWS (1934) § 332.

¹¹See Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173; Cook, *Contracts and the Conflict of Laws* (1936) 31 ILL. L. REV. 143; Lorenzen, *loc. cit. supra* note 8.

¹²RESTATEMENT, CONFLICT OF LAWS (1934) § 332; AM. JURIS., CONFLICT OF LAWS § 99; COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 849, cases collected.

¹³I LAINÉ, INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ (1888) 189.

¹⁴RESTATEMENT, CONFLICT OF LAWS (1934) § 323; see GOODRICH, CONFLICT OF LAWS (1927) § 104; BEALE, *op. cit. supra* note 1, at § 311.1.

¹⁵BEALE, *op. cit. supra* note 1, at § 311.1.

decision on *when* the policy is in effect.^{15*} The problem as to *where* it is in effect has not attracted so much attention.

The Function of the Forum

Determination of the place of contracting is the function of the forum. The Restatement states the rule thus:

“The law of the forum decides as a preliminary question by the law of which state questions arising concerning the formation of a contract are to be determined, and this state is, in the Restatement of this subject, called the ‘place of contracting.’”¹⁶

In deciding this preliminary question, the forum ignores its own domestic law as to whether or not, upon the facts disclosed by the record, a contract would exist, and selects, as the law by which this ultimate question is to be determined, the law of the state which, under the general rules of conflict of laws, is decisive as to such preliminary question.¹⁷

Under its conflict-of-laws rules, in determining the place of contracting, the forum ascertains the place in which, under the general law of contracts, the principal event necessary to make a contract occurs. The forum at this stage of the investigation does not seek to ascertain whether there is a contract. It examines the facts of the transaction in question only so far as is necessary to determine the place of the principal event, if any, which, under the general law of contracts, would result in a contract. Then, and not until then, does the forum refer to the law of such state to ascertain if, under that law, there is a contract, although of course there normally will be a contract unless the local law of contracts of the state to which reference is thus made differs from the general law of contracts as understood at the forum.¹⁸

Of course all matters of procedure are governed by the law of the forum,¹⁹ and the court at the forum determines according to its own conflict-of-laws rule the preliminary question whether a given question is one of substance or procedure.²⁰

Determining the Place of Contracting of Insurance

The place of contracting of insurance presents more than usual difficulty due to the considerable diversity of opinion as to what constitutes the final act necessary to complete the contract.²¹ In general, it may be said that in-

^{15*}Patterson, *The Delivery of a Life Insurance Policy* (1919) 33 HARV. L. REV. 198.

¹⁶CONFLICT OF LAWS (1934) § 311.

¹⁷*Id.* at § 311, comment *a.*

¹⁸*Id.* at § 311, comment *d.*

¹⁹*Id.* at § 585.

²⁰*Id.* at § 584. For distinction, see *supra* pp. 170-172.

²¹See BEALE, *op. cit. supra* note 1, at § 317.1-319.1; GOODRICH, CONFLICT OF LAWS (1927) § 104; RESTATEMENT, CONFLICT OF LAWS (1934) § 317-19; PATTERSON, *The De-*

surance policies are completed where delivered,²² except when a condition precedent remains unsatisfied, in which case it is the place where that satisfaction occurs.²³

In one set of circumstances the last necessary act has been held to be at the home office of the company. The first premium was paid when the application for insurance was made and, according to the custom of companies, a "binding receipt" was given applicant providing that "insurance, subject to the terms and conditions of the policy contract, shall take effect as of the date of this receipt, provided the applicant is on this date in the opinion of the society's authorized officers in New York an insurable risk under its rules and the application is otherwise acceptable on the plan and for the amount and at the rate of premium originally applied for; otherwise the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt". The court held that this gave the society the power of acceptance or rejection which acted upon at the home office gave the contract situs in that state.²⁴ In reaching this conclusion the court exhibited greater knowledge of law than of the facts and procedure of insurance. Under such practice the action of the society's officers approaches the ministerial. If the applicant is an insurable risk under the society's rules, *etc.*, the acceptance is automatic as of the date of the receipt for the premium; the officers are finders of fact with no power beyond judging whether these facts are within the rules, which judgment on that point is subject to judicial

livery of a Life Insurance Policy (1919) 33 HARV. L. REV. 198. Annotations (1902) 63 L. R. A. 834, (1909) 23 L. R. A. (N. S.) 968, (1914) 52 L. R. A. (N. S.) 275.

²²*Lando v. Equity Life Assur. Soc.*, 11 F. Supp. 729 (N. D. Cal. 1935), *aff'd*, 84 F. (2d) 640 (C. C. A. 9th 1936); see *Martin v. Zurich Gen. Accid. & Liab. Ins. Co.*, 84 F. (2d) 6, 8 (C. C. A. 1st 1936), *cert. denied*, 57 Sup. Ct. 43 (1936). Where the policy is mailed directly to the applicant, the place of contracting is where the policy is posted: *Oliver v. Iowa State Traveling Men's Ass'n*, 76 F. (2d) 963 (C. C. A. 8th 1935), *cert. denied*, 296 U. S. 582 (1935). Where the insurance company retains control of the policy by sending it to its agent to give to the assured, there is no delivery until the agent hands over the policy: *Equitable Life Assur. Soc. v. Gerwick*, 50 Ohio App. 277, 197 N. E. 923 (1934). *But cf.* *Equitable Life Assur. Soc. v. Nikolopoulos*, 86 F. (2d) 12 (C. C. A. 3d 1936); *Jones v. Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N. Y. Supp. 4 (Sup. Ct. 1936).

²³*Delivery and payment: Boseman v. Conn. Gen. Life Ins. Co.*, 57 U. S. 686 (1937); industrial group insurance contract: *Atlas Life Ins. Co. v. Standfier*, 86 S. W. (2d) 852 (Tex. Civ. App. 1935); delivery and payment while insured in good health: *Mutual Trust Life Ins. Co. v. Ossen*, 77 F. (2d) 317 (C. C. A. 2d 1935), *cert. denied*, 296 U. S. 616 (1935); delivery, payment, and countersignature of agent: *Hartliep Transit Co. v. Central Mut. Ins. Co.*, 5 N. E. (2d) 879 (Ill. App. 1936); written acknowledgment of acceptance by assured: *Bukowski v. Security Benefit Ass'n*, 261 N. W. 783 (Iowa 1935); acceptance of application for reinstatement: *Westun v. Lincoln Nat. Life Ins. Co.*, 12 F. (2d) 422 (C. C. A. 8th 1926); acceptance of request to extend time of paying premiums: *Lincoln Nat. Life Ins. Co. v. Hammer*, 41 F. (2d) 12 (C. C. A. 8th 1930).

²⁴*Fields v. Equitable Life Assur. Soc.*, 118 S. W. 521 (Mo. 1938). *Metropolitan Life Ins. Co. v. Cohen*, 96 F. (2d) 66 (C. C. A. 2d 1938) is similar both in the holding and in the failure to give proper effect to insurance procedure.

control. The whole value of such prepayment insurance comes from the non-existence of acceptance privilege by the insurance company.

Intent as Determining Choice of Law

Intent of the parties to the contract or trust as determinative of choice of law is a device perhaps increasingly resorted to. If it will work, it easily may solve our problem. Unfortunately, the idea contains two weaknesses.

The first lies in the determination of itself. In what way is the intent disclosed? Generally, it is by the circumstances of the contracting or of the creation of the trust relation. That being so, one might better evaluate those factors directly. In other words, intent often does no more than beg the question, with the laughable result that the elements determining it are often the factors which courts disregarding intent have made use of in their choice of law. It might, perhaps, be argued with fair success that all the cases may be harmonized on the principle that the law of the contract is that with reference to which the parties intended to contract. But aside from theoretical objection to the adoption of intent as a universal criterion it furnishes but little assistance in most of the cases. As was said by the Minnesota Supreme Court:

"In a search for the actual intent of the parties when none is expressed, there is an element of legal jugglery. Usually parties to transactions of this nature, referable to one state or another, or in part to one state and in part to another, have no unexpressed but [or?] actual intent as to the law which shall control. The question of what law governs does not suggest itself to them."²⁵

a. STIPULATION AND ITS LIMITATION BY PUBLIC POLICY

Suppose, then, we determine the intent by stipulating in the contract or trust instrument that the law of a particular jurisdiction shall govern. Such solution by expressed intent or choice of law by the parties has been both attacked and defended, each quite forcibly. Beale²⁶ opposes on the ground that it practically makes a legislative body of any two persons who choose to get together and contract. "The theory means", he says, "that since the parties can adopt any foreign law at their pleasure to govern their acts, they can at their will free themselves from the power of the law which otherwise would apply to their acts."²⁷ Cavers²⁸ defends it with equal force. Both

²⁵Green v. Northwestern Trust Co., 128 Minn. 30, 150 N. W. 229 (1914).

²⁶Op. cit. supra note 1, at § 332.2.

²⁷See Harvey v. Fiduciary Trust Co., 13 N. E. (2d) 299 (Mass. 1938). Judge Learned Hand in Gerli & Co. v. Cunard S. S. Co., 48 F. (2d) 115 (C. C. A. 2d 1931) characterized an attempt to determine by a declaration of intention the law governing the contract as an effort "to pull on one's bootstraps", to which Professor Cavers rejoins that "This method of levitation actually works in many jurisdictions both here and abroad".

²⁸Trusts Inter Vivos and the Conflict of Laws (1930) 44 HARV. L. REV. 191-8. So does Walter W. Cook as to contracts in (1938) 32 ILL. L. REV. 899.

concede that some limitation or qualification is necessary and find it in the condition that the choice must be *bona fide* and (what is an application of the good faith) the selected state must have a substantial connection with the transaction.

One recent case supports the theory of legislation by stipulation. A life company in settlement of its policy issued at its home office in New York certificates of payment in monthly instalments which benefits, the certificate stated, should not be transferable nor subject to commutation or encumbrance, nor to legal process except on action for necessities. They provided also that payment should be made in New York and that all rights should be governed by the law of that state. In proceedings in Michigan by a creditor of the beneficiary residing in that state, the court applied the New York provision, against the claim that the Michigan exception applied.²⁹

Another condition or qualification must be met. The contract must not violate a statute of the state of contract,³⁰ or, if given force, accomplish some evasion of statutory provisions declaring a rule of public policy with reference to contracts made within its jurisdiction,³¹ or the contract stipulation violate the interests and public policy of the state.³² In short, it is competent for the parties to select a state to which the transaction is referable "if done without an intent to evade."³³ One court states the rule thus, citing the United States Supreme Court:³⁴

"We adopt the views of the Supreme Court therein expressed which are to the effect that, where an insurance company does business in this state and issues its policies to residents of this state, the validity of clauses in its policies must be determined by the laws of this state. The laws of this state establish a rule of public policy which overrides the freedom of contract of the parties and makes waivers of statutory provisions ineffectual although such waivers are contained in the strongest terms in the policy."³⁵

So, North Carolina has held void a provision that "this contract shall be governed by, subject to, and construed only according to the laws of the state

²⁹*Annis v. Pilkewitz*, 282 N. W. 905 (Mich. 1938).

