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OPTIONAL TERMS (JUS DISPOSITIVUM) AND  
REQUIRED TERMS (JUS COGENS) IN THE  
LAW OF CONTRACTS

*Arthur Lenhoff\**

I

CIVIL LAW AND COMMON LAW VIEWS OF THE EFFECTS OF  
STATUTORY PROVISIONS

IN speaking of statutory law in the common law courts, lawyers have ascribed to it a limiting office, namely, that of interference with the parties' freedom to act and transact at their pleasure. A closer consideration shows them that the function of statutory law varies not only with the legal system to which it belongs, but also with the structural changes within a single legal system.

*A. The Theory of the Civil Law Codes*

Whereas in the *civil law countries* all of the law is conclusively presumed to be comprised in codes,<sup>1</sup> it is simply not possible to regard each and every statutory provision as preclusive of the freedom of the parties to contract otherwise, since a codification claiming inclusiveness must necessarily contain (and this on a large scale) provisions subject in their application to the choice of the contracting parties. Only in the absence of such a choice the provisions will apply. Terms of this class are, for example, in the law of sales, those which refer to the time and the place of delivery, the cost and risk of transportation, and the passage of title.

Rules of law of this kind are called "*jus dispositivum*."<sup>2</sup> Since

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<sup>1</sup> For this reason civil law codifications have to refer (expressly or interpretatively) to analogy as the method for deciding a case for which no rule of decision can be found. E.g., Austrian Code Civil (1811) § 7; Swiss Code Civil (1907) art. 1. For the common law method, by which the judge has the power to see to it that, despite the lack of any precedents, *ibi remedium ubi jus*, as he creates that *jus*, see *Dailey v. Parker*, (C.C.A. 7th, 1945) 152 F. (2d) 174.

<sup>2</sup> STAMMLER, *LEHRBUCH DER RECHTSPHILOSOPHIE*, 2d ed., 292 (1923). There are two concepts of *jus dispositivum*, one of which points to the stopgap rules while the other signifies the *leges quae disponunt tantum, non cogunt*. Buelow, "Dispositives Zivilprozessrecht und die Verbindliche Kraft der Rechtsordnung," 64 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 1, 71-73 (1881).

their effect is inferior to that of terms which the parties themselves put into their transactions, they may, but need not, be disregarded by the actors and contractors. Wherever the will of the parties determined the contents of the transaction, as was the case with contracts, there existed in the civil law countries only very few statutory provisions which were not of the "*jus dispositivum*" category. The sporadic terms prescribed by statutes—terms, therefore, of a bargain-proof character—have been called "*jus cogens*."<sup>3</sup> The name signifies a meaning opposite to that of "*jus dispositivum*."

Thus, on principle, it can be stated that in the field of contracts the terms chosen by the parties prevailed over the statutory terms. However, in the course of the last half century the proportion which flexible statutory rules bore to the rigid ones changed somewhat in favor of the latter. Obviously, this process evolved with the gradual advancement of an economic order of regulations or planning which tends to displace that of voluntarism and freedom.

The predominance of flexible rules of law was consistent with the economic philosophy as well as with the legal theory which underlay the great civil law codifications,<sup>4</sup> or, to put it in a little different language, with individual bargaining on the one hand and conclusively presumed inclusiveness of the codes on the other.

What can make clearer their legal theory, that the party-made terms, the "*lex contractus*," are to be equated to the statutory terms, the *lex* proper, than the provision of the Code Napoléon, as follows?

"Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites."<sup>5</sup>

<sup>3</sup> I WINSCHIED, LEHRBUCH DES PANDEKTENRECHTS 125 (1906), and 3 id. 797 (index, "*jus cogens*") (1906); EUGEN EHRLICH, DAS ZWINGENDE UND NICHT-ZWINGENDE RECHT IM B.G.B. (1899). The Romans included *jus cogens* within the concept of *jus publicum quod pactis privatorum mutari non potest*. D. II. 14. 38. Cf. in Freeman's Appeal, 68 Conn. 533, 37 A. 420 (1897).

<sup>4</sup> For the historical reasons which created the desire for total codification on the continent, see MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY AND OTHER PAPERS (1927).

<sup>5</sup> French Code Civil (1804), art. 1134(1); Italian Codice Civile (1865) § 1123; Swiss Law of Obligations, art. 19; the French speak of the "*volonté des particuliers*" as the "*souveraine maîtresse*" over the consensual relations between the parties. I DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL, no. 27 et seq. (Paris 1923). The German jurists mean the same thing by referring to the "*Vertragsautonomie*." I TUHR, DER ALLGEMEINE TEIL DES DEUTSCHEN BÜRGLICHEN RECHTS 25 (1914); Stoll, "*Bertragsfreiheit*," 3 NIPPERDEY, DIE GRUNDRICHTE UND GRUNDPFLICHTEN IN DER REICHSVERFASSUNG 178 (1930).

### B. *The Theory of the Common Law*

In the *common law countries* an entirely different theory of statutory law has developed. It is significant that here the terms "*jus cogens*" and "*jus dispositivum*" have remained totally unknown.<sup>6</sup> This is apparent if one keeps in mind that until recently statutory law has been given a somewhat minor place so that a codification even of a single branch of law was not enacted until the middle of the Nineteenth Century. Until then a legislative act constituted, and was considered, an exception imposed to remove mischiefs and evils which now and then the natural growth of the common law had failed to remedy. Thus one may subscribe to the correctness of the succinct metaphor that statutes must be regarded only as the "addenda and errata of the book of the common law."<sup>7</sup>

As a result of this "rationale," statute law has exhibited the most rigorous, unrelenting and unyielding character of rules. Why, we may ask? To be sure, there were none of another nature. The spirit in which the ancient English jurists approached the construction of a statutory provision can be seen best by Lord Hobart's comparison: "The statute is like a *tyrant*; where he comes he makes all void."<sup>8</sup> Certainly no legal system can do without optional rules. In the view of the common law of England and America, however, they were bound to hide their character behind the shape of "implied" promises because the parties' will and nothing else was deemed to control the bargain. A policy which considered anything other than the expressed intention of the parties to be impotent to produce contractual obligations necessarily conflicted with the needs of an economic system for which individual transactions became the exclusive mechanism.

It is obvious that the strictest adherence to the common law principle, that the parties should be bound only as to what they expressly intended to be bound by, would have rendered most transactions ineffective; the more intricate a transaction, the greater the probability that there are some matters left unsettled because the parties did not

<sup>6</sup> The distinction is briefly mentioned in FREUND, *LEGISLATIVE REGULATION* 7, 172 (1932). He called the two classes "absolute" and "yielding" law. The word "absolute" conveys multifarious concepts, one of which may coincide with that of the text. This author prefers the expressions "required" and "optional," suggested by my colleague, Professor Louis L. Jaffe.

<sup>7</sup> GELDART, *ELEMENTS OF ENGLISH LAW* 9 (1914).

<sup>8</sup> Quoted in *Maleverer v. Redshaw*, [K.B. 1669] 1 Mod. 35, 86 Eng. Rep. 712.

anticipate them. Shall the courts then, destroy the whole bargain? Recently the English House of Lords took the view even if expressed only in the form of *dicta* that the courts were willing to imply terms whenever the parties thought that they had made a binding contract.<sup>9</sup>

Such a view may explain the invention of the concept called "open contracts," so named because, aside from the designation of the parties and the property to be sold and of the purchase price, all other terms remained open and were to be "implied."<sup>10</sup> Terms implied in this way include those of time and place of the payment, the interest rate, the time of the maturity of a purchase money mortgage, the assignability of the contract and the allocation of the risk of loss.<sup>11</sup>

In contrast to the Roman law and the civil law, the common law, perceiving contractual obligations exclusively in terms pointing to the intention of the parties, lived up verily to that principle by the complete abstention from any prescription as to the contents of the contract. One may compare therewith the detailed classification of contracts in the other legal systems, a classification based upon the difference between their contents.<sup>12</sup>

In other legal systems the content of a contract does not lose its contractual character where the terms are prescribed by the codes. In the common law countries a contrary approach is found; this will be discussed at length in section three.

In order to save incomplete transactions, according to the intention test, the common law courts resorted, as we saw, to the construction of an "implied," that is, a fictitious intention. They thus assumed that the parties silently "intended" to be bound by all the terms and condi-

<sup>9</sup> Lord Maugham in *Scammell and Nephew, Ltd. v. Ouston*, [1941] A.C. 251. (The existence of a contract under the particular circumstances, however, was denied because of the lack of that reasonable degree of certainty required for the "*consensus ad idem*.")

<sup>10</sup> I WILLIAMS, *VENDOR AND PURCHASER*, 3d ed., 16 (1922).

<sup>11</sup> E.g., *DeWolf v. Johnson*, 10 Wheat. (10 U.S.) 367 at 383 (1825); *Page v. Cook*, 164 Mass. 116, 41 N.E. 115 (1895); *Calkins v. Chandler*, 36 Mich. 320 (1877); *Wertheimer v. Boehm*, 241 N.Y. 575, 150 N.E. 561 (1925); *Weyand v. Park Terrace Co.*, 202 N.Y. 231, 95 N.E. 723 (1911); *Roberge v. Winne*, 144 N.Y. 709, 39 N.E. 631 (1895); *Weintraub v. Kruse*, 234 N.Y. 575, 138 N.E. 452 (1922); *Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330 (1895); *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N.Y. 209, 39 N.E. 75 (1894); *Pollak v. Dapper*, 219 App. Div. 455, 220 N.Y.S. 104 (1927), affirmed, 245 N.Y. 628, 157 N.E. 886 (1927); *Roberts v. Hoberg*, 212 App. Div. 595, 209 N.Y.S. 437 (1925); *Clark v. Richardson*, 222 Ind. 4, 51 N.E. (2d) 484 (1943).

<sup>12</sup> 2 WINSCHIED, *LEHRBUCH DES PANDEKTENRECHTS*, §§ 319, 363 (1906).

tions not expressed in the bargain, but which were customary or usual in the type of business.<sup>13</sup>

Naturally, at present it is generally recognized that behind all those implications lie not presumptions of a factual consent, but rules of law as developed in case-by-case made law. The operation of such rules of law can be excluded by the parties; the parties may vary them as they please. But if they do not, the rules irretrievably control the transaction. Parol evidence will not be admitted to contradict or to vary the "implied" terms.<sup>14</sup> Furthermore, it is for the judge, not the jury, to deal with the "implied" terms and conditions of which the parties themselves have not necessarily really taken notice, but of which the courts assuredly must take judicial notice.<sup>15</sup>

## II

### OPTIONAL TERMS

It is not generally recognized to what extent the rules of both common law and statute law are subject to modifications. It is important first to recognize the existence of this situation, and then to form a correct notion of the relation of optional statutory terms to the transaction.

#### A. *The Choice-of-Law Problem*

The question whether regulatory terms and conditions are of the flexible or inflexible class is subject to juristic interpretation. Nowhere more than in the conflict of laws field is the distinction clearer. One can see from the British-Canadian case, *Vita-Food Products v. Unus Shipping Company, Ltd.*, how much the answer to that question changes with varying construction in the different jurisdictions.<sup>16</sup> The

<sup>13</sup> For implied terms and for the translation of usages into agreement and of agreement into statutory language, see the illuminative discussion in CHESHIRE AND FIFOOT, *THE LAW OF CONTRACTS* 93 (1945).

<sup>14</sup> E.g., *Tobias v. Lynch*, 192 App. Div. 54, 182 N.Y.S. 643 (1920), affirmed, 233 N.Y. 515, 135 N.E. 898 (1922). Cf. I *CONTRACTS RESTATEMENT*, § 207 (1932) and, following it, *Seaman v. DeNoyelle*, 269 App. Div. 945, 58 N.Y.S. (2d) 527 (1945).

<sup>15</sup> Costigan, "Implied-in-Fact Contracts and Mutual Assent," 33 *HARV. L. REV.* 376 (1920).

