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# Conflict of Laws--What Law Governs the Validity of a Contract in Kentucky

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itself could ordinarily exercise.<sup>22</sup> Having enacted legislation which sets up a definite standard, the legislature may delegate the power of making rules and regulations to administrative bodies, the administrative function consisting of filling in the details not embodied in the necessarily general standard.<sup>23</sup> In Kentucky, the delegation of rule-making and rate-fixing powers to boards or commissions is valid.<sup>24</sup> The Kentucky court sanctions the delegation of this power to fill in the details, saying that they are "purely administrative" rather than legislative.<sup>25</sup>

With the expanding social legislation in keeping with the need for such enactments, neither the doctrine of separation of powers nor the maxim, *delegata potestas non potest delegari*, is strictly enforced. The trend of the courts in the United States is indicated by the opinion of Mr. Justice Holmes in *Springer v. Government of the Philippine Islands*<sup>26</sup> where he said that the doctrine of separation of powers is not intended "to divide the branches into water-tight compartments" but rather to afford an essential working principle to be applied practically in a practical world.<sup>27</sup>

PHILLIP SCHIFF

#### CONFLICT OF LAWS—WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT IN KENTUCKY.

The American courts have adopted at least three different rules in determining the law of what place should govern the validity of a contract. The rules so adopted are: (1) That the law of the place of

<sup>22</sup> Marshall, C. J., in *Wayman v. Southard*, 10 Wheat. 1, 42 (1825) said: "Congress may certainly delegate to others the powers which it may rightfully exercise itself." Accord, *Bay City First National Bank v. Fellows*, 244 U. S. 416, 61 L. Ed. 1233, 37 S. Ct. 734 (1917); *People v. Roth*, 294 Ill. 532, 94 N. E. 953 (1911); *State Racing Comm. v. Latonia Agricultural Assn.*, 136 Ky. 173, 123 S. W. 681 (1909); *State Board of Charities & Corrections v. Hays*, 190 Ky. 147, 227 S. W. 282 (1920); *McKenny v. Farnsworth*, 121 Me. 450, 118 Atl. 237 (1922); *Comm. v. Sisson*, 189 Mass. 247, 75 N. E. 619; *Village of Saratoga Springs v. Saratoga Springs Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908).

<sup>23</sup> *Village of Saratoga Springs v. Saratoga Springs Gas, Electric Light & Power Co.*, *supra* n. 22.

<sup>24</sup> *L. & N. R. Co. v. Greenbrier Distillery Co.*, 170 Ky. 775, 187 S. W. 296 (1916); *Hunter v. City of Louisville*, 204 Ky. 562, 265 S. W. 277 (1924); *Estes v. State Highway Comm.*, 235 Ky. 86, 29 S. W. (2d) 583 (1930).

<sup>25</sup> *Estes v. State Highway Comm.*, *supra* n. 24. See also *Klein v. City of Louisville*, 224 Ky. 624, 6 S. W. (2d) 1104 (1928); *Bell's Committee v. Board of Education of Harrodsburg*, 192 Ky. 700, 234 S. W. 311 (1921); *Lawrence County v. Lawrence County Fiscal Court*, 191 Ky. 45, 229 S. W. 139 (1921).

<sup>26</sup> 277 U. S. 189 at 211, 72 L. Ed. 853 at 855 (1928).

<sup>27</sup> For a very recent case, decided after this note was written, and bearing out the reasoning and contentions of the writer, see *Knoxville Housing Authority, Inc. v. City of Knoxville et al.*, — Tenn. —, 123 S. W. (2d) 1085 (1939) and cases cited therein.

making governs; (2) That the law of the place of performance governs; and (3) That the law intended by the parties should govern.<sup>1</sup> This confusion of rules not only exists among the various states but often among the cases of a particular state.<sup>2</sup> An examination shows that this confusion of rules exists in the Kentucky cases, and that at one time or another the Kentucky court has adopted all three rules.