³⁰*Saunders v. Union Central Life*, 212 Mo. App. 186, 253 S. W. 177 (1923). See *Boole v. Union Mut. Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416 (1921).

³¹*Albro v. Manhattan Life Ins. Co.*, 119 Fed. 629 (D. Mass. 1902).

³²*N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962 (1900), *aff'g* *Cravens v. N. Y. Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628 (1899). *And see* *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356 (1899) and *Summers v. Fidelity Mut. Aid. Ass'n*, 84 Mo. App. 605 (1900).

³³*Green v. Northwestern Trust Co.*, 128 Minn. 30, 150 N. W. 229 (1914). See as to the limitations generally, *Helm Bruce, By the Law of What State Are Questions Arising out of Life Insurance Policies to Be Determined?* (1920) ASS'N. LIFE COUNSEL No. 45.

³⁴*Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822 (1891).

³⁵*Price v. Conn. Mut. Life Ins. Co.*, 48 Mo. App. 281 (1892). The question is repeated and followed in *Hoffman v. No. American Union*, 56 S. W. 599 (Mo. 1933) and *Ragsdale v. Brotherhood*, 229 Mo. App. 545, 80 S. W. 272 (1935).

of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York," so far as its enforcement in the courts of another state is concerned.³⁶ In other states express contract stipulations as to governing laws have not been accepted,³⁷ some as the result of statutory regulations.³⁸

Even without stipulation, *i.e.*, when intent is to be inferred from facts, the comity of states cannot be pushed too far.³⁹ A state will not recognize the rule and accept the law of another state if "incompatible with its own authority or prejudicial to the interests of its own subjects".⁴⁰ It is not unconstitutional for the court of the place of performance of a contract made elsewhere and valid where made to refuse to enforce it if its performance is illegal by the law of the place of performance.⁴¹ As the Restatement puts it,

"No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."⁴²

This makes a distinction between a policy denying access to courts and a policy refusing to apply foreign rule of law. The rule just quoted from the Restatement is applicable when the entire basis of the claim upon which suit is brought is so contrary to the public policy of the forum that it will withhold altogether the use of its courts to enforce the claim. A distinction is to be noted between such a policy and the policy which, while it does not require denial of access to the courts of the forum, nevertheless requires the courts to apply certain local rules in the course of the litigation to enforce the local notions concerning the manner and method in which the courts of

³⁶*Blackwell v. Mutual R. F. Life Ass'n*, 141 N. C. 117, 53 S. E. 833, 5 L. R. A. (N. S.) 771, 115 Am. St. Rep. 677 (1906).

³⁷*Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538 (1904), *rev'g* 55 C. C. A. 536, 118 Fed. 708 (1902); *Equitable Life Assur. Soc. v. McRee*, 75 Fla. 257, 78 So. 22 (1918); *Dolan v. Mutual R. F. Life Ass'n*, 173 Mass. 197, 53 N. E. 398 (1899).

³⁸*Horton v. Home Ins. Co.*, 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717 (1898); *Commonwealth Mut. Fire Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404 (1899). *And see* *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 46 So. 817 (1908); *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693 (1898). *Cf.* *Fleming v. Grimes*, 142 Miss. 522, 107 So. 420, 45 A. L. R. 618 (1926) wherein the court, referring to the life policy in suit, remarked that it was a New York contract, and that the decisions of that state were pertinent. *Johnson v. Mutual Life Ins. Co.*, 180 Mass. 407, 63 L. R. A. 833, 62 N. E. 733 (1902); *Continental Ins. Co. v. Perry*, 138 Tenn. 205, 197 S. W. 487 (1917) following the New York holding that unearned premium must be returned, or tendered, with notice of cancellation; *Wentworth v. Equitable Life Assur. Soc.*, 65 Utah 581, 238 Pac. 648 (1925).

³⁹In (1933) 33 Col. L. Rev. 508 the cases are collected on the Public Policy Concept in the Conflict of Laws.

⁴⁰*Skiff v. Solace*, 23 Vt. 279 (1851); *Union Securities Co. v. Adams*, 33 Wyo. 45, 236 Pac. 513 (1925).

⁴¹*Bothwell v. Buckbee Mears Co.*, 275 U. S. 274, 48 Sup. Ct. 124 (1927), *aff'g* 169 Minn. 516, 211 N. W. 478 (1926).

⁴²CONFLICT OF LAWS (1934) § 612.

that state should function. This latter policy may be called the procedural policy of the forum. This procedural policy differs from the policy which denies access to the local courts under the rule stated above in the following respect: In the former case, the legal relations between the parties as determined by the foreign law will be enforced subject to certain limitations imposed by local rules; in the latter situation the state refuses altogether to enforce the legal relations created by the foreign law.⁴³ A Tennessee court,⁴⁴ relying on section 612 of the Restatement (quoted *supra*) dismissed a suit on a promissory note executed in Pennsylvania in consideration of an agreement not to prosecute the defendant for a felony for which he had been indicted in Florida. Under Pennsylvania law such an agreement is valid; in Tennessee parties to it are guilty of a misdemeanor.⁴⁵

The public policy concept may, as in *Mertz v. Mertz*,⁴⁶ prevent recovery when the foreign law which is relied upon would have allowed it, or it may nullify a defense so that recovery may be had when the foreign law would have denied it.⁴⁷

A few cases may be referred to as illustrating these principles. Courts which declare a contract void as against public policy are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good.⁴⁸ The refusal of a court to enforce a foreign contract depends upon how far it is a matter affecting the settled and uniform policy of the state, so as to be applicable to all similar transactions without the state, something local and permanent, pertaining to the local policy of the forum which is not transitory or a thing pertaining to the contract. If it is of this character, it has been said that it can no more be dispensed with, out of deference to the law governing a foreign contract, than could the institution of religion or the fundamental principles of morality.⁴⁹ Both the elementary

⁴³*Id.* at § 612, comment *a.*

⁴⁴*Windt v. Lindy*, 169 Tenn. 210, 84 S. W. (2d) 99 (1935).

⁴⁵*Accord*: *Kaufman v. Gerson*, [1904] 1 K. B. 591. Gambling contracts valid by the law of the place of contract are generally unenforceable if they would have been illegal in the jurisdiction of the forum: *Maxey v. Railey & Bros. Banking Co.*, 57 S. W. (2d) 1091 (Mo. App. 1933). Foreign contracts usurious by the law of the forum have been denied enforcement: *Personal Finance Co. v. Gilinsky Fruit Co.*, 127 Neb. 450, 255 N. W. 558 (1934). *Contra*: *George v. Haas*, 311 Ill. 382, 143 N. E. 54 (1924).

⁴⁶271 N. Y. 466, 3 N. E. (2d) 597 (1936). But in *Eskovitz v. Berger*, 276 Mich. 536, 268 N. W. 833 (1936) the Supreme Court of Michigan reached the opposite conclusion.

⁴⁷*E.g.*, *Wooley v. Shell Petroleum Co.*, 39 N. M. 256, 45 P. (2d) 927 (1935); *cf.* *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102 (1902); *Straus v. Canadian Pac. Ry.*, 254 N. Y. 407, 173 N. E. 564 (1930); *see note* (1936) 45 YALE L. J. 1463, 1469. The Restatement seems to refer only to the first type, *see* § 612.

⁴⁸*Hughes v. Penn. R. Co.*, 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 59 Am. St. Rep. 713 (1902).

⁴⁹*Rice v. Courtis*, 32 Vt. 460, 78 Am. Dec. 597 (1860).

principles that the *lex loci* governs and that the intention of the parties will be sought out and enforced "are subordinate to, and qualified by, the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught."⁵⁰ The parties to a contract may not by their intention, however expressed, override the laws of the country in which suit is brought, when a matter of the public policy of that country is involved.⁵¹ As it is peculiarly within the province of the lawmaking power to define the public policy of the state, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted.⁵²

As to the definition of public policy the courts are polarized about two different conceptions. One is that public policy applies only where enforcement of the foreign-based claim would be pernicious to the interests of the forum or repugnant to morals or natural justice.⁵³ The other confines it to the law of the state found in its constitution, statutes and decisional doctrines.⁵⁴ An adverse public policy is not indicated by a shorter period of suspension, in this case, for accumulation.⁵⁵

Determining the Place of Performance

Determination of the place of performance of an insurance contract has its difficulties though they are not so numerous as in determining the place of making the contract. The Restatement as to contracts generally says:

"The rule of the place of performance is the state where, either by specific provision or by interpretation of the language of the promise, the promise is to be performed."⁵⁶

Notwithstanding the presumption that in the absence of expressions of contrary intent, performance must be rendered at the place of contracting,

⁵⁰Grosman v. Union Trust Co., 228 Fed. 610, Ann. Cas. 1917B 613 (C. C. A. 5th 1916), *aff'd*, 245 U. S. 412, 38 Sup. Ct. 147 (1918). The quotation is from *The Kensington*, 183 U. S. 269, 22 Sup. Ct. 104 (1902).

⁵¹Compania de Inversiones Internacionales v. Industrial Mortg. Bank, 269 N. Y. 22, 198 N. E. 617, 101 A. L. R. 1313 (1935), *cert. denied*, 297 U. S. 705, 56 Sup. Ct. 443 (1936).

⁵²Bond v. Hume, 243 U. S. 15, 37 Sup. Ct. 366 (1917).

⁵³Shannon v. Irving Trust Co., 275 N. Y. 95, 9 N. E. (2d) 792 (1937), citing *Hollis v. Drew Theological Sem.*, 95 N. Y. 166. *Cf.* *Greenwood v. Curtis*, 6 Mass. 358, 378 (1810).