<sup>16</sup> *Vita Food Products, Inc. v. Unus Shipping Company, Ltd.*, [1939] A. C. 277, noted, 40 *COL. L. REV.* 518 (1940). The contract of carriage concerning goods to be shipped from Newfoundland to New York was entered into in Newfoundland; as a result of the ship having run ashore in Nova Scotia through the negligence of the captain, the plaintiff-consignees received the shipment, consisting of herrings, in a damaged condition. Their action for damages against the shipowners was dismissed by

case turned upon a Newfoundland act that every bill of lading should contain an express statement referring to the subordination of the contract to the so-called Hague Rules.

The highest court found that this requirement was not obligatory, but only directory,<sup>17</sup> and thus was immaterial. That interpretation led the court to the conclusion that the limitation of liability clauses in the bill (which were the same as the Hague Rules) controlled.<sup>18</sup> The court fortified its conclusion by reliance on an express choice by the parties of the English law which would have decided the interpretation question in this way.<sup>19</sup> The weak link in this chain of reasoning remains, of course, the question whether the stipulation concerning English law was strong enough to bring all problems, including that of validity, within the domain of English law.

As will be seen later, statutory rules which go to the contents of a contract must be distinguished from those which are essential to its formation. As for the latter, the selection-of-law stipulation cannot constitute the last word on its validity. A stipulation in a contract cannot claim validity if the contract itself must be considered invalid. Is it not true that "an agreement is not a contract except as the law says it shall be and to try to make it one is to pull on one's bootstraps"?<sup>20</sup> Consequently, before an agreement referring to a certain legal system, for instance, English law, as the law which the parties want to be applied to the transaction, obtains the quality of a contract, it must

the courts in Nova Scotia. A further appeal to the Judicial Committee of the Privy Council likewise failed.

<sup>17</sup> Being suggested by the I.L.A. on its thirtieth meeting in 1921, at The Hague, the Rules were adopted by the International Conferences on Maritime Law at Brussels, 1922 and 1923, whereupon the legislature of many countries enacted them as national laws. For the United States enactment see 49 Stat. L. 1208, 46 U.S.C. (1940) § 1300 et seq. According to the Rules, damage resulting from the negligence of the master in the navigation is exempted from the liability of the owner.

<sup>18</sup> The bill of lading in the instant case contained substantially the same restrictions with regard to the liability of the owner as the Rules. Since even without that substantial compliance with the Rules, the application of the latter necessarily had to result in the defense of non-liability, the plaintiff could have won only upon the grounds that the omission in the charter of a reference to the Rules made the bill of lading entirely ineffective, so that the defendants were to be liable upon common law principles alone.

<sup>19</sup> For the question whether in the instant case the defendants could escape the application of Newfoundland law by selection of the English law, see Cook, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 419 (1942).

<sup>20</sup> Learned Hand, J., in *Gerli & Co. v. Cunard S.S. Co.*, (C.C.A. 2d, 1931) 48 F. (2d) 115. The same idea was previously formulated by Langdell, "A Brief Survey of Equity Jurisdiction," 1 *HARV. L. REV.* 55 at 56, note 1 (1887).

measure up to what the *lex causae* requires for the making of a contract.<sup>21</sup>

The legal system which independently from the will of the parties will determine the quality of the agreement as a contract is the *lex causae*. Ergo, in order to become a contract, the agreement must conform to the requirements of the *lex causae*. As we saw, not all its rules, however, demand unconditional compliance. How far, therefore, the contracting parties must be deemed at freedom to subject the bargain, for instance, to English law,<sup>22</sup> will depend upon the rules of the *lex causae* with respect to such freedom.<sup>23</sup> Assuming that the law authorized the exercise, the rules of the law so chosen will determine the contents of the bargain. That means that the chosen law will have control, for example, over the interest rates,<sup>24</sup> the time limitations, and

<sup>21</sup> The *Unus* decision by a court of last resort greatly weakened its persuasiveness by its loose phraseology, using the concept of invalidity of the transaction in one place in the sense of signifying the absence of any contractual effect. In the preceding paragraph, however, the word is given the meaning of unenforceability merely in the forum. At first sight the court seems to suggest that parties by the choice of a foreign law may contract themselves out of the *lex causae*. The result reached by the court may be sustained only upon the distinction, pointed out in this paper, between requirements for the validity of a transaction and conditions and terms stipulated for by reference to a foreign law.

<sup>22</sup> According to *Liverpool & G.W. Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397 at 453, 9 S. Ct. 469 (1889), the law of the place of contracting applies ". . . unless the contracting parties clearly appear to have had some other law in view." Cf. *Scudder v. Union Nat. Bank*, 91 U.S. 406 (1875). That this proviso does not give the parties the power to contract themselves out of the *lex causae* can be seen from the following note.

<sup>23</sup> *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 24 S. Ct. 538 (1904) (insurance contract made in State of Washington, containing a clause that it shall be held and construed at all times and places to have been made in New York). Said the Supreme Court: ". . . parties contracting outside of the State of New York may, by agreement, incorporate into the contract the laws of that State and make its provisions controlling upon both parties, provided such provisions *do not conflict with the law or public policy of the State in which the contract is made.*" *Id.* at 554. (Italics supplied.) As for conflict-of-law rules of foreign countries, which, as those of Austria, Brazil, Denmark, Italy, Norway, Peru and Poland, greatly limit the freedom of choice, see MELCHIOR, *DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS*, § 389 (1932).

<sup>24</sup> *Bundy v. Comm. Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931) (reference to Delaware law was held ineffective in a contract made in Maryland by plaintiff, a North Carolina corporation, with defendant, a Delaware Corporation where defendant's business was wholly outside the state of Delaware). See *Man v. Phila. Warehouse Co.*, 274 U.S. 403, 47 S. Ct. 626 (1927): "The [New York] loan contract [even if made in New York] which stipulated for repayment . . . (in Pennsylvania) and which thus chose that law as governing its validity, cannot be condemned as an



the restrictions upon liability, the question of the exclusion of warranties and of the significance to be placed upon restrictive labor covenants<sup>25</sup> and other terms and conditions formulated by law. The choice, of course, may be expressed or may be implied from the whole transaction's showing clearly the intention of resorting to a foreign law.<sup>26</sup> The reference to foreign currency supplies an illustration of the proposition.

In any event, from what has been previously stated, it follows that the rules of the *lex causae* prevail as far as its *prescribed* terms and conditions are in conflict with those of the law which was merely chosen by the parties, though the *lex causae* may itself restrict the application of the required terms to transactions not involving foreign elements. But even if such is the case, still the application of the chosen foreign law may encounter some obstacles, where the foreign elements have been inserted in order to escape the *lex causae* (*fraude á la loi*).<sup>27</sup>

Undoubtedly, the frequent refusal of the courts to let stipulations freely made operate according to the parties' desires often rests upon the absence of any real contact of the bargain with the law stipulated for. An obligation, if imposed upon a contractor by an inflexible rule, does not cease to affect the contract merely because the contractor sought to circumvent by the means of a foreign-law stipulation.<sup>28</sup>

Once granted the power of the parties to exclude substantial terms of the *lex causae*, it is clear that it is immaterial whether the parties painfully draft one stipulation after another, or instead adopt the body of the foreign law as they did in the *Unus* case. The point was expressly recognized by a California court. The court held that California law controlled a marine insurance contract, but that nevertheless the parties

evasion of the law of New York which might otherwise be deemed applicable." (Italics supplied.)

<sup>25</sup> *Holland Furnace Co. v. Connolley*, (D.C. Mo. 1943) 48 F. Supp. 543 (Michigan employment contract, to be performed in Missouri, containing restrictive covenant, invalid under Michigan law, but good by Missouri law).

<sup>26</sup> The selection of provisions of another legal system may be made impliedly. See, e.g., the *Seeman* case, 274 U.S. 473, 47 S. Ct. 626 (1927), and *Louis-Dreyfus v. Paterson Steamship, Ltd.*, (C.C.A. 2d, 1930) 43 F. (2d) 824.

<sup>27</sup> See reasoning in *Andrews v. Pond*, 13 Pet. (38 U.S.) 65 (1839), and *Brierley v. Comm. Credit Co.*, (D.C. Pa. 1929) 43 F. (2d) 724, affirmed, (C.C.A. 3d, 1930) 43 F. (2d) 730.

<sup>28</sup> *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board*, [1941] 1 K.B. 402 (very well advised, the draftsman of the Australian contract which referred to English law, inserted a clause which excluded those provisions of the latter law from being applied to the contract, which appeared to be inconsistent with the Australian carriage of goods by sea act).

were entitled to stipulate for the application of English law because California law allowed the parties so to contract.<sup>29</sup> In other words, this particular law of California (incidentally, statutory law) was construed so as to fall within the class of *jus dispositivum* only.

Certainly, within the indicated limitations, if the oft repeated phrase that the intention of the parties controls the contents of the contract is true, nothing seems to be wrong with the choice of a foreign law; for instead of copying word for word from the foreign law, the parties can simplify the procedure by referring to a foreign law as such.<sup>30</sup>

The significance of the foregoing analysis is manifest also for another reason. The law chosen by the parties supplies the terms for matters which the parties left unsettled. As it was stated in the *Unus* case, the chosen law (provided the choice was allowed by the *lex causae*) "does indeed fix the interpretation and construction of the express terms and supply the relevant background of statutory or implied terms."<sup>31</sup>

The issues in actions involving such conflict problems may concern the classification as well as the scope of principles, precepts, and rules of the controlling law. Are the rules, as in that California case, only optional?<sup>32</sup> Is their scope to be limited to strictly domestic bargains?<sup>33</sup>

<sup>29</sup> *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 P. 416 (1921).

<sup>30</sup> Cook, "Contracts' and the Conflict of Laws: 'Intention' of the Parties," 32 ILL. L. REV. 899 at 906 (1937), included in COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 399 (1942).

<sup>31</sup> *Vita Food Products Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277 at 291 (italics supplied).

<sup>32</sup> Where the incident to the contract, e.g., the operation of the parole evidence rule, might be considered as "waivable" (the rule being, according to the *lex causae*, of substantive character), the forum might not apply the rule. *Zell v. American Seating Co.*, (C.C.A. 2d, 1943) 138 F. (2d) 641. It might be that the rule of substantive law is "waivable" only upon the compliance with certain requirements. *Illinois Steel Co. v. B. & O. R.R. Co.*, 320 U.S. 508, 64 S. Ct. 322 (1944) [Only by incorporating a non-recourse clause into a uniform bill of lading does the consignor obtain relief from liability for the payment of the freight charges; even though delivery by the carrier to the consignee should be made without receiving payment]. That the consignor would otherwise remain liable to the carrier irrespective of a stipulation to the contrary can be seen from *Boston and Me. R.R. v. Hooker*, 233 U.S. 97, 34 S. Ct. 526 (1914). Equally, the validity of clauses limiting the liability of a carrier in a contract referring to foreign law as the applicable one may depend on the classification of the rule in the *lex causae*. If there it is regarded as *jus cogens*, a contrary stipulation will be devoid of any effect. *Oceanic Steamship Navigation Co. v. Corcoran*, (C.C.A. 2d, 1925) 9 F. (2d) 724.

<sup>33</sup> *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 24 S. Ct. 538 (1904) (express reference to New York law in a contract made in Washington). See Chitty, J. in *In re Missouri Steamship*, 42 Ch. Div. 321 (1889), on the scope of the pertinent rule

Will not a qualification of the transaction different from that in the *lex loci contractus* result in the application of other rules than the one applied there to the bargain?<sup>34</sup> Generally the courts of the forum will follow the lead of the *lex causae* as far as the question whether a legal precept is waivable or non-waivable is at issue; but their own characterization of the transaction will determine under which precepts it will be subsumed.<sup>35</sup> Correctly, the forum will also look to the courts of the *lex loci contractus* respecting their construction of a rule having a strictly domestic scope.<sup>36</sup> The forum, however, can decide those questions for itself. It can certainly do so where the law of a foreign country is involved; but it may even disregard the construction chosen by the courts of the sister state if it finds its own classification preferable.<sup>37</sup> Naturally, terms properly chosen by the parties but in conflict with

in the proper law. Cf. N.Y. Ins. L. (McKinney, 1940) § 143(2) excluding the freedom of choice where either the persons insured are New York residents or the situs of the property is in New York or the activities insured against liability risks are carried out in New York.