At the outset it should be indicated that while the Kentucky cases are in confusion in regard to the rules set out above, they are in accord with respect to certain matters pertaining to the validity and enforcement of foreign contracts. Kentucky follows the general rule of Conflict of Laws that if to enforce the contract, although valid where made, would be against the public policy of the law of Kentucky, the contract will not be enforced in Kentucky.<sup>3</sup> The cases are also in accord that if the contract is void where made it is void everywhere else.<sup>4</sup> Thirdly, Kentucky follows the general rule that the law of the forum governs as to procedural matters such as pleadings, evidence and type of judgment.<sup>5</sup>

One group of Kentucky cases follows the rule, as set out above, that the law intended by the parties should govern the validity of the contract.<sup>6</sup> Under this rule regardless of where the contract was made or to be performed that law shall determine its validity which the parties intended to govern. In *Glenny Glass Co. v. Taylor*<sup>7</sup> a note was made in Washington, D. C., and was made payable in New York. The defendant signed the note in Kentucky and the court held that the law of Kentucky should govern the validity of the contract because that was clearly the law by which the defendant intended to be bound. In the *Redwine Case*<sup>8</sup> it was clear that the person who made the contract

<sup>1</sup> Goodrich, Conflict of Laws (1927) 228; 2 Beale, Treatise on the Conflict of Laws (1935) 1079.

<sup>2</sup> Developments—Conflict of Laws (1937) 50 Harv. L. R. 1159.

<sup>3</sup> Union Cent. Life Ins. Co. v. Spinks, 119 Ky. 261, 33 S. W. 615 (1904). See also Barbee and Co. v. Bevins, Hopkins and Co., 176 Ky. 113, 195 S. W. 154 (1917); Herold Motor Car Co. v. Comm., 216 Ky. 335, 287 S. W. 939 (1926).

<sup>4</sup> Ford v. Buckeye State Ins. Co., 69 Ky. 133, 99 Am. Dec. 663 (1869); Ohio and Miss. R. R. v. Tabor, 98 Ky. 503, 32 S. W. 168 (1895); Orr's Admr. v. Orr, 157 Ky. 570, 163 S. W. 757 (1914). The rule is based on the theory that if an act could have no legal effect in the state where it occurred it could have no legal effect elsewhere.

<sup>5</sup> Graves v. Graves, 5 Ky. 207, 4 Am. Dec. 697 (1810); Fry Bros. v. Theobald, 205 Ky. 146, 265 S. W. 498 (1924); Pinson v. Murphy, 220 Ky. 464, 295 S. W. 442 (1927); Traveler's Ins. Co. v. Mahan, 273 Ky. 691, 117 S. W. (2d) 909 (1938). This is a logical rule in view of the fact that by asking the aid of the court the parties must accept its procedural rules, and furthermore, the court is geared to its own procedure and can best apply the rules regulating it.

<sup>6</sup> Glenny Glass Co. v. Taylor, 99 Ky. 24, 34 S. W. 711 (1896); Cleveland, C., C., and St. Louis Ry. Co. v. Druien, 118 Ky. 237, 80 S. W. 778 (1904); Redwine's Ex. v. Redwine, 160 Ky. 282, 169 S. W. 864 (1914).

<sup>7</sup> 99 Ky. 24, 34 S. W. 711 (1896).

<sup>8</sup> 160 Ky. 282, 169 S. W. 864 (1914)

intended for the law of Kentucky to govern its validity even though the contract was made in Florida.

The most serious objection to permitting the law intended by the parties to govern the validity of the contract is that very often this intention is hard to discover, or it may be that there was no intention at all expressed. The rule, moreover, is subject to several presumptions which only tend to confuse the general rule.<sup>9</sup> Most important of these presumptions as set out by the Kentucky court is that in the absence of any expressed intention to the contrary, it will be presumed that the place of performance shall control.<sup>10</sup> To add further confusion to the problem the court in *Cleveland, C., C., and St. Louis Ry. Co. v Druien*<sup>11</sup> imposed an exception to the presumption just stated. In that case a contract was made in Illinois whereby the railroad agreed to ship mules to Kentucky for Druien. The contract limited liability from loss by fire which limitation was valid in Illinois. The mules were burned to death in Illinois and Druien sued for their value in Kentucky where a common carrier cannot limit his liability by contract. The court held that ordinarily the law of Kentucky would govern the matter because there was no expression of intention as to what law should govern, but since the contract was to be partly performed in Illinois the law of that state should control as to the damages arising there. The court said that since the railroad knew the limitation was void in Kentucky it must have intended it to govern only to the part of the contract to be performed in Illinois.