⁵⁴Mertz v. Mertz, 271 N. Y. 466, 3 N. E. (2d) 597 (1936). *Shannon v. Irving Trust Co.*, 275 N. Y. 95, 9 N. E. (2d) 792 (1937). *Cf.* *Personal Finance Co. v. Gilinsky Fruit Co.*, 127 Neb. 450, 255 N. W. 558 (1934). *See, The Public Policy Concept in the Conflict of Laws* (1933) 33 Col. L. Rev. 508.

⁵⁵Shannon v. Irving Trust Co., 275 N. Y. 95, 9 N. E. (2d) 792 (1937).

⁵⁶CONFLICT OF LAWS (1934) § 355.

there are numerous assertions in the decisions that in the case of a debt the place of payment is presumably the residence or place of business of the creditor.⁵⁷ Says one court,

"The very nature of a policy of insurance strongly implies that in the event of loss within its terms, the amount coming due will be delivered to the beneficiary. The most reasonable inference is that this delivery is to take place where the beneficiary resides or is to be found."⁵⁸

One case has held that the place of performance of the life insurer's promise to pay is the place where the insured dies,⁵⁹ which would seem to be stretching the intention of the parties a bit too far, since there is no guaranty that the insured will die even in the continent where the insurance contract was made.

The place where the insurance policy is made payable by the contract is not the place of performance necessarily. In *Atlas Life Ins. Co. v. Standfier*⁶⁰ a statute of the place of contracting which provided for the payment of attorney's fees and the imposition of a penalty on the failure of the insurer to pay promptly was applied to a policy which was expressly payable in another state. So policies issued by the company in state *N* were held to be construed by the laws of state *M*, where application was made, the premium paid, the policy delivered, the insured and beneficiary lived, and the company did business, although proceeds at maturity were to be paid at the home office.⁶¹

Specific Questions and the Law By Which Answered

The question of what is the obligation imposed by a contract of insurance, what are its terms and provisions, has usually rightly been held to be governed by the law of the place of contracting. Thus, there being no different place of performance or intention of the parties, the law of the place of contracting has been held to govern the right of insured to change the beneficiary,⁶² and if the right exists, what is the proper method of doing so,⁶³ who is eligible to be beneficiary, and whether the right of a beneficiary, the wife of the insured, is lost by divorce.⁶⁴ But the law of the place of performance

⁵⁷BEALE, *op. cit. supra* note 1, at § 355.1.

⁵⁸Clark v. Policyholders Life Ins. Ass'n, 138 Cal. App. 505, 32 P. (2d) 653 (1934).

⁵⁹Martin v. Mutual Life Ins. Co., 190 Mo. App. 703, 176 S. W. 266 (1915).

⁶⁰86 S. W. (2d) 852 (Tex. Civ. App. 1935).

⁶¹Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295 (1911).

⁶²Hoskins v. Hoskins, 231 Ky. 5, 20 S. W. (2d) 1029 (1929) (disregarding the law of insurer's domicile); Orthwein v. Germania Life Ins. Co., 261 Mo. 650, 170 S. W. 885 (1914); Haven v. Home Ins. Co., 149 Mo. App. 291, 130 S. W. 73 (1921) (disregarding the law stipulated for).

⁶³Modern Woodmen v. Myers, 99 Ohio St. 87, 124 N. E. 48 (1918).

⁶⁴Pendleton v. Great Southern Life Ins. Co., 135 Okla. 40, 273 Pac. 1007 (1929).

governs in determining who is the right person to whom performance (payment) should be given, that is, who is the beneficiary, as distinguished from who may be the beneficiary. It governs the manner of fulfilling the obligation and the details of doing so. It governs in determining the hour or day performance is to be rendered and the medium of payment and of course it determines if a breach has occurred.⁶⁵

a. MEANING OF LANGUAGE

It is the general rule that the language used in a life insurance policy, designating the beneficiary (subject to statutory or charter restrictions as to who may be designated), is to be regarded as the language of the insured alone and is to be treated as of a testamentary character, receiving as nearly as possible the same construction as if used in a will under the same circumstances.⁶⁶ Hence, the phrase "heirs" or "heirs at law", *etc.*, in a policy of life insurance is to be construed, in the absence of evidence of a contrary intent, in accordance with the *lex domicilii* of the insured, though the insurance contract is entered into or payable in another state, by whose law such terms would be given a different meaning.⁶⁷ So as to the persons coming within the designation of "children".⁶⁸

The parties' intention governs the meaning of the words used when that is apparent. "This", as Professor Goodrich points out,⁶⁹ "is a wholly different point from that involved in allowing them to choose the law to govern the obligation. Here there is no question of validity; the sole question is that of fixing the meaning of language, and there is no more difficulty in giving effect to a Texas use of a term in a Missouri contract than in giving effect to French or German instead of English as a means of expression, providing the parties show what they mean."

If a change of domicil occurs between the time the contract was made and the time of insured's death, the domicil when beneficiary was designated

⁶⁵*Equitable Life Assur. Soc. v. McRee*, 75 Fla. 257, 78 So. 22 (1918); *Booz v. Booz*, 183 Iowa 381, 167 N. W. 93 (1918); *Weiditschka v. Supreme Tent*, 188 Iowa 183, 170 N. W. 300 (1920), *rehearing denied*, 188 Iowa 183, 175 N. W. 835 (1920). In none of these cases did a place of contracting differ from the place of performance apparently. But in *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436 (1901) it was held that the law of the place of contracting, not that of performance, governs in determining who is entitled to payment if the beneficiary predeceases the insured.

⁶⁶*Knights Templar etc. Ass'n v. Greene*, 79 Fed. 461 (S. D. Ohio 1897). A general discussion of the cases is found in (1904) 63 L. R. A. 856; (1910) 23 L. R. A. (N. S.) 975-8; (1914) 52 L. R. A. (N. S.) 279.

⁶⁷*Knights Templar etc. Ass'n v. Greene*, *supra* note 66; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253 (1893); *BEALE, op. cit. supra* note 1, at § 342.2; *MINOR, CONFLICT OF LAWS* (1901) § 186.

⁶⁸*Continental Life Ins. Co. v. Webb*, 54 Ala. 688 (1875).

⁶⁹*Op. cit. supra* note 1, at § 109.

prevails.⁷⁰ In the Connecticut case of *Mullen v. Reed*,⁷¹ a life insurance policy was issued in Massachusetts to a resident of that state, being written in favor of the assured's "heirs at law". The assured afterwards changed his domicile to Connecticut and died there. The court held that the law of Massachusetts, not that of Connecticut, should control the meaning to be attached to the phrase. Professor Minor says⁷² this decision was clearly correct; for whatever the rule may be touching the law that should govern the interpretation of a revocable will, upon a change of the testator's domicile, the above rule must be applied to a contract whose obligation attaches at the time it is made, and cannot afterwards be altered save by the mutual consent of the parties.

The problem is the same in construing that word in a trust deed, where it is held to mean the persons who satisfy that description according to the law of the domicile of the trustor or testator at the time of the execution of the instrument.⁷³ The construction of the word is the same in a will.⁷⁴ In a case of two trustors with different domicils and the situs of the property and of the cestui was at the domicile of one of them, the instrument was interpreted according to the law of that state,⁷⁵ and this rule is adopted by the Restatement.⁷⁶

b. CONSUMMATION OF POLICY RIGHTS

Analogy and an easy habit of thought might lead one to govern the exercise of an option in a contract by the law of the place where the exercise or selection occurs. Yet that may be wrong. Contracts which are mere consummations of a policy are made where the original policy was made because they are the fruitage merely of rights created or reserved by the original contract. Changing the beneficiary, for example, is just one of the things which the insurance company agreed to do on request, so its validity and effect is determined by the law of the place where the insurance contract was made,⁷⁷ and this is so although the policy said another state should govern;⁷⁸

⁷⁰*Mullen v. Reed*, 64 Conn. 240, 29 Atl. 478 (1894).

⁷¹*Ibid.*

⁷²*Op. cit. supra* note 67, at § 186.

⁷³*Clow v. Hosier*, 258 Fed. 278 (C. C. A. Cal. 1919); *Merrill v. Preston*, 135 Mass. 451 (1883); *Codman v. Krell*, 152 Mass. 214, 25 N. E. 90 (1890); *City Bank F. T. Co. v. Whiting*, 241 N. Y. Supp. 398 (1930); *In re Bankes*, [1902] 2 Ch. 333.

⁷⁴*Lincoln v. Aldrich*, 149 Mass. 368, 21 N. E. 671 (1889). Otherwise in Alabama: *Price v. Tally's Adm'r*, 10 Ala. 946 (1847).

⁷⁵*Curtis v. Curtis*, 138 App. Div. 208, 123 N. Y. Supp. 103 (1st Dep't 1918); commented on in (1919) 32 HARV. L. REV. 729.

⁷⁶CONFLICT OF LAWS (1934) § 296, comment b.

⁷⁷*Hoskins v. Hoskins*, 231 Ky. 5, 20 S. W. (2d) 1029 (1929) (whether insured has right to change); *Orthwein v. Germania Life*, 261 Mo. 650, 170 S. W. 885 (1914); *Pendleton v. Great Southern Life Ins. Co.*, 135 Okla. 40, 273 Pac. 1007 (1929); *National Trust Co. v. Hughes*, 14 Man. 41 (1902); *Re Hewitt*, 42 Ont. L. 286, 43 Dom. L. R. 716 (1918).

⁷⁸*Haven v. Home Ins. Co.*, 149 Mo. App. 291, 130 S. W. 73 (1921).

however, the rule is otherwise if the policy is entirely rewritten to accomplish the change of beneficiary.⁷⁹ With reference to substituted or converted policies, it is held that a twenty-payment life insurance policy issued in accordance with a provision in a term policy which it replaces is governed by the law of the place where the term policy is issued, since it is part of the original contract, when it was to issue upon simple application, with nothing left to future agreement.⁸⁰ On the other hand, the interpretation and validity of a life insurance policy obtained by the insured in exchange for another policy will, if the exchange policy is a separate, detached, and distinct contract and in the absence of an express provision or any fact or circumstance indicating that the parties wished the law of the jurisdiction of the original contract to apply, be governed by the law of the state in which the substituted policy is delivered and accepted and in which the insured resides.⁸¹ Surrender is a consummation of a right given in the policy and so is governed by the place of contracting of the policy.⁸²

But to have the effect just stated they must be mere consummations of rights created or reserved by the original contract, *i.e.*, the hatching of an egg laid in the contract. If they contain new elements or conditions, there is an offer and acceptance and so a new contract which must be subject to its own choice of law. The insurance policies of every company offer various modes of payment, one of which may be elected by the insured while the policy is in force or by the beneficiary at maturity. These in nearly every instance are limited to a single beneficiary and her estate. Selection of one of these is an action within the insurance contract. However, if the mode varies in any particular, such as naming a secondary beneficiary to receive the balance or providing a different manner of payment, the contract is new and governed, it may be, by a different law. This is the result generally because rarely is an insurance settlement confined to the policy option.