<sup>34</sup> Reasoning in *McArthur v. Maryland Casualty Co.*, 184 Miss. 663, 186 S. 305 (1939); cf. *Wood & Selick v. Compagnie Générale Transatlantique*, (C.C.A. 2d, 1930) 43 F. (2d) 941.

<sup>35</sup> E.g., *Brooks v. Traveler's Protective Assn.*, (D.C. N.Y. 1931) 47 F. (2d) 618. There the law of Pennsylvania allowing a clause shortening the time of limitation was applied to a membership certificate in a fraternal benefit association organized in Missouri, upon the ground that the place of contracting was in Pennsylvania. Naturally, the construction of a contract in which the parties subjected themselves to a certain law, e.g., Spanish law, may show that according to the entire meaning of the bargain only the rules of the foreign substantive law were to be applied. *Dorff v. Taya*, 194 App. Div. 278, 185 N.Y.S. 174 (1920), noted, 34 HARV. L. REV. 784 (1921).

<sup>36</sup> See, for instance, as respects the question of the requisite of consideration, *In re Bonacina, Le Brasseur v. Bonacina*, [1912] 2 Ch. 394 (promise made by an Italian in Italy to an Italian creditor subsequent to his release from provable debts held valid despite absence of consideration).

<sup>37</sup> Thus, statutory exemption rights, the waiver of which was invalid under this law (the *lex causae*) were disregarded in the forum (Illinois). *Sanders v. Armour Fertilizer Works*, 292 U.S. 190, 54 S. Ct. 677 (1934). The Full Faith and Credit Clause may compel the application of the construction of a statute, as well as of a charter and of by-laws, placed upon them by the courts of the state of incorporation, when the classification thereof as substantive is accepted. As for statutes, see *Bradford Electric Light Co., Inc. v. Clapper*, 286 U.S. 145, 52 S. Ct. 571 (1932). As for by-laws, see *Royal Arcanum v. Green*, 237 U.S. 531, 35 S. Ct. 724 (1915); *Modern Woodmen v. Mixer*, 267 U.S. 544, 45 S. Ct. 389 (1925); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 59 S. Ct. 35 (1938). So far there has not been a direct pronouncement by the United States Supreme Court upon constitutional guaranties for the enforcement of a sister state's common law rules. See Ross, "Has the Conflict of Law become a Branch of Constitutional Law?" 15 MINN. L. REV. 161 at 172 (1931).

considerations of strong local policy, will in all probability be disregarded in the forum. The recourse to public policy as the ground for the refusal to enforce the terms, properly called the public policy exception, has the effect that terms recognized as valid at the place of contracting appear to be ineffective under the law of the forum.<sup>38</sup> In this connection, a recent New York case, *Roth v. Patino*,<sup>39</sup> calls for brief comment. There, the prerequisites for the form of the transaction were met according to the *lex loci*, French law, but not according to New York law. Assuming with the court that the parties had impliedly chosen New York law as the applicable body of law, could one approve of the decision which the court placed upon the ground that the choice of a law included the subjection of the transaction to all requirements of the foreign law, not only to the terms concerning the contents of the transaction involved? Since French law determined whether the transaction was a contract, the "chosen" New York law could effect only matters of contents, not those of validity.

At this point it may be worth while to pause and consider the consequences which result from denial of the enforcement of such stipulations. *Fox v. Postal Telegraph-Cable Co.* involved the problem.<sup>40</sup> The defendant company was sued for damages caused by a delay in the delivery of a telegram; it pleaded a stipulation valid at the place of contracting which was New York, and valid at the place of delivery which was Illinois. Nevertheless, the forum, a Wisconsin court, refused to follow either law and held the company liable according to its own law. In criticizing the decision, a learned writer remarked that what the court did was to enforce a contract which was never made.<sup>41</sup> No doubt, if made on the continent such a criticism would sound quite familiar, the civilian thinking that obligations, although imposed upon the parties by law, assume the character of contractual obligations rather than tortious ones, because they are incidents to the contract.<sup>42</sup>

Certainly, in the *Fox* case, the traditional common law concept of the liability of a carrier as sounding in tort formed the basis of the decision.<sup>43</sup> Under this view, an exculpatory clause was regarded as a

<sup>38</sup> *Griffin v. McCoach*, 313 U.S. 498, 61 S. Ct. 807 (1941).

<sup>39</sup> 185 Misc. 325, 56 N.Y.S. (2d) 853 (1945).

<sup>40</sup> 138 Wis. 648, 120 N.W. 399 (1909).

<sup>41</sup> Ross, "Has the Conflict of Law become a Branch of Constitutional Law?" 15 MINN. L. REV. 161 at 162 (1931).

<sup>42</sup> See, e.g., *S.K. v. Kn.*, 77 Entscheidungen des Reichsgerichts (Ziv.) 408 (1911).

<sup>43</sup> 138 Wis. 648 at 651, 120 N.W. 399 (1909) ("... the *tort* was committed. . .") (Italics supplied).

stipulation aimed at the creation of an immunity for the common carrier from his legal liability. If this view was correct, the court might properly have refused to apply the stipulation because of its incompatibility with the local policy of the forum.<sup>44</sup>

It is questionable, however, whether a court should invoke the public policy reservation in a case which has no contact with the forum. Ordinarily, in such cases American courts follow a hands-off policy regarding the propriety of foreign law.<sup>45</sup>

### B. *Procedural Codes*

The classification of statutory provisions as discussed previously is not restricted to substantive law. By no means can it be said that all of codified procedural law subjects the parties absolutely to its control. Far from that, the codes of recent vintage leave the parties the greatest latitude in shaping the course of an action, a latitude which they had enjoyed in the pre-Code era. For instance, in a civil action the parties may choose not only venue,<sup>46</sup> but may by stipulation extend the time for appeal and the time for pleading; the latter with some restrictions. Moreover, the parties are able conventionally to shorten the time statutorily limited for the commencement of an action.<sup>47</sup> They may like-

<sup>44</sup> E.g., *Santa Fe, P. & P. R.R. Co. v. Grant Bros. Construction Co.*, 228 U.S. 177, 33 S. Ct. 474 (1913); *The Kensington*, 183 U.S. 263, 22 S. Ct. 102 (1902); *Strauss & Co. v. Can. Pac. Ry. Co.*, 254 N.Y. 407, 173 N.E. 564 (1930). Where the code of a foreign country declared its provisions to be not subject to a waiver and the *lex fori* has no analogous provisions, the court may dismiss the action. This was done because of such divergence respecting damages for wrongful death in *Slater v. Mexican Nat. Ry. Co.*, 194 U.S. 120, 24 S. Ct. 581 (1904).

<sup>45</sup> Another question not subject of the present discussion is presented by the narrow interpretation given the Full Faith and Credit clause which was thus held (in line with the general attitude of the courts) not to cover the common law of the sister states.

<sup>46</sup> Whether the application of one of the alternate venue provisions of the federal Employers Liability Act, §6 [45 U.S.C. (1940) § 56], can be contracted away is a disputed question. See on the one hand *Detwiler v. Lowden*, 198 Minn. 185, 269 N.W. 367, 838 (1936), on the other, *Sherman v. Pere Marquette Ry.*, (D.C. Ill. 1945) 62 F. Supp. 590. As for stipulations for venue in tax cases see I.R.C., § 1141 (b) (2).

<sup>47</sup> The only restriction placed upon such agreements is that of reasonableness of the length of time. *Sapinkopf v. Cunard S.S. Co.*, 254 N.Y. 111, 172 N.E. 259 (1930), cert. den., 282 U.S. 879, 51 S. Ct. 83 (1930) (bill of lading); *Brandyce v. Globe & R. Fire Ins. Co.*, 252 N.Y. 69, 168 N.E. 832 (1929) (insurance policy); as a result of such stipulation, the limitation statute does not apply at all, including its provisions which would otherwise have entitled the plaintiff, who was involuntarily nonsuited, to renew his action within one year. *Kenemer v. Arkansas Fuel Oil Co.*, (C.C.A. 5th, 1945) 151 F. (2d) 567.

wise elect the trier of the case, jury or judge, or referee; as for the latter, they may select even the person.

Thus the centuries-old custom which let the parties control the mechanism of proceedings has wound its way into the structure of modern codes.

Now and then the courts feel obligated to remind the parties of a few limitations which they think are placed upon the power of the parties to an action. Such was the case, recently, in *Skinner v. Paramount Pictures, Inc.*<sup>48</sup> There the parties sought to force upon the appellate tribunal their agreement that an order denying plaintiff's motion for a temporary injunction be considered and treated for all purposes as a decision made after trial and that the appeal from the order be treated as an appeal from a judgment rendered on the merits after trial. Incidentally, the temporary injunction was not denied upon the ground that the plaintiffs had no cause of action, but, on the contrary, upon the ground that nothing less than a trial could remove the strong doubts whether the plaintiffs had a cause of action.<sup>49</sup> True, the New York Court of Appeals felt bound to reverse the Appellate Division which had gone so far as to concede the parties the power to have a review on the merits without a judgment. However, Chief Judge Lehman, who delivered the opinion, added a dictum that ". . . Subject only to limitations imposed by the law of the State, they [the parties] could by stipulation agree upon the rules of substantive law and *procedure* that should be applied in determining the controversy by a court of competent jurisdiction."<sup>50</sup>

Although it might still be true that the parties cannot completely deprive a court of its jurisdiction over a case, one can discern in the expansion of legislation enforcing the performance of arbitration clauses and agreements and in other matters a trend to the contrary.<sup>51</sup>

<sup>48</sup> 294 N.Y. 474, 63 N.E. (2d) 64 (1945).

<sup>49</sup> N.Y. Civil Practice Act (Cahill, 1937) § 584 (2) ". . . may grant the motion for judgment which the court below ought to have granted."

<sup>50</sup> 294 N.Y. 474 at 478, 63 N.E. (2d) 64 (1945) (italics supplied); as for the rules of evidence, for centuries agreements to alter them were held admissible, e.g., *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (72 Mass.) 174 (1856); cf. 1 WIGMORE ON EVIDENCE § 7a at p. 217 (1940). As for a waiver of the parol evidence rule, see *Brady v. Nally*, 151 N.Y. 258, 45 N.E. 547 (1896); *Loomis v. New York Cent. & H.R.R. Co.*, 203 N.Y. 359, 96 N.E. 748 (1911)

<sup>51</sup> Cf. 2 CONTRACTS RESTATEMENT, § 558 (1932). Reference may be had to the abundance of concurrent jurisdiction and to the choice left to the parties for the removal to federal courts. Stipulations restrictive of venue provisions of the Federal Employers Liability Act were held valid in *Detwiler v. Lowden*, 198 Minn. 185, 269 N.W. 367, 838 (1936), and held invalid in *Sherman v. Pere Marquette Ry. Co.*,

Finally, in contrast to the civil law codifications, neither the codes of civil procedure nor other statutes regulating a more or less extended branch of law operate upon the assumption of being "the," not merely "one" source of the law concerned. In other words, all the statutes rest upon the admission that there are gaps; they disclaim *Lueckenlosigkeit*, thus leaving the more or less large vacuum to the rules and precepts of the unwritten law.<sup>52</sup>

### C. Optional Terms in Statutes

In section 71 of the Uniform Sales Act,<sup>53</sup> derived from section 55 of the English Sale of Goods Act,<sup>54</sup> the parties to the contract are given the right to negative or vary what would arise as right, duty, or liability by implication of law. *Expressum facit cessare tacitum*.<sup>55</sup> Thus the connotation of legal terms as implied ones constitutes the basis for their classification as *jus dispositivum*.

