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CONFLICT OF LAWS--EFFECT OF FORUM'S STATUTE OF FRAUDS ON FOREIGN ORAL CONTRACT TO BEQUEATH PROPERTY

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CONFLICT OF LAWS—EFFECT OF FORUM'S STATUTE OF FRAUDS ON FOREIGN ORAL CONTRACT TO BEQUEATH PROPERTY—Plaintiff brought an action in New York for specific performance of an oral agreement allegedly made by testator in Florida not to change his will without plaintiff's consent. Defendant's motions for dismissal of the complaint and summary judgment were dismissed. The appellate division on reargument entered orders reversing the lower court. On plaintiff's appeal to the court of appeals, *held,* affirmed. The New York Personal Property Law,[1] which states that oral contracts to bequeath property are void, is controlling, regardless of whether this section of the statute of frauds is procedural or substantive. If the section is procedural, the law of the forum would apply making the oral contract unenforceable; if substantive, the contract is void because the statute is an expression of the public policy of the forum, permitting the forum to disregard ordinary conflict of laws rules. *Rubin v. Irving Trust Co.,* 305 N.Y. 288, 113 N. E. (2d) 424 (1953).

The English case of *Leroux v. Brown,*[2] decided in 1852, gave rise to the seemingly endless controversy concerning the effect of the forum's statute of

[1] 40 N.Y. Consol. Laws (McKinney, 1949) §31: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; . . . .

(7) Is a contract to bequeath property or make a testamentary provision of any kind."

[2] 12 C.B. 801 (1852).

frauds on contracts drawn in another state or country. This English decision originated the procedural-substantive interpretation of the statute of frauds by characterizing section 4[3] as procedural in its application while labeling section 17[4] substantive and consequently of no effect upon contracts drawn in other jurisdictions. A definite split in American jurisdictions over the validity and reasoning of the *Leroux v. Brown* emphasis on the precise language of the statute, coupled with expanding commercial intercourse and varying types of statutes of frauds, served to confuse rather than clarify the procedural-substantive approach to this problem.[5] Criticism of this dual approach to the forum's statute of frauds has been severe,[6] but the sheer weight of many decisions[7] indicates that the courts and counsel in determining a conflicts problem involving an oral contract will continue to direct their attention to a characterization of the forum's statute of frauds. However, the principal case is illustrative of the courts' ability to render a decision without making the procedural-substantive characterization.[8] A determination that the forum's statute is substantive may not foreclose the issue of its application, for there has always been a tendency[9] on the part of American courts, as in the principal case, to utilize public policy arguments to prohibit action on foreign contracts which would be clearly void if made in the forum.[10] It is difficult, if not impossible, to predict[11] when a court will employ the public policy

[3] The key phrase in §4 of the English Statute of Frauds in 1852 was ". . . no action shall be brought. . . ."

[4] The phrase in §17 of the English Statute of Frauds in 1852 distinguishing it from §4 was ". . . no contract shall be allowed to be good. . . ." This substantive characterization carried over to many American statutes which declared that the contract was invalid or void. See Lorenzen, "The Statute of Frauds and the Conflict of Laws," 32 YALE L.J. 311 (1923).

[5] See 105 A.L.R. 652 (1936); Lorenzen, "The Statute of Frauds and the Conflict of Laws," 32 YALE L.J. 311 (1923).

[6] See Cook, " 'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L.J. 333 at 344 (1933), in which the author criticizes the present approach and contends that the forum should apply the rules taken from the foreign system of law unless it means an unwarranted inconvenience to the forum.

[7] See Ailes, "Substance and Procedure in the Conflict of Laws," 39 MICH. L. REV. 392 (1941), which criticizes Cook and other writers who have complained of the illogical procedural-substantive approach. See note 6 supra. Ailes contends that this approach, deeply rooted in precedent, is, despite its weakness, the best solution yet offered and brings order into the field of conflict of laws.

[8] Judge Desmond in a concurring opinion in the principal case contended that the New York Court of Appeals should have settled this question of whether their statute of frauds was procedural or substantive as such decisions are the primary function of the court. He characterizes the statute as procedural and thus a rule of evidence for the New York courts.

[9] See 33 COL. L. REV. 508 (1933) for an excellent collection of cases where public policy has been employed by the forum.

[10] See Lams v. F. H. Smith Co., 36 Del. 477, 178 A. 651 (1935), in which the Delaware court ruled that Delaware's statute of frauds was substantive and in addition that the public policy of Delaware demands that the statute be so characterized for such an interpretation protects all Delaware citizens on contracts drawn in Delaware no matter where the suit is brought. The court thus refused to apply public policy in such a way as to defeat the plaintiff's action on a New York contract void under the Delaware statute of frauds.

[11] See the opinion of the lower court in the principal case where the court's decision that public policy did not apply proved wrong. Rubin v. Irving Trust Co., 107 N.Y.S. (2d) 847 (1951).

rule to defeat an action on a contract[12] but the principal case has solid authority in this application of public policy to a contract to devise or bequeath property.[13] What is, and who determines this public policy is the vexing and basic problem.[14] In the principal case the court envisaged the necessary public policy in the passage of amendments to the Personal Property Laws[15] in 1933 eliminating the constant stream of lawsuits in the New York courts based on oral contracts to bequeath property. There is a body of law in a few states which holds that the statute of frauds in itself is a legislative declaration of public policy sufficient to bar the forum's enforcement of the contract, even if the statute is interpreted as substantive.[16] However, abundant authority exists in other jurisdictions rejecting this approach on the theory that the legislature enacted the statute for the sole purpose of controlling contracts made in the forum with no thought of declaring a public policy.[17] Today, the historical procedural-substantive approach definitely serves a purpose in the disposal of simple cases, but it would seem that in the difficult cases counsel would do well to examine closely all facets of the particular fact situation in light of the courts' tendency to submerge the procedural-substantive approach in favor of other considerations such as public policy, special interests of the forum,[18] and place of performance of the contract.[19]

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[12] Note 8 supra.

[13] Barbour v. Campbell, 101 Kan. 616, 168 P. 879 (1917); Emery v. Burbank, 163 Mass. 326, 39 N.E. 1026 (1895).

[14] See Nutting, "Suggested Limitations of the Public Policy Doctrine," 19 MINN. L. REV. 196 (1934), in which it is contended that the legislature and not the courts should make the declarations of public policy. But see Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918), in which Cardozo states that legislative enactment or lack of same is not conclusive as to public policy determination.

[15] Note 1 supra.

[16] Farley v. Fair, 144 Wash. 101, 256 P. 1031 (1927); Barbour v. Campbell, note 13 supra.

[17] Henning v. Hill, 80 Ind. App. 363, 141 N.E. 66 (1923); D. Canale & Co. v. Pauly & P. Cheese Co., 155 Wis. 541, 145 N. W. 372 (1914); Lams v. F. H. Smith Co., note 10 supra.

[18] See principal case and argument that New York law should apply because of New York's various contacts with the case; e.g., it was the domicile of the testator, place for performance of the contract, and situs of administration of the testator's estate.

[19] See also Meylink v. Rhea, 123 Iowa 310, 98 N.W. 779 (1904), where lex rei sitae and not lex loci contractus was held controlling in a contract for sale of realty.