A loan agreement may or may not be governed by the law of the place of the insurance contract depending on the right or privilege of the policyholders to secure the loan. If the policy contains a positive promise to make a loan, in the nature of a continuing offer, so to speak, the loan is governed by the law of the policy contract. In such circumstances, it is the consummation of a policy provision. Thus, the provisions of the law of the state of

⁷⁹Webster v. Modern Woodmen, 192 Iowa 1376, 186 N. W. 659 (1922).

⁸⁰Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 45 Sup. Ct. 129 (1924). Regular life in place of term: Silliman v. I. L. Ins. Co., 131 Tenn. 303, 174 S. W. 131, L. R. A. 1915F 707 (1915). Paid-up in place of regular insurance: Dannhauser v. Wallenstein, 169 N. Y. 199, 62 N. E. 160 (1901).

⁸¹Nielsen v. General Am. Life Ins. Co., 89 F. (2d) 90, 110 A. L. R. 1133 (C. C. A. 10th 1937).

⁸²Parsons v. Northwestern Nat. Life, 133 Iowa 532, 110 N. W. 907 (1907); Northwestern Mut. Life v. Joseph, 31 Ky. Law Rep. 714, 103 S. W. 317, 12 L. R. A. (N. S.) 439 (1907); McCormick v. Travelers Life, 215 Mo. App. 258, 264 S. W. 916 (1924).

the policy as to rights on default govern.⁸³ On the other hand, where cash loans can be obtained under a loan application reciting that the agreement is made and delivered at the place of the home office of the company and where the right to secure the loan is not absolute, but some discretion with respect to making a loan is reserved to the insurer, the contract of loan is governed by the law of the state where the insurer has its home office, even though the agreement for the policy loan itself was in fact signed elsewhere.⁸⁴ In practice, usually, a loan agreement is regarded as separate and distinct from the original contract of insurance and governed, at least as regards its validity, by the law of the place where it—the loan agreement—is made.

C. CAPACITY TO DEAL WITH INSURANCE

Over the contracts of married women much legal lore has been evolved which now is of little importance because the "shield of coverture" designed to protect the wearer from her own ignorance and weakness is now "seldom worn with becoming, and never with flattering, grace". But as to the acts of minors the problem is not only live but complicated by the complexity of modern life and work. The rule maintained by the jurists of Continental Europe and by some European and American writers is that the domicil of origin determines the personal capacity wherever the person may go. This is on the theory that the law of the domicil of birth should prevail over the place of actual domicil in fixing the age of majority, each state or nation being presumed to be best capable of judging from physical circumstances, climate or otherwise when the faculties of its citizens are morally or civilly perfect for the purposes of society. This rule has the advantage of certainty. On the other hand it has the disadvantage that the person will suddenly become of age in crossing the line into a state having a low majority age.⁸⁵ The prevailing American rule is that the legal capacity of a person to make a contract or perform any other act is to be determined by the law of the place where the act was done or the contract made. Therefore, a person who is a minor until twenty-five by the law of his domicil and incapable as such of making a valid contract there, may nevertheless in another country where he would be of age at twenty-one make a contract at that age.⁸⁶ If, however, the infant signs a contract in the state of his domicil and the entire performance on his part is to be in that state, the law of that state will, be

⁸³Mutual Life Ins. Co. v. Liebing, 259 U. S. 209, 42 Sup. Ct. 467 (1922).

⁸⁴New York Life Ins. Co. v. Dodge, 246 U. S. 357, 38 Sup. Ct. 337, Ann. Cas. 1918E 593 (1918).

⁸⁵Pillet, *Essai d'un System General de Solution des Conflits des Loix* (1894) 21 CLUNET 417.

⁸⁶Wilder's Succession, 22 La. Ann. 219, 2 Am. Rep. 721 (1870); Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321 (1880); Thompson v. Ketchum, 8 Johns. 189, 5 Am. Dec. 332 (N. Y. 1811); annotation 17 Am. Dec. 180; 5 Eng. Rul. Cas. 867.

applied to determine its validity, even though the acceptance by the other party, which completes the contract, is in another state.⁸⁷

The fact that a person is or is not of age in one state does not affect the question of his minority or his capacity in any particular in another state.⁸⁸ A minor may be emancipated either by statute or in accordance with the provision of the common law.⁸⁹ The consequences of this emancipation, like the consequences of minority, must depend on the law of the state where the transaction takes place. Proceeding may be had in a state for the removal of the incapacity of minority for some particular purpose. Such a proceeding does not enlarge the capacity of the person under the law of any other state.⁹⁰ Thus, in *State v. Bunce*⁹¹ an Arkansas minor owned movables in the hands of a curator in Missouri. An Arkansas statute authorized certain courts to remove the legal disabilities of minors in general or with respect to a particular business and an Arkansas court did remove such disability "so far as to authorize him to demand, sue for, and receive all moneys belonging to him in the State of Missouri, in the hands of his curator". A Missouri court dismissed such suit saying, "The legislature of Arkansas did not possess power to pass a law to override and control our laws". The application of these principles to insurance may be illustrated by this situation:

By statute in Ohio, a person fifteen years or over may take out insurance for benefit of parents and may surrender or borrow upon it as if of age. But, his power to deal with his policy is suspended if his domicil crosses into Indiana which does not have such a statute. Again, a girl of eighteen in a state where that is the age of majority may validly take out insurance but she would lose power over it by removal to a state where the age of majority is twenty-one.⁹² Thus, the insurance company cannot rely on the original domicil.

The questions we have been discussing may become important in the development of deferred settlements by insurance companies. Often the recipients of interest and instalments are children living in different states, with different majority laws, and during payment their residence may cross state lines. His or her rights and the conditions of exercising them will be governed, probably, by the law in which the domicil is at the time.⁹³

⁸⁷*International Textbook Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115 (1912).

⁸⁸*Philpott v. Missouri Pac. R. Co.*, 85 Mo. 164 (1884); *O'Dell v. Rogers*, 44 Wis. 136 (1878).

⁸⁹*Harmon v. McGawley*, 9 La. 567 (1836); *Gulf C. & S. F. R. Co. v. Lemons*, 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943 (1918).

⁹⁰*Wilkinson v. Kuster*, 124 Ala. 574, 26 So. 940 (1899); *State v. Bunce*, 65 Mo. 349 (1866).

⁹¹65 Mo. 349 (1866).

⁹²*Heistand v. Knns*, 8 Blackford 345 (Ind. 1847).

⁹³This subject is interestingly discussed by Clyde P. Johnson in (1924) 4 PROCEEDINGS LIFE INS. COUNSEL 369.

Fraternal Insurance Subject to Different Rules

Some of the rules are different in fraternal benefit insurance, and this must be borne in mind, otherwise the decisions may be misleading. There is an indivisible unity between the members of such a society in respect to the fund from which their rights are to be enforced and consequently their rights are to be determined by a single law. Membership involves something more than a contract; it looks to and must be governed by the law of the state granting the charter of incorporation. An example is the rule that who are eligible beneficiaries must be determined by the law of that state⁹⁴ even against a smaller list in the statute of the state of contract.⁹⁵

When Documents Embody Rights

Where a right is, by the law which created it, embodied in a document, the right is subject to the jurisdiction of the state which has jurisdiction over the document.⁹⁶

A document may be a letter or ancient writing valuable for itself (in this sense not interesting to us here), it may be a memorandum of a legal transaction or written contract; it may, like a bill of lading, embody the title to a chattel (also of no interest in this study) or it may itself embody an obligation or right, in which case the ownership of the document is regarded as conferring a kind of legal ownership of the right of action represented by it—as if the instrument were itself the obligation. There is sound basis for this says Professor Williston⁹⁷ “where by contract or custom enforcement of a right is conditional on the surrender of the document evidencing the right”.

Whether a right is embodied in a document depends upon the law which created the right. When it was so merged by that law, the presence of the paper confers jurisdiction over the right. No right is embodied in a document except as provided by the law of the state which creates the right. The validity of the conveyance of a right embodied in a document depends on the validity of the conveyance of the document. Since a document is a chattel the validity of its conveyance is governed by the law of the state where the document is at the time of the conveyance.⁹⁸

If a chose in action is evidenced by a document in which, by the law of the state where it was issued, the title to the obligation is embodied, a tran-

⁹⁴Supreme Council R. A. v. Green, 237 U. S. 531, 35 Sup. Ct. 724, L. R. A. 1916A 771 (1915); Modern Woodmen v. Mixer, 267 U. S. 554, 45 Sup. Ct. 389, 41 A. L. R. 1384 (1925); Hollingsworth v. Supreme Council R. A., 175 N. C. 615, 96 S. E. 81, Ann. Cas. 1918E 401, 41 A. L. R. 1386, L. R. A. 1916A 770 (1918).

⁹⁵United Order v. Merrick, 165 Mass. 421, 43 N. E. 127 (1896).

⁹⁶RESTATEMENT, CONFLICT OF LAWS (1934) § 52.

⁹⁷CONTRACTS (Rev. ed. Williston and Thompson 1936) § 430.