In contrast to them, the obligations framed as statutory commands must be construed as being unsusceptible of variations or alterations by stipulations of the parties. The so-called "implied" warranties present a good example of terms that arise, as it was said in a recent case, outside of the contract; yet the law, said the court, annexes them to the contract.<sup>56</sup> It writes them, by implication, into the contract which the

(D.C. Ill. 1945) 62 F. Supp. 590. Likewise by resort to the waiver concept one has arrived at the suability of an unincorporated labor union. *Iron Molders' Union v. Allis-Chalmers Co.*, (C.C.A. 7th, 1908) 166 F. 45. As for stipulations for removal from courts of general jurisdiction to a Surrogate Court even in excess of the statutory direction, see *Matter of Buehler*, 186 Misc. 306 (1946). However, see, against the admissibility of the waiver of a trial where the facts were in dispute, *Jacobs v. Steinbrick*, 242 App. Div. 197, 273 N.Y.S. 498 (1934).

<sup>52</sup> E.g., *Matter of Barnes*, 185 Misc. 215, 56 N.Y.S. (2d) 386 (1945), holding that the New York Civil Practice Act does not provide for an adjudication of competency on application brought after the adjudication had become *res judicata* on the question whether petitioner was incompetent. Ergo, said the court, the proceeding must still be controlled by the common law (i.e., in the nature of *supersedeas*) giving the court full discretion on the issue even though petitioner was released from State Hospital as being in a normal state. Cf. the reference of the Uniform Negotiable Instrument Law, § 196, to the law merchant and the reference of the Uniform Sales Act, § 73, to the rules of law and equity including the law merchant as to any case not provided for in those acts. The exception is presented for obvious constitutional reasons in the penal Codes, e.g. N.Y. Penal Law (McKinney, 1944) § 22.

<sup>53</sup> Approved in 1906 by the National Conference of Commissioners on Uniform State Laws and adopted by 35 states.

<sup>54</sup> 56 and 57 Vict., c. 71 (1894).

<sup>55</sup> 2 Co. Litt. Hargrave and Butler, 19th ed., \*183 (1832).

<sup>56</sup> *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927).

parties have made. Consequently, on the one hand the parties may exclude them, but if they fail to do so in express language, the warranties are regarded terms of the contract.<sup>57</sup>

On the other hand, the cited section of the Sales Act demonstrates again that statutory rules were regarded as *jus cogens*. The act placed the implied terms in contrast to the statutory conditions. Ergo, customs or stipulations contrary to the merely implied obligations prevail over the latter but not over the statutory obligations.<sup>58</sup>

It was not until the most recent years that legislative acts have shown a tendency to recognize that statutory rules might just as well be shaped in the form of inflexible rules as in that of implied terms and conditions; this new approach is expressed in phrases like 'unless the parties have otherwise agreed upon' or 'subject to special agreement' and other words of similar effect.<sup>59</sup>

Still, however, one is anxious to retain the doctrine that the obligations created by such rules of *jus dispositivum* must be given a consensual form. Thus the initial paragraph of the Uniform Vendor and Purchaser Risk Act reads as follows: "Any contract shall be interpreted unless the contract expressly provides otherwise, as including an agreement. . . ." The draftsmen, of course, knew the real character of such obligations as creatures of statutory law.<sup>60</sup> They knew that statutory or common law optional rules are not any the less rules of law than all the

<sup>57</sup> The cases are conflicting. See the cases collated in BOGERT AND BRITTON, CASES ON THE LAW OF SALES 881, note 1 (1936).

<sup>58</sup> "It should need no enumeration of authorities to show that no evidence of custom or usage can be admitted, if it conflicts in any way with the statutory law." *Hubbard Fertilizer Co. v. American Trona Corp.*, 142 Md. 246 at 249, 120 A. 522 (1923).

<sup>59</sup> The Uniform Sales Act, a very recent legislative achievement is characteristic of the present aspect of legislation, e.g. §§ 9, 19, 20, 22, 42, 43, 44(4), 45(1), 46, 47(2), 49, 50. The Uniform Vendor & Purchaser Risk Act furnishes another illustration. It applies "unless the contract expressly provides otherwise." See, for another example, N.Y. Real Property Law (McKinney, 1945) § 227. Where a statute lacks such a reference, it will be construed as stating an "inflexible rule." The results, no doubt, are not always satisfactory. See, for instance, *Matter of Caswell*, 185 Misc. 599, 56 N.Y.S. (2d) 507 (1944), denying the possibility of a compromise concerning a spendthrift trust upon the ground of N.Y. Real Property Law (McKinney, 1945) § 103 and N.Y. Personal Property Law (McKinney, 1938) § 15.

<sup>60</sup> Harlan F. Stone, "Equitable Conversion by Contract," 13 COL. L. REV. 369 at 371 (1913): "... the 'presumed intention' ... is only another way of saying that it does not rest upon intention at all, but depends rather upon the operation of rules of law, regardless of the intent of the owner." And Professor E. W. Patterson, "Constructive Conditions in Contracts," 42 COL. L. REV. 903 (1942), therefore, would prefer the expression "constructive conditions" to that of "implied conditions."



others and that the former differ from the latter only as a conditional application of rules differs from an unconditional one. By the same token, statutory and common law optional rules alike are often referred to as "rules of construction." This phraseology was well suited to a legal theory for which the notion "rules of law" became a synonym with inflexible rules or rules not susceptible to their exclusion or re-codification through a stipulation by the parties.

The conditional application inherent in the concept of flexible rules must not be confused with the conditional avoidance of a transaction because of its conflict with inflexible rules, that is, unconditionally controlling statutory rules. The difference is equal to that between the question of validity and that of enforcement.

Let us exemplify the proposition. If in a will the testator, barring the anti-lapse statute from any control over his dispositions, made a gift over in the event that the legatee, his brother, predeceased him, to a person unrelated to the testator, the gift is perfectly valid.<sup>61</sup> The case typifies the conditional nature of *jus dispositivum*.

Concerning the other category, namely the conditional character of an avoidance, let us assume that a party to be charged in an oral land contract, for instance, the vendor, did not avoid the contract, but carried it out; by doing so, he waived a good defense and so made, *ex post*, the contract binding.<sup>62</sup> Moreover, cases of estoppel may arise which prevent the party from raising any objection against the enforceability of the bargain. In addition, once carried over into a deed delivered to the vendee, the oral agreement has merged in the latter and the original omission of a written form may so be cured.<sup>63</sup> And yet the principal rigidity of the statutory rule finds expression in the proposition that the parties cannot in advance by stipulation preclude the control of the bargain by the Statute of Frauds. They are no more able thus to prevent the statute from invalidating an oral land contract than they can in advance waive the benefit of the Statute of Limitation.<sup>64</sup>

Obviously, according to our system of pleading, failure to plead this statute by demurrer (motion) or in the answer, concludes the

<sup>61</sup> E.g., *Matter of Neydorff*, 193 App. Div. 531, 184 N.Y.S. 551 (1920) [with respect to N.Y. Decedent Estate Law (McKinney, 1939) § 29].

<sup>62</sup> Summers, "The Doctrine of Estoppel Applied to the Statute of Frauds," 79 UNIV. PA. L. REV. 440 (1931), quoting from *St. Louis, K. & N. Ry. Co. v. Clark*, 121 Mo. 169 at 186, 25 S.W. 192 (1894)

<sup>63</sup> See 17 CORN L.Q. 290 (1932).

<sup>64</sup> E.g., *Shapley v. Abbott*, 42 N.Y. 443 (1870).

defendant.<sup>65</sup> However, the same result attends the omission to raise other objections or denials even though they may concern requisites indispensable for the validity of a contract.<sup>66</sup> The distinction between "mandatory" and "directory" is not germane to our problem. It is directed primarily to the question whether the courts have discretion in the enforcement of primary rights, and not to the control of the parties over the contents of their contract. Thus under the Fair Labor Standards Act the courts have been vexed by the problem whether they are compelled to render a judgment for an additional amount equal to the originally unpaid balance of minimum wages, if the employer had at last paid that balance before the commencement of the action. This classification goes to the discretion of the courts, not to that of the parties and, therefore, does not coincide with that heretofore discussed.<sup>67</sup>

### III

#### THE USE AND NATURE OF REQUIRED TERMS

##### A. *Statutory Methods of Requiring Terms*

The methods which legislation may apply to force its objective upon the contracting parties are multifarious. One category, that of standard forms as used in the field of insurance, has been discussed elsewhere in this paper. There are other methods worth discussing. Let us look at labor legislation as the foremost field of prescribing terms and conditions in recent years. There are three types of legislation: the legislature itself may formulate the exact terms; or a statute may authorize an administrative agency to formulate exact terms; or the legislature may, by reference to certain types of transactions, prescribe terms which must be incorporated into contracts. The Fair Labor Standards Act of 1938 applied the first two methods and even, indirectly, the third one. The third type is best represented by collective-bargaining-contracts statutes. Acts of this type, such as the Labor Rela-

<sup>65</sup> Where, for instance, the complaint alleged that there was consideration, although there was none, and the answer raised only affirmative defenses, the existence of consideration is assumed for the purpose of the action.

<sup>66</sup> E.g., in N.Y. Civil Practice Act (Cahill, 1937) § 242 and Court Rules 107 (8) and 110 (8).

<sup>67</sup> N.Y. Statutes (McKinney, 1942) § 171; e.g. *Rigopoulos v. Kervan*, (C.C.A. 2d, 1942) 140 F. (2d) 506. Related to the classification is that based on whether the disregard of a provision by the court constitutes a mere irregularity or a fatal defect. For details see FREUND, LEGISLATIVE REGULATION 376 (1932).

tions Acts and the National Railway Labor Act, prescribe wages, hours, and working conditions as scheduled in such statutes.

### B. *Choice of Statutory Methods*

Quite naturally, the determination of a method of entirely or partly prescribing the contents of a bargain which befits the legislative objective, will depend upon a variety of considerations. Where the relationships concerned show great variations, the first mentioned type seems to be impracticable. On the other hand, where the objective pursued by way of governmental intervention is a very narrow one, a generalizing command is adequate. For example, during the period of *laissez-faire*, the common law intervened in the master-servant relationship only slightly, as by creating the obligation of a master to provide for his servant a suitable and reasonably safe place to work. In admiralty, the shipowner has been since the Middle Ages under the obligation to procure maintenance and cure for his seamen, if injured or sick while in his service on the ship. Both obligations attach to the employment contract upon entrance into the service, and neither of them can be bargained away.<sup>68</sup> Briefly, they show all the earmarks of *jus cogens*, and their chief source will be found in legislative provisions. It is now our purpose to consider to what extent these statutory requirements are consistent with existing Anglo-American theories of contract.

### C. *The Differentiation between Legal Commands for Consent, Validity and Contents*

It is a matter of common knowledge that the formation of a valid and enforceable contract depends upon the compliance with certain requirements. Properly, the distinction must be made between the element called mutual understanding on the one hand and other elements of validity and enforceability on the other; such elements are consideration, a written form, capacity of the parties, and legality of the object of the contract.<sup>69</sup> It is likewise self-evident that no stipulation to the contrary between the parties can make a valid contract from a

<sup>68</sup> For the "maintenance and cure" obligation, see the comprehensive discussion in *Hume v. Moore-McCormack Lines*, (C.C.A. 2d, 1941) 121 F. (2d) 336; for the rigor of the master's duty, likewise not subject to any waiver, see *Narramore v. Cleveland, C. & St. L. Ry. Co.*, (C.C.A. 6th, 1899) 96 F. 298, and *Johnston v. Fargo*, 184 N.Y. 379, 77 N.E. 388 (1906).