A second group of cases adopt the rule that the law of the place where the contract is to be performed shall determine its validity.<sup>12</sup> The rule as stated in *Howard v. Western Union Telegraph Co.*<sup>13</sup> is that, ". . . where contracts are made in one place to be performed in another, they are to be governed by the law of the place of performance." The rule would seem to be based on the theory that when the parties drew up the contract they kept in mind the law of the place where the contract was to be performed and necessarily expected that law to apply.<sup>14</sup> The rule that the place of performance shall govern is also subject to presumptions. It has been held in Kentucky that unless it is otherwise shown by the contract, the place of making will be

<sup>9</sup> Goodrich, Conflict of Laws (1927) 228.

<sup>10</sup> Short and Co. v. Trabue & Co., 61 Ky. 269 (1863); Twentieth St. Bank v. Diehl, 260 Ky. 359, 85 S. W. (2d) 865 (1935). And see New Domain Oil and Gas Co. v. McKinney, 138 Ky. 133, 221 S. W. 245 (1920). In *Western Union Telegraph Co. v. Lacer*, 122 Ky. 839, 93 S. W. 34 (1906) the court said that the parties must be conclusively presumed to have intended that the law of the place where the breach occurred should govern the validity of the contract.

<sup>11</sup> 118 Ky. 237, 80 S. W. 773 (1904).

<sup>12</sup> *Godwin v. Shipley*, 46 Ky. 575 (1847); *Young v. Harris*, 53 Ky. 447 (1854); *Stevens v. Gregg*, 10 Ky. L. Rep. 267 (1888); *Howard v. Western Union Telegraph Co.*, 119 Ky. 625, 86 S. W. 982 (1905); *Miller Bros. v. Blackburn Coal Co.*, 212 Ky. 447, 279 S. W. 618 (1926)

<sup>13</sup> 119 Ky. 625, 86 S. W. 982 (1905).

<sup>14</sup> See note 12, *supra*.

deemed to be the place of performance and as a result the law of the place of making will govern.<sup>15</sup> As a necessary corollary, if the contract is made in the state in which it is to be performed the law of that state will govern its validity.<sup>16</sup>

The majority of Kentucky cases adopt the rule that the place where the contract was made should govern its validity.<sup>17</sup> The rule is well stated in *Graves v. Graves*<sup>18</sup> where the court said, "With respect to the nature and construction of contracts, and the rights and obligations of parties arising out of them, the principle is well settled, that the law of the place where the contract was made is to govern . . ." In *Fry Bros. v. Theobald*<sup>19</sup> the court said, ". . . the authorities are uniform in holding that the validity of the contract is to be determined by the law of the state in which it is made . . ."

In *Western Union Telegraph Co. v. Lacer*<sup>20</sup> the court adopted a fourth rule and applied it to the particular facts of that case. There the court held that where the contract is to be performed partly in one state and partly in another state the law of the place where the breach occurred should govern the validity of the contract.

Most writers agree that the better rule is that the law of the place

<sup>15</sup> *Short and Co. v. Trabue and Co.*, 61 Ky. 269 (1863); *New Domain Oil and Gas Co. v. McKinney*, 188 Ky. 183, 221 S. W. 245 (1920). In the *New Domain* case the court confused the rule that the place of performance should govern with a rule that ". . . when made by one having a regular domicile, it will be presumed that the law of the place of his domicile shall govern the validity of the contract . . ." There is, however, no other Ky. case which indicates that the law of the domicile might govern.

<sup>16</sup> *Johnson v. Bank of U. S.*, 41 Ky. 310 (1842); *Stevens v. Gregg*, 10 Ky. L. Rep. 267 (1838); *Arnett v. Pinson*, 33 Ky. L. Rep. 36, 108 S. W. 852 (1908); *Elswick v. Ramey*, 157 Ky. 639, 163 S. W. 751 (1914); *Cooper's Admr. v. Lebus' Admr.*, 262 Ky. 245, 90 S. W. (2d) 33 (1935).