⁹⁸RESTATEMENT, CONFLICT OF LAWS (1934) § 262; BEALE, *op. cit. supra* note 1, at § 52.1.

saction purporting to create a trust therein is governed by the law of the state where the document is at the time of the transaction.⁹⁹ "In respect of specialty debts the test has always been not the place and residence of the debtor, but the actual place where the actual document constituting the specialty exists, namely, where the piece of paper is to be found."¹⁰⁰ In particulars, other than taxation, it is well settled that a bond or note is regarded like a chattel having a locality in space and therefore governed by the law of the place at which it is dealt with.¹⁰¹

As far as the transfer of title is concerned, commercial paper is now viewed as subject to the same rules that govern other chattels.¹⁰² Thus, the law of the situs controls the validity of the transfer of a check,¹⁰³ a certificate of stock,¹⁰⁴ or a bill of exchange.¹⁰⁵ It was recently held that where a Georgia bank issued a transferable certificate of deposit for bonds in its vaults, and the certificate is transferred in New York, the validity of the transfer of the certificate is governed by the law of New York.¹⁰⁶ The circumstances here come very close to those in settlement of insurance proceeds. Many life companies take up the policy at maturity and issue in its place a certificate evidencing its obligation in the conditions applicable at that time. In an action to cancel certificates of deposit it was held that the action was properly brought at the situs of the fund, rather than the situs of the certificates.¹⁰⁷

Delivery of an insurance policy with donative intent transfers the rights embodied in the document.¹⁰⁸ The rule seems to be the same as for savings bank books, non-negotiable or unendorsed bill or note of third person, a non-negotiable bond, a certificate of stock, or lottery ticket.¹⁰⁹ It cannot "be controverted that a gift of a written contract, which calls for the payment of money to the donor, can be made by parol, and that a written assignment is not necessary when there is a delivery of the written contract by the donor

⁹⁹RESTATEMENT, CONFLICT OF LAWS (1934) § 294, comment f.

¹⁰⁰New York Life Ins. Co. v. Public Trustee, 131 L. T. Rep. 445 (C. A. 1924).

¹⁰¹BEALE, *op. cit. supra* note 1, at § 52.1. See *Alcock v. Smith*, 1 Ch. 238 (1892); *Embircos v. Anglo-Austrian Bank*, 1 K. B. 677 (1905).

¹⁰²The rule is otherwise for purposes of taxation. Compare *Blodgett v. Silberman*, 277 U. S. 1, 48 Sup. Ct. 410 (1928) with *Frick v. Pennsylvania*, 268 U. S. 473, 45 Sup. Ct. 603, 42 A. L. R. 316 (1925).

¹⁰³*Embircos v. Anglo-Austrian Bank*, 1 K. B. 677 (1905).

¹⁰⁴*Direction der Disconto-Gesellschaft v. U. S. Steel Corp.*, 267 U. S. 22, 45 Sup. Ct. 207 (1925).

¹⁰⁵*Alcock v. Smith*, 1 Ch. 238 (1892).

¹⁰⁶*Application of Goodchild*, 160 Misc. 738, 290 N. Y. Supp. 683 (Surr. Ct. 1936).

¹⁰⁷*First Natl. Bank of Broken Bow v. Bank of Horatio*, 161 Ark. 259, 255 S. W. 881 (1923).

¹⁰⁸"By overwhelming authority," says *Gledhill v. McCoombs*, 110 Me. 341, 86 Atl. 247 (1913).

¹⁰⁹WILLISTON, CONTRACTS (Rev. ed. Williston and Thompson 1936) § 439 and numerous citations. RESTATEMENT, CONTRACTS (1934) § 158 comment *ib.*

to the donee, with the intention to make a gift of it and the money it secures."¹¹⁰

The trend of decision, following the growth of commercial interests, is to increase the class of documents held to embody rights.¹¹¹ This is natural as may be seen if we consider the evolution of criteria of choice of law. Early, it was the domicile of the trustor and the phrase *mobilia sequuntur personam* had a potency which has lessened only in recent years. These years have seen the rise of situs of the property. More and more property has been endowed with a situs nature—first formal contracts and securities, then those not so formal. It is submitted that this ever-widening class should include insurance contracts and the certificates which evidence or are the company's obligation towards funds left on deposit with them—certificates of deposit, so to speak. It is difficult to visualize rights more completely embodied in a document. It is difficult also, to conceive a more simple criterion in choice-of-law problems.

If an insurance policy is under seal, it obviously can be dealt with as a document embodying a right. But if not possible to deal with the policy on the basis of a common law specialty, such instruments are in fact used in business as mercantile specialties without regard to seal. Consistently with the mercantile view courts have held that the mere delivery of an insurance policy constitutes a completed gift of the chose in action embodied in it. Similarly, the policy is an asset for administration in the jurisdiction where the policy is situated at the death. Title to it vests in the administrator then appointed and no other jurisdiction should undertake to administer the asset. There are several cases which seem to take this view in whole or part.¹¹²

Assignments of Insurance—By what Law Governed

As a general rule an assignment of a policy of insurance is regarded as a contract distinct and separate from the original contract. Consequently it is governed by the law of the place where it (the assignment) is made,

¹¹⁰*In re Huggin's Estate*, 204 Pa. 167, 53 Atl. 746 (1902).

¹¹¹This was accepted in *Hutchison v. Ross*, 262 N. Y. 381, 187 N. E. 65, 89 A. L. R. 1007 (1933). See further consideration of the document in cases of Trusts, *infra* pp. 190-192.

¹¹²The following are listed and discussed by BEALE, *op. cit. supra* note 1, at § 471.10: *Union Mut. Life Ins. Co. v. Lewis*, 97 U. S. 682, 24 L. ed. 1114 (1878); *New Eng. Mut. Life v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364 (1884); *New York Life v. Smith*, 67 Fed. 694 (C. C. A. 9th 1895); *Equitable Life v. Vogel*, 76 Ala. 441 (1884); *Rice v. Metropolitan Life Ins. Co.*, 152 Ark. 498, 238 S. W. 772 (1922); *Holyoke v. Mutual Life*, 22 Hun 75 (1880), *aff'd*, 84 N. Y. 648; *Sulz v. Mutual Reserve Fund Life*, 145 N. Y. 563, 40 N. E. 242 (1895); *Matter of Gordon*, 186 N. Y. 471, 79 N. E. 722 (1906); *Ellis v. Northwestern Mut. Life Ins. Co.*, 100 Tenn. 177, 43 S. W. 766 (1897); *Gurney v. Rawlins*, 2 M. & W. 87 (1836); *Re Ontario Mutual Life Assur. Co.*, 30 Ont. 666 (1899). See *N. Y. Life Ins. Co. v. Public Trustee*, 131 L. T. Rep. (C. A. 1924); *Evans v. Charles Scribners Sons*, 58 Fed. 303 (N. D. Ga. 1893).

without reference to the place where the original contract of insurance was made, or to the law governing that contract; and this although the original contract stipulates that a certain state shall be the place of contract.¹¹³ Having made that general statement we must stop to consider a fine distinction and slight exception before going on to apply the principle. Whether a right under a contract is capable of being transferred by the owner is determined by the law of the place of contracting.¹¹⁴ Whether a transfer has been made, *i.e.*, the validity of the assignment (assuming the contract to be assignable), is governed by the law of the place where the assignment was made.¹¹⁵ The place of assignment is the place where the last act or event occurred which is necessary to the formation of the contract of assignment.¹¹⁶

The law of the place of assignment governs the capacity of the assignor to assign¹¹⁷ and the formalities.¹¹⁸ It governs the sufficiency of the consideration given by the assignee of an insurance policy,¹¹⁹ the legality of an assignment to one without insurable interest¹²⁰ and the validity of an assignment of a policy without the beneficiary's consent¹²¹ or without delivery.¹²² But in New Jersey the law of that state will govern the assignment of a policy if all parties are domiciled there, even if the assignment is executed elsewhere.¹²³

II. BY TRUST COMPANIES*

If one thinks the choice of law is uncertain in case of contracts, he will

¹¹³COUCH, INSURANCE (1929) § 209. The cases are collected and discussed in (1904) 63 L. R. A. 858; (1910) 23 L. R. A. (N. S.) 978; (1914) 52 L. R. A. (N. S.) 281-283.

¹¹⁴Davis v. Brown, 159 Ind. 644, 65 N. E. 908 (1903); Northwestern Mut. Life Ins. Co. v. Adams, 155 Wis. 335, 144 N. W. 1108 (1914); BEALE, *op. cit. supra* note 1, at § 348.2; RESTATEMENT, CONFLICT OF LAWS (1934) § 348.

¹¹⁵New York Life Ins. Co. v. Dunlevy, 214 Fed. 1 (C. C. A. 9th 1916), *aff'd*, 241 U. S. 518, 36 Sup. Ct. 613 (1916); Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295 (1911); BEALE, *op. cit. supra* note 1, at § 350.1; RESTATEMENT, CONFLICT OF LAWS (1934) § 350. See annotations (1903) 65 L. R. A. 858; (1920) 25 L. R. A. (N. S.) 978; (1914) 52 L. R. A. (N. S.) 281.

¹¹⁶BEALE, *op. cit. supra* note 1, at § 348.1.

¹¹⁷RESTATEMENT, CONFLICT OF LAWS (1934) § 351.

¹¹⁸*Id.* at § 352.

¹¹⁹Glover v. Wells, 40 Ill. App. 350 (1891), *aff'd*, 140 Ill. 102, 29 N. E. 680 (1892).

¹²⁰Haase v. First Natl. Bank, 203 Ala. 624, 84 So. 761 (1920); Manhattan Life Ins. Co. v. Cohen, 139 S. W. 51 (Tex. Civ. App. 1911), *appeal dismissed*, 234 U. S. 123, 34 Sup. Ct. 874 (1914).

¹²¹Fourth Natl. Bank v. Woolfolk, 220 Ala. 344, 125 So. 217 (1929); Howard Undertaking Co. v. Fidelity Life Ass'n, 59 S. W. (2d) 476 (Mo. App. 1933); Barbin v. Moore, 85 N. H. 362, 159 Atl. 409 (1932).

¹²²Appeal of Colburn, 74 Conn. 463, 51 Atl. 139 (1902).

¹²³Henry v. Thompson, 78 N. J. Eq. 142, 78 Atl. 14 (1910).

*A study of the holding and distribution of proceeds by a trustee who receives them in one sum is necessary because the trust controls the policy which is a part of the trust res, and the governing law of the trust may be the governing law of certain features of the insurance contract. Also, certain conflict rules of trusts generally, and

be quite sure of it on undertaking the study of trusts. Fortunately, we are interested only in a portion of the field, namely, living or inter vivos trusts and here again only in those which have as their subject-matter contracts or rights in contracts which lawyers call choses in action. Of course the subject-matter or trust res may contain other forms of property such as chattels, cash, securities, and land located in different places to complicate the choice-of-law problem. It will help if we remember that the constituent act of creating a living trust is the transaction of changing the title of the trust res from the trustor to the trustee.