<sup>69</sup> ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS*, 15th ed., 11 (1920).

bargain deficient in a formative element.<sup>70</sup> These initial formal requirements imposed by the law establish conditions designed to protect the parties in giving and registering their consent to the bargain. Once the fact of the bargain is established, the law, at least in the past, has allowed the parties to control its contents. On principle, the law left it to the parties to agree on whatever they pleased, but would not leave it to them to stipulate what, according to their own ideas, constituted a sufficient consideration. The test of sufficiency, it was thought, must be beyond the discretion of the parties. What has been said about the requirement of consideration holds true of the other requirements of the second class.

Naturally the rigor inherent in this class softens to a slight degree when the law offers a choice between several ways of meeting a requirement, as for instance, in the case of the Statute of Frauds with respect to the sale of goods.<sup>71</sup>

There is one feature of this topic which calls for emphasis. No one has ever alleged that those requirements which are here grouped as a "second class" present examples of a qualification of the freedom-of-contract principle. It was always well understood that "freedom of contract" means nothing more than freedom to stipulate the contents of a contract.<sup>72</sup>

In order to develop a general theory as to the character of these terms, we must first consider the effects of the statutory prescription.

We have pointed out that the common law was indisposed to regard any terms either suggested or required by statute as contractual in nature. Even optional terms (*jus dispositivum*) were referred to the parties' intention rather than to the intervention of the statute.<sup>73</sup> By contrast, required terms were considered to be non-contractual, although they determined the contents of a contract freely entered into

<sup>70</sup> The understanding in the legal sense includes the indication to enter into an enforceable bargain. Accordingly, when the parties mutually clearly negated such intention, no contractual understanding ensued. *Rose & Frank Co. v. J. R. Compton and Bros., Ltd.*, [1925] A.C. 445; *Smith v. McDonald*, 37 Cal. App. 503, 174 P. 80 (1918); see 37 HARV. L. REV. 154 (1923). Cf. 1 CONTRACTS RESTATEMENT, § 5 (1932).

<sup>71</sup> Uniform Sales Act, § 4(4); the Uniform Wills Act of 1910, § 1 furnishes another example. See also N.Y. Decedent Estate Law (McKinney, 1939) § 22a.

<sup>72</sup> Instructive on this point is the reasoning in *Terwilliger v. Ontario, C. & S. R. R. Co.*, 149 N.Y. 86 at 96, 43 N.E. 432 (1896).

<sup>73</sup> Cf. *Frank, J. in Beidler v. Bookmyer & Universal Ins. Co.*, (C.C.A. 2d, 1943) 134 F. (2d) 828 at 829, 830.

by the parties. We shall trace the mutations by which these terms have become acclimated in the field of contract.

The first change came when the legislature prescribed to the minutiae which terms and conditions contracts of certain types must contain. Naturally it was not until public policy turned from keeping hands off business transactions to that of having a hand in the regulation of certain business types, that this first change in the structure of statutory law developed. Such a type evolved in insurance law. Assuredly, for a long time there had been some regulations in the law of contracts. They were limited, however, to the threshold requirements, particularly to the form of a contract and to prohibitions. Then the intervention of legislation expanded so as to control the contents. Where, now, is he who would say that, for example, the optional rights granted to the insured with respect to the premium reserve must be deemed to be non-contractual because of the statutory request to include such obligations in the contract? When conditions or terms attached to a contract must be held contractual obligations just as much as party-made terms or conditions, it can no longer be true that the contractual character rests necessarily upon the intent of the parties. Did not the statutory direction of what the parties have to include in their contracts logically mean the proscription of such terms and conditions as are at variance with them?

In *Hicks v. British-American Assurance Company*,<sup>74</sup> the question came up whether a mere oral understanding that plaintiff should be insured against the fire risk of his building for a certain amount of money, constituted an insurance contract. The court of appeals found that it did. Said the court:<sup>75</sup> "The law reads into the [fire insurance] contract the standard policy . . .," and the court added: ". . . the conversation disclosed the sum for which the property was to be insured, the amount of premiums and the period of insurance, and the statute provided for all of the other conditions of the contract of insurance." It is very important to note that the court said further that this was still recovery on the contract.

Surely the statutory formulation of detailed provisions<sup>76</sup> must be

<sup>74</sup> 162 N.Y. 284, 56 N.E. 743 (1900).

<sup>75</sup> *Id.* at 288, 289.

<sup>76</sup> E.g., N.Y. Workmen's Comp. Law (McKinney, 1938) § 54 (1): "Every policy of insurance covering the liability of the employer for compensation . . . shall contain a provision setting forth. . . ." (then, in the next four subdivisions, other terms are prescribed which have to be inserted in the insurance policy). See further, N.Y. Ins. Law (McKinney, 1940) §§ 155, 158 (2), 159-164, 167, 168; no policy of life,

preferred to administrative regulation, if for no other reason than because of constitutional scruples.<sup>77</sup> However, this was certainly not the only consideration for the statutory prescription of a model contract. What, then, was it? To answer the question is to repeat the preceding discussion on the theory of English statutory law and the doctrine of implied terms and conditions. Briefly, in requiring the insurer to insert into his policies the terms and conditions prescribed, the statute's voice assumes a consensual rather than an authoritative character. Yet before we continue the discussion on the nature of required terms, two other questions must be raised.

#### D. *Departures from the Prescribed Formulation*

Does the prescription of terms by legislation inexorably turn the contractors into simple copyists of the *verba legis*? Is, under all circumstances, such formulation of the terms to be regarded as exclusive? Or how far, if at all, does such legislation permit the parties to alter or modify the model? One may indeed ask why it should be appropriate to require adherence *ad verbum*, when the policy behind the legislative command points to the protection of a certain class of persons to which only one of the two contractors belongs. Then it seems to be rather the nature of such a legislative act that the legislative demand constitutes a minimum condition. If so, no obstacle can be seen to alterations or modifications of minimum requirements for the benefit of a member of the protected class.

At the time of this writing, however, the suggestion here submitted

group life, annuity, group annuity, group accident, industrial life, accident or health, liability or fire insurance shall be issued unless the same contains all the clauses set forth in those sections. As for fire insurance, the entire contents is prescribed in form of a standard policy. See Patterson, "Administrative Control of Insurance Policy Forms," 25 COL. L. REV. 253 at 267 (1925). The method is not restricted to insurance law. See, for example, N.Y. Personal Property Law (McKinney, Supp. 1946) § 64a (conditional sales), and the English Hire-Purchase Act, 1938, 1 and 2 Geo. 6, c. 53, § 2.

<sup>77</sup> It was Massachusetts which in 1873 invented the method of legislating standardizing provisions in insurance law, yet then it was still *jus dispositivum*. For the history of this standard form see *Wild Rice Lumber Co. v. Royal Ins. Co.*, 99 Minn. 190, 108 N.W. 871 (1906). In 1881 Michigan and in 1886 New York created the inflexible standard type. *Quinlan v. Providence Wash. Ins. Co.*, 133 N.Y. 356, 31 N.E. 31 (1892). However, in 1905, a Michigan court declared the Michigan statute unconstitutional. For more details, see RICHARDS, *LAW OF INSURANCE*, 3d ed., 278 (1910), and Patterson, "Administrative Control of Insurance Policy Forms," 25 COL. L. REV. 253 (1925). The present New York standard fire policy was first prescribed in 1917. Its last form is of 1943, N.Y. Laws (1943) c. 671, N.Y. Ins. Law (McKinney, Supp. 1946) § 168 (6).

has not yet been accepted with universal favor by the courts. A few years ago an insured, to whom there was delivered a fire insurance policy in complete conformity to the standard form, sued for reformation of the policy upon the ground that conditions more favorable to him had been agreed upon. But the Wisconsin courts rejected his demands.<sup>78</sup> They were not the only ones to deny it. When a legislature has provided for a standard form, the question whether the parties may vary its contents has been answered in the negative in many a jurisdiction.<sup>79</sup> Few courts appear to be more inclined to recognize the power of the parties to modify the model for the benefit of a member of the protected class.<sup>80</sup> A most recent legislation on insurance, the New York Insurance Law,<sup>81</sup> in general allows<sup>82</sup> variations, provided that they are "in the opinion of the Superintendent of Insurance more favorable to the insured."<sup>83</sup> There are other jurisdictions in which the insurer is unqualifiedly authorized to insert in the policies provisions more liberal to the clients than the statute prescribed.<sup>84</sup>

Certainly one has to beware of pronouncing a general principle of liberalization as to modifications of the statutory enactments. What might be tolerable in the field of labor law might lead to mischiefs in other fields. As the collapse of large European insurance enterprises in the last decade demonstrated, a competition might be conducted by undercutting in premiums as well as by exceeding statutory minimum conditions, with damaging results to the public at large.<sup>85</sup>

In the field of labor relations, the binding effect of schedules of wages, hours, and working conditions agreed upon in collective bargaining contracts upon non-members of the unit can be explained only

<sup>78</sup> *Ottens v. Atlas Assur. Co., Ltd.*, 226 Wis. 596, 275 N.W. 900 (1937). Similarly, *First National Bank v. Newark Fire Ins. Co.*, 118 Pa. Super. 582, 180 A. 163 (1935).

<sup>79</sup> I COUCH, *CYCLOPEDIA OF INSURANCE LAW*, § 72a, p. 97 (1929).

<sup>80</sup> *Aetna Life v. Hardison*, 199 Mass. 181, 85 N.E. 407 (1908).

<sup>81</sup> N.Y. Ins. Law (McKinney, 1940) §§ 155, 158, 159, 160, 161, 162, 163.

<sup>82</sup> As to fire insurance, see *Standard Policy*, 1943, line 45-46 [N.Y. Ins. Law (McKinney, Supp. 1946) § 168]. As for accident and health insurance, the statute prescribes even "the optional standard provisions," *id.*, § 164 (4).

<sup>83</sup> The finding on this point is now placed in the regulatory and discretionary power of the administrator, while formerly the parties were left full freedom in this regard. *Hopkins v. Conn. Gen. Life Ins. Co.*, 225 N.Y. 76, 121 N.E. 465 (1918).

<sup>84</sup> E.g., where the statutory contestability period is limited to three years, the company may restrict it, for instance, to one year. This was the holding, under such a statute [S.D. Code (1939) 31.1508] in *Policy Holder's Nat. Life Ins. Co. v. Harding*, (C.C.A. 8th, 1945) 147 F. (2d) 851.

<sup>85</sup> Cf. LENHOFF, *DAS WETTBEWERBSPROBLEM IM VERSICHERUNGSRECHT* 9 et seq. (1937).

upon the theory of statutory regulations.<sup>86</sup> It is obvious that no collective bargaining contract, any more than any other contract, can impose its schedules upon persons other than the contracting parties (or their privies). But a statute can do so either by direct prescription of the terms or, as in the case of collective contracts, by reference to the schedules as fixed in trade agreements between employer and union.<sup>87</sup> Clearly the latter method has the advantage over the former, that periodical changes will be obtainable much more easily.

Here again one is faced with the question whether such regulation is unalterable or subject to modifications more favorable for the employee.<sup>88</sup> But even in this field of law the validity of terms thus modified might be questioned whenever the policy behind the statute shows great distrust of any departure from the path laid out by the legislature. This is particularly true of labor relations statutes.<sup>89</sup>

#### E. *Effects of Omitting Required Terms*

Finally, in the event that the contract does not contain the prescribed terms and conditions, the formulation of the essential parts of the contents in the statute protects the transaction from destruction whereas a mere prohibition could not save it. It is the latter effect which also weighs heavy in the mind of a legislature faced with the choice between a formulation of contractual provisions or of statutory prohibitions. Where the contents of a contract conflict with statutory prohibitions, courts are not inclined to perform juristic surgery by saving the good parts and excising the bad ones,<sup>90</sup> but it is easy for them

<sup>86</sup> The foremost representative among such statutes are National Railway Labor Act, §2 (4) (9), and the National Labor Relations Act, § 9(a). For details, see Lenhoff, "The Present Status of Collective Contracts in the American Legal System," 39 MICH L. REV. 1109 at 1137 et seq. (1941). For discussion on the constitutional problem and the dividing line to be drawn between those statutes and the kind of legislation underlying *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855 (1936), see Lenhoff, *id.* at 1137, note 94.