<sup>17</sup> *Graves v. Graves*, 5 Ky. 207, 4 Am. Dec. 697 (1810); *Steele v. Curle*, 34 Ky. 381 (1936); *Thomas v. Beckman*, 40 Ky. 29 (1840); *Archer v. National Ins. Co.*, 65 Ky. 226 (1867); *Hyatt v. Bank of Ky.*, 71 Ky. 193 (1871); *Gibson v. Sublett*, 82 Ky. 596, 6 Ky. L. Rep. 645 (1885); *Young's Trustee v. Bullin*, 19 Ky. L. Rep. 1561, 43 S. W. 687 (1897); *Arnett v. Pinson*, 33 Ky. L. Rep. 36, 108 S. W. 852 (1908); *Clary v. Union Cent. Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014 (1911); *Smith v. B. and O. R. R. Co.*, 157 Ky. 113, 162 S. W. 564 (1914); *Fry Bros. v. Theobald*, 205 Ky. 145, 265 S. W. 498 (1924); *Traveler's Ins. Co. v. Mahan*, 273 Ky. 691, 117 S. W. (2d) 909 (1938). Beale says that the general rule in Kentucky is that the law of the place of performance shall govern. 23 *Harv. L. R.* 7, 96 (1910). This statement was based on a few earlier cases and is apparently not true today.

<sup>18</sup> 5 Ky. 207, at 208, 4 Am. Dec. 697 (1810).

<sup>19</sup> 205 Ky. 146, 148, 265 S. W. 498 (1924).

<sup>20</sup> 122 Ky. 839, 93 S. W. 34 (1906). "A contract made in one state to be performed partly where made and partly in another state, should be construed, in fixing a liability for its breach, according to the laws of the jurisdiction where the breach occurred; . . ." See also *Cleveland, C., C., and St. Louis Ry. Co. v. Druien*, 118 Ky. 237, 80 S. W. 778 (1904).

where the contract was made should govern its validity,<sup>21</sup> and this seems to be the modern weight of authority.<sup>22</sup> The rule is based on sound principles of law most important of which is that only by the law of the place where the acts took place could it be determined whether they had any legal effect.<sup>23</sup> In other words, unless the acts of the parties had the legal effect of creating a contract in the state where they occurred there could be no contract to enforce in another state. Furthermore, as a practical matter, the easiest law to apply is that under which the parties acted because, having determined where the contract was made, that law follows as a part of the contract.<sup>24</sup> And lastly, this rule entails none of the uncertainties which follow the rule that the place of performance shall govern or the rule that the intention of the parties should control. If the intention of the parties is to govern there might be a conflict of evidence on the matter, or a conflict of intention, and the court would be forced to choose between conflicting laws. If the law of the place of performance is to govern the performance might extend over two or more jurisdictions<sup>25</sup> therefore causing a conflict as to what law should be applied. But when the court has determined where the contract was made, which must necessarily be a particular jurisdiction, there can be no uncertainty as there is only one law to apply, namely that where the contract was made. Therefore it is submitted that in all future cases the Kentucky court should determine the validity of the contracts before it according to the law of the place where the contract is made.

JAMES D. ALLEN

#### MARRIED WOMEN'S SURETYSHIP CONTRACTS IN THE UNITED STATES.

The married woman's contractual disabilities have been removed to varying degrees in most American jurisdictions. Upon examination of the statutes, virtually the only limitation upon the total removal of these disabilities seems to be as to a married woman's capacity to be a surety. It is the purpose of this note to discuss the capacity of married women to be sureties in the various states.

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<sup>21</sup> Stumberg, *Conflict of Laws* (1937) 201 where he cites Beale, Goodrich and Minor as supporting the rule. Stumberg seems to disagree with the rule, 204-207. *Restatement, Conflict of Laws* (1934) sec. 332 adopts the rule that the law of the place where the contract is made should govern its validity.

<sup>22</sup> See Goodrich, *Conflict of Laws* (1927) 220.

<sup>23</sup> 2 Beale, *Conflict of Laws* (1935) 1090; Goodrich, *Conflict of Laws* (1927) 229, "It takes the sanction of the law plus the acts of the parties to complete the contract."

<sup>24</sup> 2 Beale, *op. cit. supra* note 23, at 1091.

<sup>25</sup> *Western Union Telegraph Co. v. Lacer*, 122 Ky. 839, 93 S. W. 34 (1906) shows the difficulty.