Validity and Its Determination

The validity of a trust of choses in action created by a settlement or other transaction inter vivos is determined by the law of the place in which the transaction takes place.¹²⁴ However, this is not so simple as it sounds because of questions about the place.¹²⁵

In recent years the location of the property has been a factor increasingly considered determinative of the governing law resulting finally in the great case of *Hutchison v. Ross*¹²⁶ which was thoroughly argued in all courts. The facts in that case were these: Ross, of Montreal, marrying as a young man, before his father's death, agreed to create a trust fund of \$125,000 for his wife. The father died leaving \$10,000,000 to his son. The son thereupon, desiring to settle \$1,000,000 instead of \$125,000 on his wife and children, procured documents to that effect to be prepared and executed, the trustee being a New York bank. Half the amount was already in the bank, and the remainder was sent there after the document had been signed. After several years it was attempted to nullify the million-dollar trust on the ground that it was invalid by the law of the Province of Quebec, the domicil

specifically of the trustee settlement of insurance, may apply to the analogous settlement by the life company. In fact, there is considerable evidence that the life company settlement is itself a quasi-trust with the insured until maturity and the insurance company thereafter the trustee. For an extended discussion of this see the author's *POWER OF AN INSURED TO CONTROL THE PROCEEDS OF HIS POLICY* (1926) c. 2.

¹²⁴RESTATEMENT, *CONFLICT OF LAWS* (1934) § 294 (2).

¹²⁵Professor Beale has stated (*op. cit. supra* note 1, at § 294.4) that it seems safest in the case of intangibles not part of an aggregate to apply the law of the domicil of the owner to the passing of title, but the cases in note 126, *infra*, reveal situs of the property or documents to be an important criterion.

¹²⁶*Hutchison v. Ross*, 262 N. Y. 381, 187 N. E. 65, 89 A. L. R. 1007 (1933), *aff'g* *Ross v. Ross*, 233 App. Div. 626, 253 N. Y. Supp. 871 (1st Dep't 1931), which reversed 137 Misc. 795, 243 N. Y. Supp. 418 (Sup. Ct. 1930). This case has been widely discussed in the law journals, *e.g.*, (1933) 8 ST. JOHN'S L. REV. 97; (1933) 1 U. OF CHI. L. REV. 494; (1933) 33 COL. L. REV. 1251; (1934) 32 MICH. L. REV. 696; (1934) 18 MINN. L. REV. 565; (1933) 47 HARV. L. REV. 350; (1934) 20 VA. L. REV. 468; (1934) 19 CORNELL L. Q. 282; (1934) 28 ILL. L. REV. 966. *Forbes v. Comm'r of Internal Revenue*, 82 Fed. (2d) 204 (C. C. A. 1st 1936). See other cases cited in annotation (1934) 89 A. L. R. 1027-8. *But see* *Hasbrouck v. Martin*, 120 N. J. Eq. 96, 183 Atl. 735 (1936).

of the parties. The court, however, held that the securities dealt with by the settlement were in New York, and that the law of New York, as state of situs, validated the settlement.

The court considered the maxim *mobilia sequuntur personam* and rejected it as outmoded or at least of lessened potency as a juristic formula.¹²⁷ In its stead the rule of tangible property has been extended to negotiable instruments and more recently, by slow process to other intangible personal property, at least when "no one can get the benefits of ownership except through and by means of the paper" which evidences such intangible property.¹²⁸ Although the court specifically limited its decision to "documents which in the market place are treated as property and not merely evidence of property", its reasoning reveals the pressure of legal thought to extend the principle to still less formal intangibles. It said:

"In all the affairs of life there has been a vast increase of mobility. Residence is growing less and less the focal point of existence and its practical effect is steadily diminishing. Men living in one jurisdiction often conduct their affairs in other jurisdictions and keep their securities there. Trusts are created in business and financial centers by settlors residing elsewhere."

This case was followed by the New Jersey court in *Cutts v. Najdrowski*,¹²⁹ where a resident of that state caused his bank account in New York to be changed to a trustee for a New Jersey cestui. It was held that the law of New York governed. One commentator¹³⁰ on the *Hutchison* case states that "undoubtedly the prevalent modern tendency is to substitute the law of the situs of the property".

A different but not inconsistent point of view was advanced in *Wilmington Trust Co. v. Wilmington Trust Co.*¹³¹ Here an inter vivos trust of securities, giving the life beneficiary both general and special powers of appointment, was created with all operative factors occurring in New York. Subsequently, with the consent of the donor, a Delaware trust company was appointed successor trustee and additional securities were deposited with it. The life beneficiary of the inter vivos trust, in the exercise of the powers of appointment, set up trusts which were valid under Delaware law but in violation of the New York law against suspension of absolute ownership. The court

¹²⁷The maxim "was intended for convenience and not to be controlling when justice does not demand it".

¹²⁸*Direction der Disconto-Gesellschaft v. U. S. Steel Corp.*, 267 U. S. 22, 28, 45 Sup. Ct. 207 (1925). See general discussion of documents embodying rights, *supra*, pp. 186-188.

¹²⁹123 N. J. Eq. 481, 198 Atl. 885 (1938).

¹³⁰(1934) 20 VA. L. REV. 468 citing *Goetschius v. Brightman*, 245 N. Y. 186, 156 N. E. 660 (1927).

¹³¹186 Atl. 903 (Del. Ch. 1936); notes, (1937) 37 COL. L. REV. 125; (1937) 25 GEO. L. J. 464; (1936) 15 CHI.-KENT L. REV. 59.

held that the validity of the appointed trusts was governed by New York law since the original presence of all operative factors in New York showed that the donor intended New York law to govern.¹³²

The earlier case of *Lozier v. Lozier*¹³³ utilized situs of the trust res as the criterion in an interesting way with an unexpected result. A testator domiciled in Ohio left certain securities in trust. The trustees were domiciled in New York and the securities were there. A cestui attempted to assign his interest, which admittedly was assignable by Ohio law but not assignable by New York law. The Ohio court held that Ohio law governed the validity of the assignment on the ground that securities being personal property, their domicile is ambulatory and follow their lawful custodian, which it held to be the probate court in Ohio, considering the trustees its agents merely. Professor Cook's criticism of this case illustrates the difficulty for students and lawyers in the inexact language used by the courts.¹³⁴ The decision, he says, is ambiguous in the phrase "Ohio law" in that it may refer to rules established in that state for trusts having no extra-territorial elements or, with better reason, may be the rule established in Ohio for trusts with extra-territorial elements which may for reasons of policy be identical in scope with that applied by New York law to New York trusts. In *Kennedy v. Morse*¹³⁵ a resident of Rhode Island bequeathed securities to a trustee domiciled in New York for benefit of her daughter also domiciled in New York. The validity of the trust was determined by the law of Rhode Island.¹³⁶ A creditor attempted to reach the income from the trust of a New York cestui on the theory that the Rhode Island law made her interest assignable but the court applied the New York law and refused to aid the creditor.

It is well to stop at this point to clear an apparent conflict in the decisions. The United States Supreme Court has held intangibles taxable at the owner's domicile even when the instruments are in another state. On the same theory other courts have held that their situs for transfer inter vivos must likewise be at the owner's domicile. Says Professor Cavers:

"The source of this confusion lies in the use of the term situs. Now situs, with respect to an intangible, is solely a judicial concept, an elliptical phrasing of the decision that the intangible should be subject for the purpose in hand to the law of the jurisdiction so designated. There is no reason why that situs must be the same for all purposes. Because the supreme court for reasons which are doubtless good and sufficient declines to stay the hand of the tax collector at the domicile

¹³²The court reasoned that the exercise of the power must be regarded as the act of the donor, and therefore regarded the interests created by the appointment as having been created by the donor.

¹³³99 Ohio St. 254, 124 N. E. 167 (1919).

¹³⁴(1919) 19 Col. L. Rev. 487.

¹³⁵71 App. Div. 104, 75 N. Y. Supp. 728 (1st Dep't 1902).

¹³⁶In *Cross v. U. S. Trust Co.*, 131 N. Y. 330, 30 N. E. 125 (1892).

of a decedent from taxing the stocks and bonds which the decedent had kept elsewhere, it does not follow that any transfer of these stocks and bonds which the owner might have made during his lifetime would have been equally subject to the law of his domicile. The consideration justifying a tax on intangibles may be quite irrelevant to the proper determination of what law governs their transfer inter vivos."¹³⁷

A perpetuity and an unlawful accumulation are elements of validity which are governed by the law of the place where the trust is created.¹³⁸

Stipulating the Governing Law

As to questions relating entirely to the validity of a trust, such as the rule against perpetuities, a trustor can not provide that the more liberal rule of another state shall govern,¹³⁹ and probably he can not validate a provision that the cestui's interest shall not be subject to the claims of creditors by selecting as the governing one a more favorable state. On the other hand there is the beginning of a tendency to authorize by statute a selection of a governing law; thus, New York provides that the expressed wish of the creator of a trust to have the New York law govern will be followed if the personal property is situated in New York when the trust is created.¹⁴⁰

a. EFFECT OF LOCAL PUBLIC POLICY

An interesting and important question exists when a trust valid where made is to be administered in a state whose laws forbid certain features. The general rule subjects the trust to the laws of the state where it is to be administered.¹⁴¹ Hence, a trust valid in the state where created can not be carried out in a state where it conflicts with local rules.¹⁴² Conversely, if a trust is invalid where made (*e.g.*, violates its rule against perpetuities) but is valid in the state of administration, the greater number of such states have refused to upset the trusts, claiming that their local laws are not designed to apply to trusts executed abroad.¹⁴³

¹³⁷*Trusts Inter Vivos and Conflict of Laws* (1930) 44 HARV. L. REV. 161, 172.

¹³⁸Succession of Herber, 128 La. 111, 54 So. 579 (1911); Cross v. U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125 (1892).

¹³⁹City Bank Farmers Trust Co. v. Check, (1935) 93 N. Y. L. JOUR. 2441.

¹⁴⁰N. Y. PERSONAL PROPERTY LAW § 12a. Oddly enough in Shannon v. Irving Trust Co., 275 N. Y. 95, 9 N. E. (2d) 792 (1937), the trustor was permitted to negative the New York law by designating the law of another state in circumstances which would otherwise have called for the law of New York. The annotator in (1936) 84 U. OF PA. L. REV. 901 thinks it doubtful if the legislature intended to create a proper conflict rule and at the same time grant the privilege of evading it.

¹⁴¹For discussion of the rule in connection with contract choice-of-law, see *supra* pp. 175-179.

¹⁴²Beale, *Equitable Interests in Foreign Property* (1907) 20 HARV. L. REV. 382; GOODRICH, CONFLICT OF LAWS (1927) § 161; MINOR, CONFLICT OF LAWS (1901) § 144; 2 WHARTON, CONFLICT OF LAWS (1905) § 591b.