<sup>87</sup> As the legal history of collective bargaining contracts shows, the courts refused to concede that the schedules of such contracts had an automatically binding effect upon an individual employment relationship, until a statute was enacted giving them such an effect. Cf. 2 HUECK UND NIPPERDEY, *LEHRBUCH DES ARBEITSRECHTS*, 3d ed., 35 (1932). In this country, see *J. I. Case Co. v. NLRB*, 321 U.S. 332, 64 S. Ct. 576 (1944). Conversely, in absence of a statute, the courts denied such effect, e.g., decision of Czechoslovakian Supreme Court 1925, 11, 11, in 8 *Prager Archiv* 88 (1926).

<sup>88</sup> *Order of R.R. Tel. v. Ry. Express Agency*, 321 U.S. 342, 64 S. Ct. 582 (1944).

<sup>89</sup> Justice Jackson in *J. I. Case v. NLRB*, 321 U.S. 332, 64 S. Ct. 576 (1944).

<sup>90</sup> Formerly the English courts regarded violation of a statute as fatal under any circumstances, an effect which probably originated the simile elsewhere mentioned of



to replace nonconforming provisions by terms and conditions statutorily prescribed.

It will be seen that such process of replacement has been generally resorted to wherever the contents of a contract conflicted with those prescribed by the law. And many statutes expressly state that in case of such a conflict the prescribed provisions must be regarded as parts of the contract.<sup>91</sup> This amounts to a substitution of the prescribed provisions for the nonconforming terms. For example, Congress proceeded in this manner in the famous Joint Resolution which proscribed all kinds of gold clauses in contracts; illegal stipulations were deemed to be replaced by the statutory terms according to which the obligations were dischargeable by payment, dollar for dollar, in legal tender.<sup>92</sup>

Very frequently statutes prescribe the contents of a special contractor's bond along with the conclusive statutory presumption that such bond is deemed to be drawn in accordance with the statutory contents, regardless of whether the actual contents of the bond conform to the statutory requirement.<sup>93</sup>

Even in the absence of a legislative directive, the courts, as noted before, have come to the same result.<sup>94</sup> Reading the statute as if its

the tyrant. A conflict between the contract and the common law prohibition was looked upon more mildly, for "the common law" was construed as "dividing according to common reason." *Norton v. Symmes*, [K.B. 1614] Hob. 12, 80 Eng. Rep. 163. ". . . the common law [in contrast to a statute] is like a *nursing father*, makes void only that part where the fault is and preserves the rest." *Maleverer v. Redshaw*, [K.B. 1669] 1 Mod. 35, 86 Eng. Rep. 712. Now, this is long past; neither the former nor the latter proposition is true and, as no violation of a statutory prohibition destroys the contract, so a contract restraining, for instance, the employee in the utilization of his knowledge or skill acquired in the promisee's employment may be held to be unenforceable although it conflicts only with the common law principle and not always with the statutory rule. *Sternberg v. O'Brien*, 48 N.J. Eq. 370, 22 A. 348, (1891); *Driver v. Smith*, 89 N.J. Eq. 339, 104 A. 77 (1918). Yet see *General Mills, Inc. v. Steele*, (C.C.A. 5th, 1946) 154 F. (2d) 367.

<sup>91</sup> Cf. the phrase frequently used in statutes "anything . . . to the contrary notwithstanding." *Equitable Life Assurance Soc. v. Clements*, 140 U.S. 226, 11 S. Ct. 822 (1891). And see further, English Merchant Shipping Act of 1894, 57 and 58 Vict., c. 60, § 458.

<sup>92</sup> 48 Stat. L. 113 (1933), 31 U.S.C. (1940) § 463.

<sup>93</sup> Compare the statute involved in *Maryland Casualty Co. v. Fowler*, (C.C.A. 4th, 1929) 31 F. (2d) 881 and 63 A.L.R. 1381 (1929).

<sup>94</sup> *New York Life Ins. Co. v. Cravens*, 178 U.S. 389, 20 S. Ct. 962 (1900); *Philip Carey Co. v. Maryland Casualty Co.*, 201 Iowa 1063, 206 N.W. 1808 (1926) (statutory provisions concerning contents of a contractor's bond); *Lorando v. Gethro*, 228 Mass. 181, 117 N.E. 185 (1917) (insurance); *Roeser v. Guardian Life Ins. Co.*, 162 Misc. 798 at 800, 296 N.Y.S. 585 (1936): ". . . it is settled law that even if the policy had contained a contrary stipulation, the standard provisions of the statute would nevertheless govern the contract of insurance."

terms had been written into the contract, the courts do not find any difficulty in replacing conflicting provisions with prescribed terms.<sup>95</sup> They vary in their approach, but they agree on the result.

One approach has been to consider the party estopped from putting in the either-or proposition, under which he could either have the contract enforced under stipulated terms or have it rendered nugatory. He cannot be placed in a better position on account of his noncompliance with the legal command than he should be if he had lived up to it.<sup>96</sup>

The fact that he had obtained the other party's consent to the non-conforming stipulation is immaterial. Terms are prescribed in the interest of the members of a particular class to which the other party belongs. It is for this reason that the defense cannot be heard that both were *in pari delicto*. Consequently, even though, for example, the applicant for a job fraudulently misrepresented his age, he was held entitled to the statutory wage rate scheduled for the higher wage bracket.<sup>97</sup>

No attempt is made here to reconcile the innumerable state decisions on the question of waiver respecting terms which were not subject to bargaining.<sup>98</sup> Whatever the construction, the claim in such cases rests ultimately upon statutory direction.<sup>99</sup> This explains why today the main current of opinion is inclined to deny the defense of waiver, not only as to the mere executory portion, but even with respect to the executed portion of the contract.<sup>100</sup>

Not a few courts have placed this result upon the ground of the lack of consideration for the release implied in the acceptance by the promisee of the substandard performance made by the promisor.<sup>101</sup> One might, perhaps with better reason, say that the statutory provisions which prescribed the contents of the obligations denied to the

<sup>95</sup> VANCE, INSURANCE, 2d ed., 239 (1930).

<sup>96</sup> Johnson v. Hartland Farmer's Mut. Fire Ins. Co., 220 Wis. 77, 264 N.W. 480 (1936).

<sup>97</sup> Walsh v. Commercial Travellers' Assn., [1940] Vict. L.R. 259, noted 54 HARV. L. REV. 515 (1941).

<sup>98</sup> Cases collated in 70 A.L.R. 972 (1931).

<sup>99</sup> Satterlee v. Bd. of Police, 75 N.Y. 38 (1878); Bodenhofer v. Hogan, 142 Iowa 321, 120 N.W. 659 (1909), and note thereto, 19 Ann. Cas. 1073 (1911) (with cases collated.)

<sup>100</sup> 6 WILLISTON ON CONTRACTS, § 1730 (1938).

<sup>101</sup> United States v. Morley Const. Co., (C.C.A. 2d, 1938) 98 F. (2d) 781; Hamilton v. Edmundson, 235 Ala. 97, 177 S. 743 (1937); Pitt v. Bd. of Education, 216 N.Y. 304, 110 N.E. 612 (1915); *contra*, Ryan v. New York, 177 N.Y. 271, 69 N.E. 599 (1904).

members of the protected class the capacity to waive rights secured by them.

F. *Are Required Terms Contractual in Nature?*

By another view, one might regard the party charged with the obligation as having, by entering into the bargain, consented to the subordination of the stipulations to the prescribed terms.<sup>102</sup> In taking this approach, courts might find it easier to construe even that portion of the contents, which is nothing more than a copy of the statutory provisions, to be of consensual rather than of heteronomous character. Thus, in deciding that the prescribed terms, if at variance with the stipulations of the parties, prevail over the latter, the courts put the former on the same level as express terms. It is faulty to apply the expression "implied obligations" or "implied terms and conditions" to them, for, if they were implied, they should be subject to the stipulations of the parties and not the other way around. Nothing could more strongly bear out the idea of the contractual nature of required terms than the recent decision rendered by the highest court of Michigan in *Life Insurance Company of Detroit v. Burton*.<sup>103</sup> The court directed the reformation of a bond solely upon the ground that terms, the incorporation of which was required by statute, had been omitted.

The logical process is similar to that resorted to by the courts in order to restrict the scope of stipulations which limit or exclude a seller's warranty. Does not the Uniform Sales Act class the seller's obligation inherent in the description of the goods, e.g., of a "new automobile," among the implied warranties? Yet it was held that a disclaimer referring to "all conditions, warranties and liabilities implied by statute" did not eliminate the liability of the seller for the breach of an express term, embodied in the words "new automobile."<sup>104</sup> If this is so here, there would be even more reason for it to be true for terms which cannot be precluded from the contract by the parties. To contract for a bargain of a certain type means in the eyes of the law to include therein the terms as required by law.

In a similar vein, the courts hold that the double liability imposed upon a stockholder for the benefit of the creditors of a corporation is

<sup>102</sup> *Lorando v. Gethro*, 228 Mass. 181, 117 N.E. 185 (1917); *Matter of Metropolitan Life Ins. Co. v. Conway*, 252 N.Y. 449 at 452, 169 N.E. 642 (1930); *Patterson, "Compulsory Contracts in the Crystal Ball,"* 43 COL. L. REV. 731 at 742 (1943).

<sup>103</sup> 306 Mich. 81, 10 N.W. (2d) 315 (1943).

<sup>104</sup> *Andrews Bros., Ltd. v. Singer and Co., Ltd.*, [1934] 1 K.B. 17 (§ 13 of the English Sale of Goods Act, 1893, corresponding to Uniform Sales Act, § 14).

“contractual in nature, although statutory in origin.”<sup>105</sup> As interpreted by them, the statute puts a liability clause into every subscription or purchase of stock, a clause according to which the stockholder assumes a liability for an assessment in accordance with the terms of the statute. In other words, by voluntarily becoming a stockholder, he incurs a liability, which, although originating in the legal command, becomes an express term of his contract.<sup>106</sup>

The significance of this interpretation can easily be seen. In the first place, there is no room for objections which otherwise could be raised against an action based upon the liability and brought in any jurisdiction where a stockholder may be found;<sup>107</sup> i.e., the obligation does not rest upon a penal statute to which no extra-territorial effects can be given. In the second place, a stockholder is deemed to have submitted to the jurisdiction of the state of incorporation with respect to the assessment as an incident to the contract. Third, the application by the courts of the contract statute of limitations is on all fours with their construction of the liability as a contractual one.<sup>108</sup>

Among the various classes of prescribed obligations there is a hierarchy depending upon the degree of subordination of one to the other. For example, wage or overtime schedules of a collective bargaining contract, made under section 9(a) of the National Labor Relations Act, must not conflict with the analogous commands of the Fair Labor Standards Act.<sup>109</sup> Likewise, where a standardized form in an

<sup>105</sup> *Brown v. O'Keefe*, 300 U.S. 598, 57 S. Ct. 543 (1937); *Chisholm v. Gilmer*, 299 U.S. 99, 57 S. Ct. 65 (1936); *Broderick v. Rosner*, 294 U.S. 629, 55 S. Ct. 589 (1935); *Converse v. Hamilton*, 224 U.S. 243, 32 S. Ct. 415 (1912); *Bernheimer v. Converse*, 206 U.S. 516, 27 S. Ct. 755 (1907); *Whitman v. Oxford National Bank*, 176 U.S. 559, 20 S. Ct. 477 (1900); *Flash v. Conn*, 109 U.S. 371, 3 S. Ct. 263 (1883); particularly *Pulsifer v. Greene*, 96 Me. 438, 52 A. 921 (1902); *Wiles v. Suydam*, 64 N.Y. 173 (1876). Cf. Hohfeld, “Nature of Stockholders’ Individual Liability for Corporation Debts,” 9 *COL. L. REV.* 285, particularly 308, 313 (1909).