¹⁴³Vansant v. Roberts, 3 Md. 119 (1852); Chamberlain v. Chamberlain, 43 N. Y. 421 (1871); Fordyce v. Bridges, 2 Phila. 497 (Pa. 1847).

But New York has a special rule. Its courts have held that the New York restrictions will not apply if the gift is to a foreign charitable corporation, which, therefore, is administered abroad.¹⁴⁴ Conversely, they do not apply to trusts created abroad and valid there though violating the rule against perpetuities in New York where to be administered.¹⁴⁵ In other words, New York is inclined to support the trust if valid in either state. An illustration is *Cross v. U. S. Trust Company*,¹⁴⁶ wherein the New York Court of Appeals held that a disposition of personal property by will in the form of a trust to be executed in New York, made by a person domiciled in another state, valid at the place of domicile, was valid in New York, notwithstanding the absolute ownership of the property was suspended for a period longer than permitted by the New York statute. The same court in *Hope v. Brewer*,¹⁴⁷ adopted the converse rule, namely, that a testamentary gift by a New York resident to trustees in a foreign country for a purpose there legal was valid, though it transgressed the perpetuity rule of New York, the court saying:

"Our law with respect to creation of trusts, the suspension of the power of alienation of real estate, and the absolute ownership of personal, was designed only to regulate the holding of property under our laws and in our state, and a trust intended to take effect in another state or in a foreign country would not seem to be within either its letter or spirit. When a citizen of this state or a person domiciled here makes a gift of personal estate to foreign trustees for the purpose of a foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: 1st, whether all the forms and requisites necessary to constitute a valid testamentary instrument under our laws have been complied with; and 2d, whether the foreign trustees are competent to take the gift for the purposes expressed and to administer the trust under the law of the country where the gift was to take effect."

However, the courts of New York will not directly aid in carrying out there a bequest which is in violation of its statute against perpetuities; yet they will not hold such a bequest void when it is valid by the law of the

¹⁴⁴*Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558 (1892); *Robb v. Wash. & Jeff. College*, 185 N. Y. 485, 78 N. E. 359 (1906); *Matter of Crum*, 98 Misc. 160, 164 N. Y. Supp. 149 (Surr. Ct. 1916); *Matter of Feehan's Estate*, 135 Misc. 903, 241 N. Y. Supp. 669 (Surr. Ct. 1929).

¹⁴⁵*Am. Bible Soc. v. Healy*, 153 Mass. 197, 26 N. E. 404 (1891); *Cross v. U. S. Trust Co.*, 131 N. Y. 330, 30 N. E. 125 (1892); *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407 (1893).

¹⁴⁶*Supra* note 145.

¹⁴⁷136 N. Y. 126, 32 N. E. 558 (1892). *Hope v. Brewer* was followed in *Robb v. Wash. & Jeff. College*, 185 N. Y. 485, 78 N. E. 359 (1906) and *St. John v. Andrews Institute for Girls*, 191 N. Y. 254, 83 N. E. 981 (1908). It overruled, in the name of distinguishing, the decision of *Bascom v. Albertson*, 34 N. Y. 584 (1866).

state by which the disposition of the property is to be governed; so while distribution in New York under such a bequest will not be decreed, the assets will be directed to be remitted to the state where testator was domiciled.¹⁴⁸

Where testatrix dying in another state creates, in a corporation in New York, trusts relating to personalty, valid under the laws of testatrix's domicil but void under the laws of New York, the courts of that state will not assume jurisdiction in the premises, but the trusts must be administered and their validity determined under the laws of testatrix's domicil.¹⁴⁹

The tendency of the New York courts to uphold trusts wherever possible was manifested in *Shannon v. Irving Trust Co.*¹⁵⁰ Here, the trust agreement, after setting out provisions for accumulation which were valid by the law of New Jersey but invalid under New York law, expressly stipulated that New Jersey law should govern the validity of the trust. The settlor and beneficiaries were domiciled in New Jersey; the domicil of the trustee, the execution of the trust instrument, the situs of the movables at the time of the transfer, and the administration of the trust were all in New York. The court held that the trust was valid on the ground that the settlor's and beneficiaries' New Jersey domicil was a sufficient basis for sustaining the intent of the parties that New Jersey law be applied. The court stated its conclusion¹⁵¹ of the law thus:

"The cases have uniformly held that the public policy of New York confines the New York rule against perpetuity to trusts established by residents to be administered here."

Determining the Place of Administration

To determine the law governing the administration of the trust, the courts have referred to and considered the following factors:¹⁵²

1. Domicil of the trustor;
2. Place in which the trust instrument was executed and delivered;

¹⁴⁸*Bascom v. Albertson*, 34 N. Y. 584, 609 (1866); *Chamberlain v. Chamberlain*, 43 N. Y. 424 (1871); *Despard v. Churchill*, 53 N. Y. 192 (1873).

¹⁴⁹*Cross v. U. S. Trust Co.*, 25 Abb. N. C. 166, 10 N. Y. Supp. 781 (Sup. Ct. 1890).
¹⁵⁰246 App. Div. 280, 285 N. Y. Supp. 478 (1st Dep't 1936), noted (1936) 84 U. of P. A. L. REV. 901; (1936) 5 BROOKLYN L. REV. 325.

¹⁵¹A note in (1937) 50 HARV. L. REV. 1156 states: "It seems unlikely that other states will follow the New York view as to what is encompassed by the policy against accumulations, since there is strong argument that the vice aimed at by the law against accumulations is the holding of property within the state, irrespective of the owner's domicil or intent, on uses frowned on by the law." See *Cavers, Trusts Inter Vivos and Conflict of Laws* (1930) 44 HARV. L. REV. 161, 165.

¹⁵²The cases in which each is discussed are listed in an admirable discussion by Walter W. Swabenland, *The Conflict of Laws in Administration of Express Trusts of Personal Property* (1936) 45 YALE L. J. 438. See also notes, (1937) 37 COL. L. REV. 126; (1934) 89 A. L. R. 1023.

3. Language of the trust instrument;
4. Place of probate of the will;
5. Location or situs of the trust property;
6. Domicil of the trustee;
7. Domicil of the cestui or beneficiary;
8. Place in which the business of the trust is carried on;
9. Intention or stipulation of the creator.

It will be noted that the first four factors relate to the creation of the trust; the fifth to the subject-matter or trust res; and the sixth, seventh, and eighth, to the performance of the trust. Certain factors necessarily exist in combination, *e.g.*, the place of probate is always the domicil of the testator or the location of the property and the place of carrying on the business of the trust is the domicil of the trustee or location of the trust property. Since this discussion concerns itself with living or inter vivos trusts only, the fourth can be dismissed from mind.¹⁵³ Cook¹⁵⁴ discarded 6 and 8. He saw much in favor of 7, but concluded the result sufficiently undesirable to induce a rejection of it. He thought 5 not feasible because the most important class of personal property—choses in action—has no situs. His contribution to the study was the suggestion that the court should select the jurisdiction with which on the whole “the trust has the most substantial connection”.

Knowing the factors which the courts have considered in determining the law governing the administration of trusts and realizing that all or nearly all appear in every case and that they may exist in different states in great variety, the problem is to determine the relative weights. The result is confusion¹⁵⁵ out of which the Restatement attempted to bring some order by the following pronouncement:

“A trust of movables created by an instrument inter vivos is administered by the trustee according to the law of the state where the instrument creating the trust locates the administration of the trust.”¹⁵⁶

In order to determine where the administration of the trust is located, consideration is given to the provisions of the instrument, the residence of the trustees, the residence of the beneficiaries, the location of the property, the place where the business of the trust is to be carried on.¹⁵⁷

¹⁵³Only one case, *Keeney v. Moore*, 71 App. Div. 104, 75 N. Y. Supp. 728 (1st Dep't 1902) has been found in which the forum was expressly referred to by the court as a factor.

¹⁵⁴(1919) 19 COL. L. REV. 486.

¹⁵⁵“It is practically impossible,” says the annotator in 89 A. L. R. 1023, “to deduce a uniform rule from the results reached in the adjudicated cases . . . the law applied often being the law of a state which is the situs of numerous elements conjunctively.”

¹⁵⁶CONFLICT OF LAWS § 297.

¹⁵⁷*Id.* at § 297, comment *d.*

Any question which arises after the trust has come into being is a question of the administration of the trust.¹⁵⁸ Among the matters of administration governed by the law of the state where that is located, are all questions as to the rights of the cestui of the trust; and specifically, whether the trustor may revoke,¹⁵⁹ who takes as cestui,¹⁶⁰ the alienability of the cestui's interest,¹⁶¹ the right of creditors of the cestui to reach the trust res or its income,¹⁶² the right of the cestui, a married woman, to receive the income free from the interference of her husband,¹⁶³ the right of the cestui to put an end to the trust and receive a conveyance of the trust res.¹⁶⁴

Increasing Importance of Beneficiary's Domicil

The domicil of the beneficiary has not received much consideration in the choice of law and one writer¹⁶⁵ says that it does not merit any because there may be several beneficiaries. Yet even he admits that the domicil of the beneficiary may throw light on the trustor's intention as to location of the trust's administration or aid the court in determining to what law he intended to submit the validity of the trust.

Professor Gray questioned¹⁶⁶ the Pennsylvania decision of *DeRenne's Estate*¹⁶⁷ in which the Orphans' Court of Philadelphia held the Pennsylvania statute against accumulation did not apply. "Does not", he asks, "the statute forbid the doing of certain acts in Pennsylvania as against public policy?" But *DeRenne's Estate* was followed in the Supreme Court by *Fowler's Appeal*.¹⁶⁸ In both cases, the cestui que trust lived out of Pennsylvania.

¹⁵⁸BEALE, *op. cit. supra* note 1, at § 297.2.

¹⁵⁹*In re Muspratt-Williams*, W. N. 14 (1901).

¹⁶⁰*West v. Fitz*, 109 Ill. 425 (1884).

¹⁶¹*Spindle v. Shreve*, 111 U. S. 542, 4 Sup. Ct. 522 (1884); *Farmers & M. S. Bank v. Brewer*, 27 Conn. 600 (1858); *First Nat'l Bank v. Nat'l Broadway Bank*, 156 N. Y. 459, 51 N. E. 398 (1898); *Curtis v. Curtis*, 185 App. Div. 391, 173 N. Y. Supp. 103 (1st Dep't 1918); *Lozier v. Lozier*, 99 Ohio St. 254, 124 N. E. 167 (1919); *In re Fitzgerald*, (1904) 1 Ch. 573; RESTATEMENT, CONFLICT OF LAWS (1934) § 297, comment b.