<sup>106</sup> *Platt v. Wilmot*, 193 U.S. 602, 24 S. Ct. 542 (1904); *Anderson v. Andrews*, (D.C. Pa. 1945) 62 F. Supp. 705 [for facts of this case, see *Anderson v. Abbott*, 321 U.S. 349, 64 S. Ct. 531 (1944)].

<sup>107</sup> See cases cited in note 105, supra, and *Thomas v. Matthiessen*, 232 U.S. 221, 34 S. Ct. 312 (1914).

<sup>108</sup> *Pufahl v. Parks’ Estate*, 299 U.S. 217, 57 S. Ct. 151 (1936); *McDonald v. Thompson*, 184 U.S. 71, 22 S. Ct. 297 (1902); *Anderson v. Andrews*, (D.C. Pa. 1945) 62 F. Supp. 705.

<sup>109</sup> For the discretion given to collective contracts in this respect, see Fair Labor Standards Act, § 7(b). Yet beyond that scope, terms of collective contracts cannot supersede statutory terms. *Martino v. Michigan Window Cleaning Company*, (U.S. 1946) 66 S. Ct. 379.

insurance policy is in the teeth of a statutory provision, the courts will proclaim the superiority of the latter over the former.<sup>110</sup>

This brings up the question whether the rules applied by the courts for the construction of a contract hold true of its construction with regard to terms and conditions carried over in a contract from prescribed forms or other legislative provisions. Are ambiguities in such contract to be construed against the party which drafted the document? It is one thing to give an obligation imposed upon the draftsman by law a consensual character, and it is an entirely different thing to treat it so for the purpose of its construction. After all, that rule of construction originated in the consideration that doubts concerning expressions must be resolved against him who chose them. No one will allege that the obligations discussed here were formulated by the companies which inserted them in their contract forms. Accordingly, the majority of the courts<sup>111</sup> have been prone not to charge them for ambiguities in the language of standard policies.<sup>112</sup> As the New York Court of Appeals held, the parties showed no volition in the words or shape of prescribed terms.<sup>113</sup>

Similarly, a limitation period incorporated by statute in the contract is interpreted as a general Statute of Limitation rather than as a term of the contract.<sup>114</sup>

Thus, seven observations upon the nature of required terms may be submitted.

(1) Terms and conditions imposed by law upon the contracting parties are enforceable by the obligee against the obligor *qua obligor*.<sup>115</sup>

<sup>110</sup> Fadanelli v. Nat. Security Fire Ins., 113 Neb. 830, 205 N.W. 642 (1925) (standard fire policy provision, held, yielding to valued-policy statute).

<sup>111</sup> The minority view can be seen from Friend v. Business Men's Assur. Co., 141 Kan. 470, 41 P. (2d) 759 (1935); Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 A. 1037 (1908); Gratz v. Ins. Co. of N. Am., 282 Pa. 224, 127 A. 620 (1925); to the same effect VANCE, INSURANCE, 2d ed., 690 (1930).

<sup>112</sup> Funk v. Aetna Life Ins. Co., (C.C.A. 9th, 1938) 95 F. (2d) 38; Shaw v. United States Fidelity & Guarantee Co., (C.C.A. 3d, 1938) 101 F. (2d) 92; Gallop v. Continental Casualty Co., 290 Ill. App. 8, 7 N.E. (2d) 771 (1937); MacBey v. Hartford Accident & Indemnity Co., 292 Mass. 105, 197 N.E. 516 (1935); Wilcox v. Mass. Protective Assn., 266 Mass. 230, 165 N.E. 429 (1929); Heim v. Am. Alliance Ins. Co., 147 Minn. 283, 180 N.W. 225 (1920); Temple v. Niagara Fire Ins. Co., 109 Wis. 372, 85 N.W. 361 (1901).

<sup>113</sup> Hamilton v. Royal Ins. Co., 156 N.Y. 327 at 336, 50 N.E. 863 (1898).

<sup>114</sup> Id. at 337.

<sup>115</sup> "The alleged obligor does 'consent' to enter into the *type* of agreement on which the statute is predicated, even when he signs an instrument which does not in

It would be strange indeed if the character of such obligations had to vary according to whether or not the parties wrote the legal command expressly into the document. The courts did not hesitate to hold the United States liable under the Tucker Act upon terms imposed by law on a contracting party, for instance, a lessee. In other words, they had to construe the obligations to be contractual, for otherwise the Tucker Act could not have applied.<sup>116</sup>

(2) As to the contractual character of the obligation, there is no difference between prescribed terms and implied terms. If, for example, a contract which contains an obligation to pay the principal sum with interest at a certain future time is entirely silent as to the interest rate, the legal rate becomes the contractual one.

(3) Viewed from the angle of constitutional law, the fact that the subject matter of an obligation was prescribed by legislation may have significance. When, for example, during the depression era of the thirties, it became necessary to reduce interest or to suspend its payment, the statutory provision making the interest rate prior to maturity applicable after maturity, was held not within the prohibition of the contract clause, though in fact the parties had expressly adopted the statutory provision.<sup>117</sup> In short, the post-maturity period is entirely within the control of the legislature.

(4) Likewise, the source from which the terms and conditions are derived affects the method of interpretation which is appropriate. The majority of the courts applied the same method to their interpretation as to that of legislative acts generally; similarly, the courts will take

some particulars conform." Patterson, "Compulsory Contracts in the Crystal Ball," 43 *COL. L. REV.* 731 at 742 (1943).

<sup>116</sup> 24 *Stat. L.* 505 (1887), 28 *U.S.C.* (1940) § 250 ("... upon any contract, expressed or implied, with the Government of the United States, or for damages... in cases not sounding in tort..."). Cf. *Herren v. Farm Security Adm.*, (D.C. Ark, 1945) 60 *F. Supp.* 694.

<sup>117</sup> *Title Guarantee & Trust Co. v. 2846 Briggs Ave., Inc.*, 283 *N.Y.* 512, 29 *N.E.* (2d) 66 (1940). Where the contract is silent on the interest rate as payable after maturity, the statutory rate applies and not the rate stipulated for the time preceding the maturity. *Metropolitan Savings Bank v. Tuttle*, 290 *N.Y.* 497, 49 *N.E.* (2d) 983 (1943). With full recognition of this principle, one cannot deny the contractual character of the obligation to pay the interest; ergo, for the choice of the applicable statute, the court will look to the law of the place of performance. In re *Wisconsin Cent. Ry. Co.*, (D.C. Minn. 1945) 63 *F. Supp.* 151.

Courts have to face a "contract-clause" problem also with respect to the lien created by statutory provision, e.g., mechanic's lien, where such lien was not framed explicitly as a contractual stipulation. For the conflicting decisions concerning the constitutionality of statutory changes affecting contracts involving such liens, see 158 *A.L.R.* 1043 at 1046 (1945).

judicial notice of them as they do of the sources in which the terms originated.<sup>118</sup>

(5) Violations of statutory law, at least of that which belongs to the prescribed-terms class (in contrast to the prohibitory class) no longer render the bargain void; for they are deemed as much expressed in the contract as the contrary stipulations actually are. The results reached by the courts, even in absence of a legislative directive, accord with the general trend demonstrated in a great many statutory provisions. A few examples, taken from the property law, labor law, and insurance law, will serve to illustrate.

A direction in a deed or will for the accumulation of rents and profits which exceeds the statutory time limits remains valid for the time permitted, so that it is void only as to the time in excess thereof.<sup>119</sup>

The National Railway Labor Act directs every carrier to include in certain notices to be given to its employees enumerated sections of the act; these provisions are by statutory command made a part of the employment contract and "shall be held binding upon the parties regardless of any other express or implied agreements between them."<sup>120</sup>

According to the recent New York Insurance Act, any contract or policy of insurance or annuity contract made in violation of the provisions of the act shall be valid and binding upon the insurer, but in all respects in which its provisions are in violation of the requirements of the statute it shall be enforceable as if it conformed with such requirements.<sup>121</sup>

Looking at the recent legislation from the historical point of view, one notices that its course has only reaffirmed on a large scale a tendency which common law has shown for a long time, namely the tendency to save, if possible, a bargain from total destruction. With the exception of New York<sup>122</sup> and of a very few other states, the Amer-

<sup>118</sup> In contrast to customs. Where the customs constitute a part of a contract, they must be pleaded and proved. *Phoenix Iron & Steel Co. v. Wilkoff Co.*, (C.C.A. 6th, 1918) 253 F. 165; *Terminal R. Assn. of St. Louis v. Schorb*, (C.C.A. 8th, 1945) 151 F. (2d) 361. Accordingly, the same is true of the terms of a collective bargaining contract. It is the statute, e.g. NLRA, § 9(a), which provides for their incorporation in the individual employment contract. Lenhoff, "The Present Status of Collective Contracts in the American Legal System," 39 MICH. L. REV. 1109 at 1137 (1941).

<sup>119</sup> N.Y. Real Property Law (McKinney, 1945) § 61 (1) (3); N.Y. Personal Property Law (McKinney, 1938) § 16 (1) (3). See also Real Property Law (McKinney, 1945) § 169.

<sup>120</sup> National Railway Labor Act, § 2(8).

<sup>121</sup> N.Y. Laws (1939) c. 882, N.Y. Ins. Law (McKinney, Supp. 1946) §143(1).

<sup>122</sup> *Sabine v. Paine*, 223 N.Y. 401, 119 N.E. 849 (1918); cf. N.Y. Gen. Bus. Law (McKinney, 1941) § 373. The lender can recover neither principal nor legal

ican courts have held that the charge in excess of the permissible interest rate does not void the entire contract both as to interest and principal, but voids only the stipulation as to the excess interest.<sup>123</sup> And it has been recognized from time immemorial that a waiver of the right to redeem a mortgage does not invalidate the entire mortgage, but only that waiver.<sup>124</sup>

(6) The axiom that there could not be a contractual obligation without intention haunted the courts so as to induce them to a *petitio principii*. From the general proposition that the contract is a voluntary transaction, judges have improperly assumed that a feature of the contract imposed *in invitum* cannot be part of the contract proper. No less a jurist than Justice Cardozo, in speaking for the New York Court of Appeals, in *Smith v. Heine Safety Boiler Co.*, based his argument for the tortious nature of the master's obligation to the servant upon its non-waivable character.<sup>125</sup> When he, fifteen years later, then a Justice of the United States Supreme Court, analysed the maritime maintenance-and-cure obligation, his dicta admitted its contractual nature, adding only that it has no strict contractual character because "no agreement is competent to abrogate the incident."<sup>126</sup>

The contractual character of the right to maintenance and cure has been consistently recognized by the Supreme Court. In *Pacific Steamship Co. v. Peterson*<sup>127</sup> the plaintiff, a seaman, had accepted maintenance and cure. Subsequently he brought an action under the Jones Act<sup>128</sup> for negligent injuries. The defendant pleaded an election

interest. In this regard, the New York law conforms to the early English law which held the whole bargain to be illegal.

<sup>123</sup> 2 CONTRACTS RESTATEMENT, §§ 526 and 535 and comments, p. 1021 (1932). See Uniform Small Loan Law, § 13.