¹⁶²*Keeney v. Morse*, 71 App. Div. 104, 75 N. Y. Supp. 728 (1st Dep't 1902); *Gould v. Gould*, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925); *Matter of Havemeyer*, 127 Misc. 197, 216 N. Y. Supp. 334 (Surr. Ct. 1926); BEALE, *op. cit. supra* note 1, at § 297.2.

¹⁶³*Reynolds v. Ellis*, 2 Ch. 333 (1902).

¹⁶⁴*Mercer v. Buchanan*, 132 Fed. 501 (W. D. Pa. 1904); *Selleck v. Hawley*, 331 Mo. 1038, 56 S. W. (2d) 387 (1932); *Curtis v. Curtis*, 185 App. Div. 391, 173 N. Y. Supp. 103 (1st Dep't 1918); RESTATEMENT, CONFLICT OF LAWS (1934) § 297.

¹⁶⁵*Cavers, Trusts Inter Vivos and Conflict of Laws* (1930) 44 HARV. L. REV. 168, 189.

¹⁶⁶PERPETUITIES (3d ed. 1915) § 725.

¹⁶⁷12 W. N. C. 94 (1882) (a Georgia citizen bequeathed personal property to a Pennsylvania corporation on trusts not allowed by the Pennsylvania statute). See *Asher, Public Policy in the Law of Conflicts in Pennsylvania* (1939) 13 TEMPLE L. Q. 216.

¹⁶⁸125 Pa. 388, 17 Atl. 431 (1889) (the trustor was domiciled in Illinois and the deed of trust was made there. The securities were of foreign corporations; the cestui que trust was in Colorado and the trustee was a Pennsylvania corporation).

Professor Minor has developed Professor Gray's thought along a different line.¹⁶⁹ Speaking of laws relating to the capacity of the beneficiary to take (as distinguished from the capacity of the testator to give) he says the purpose is to subserve a general policy which the welfare of the state as a whole requires should be carried out. Such are prohibitions on a corporation to be a legatee or to hold more than a certain amount of property bequeathed to it, or the policy of statutes of mortmain. It is evident that the state enacting such a law is not interested in enforcing it if the corporation or other beneficiary thus prohibited to take is not within its borders; on the other hand if such beneficiary is within its limits, the policy of the law applies no matter where the testator's domicil may be or what may be its law. "The capacity of the legatee to take should be regulated by the law of the beneficiary's domicil just as much as the testator's capacity to give is controlled by the law of his domicil."¹⁷⁰

An Ohio court in an early case¹⁷¹ said that though it is a general rule that parties residing in different states can contract with reference to the law of either state and, having so contracted, their contract will be determined by such law, there is this exception: Where a state, to shield and protect its own citizens, passes a law which shall govern and control the making of such contracts, the law throws its protecting shield over the citizens of the state and will determine the rights of parties if the laws of two states conflict.

Why shouldn't the domicil of the recipient of insurance proceeds determine the ruling law? Some questions concern her very much and the policyholder very little. For instance, to the beneficiary the alienability of the fund held for her benefit and, conversely, its protection against attack is vital. It seems unfair to extend to or forbid, as the case may be, a beneficiary living in California or Louisiana a legal right or a protection given by the law of her domicil because a New York or a New England company living in a radically different legal system, by a general provision printed in all its policies, desired to impose the law of its state upon the universe.

¹⁶⁹CONFLICT OF LAWS (1901) 138-140.

¹⁷⁰MINOR, CONFLICT OF LAWS (1901) 139, citing: *Sickles v. New Orleans*, 80 Fed. 868 (C. C. A. 5th 1897); *Fellows v. Miner*, 119 Mass. 541 (1876); *Sohier v. Burr*, 127 Mass. 221 (1879); *Healy v. Reed*, 153 Mass. 197, 26 N. E. 404 (1891); *Chamberlain v. Chamberlain*, 43 N. Y. 424 (1871); *Kerr v. Dougherty*, 79 N. Y. 327 (1880); *Hope v. Brewer*, *supra* note 147; *see Vansant v. Roberts*, 3 Md. 119 (1852); *Cameron v. Watson*, 40 Miss. 191 (1866).

¹⁷¹*Ins. Co. v. Block*, 12 Ohio Civ. Ct. 224, 6 O. C. D. 166 (1893). The doctrine is also asserted in the important case of *N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962 (1900).

III. SUMMARY

Few transactions may have contact with more states or countries than settlements of insurance by the life company itself or through an insurance trust. These states may, and generally do, differ radically in their views on perpetuities, restraints on alienation, and limitation of accumulation, as well as on numerous other elements which do not come within the strict limits of this work. There also is wide divergence in theory between different cases in the same state and sometimes within the same case. To exhibit some order in this confusion the following facts and conclusions are submitted on the problem of what law governs the insured's dealing with his policy, more specifically in the disposition of its proceeds.

1. A choice-of-law question may arise with respect to the making, the construction, the performance, the transfer, or the enforcement. For each it may be claimed that the governing law is the law of the place where the contract, trust or assignment was made (*lex loci contractus* or *lex loci celebrationis*), the law of the place of performance (*lex loci solutionis*) or the law of the place where enforcement is sought (*lex loci fori*).

2. Validity is governed by the law of the place where the contract was made, the trust created, or the assignment completed.

3. The place of contracting is determined by the law of the forum. In determining this preliminary question the forum ascertains the place in which, under the general law of contracts or trusts as the case may be, occurred the principal event necessary to make the contract or trust.

4. The place where the contract is made is where the last act is done that is necessary to make the promise complete and binding. Just what event is the final one necessary to make the contract or trust binding is to be determined by the principles of the law of contract or trust and by the particular instrument if it has anything to say about it.

5. Insurance policies are completed where delivered except when a condition precedent remains unsatisfied in which case it is the place where that satisfaction occurs.

6. Intent of the parties is becoming increasingly determinative of the choice of law. This intent may be disclosed by facts and circumstances (an obviously uncertain situation) or by an express stipulation that the law of a particular jurisdiction shall govern.

7. Choice of law by stipulation has been attacked as a means of evading statutes and decisions made for the protection of a state's citizens but is

being accepted in many courts provided the selected state has a substantial connection with the transaction and the contract or trust does not violate a statute or public policy of the state of contract or of the forum. A tendency exists to hold the transaction valid if either state favors.

8. Place of performance is the state where the promise is to be performed. Presumably it is the domicile of the creditor. The place where the insurance policy is made payable by the contract is not the place of performance necessarily.

9. The question of what is the obligation imposed by a contract of insurance is answered by the law of the place of contracting, in absence of valid selection of another place. The obligation includes the right and method of changing beneficiary and who is eligible to be beneficiary. However, the law of place of performance determines who is (as distinguished from who may be) the beneficiary, and the manner of fulfilling the obligation.

10. The meaning of language, *e.g.*, "heirs", is determined by the law or usage of the speaker's domicile, and at the time he spoke if a change in domicile has occurred.

11. Consummations of policy rights or options are governed by the law of the policy, *i.e.*, where it was made. Such are, changing beneficiary, conversion to other forms of policy or insurance, surrender, and sometimes loans. However, to have this result they must be mere consummations without new elements or conditions.

12. The capacity to make or deal with an insurance contract or its results is determined by the law of the place where the act is done. The competency of a minor, for instance, may be important in electing an instalment settlement of a policy or in receiving the instalments or interest of a settlement arranged by the insured. In a less important way the competency of a married woman may be involved.

13. Fraternal benefit insurance is in a class by itself and governed as to many questions by the law of the state by which the society was incorporated.

14. The trend of decision, following the growth of commercial interests, is to increase the class of documents held to embody rights in which case the ownership of the document is regarded as conferring a kind of legal ownership of the right of action represented by it—as if the instrument were itself the obligation. There is some reason to believe that insurance contracts and with even more reason the certificates of deposit of insurance proceeds

held by the beneficiaries are now included in that class. To the extent this is so will these obligations be controlled as to contracts or trusts by the law of the state which has jurisdiction over the document.

15. Generally speaking, an assignment of insurance is regarded as a separate contract and governed by the law of the place where the assignment is made. Thus it governs the sufficiency of the consideration, the capacity of the assignee to take, the effect on validity of lack of delivery or of beneficiary's consent. But whether a right under a contract is capable of being assigned is determined by the law of the place of contracting. The place of assignment is where the last act or event occurred which is necessary to the transfer.

16. In trusts the choice-of-law problem is even more complex. There is still another and very important party, the trustee. The subject-matter may comprise different kinds of property situated in different states—cash, chattels, contracts, and land.

17. The validity is determined by the law of the place in which the transaction takes place and the constituent act of creating a living trust is the transaction of changing the title of the subject-matter from the trustor to the trustee.

18. The modern tendency is to consider situs of the property determinative of the validity of the trust. Securities are property and their location decides.

19. The general rule subjects a trust to the laws of the state where it is to be administered. Hence, a trust valid where created cannot be carried out in a state where it conflicts with local rules. Conversely, if a trust is invalid where made but is valid in the state of administration, the majority of such states have refused to upset the trusts claiming that their local laws are not designed to apply to trusts executed abroad.

20. To determine the law governing administration the courts have considered various factors each with strong support but the Restatement brings some order out of the chaos by the rule that a trust of movables created by an instrument inter vivos is administered by the trustee according to the law of the state where the instrument locates the administration of the trust. In order to determine that place consideration is given to the provisions of the instrument, the residence of the trustee, the residence of the beneficiaries, the location of the property, the place where the business of the trust is to be carried on.

21. Some of the elements of validity, to be governed by the law of the place where the trust is created are perpetuities and accumulation. Among the matters of administration governed by the law of the state where that is located are all questions of rights of the cestui of the trust and specifically: May the trustor revoke; who takes as cestui; the alienability of her interest; the right of her creditors to reach the trust res or income, the right of the cestui, a married woman, to receive the income without interference by husband; her right to put an end to the trust and receive the trust res.

22. In contradiction to the above, perhaps, the domicil of the beneficiary is beginning to have some consideration and probably will have more. The capacity of the beneficiary to take and her ability to hold should be protected by the law of her state.