<sup>124</sup> Cf. TIFFANY, REAL PROPERTY, § 850 (1940); *Mooney v. Byrne*, 163 N.Y. 86, 57 N.E. 163 (1900). The same is true of other stipulations, by which the one party unlawfully waived protective rights imposed upon the other such as exemption privileges of a debtor or restrictions upon an automatic renewal clause in favor of the tenant. Such a waiver is void even when the statute does not contain an express prohibition against the waiver. *Kneettle v. Newcomb*, 22 N.Y. 249 (1860); *Crowe v. Liquid Carbonic Co.*, 208 N.Y. 396, 102 N.E. 573 (1913); *Wood Co. v. Horgan*, 291 N.Y. 422, 52 N.E. (2d) 932 (1943). Yet all the other terms of the contract remain unaffected. The same result was reached in *Siegel v. Bowers*, 185 Misc. 684, 58 N.Y.S. (2d) 187 (1946) (compromise of landlord's nuisance action, containing other clauses conflicting with Rent Regulations).

<sup>125</sup> *Smith v. Heine Safety Boiler Co.*, 224 N.Y. 9 at 11, 121 N.E. 891 (1918).

<sup>126</sup> *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 at 371, 53 S. Ct. 173 (1932).

<sup>127</sup> 278 U.S. 130, 49 S. Ct. 75 (1928).

<sup>128</sup> Merchant Marine Act of 1920, § 33, 41 Stat. L. 988 at 1007, 46 U.S.C. (1940) § 688.



of remedies. The court replied: "the right to maintenance, cure and wages, implied in law as a contractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence. . . ." <sup>129</sup>

On the other hand, the seaman would be compelled to elect between this action under the Jones Act, and the common law maritime action for injuries due to unseaworthiness, <sup>130</sup> for ". . . there is but a single wrongful invasion of his primary right of bodily safety. . . ." <sup>131</sup>

In short, the bargain-proof nature of an obligation incidental to a contractual relationship such as the employment relationship cannot be the test for the denial of its contractual character. Nor can culpability constitute the criterion; true, the maintenance and cure obligation exists even in absence of any negligence on the part of the shipowner, but, according to the main current of opinion, so does the damage claim based upon general maritime law. <sup>132</sup>

The variance between the nature of the two types of claims can be explained by an analysis of the rights which the parties have *inter se*. The right to maintenance and cure, like other forms of compensation for services, runs to the seaman himself; <sup>133</sup> the seaman, however, has no actionable right against the owner to the effect that the latter put the vessel into a state of seaworthiness. Nor can a servant compel his master to supply a safe place and safe tools. The duty regarding seaworthiness of a ship and safety of the workshop does not run to an individual; they are imposed upon shipowner and master only in the interest of public health and public safety. Naturally, legislation may be shown to have a wider scope which includes particular duties to the employees. On this point it is worth noting that in many civil law countries analogous provisions of the civil codes were construed as if

<sup>129</sup> Pacific S.S. Co. v. Peterson, 278 U.S. 130 at 138, 49 S. Ct. 75 (1928).

<sup>130</sup> Plamals v. S.S. "Pinar Del Rio," 277 U.S. 151, 48 S. Ct. 457 (1928); Brown v. C. D. Mallory, (C.C.A. 3d, 1941) 122 F. (2d) 98; Skolar v. Lehigh Valley R. Co., (C.C.A. 2d, 1932) 60 F. (2d) 893; cf. also Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 47 S. Ct. 600 (1927). (After the suit brought under the general maritime law had failed, a new complaint based upon the Jones Act held barred, because of *res adjudicata*.) Cf. Aguilar v. Standard Oil of New Jersey, 318 U.S. 724, 63 S. Ct. 930 (1943).

<sup>131</sup> Pacific S.S. Co. v. Peterson, 278 U.S. 130 at 138, 49 S. Ct. 75 (1928).

<sup>132</sup> Sieracki v. Seas Shipping Co., (C.C.A. 3d, 1945) 149 F. (2d) 98, noted, 59 HARV. L. REV. 127 (1945); cf. Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455 (1944).

<sup>133</sup> See the rationale in Brown v. C. D. Mallory, (C.C.A. 3d, 1941) 122 F. (2d)

they created a contractual right of the employees against the employer for the safety of the place.<sup>134</sup>

It might be more than a fair guess to trace the different construction in American law to the belief that imposed duties are inconsistent with a contractual construction. One must not forget that the invention of implied warranties in sales was not made until the Nineteenth Century, when the duties of the master and shipowner had been recognized for a long time.

The practical significance can be seen in the situation in which the plaintiff's safety depended upon a fellow employee's conduct; then, without statutory changes,<sup>135</sup> the master was held to be relieved from any liability.<sup>136</sup> If he had been burdened with a contractual obligation, the result would have had to be different. Furthermore, contributory negligence would not have been a defense.<sup>137</sup>

In recent years, we notice how completely the courts accept the proposition that terms required by legislation are treated exactly as promises in the sense that the plaintiff recovers the value of the promise rather than merely such damages as flow from the violation of the statute. The Fair Labor Standards Act furnishes a splendid illustration.<sup>138</sup> Under it an employee has a right to the statutory rates of pay regardless of any contrary stipulation.<sup>139</sup> Certainly employer and employee may establish the correct rates directly by contract and, in doubt-

<sup>134</sup> *S. M. v. Deutsches Reich*, 95 *Entscheidungen des Reichsgerichts (N.F.)* 103 (1919); (Austrian Supreme Court, March 9, 1937) 19 *SZ.* No. 75; and 12 *Reports of the Austrian Labor Courts* No. 433 (1933) (right to specific performance).

<sup>135</sup> Chiefly conspicuous for such expressions are the Federal Employer Liability Act, 35 *Stat. L.* 65 (1908), as amended by 53 *Stat. L.* 1404 (1939), 45 *U.S.C.* (1940) § 51 et seq., and the Jones Act, 41 *Stat. L.* 988 at 1007 (1920), 46 *U.S.C.* (1940) § 688, cited note 128, supra, the latter incorporating the pertinent contents of the former.

<sup>136</sup> *Holliday v. Fultan Band Mill*, (C.C.A. 5th, 1944) 142 *F. (2d)* 1006 at 1007; *Anderson v. Scheuerman*, 232 *Iowa* 705, 6 *N.W. (2d)* 125 (1942). A discussion of the qualifications produced by the so-called vice-principal doctrine is outside the scope of this paper.

<sup>137</sup> Naturally, the inadequacy of the principle stimulated the ingenuity of judicial reasoning in order to deny such negligence on the part of the employee; this is illustrated also by the attacks against the simple-tool doctrine, with the aim to restrict the defense of contributory negligence and of exemption of risk. See *Jacob v. City of New York*, 315 *U.S.* 752, 62 *S.Ct.* 854 (1942), and *Adam v. Konvalinka*, 291 *N.Y.* 40, 50 *N.E. (2d)* 535 (1943).

<sup>138</sup> 58 *Stat. L.* 1060 (1938), 29 *U.S.C.* (1940) § 201 et seq.

<sup>139</sup> *Walling v. Belo Corp.*, 316 *U.S.* 624, 62 *S. Ct.* 1223 (1942); *Brooklyn Savings Bank v. O'Neil*, 324 *U.S.* 697, 65 *S. Ct.* 895 (1945).

ful cases, the terms as contracted for will be held to be proper.<sup>140</sup> But, if they fail to make such stipulations or if the stipulations as made fall short of the terms as prescribed, then the latter, not the former, are deemed to constitute the contents of the contract.<sup>141</sup> And more than that, the "liquidated damages" provision of the law has been construed as a contractual compensation rather than a penalty, a construction which had a bearing upon the question of constitutionality,<sup>142</sup> jurisdiction,<sup>143</sup> exclusion of judicial discretion,<sup>144</sup> recovery of interest from the time of the default on<sup>145</sup> and, finally, upon the Statute of Limitations.<sup>146</sup> Here, again, as discussed elsewhere in this paper with respect to standard policies in insurance law, the prescribed terms entered the contract without, or even against, the will of the employer.

(7) There remains the question whether the requirement that the contractor must write the required terms into the contract has any different effects from the simple statutory declaration of the terms. Incidentally, the requirement may produce uncertainty as to the effects of divergencies and omissions, but a more important effect may be the paradox that the intended benefits of the statute may be denied to the very class for whom it was enacted.

<sup>140</sup> *Harnischfeger Corp. v. Walling*, 325 U.S. 427, 65 S. Ct. 1246 (1945); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 65 S. Ct. 11 (1943); *Tennessee Coal Iron & R. Co. v. Muscoda*, 321 U.S. 590, 64 S. Ct. 698 (1944).

<sup>141</sup> *Jewell Rich Coal Co. v. Local No. 6167*, 325 U.S. 161, 65 S. Ct. 1063 (1945); *Northwestern Yeast Co. v. Broutin*, (C.C.A. 6th, 1943) 133 F. (2d) 628 at 631.

<sup>142</sup> *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216 (1941) (question of due process).

<sup>143</sup> Thus, state courts have jurisdiction under section 16 of F.L.S.A. ("competent jurisdiction"), while if viewed as penalty, they had *none*. Federal Judicial Code, § 256, second, 28 U.S.C. (1940) § 371; *Emerson v. Mary Lincoln Candies, Inc.*, 173 Misc. 531, 174 Misc. 353, affirmed, 261 App. Div. 879 (1941), affirmed, 287 N.Y. 577, 38 N.E. (2d) 234 (1941); *Hargraves v. Mid-Continent Petroleum Co.*, (D.C. Okla. 1941) 36 F. Supp. 233.

<sup>144</sup> *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216 (1942).

<sup>145</sup> Cf. N.Y. Civil Practice Act (Cahill, 1937) § 480 ("... any action ... based upon breach of performance of a contract ..."), construed in *Pedersen v. J. F. Fitzgerald Const. Co.*, 293 N.Y. 126, 56 N.E. (2d) 77 (1944).

<sup>146</sup> E.g., N.Y. Civil Practice Act (Cahill, 1937) § 48 (1) (6 years) and not id., § 49 (3) (3 years), since the latter refers to actions upon a statutory penalty, the former to those upon a contract or statutory obligations. *Walsh v. 515 Madison Ave. Corp.*, (N.Y. S. Ct. 1943) 42 N.Y.S. (2d) 262. State limitation statute held, applicable to contractual obligations: *Republic Pictures Corp. v. Kappler*, (C.C.A. 6th, 1945) 151 F. (2d) 543. A good discussion of the cases collated there can be found in *Keen v. Mid-Continent Petroleum Corp.*, (D.C. Iowa 1945) 58 F. Supp. 915.

Nevertheless, awkward as the way of statutorily stereotyping contracts seems to be, it had its *raison d'être*. One need only remember that not very long ago in *Adkins v. Children's Hospital*<sup>147</sup> prescription of terms and conditions for a contractual relationship was deemed to be irreconcilable with the idea of a contract.<sup>148</sup> For us, the fine distinction between terms prescribed for a contractual relationship of a certain class and terms to be inserted in such a contract by the contractor himself seems to be no more than gossamer. In either case, the parties subject to the statute are still free to decide whether or not they would enter into the relationship; and, on the other hand, if they enter their bargaining is limited by the statutory command, whatever its mode of expression.

It is interesting to note that where the state or its divisions acted as employer, the courts, even prior to 1937, found no fault with a direct command of the terms to the benefit of which the employees were entitled. A sovereign, of course, may burden itself as it pleases.<sup>149</sup> On the other hand, when the state acted as champion for the protection of another's employees, the form in which the state exercised its protective function was that of mere directions to the public contractors to write specified terms into the contract. The latter method was apparently thought to satisfy the constitutional requirements for freedom of contract. Such important acts as the Davis-Bacon Act<sup>150</sup> and the Walsh-Healy Act<sup>151</sup> still cling to that method. Acts of similar pattern were

<sup>147</sup> 261 U.S. 525, 43 S. Ct. 394 (1923), overruled in 1937 by *West Coast Hotel v. Parrish*, 300 U.S. 379, 57 S. Ct. 578 (1937).

<sup>148</sup> POUND, *INTERPRETATION OF LEGAL HISTORY* 63 (1923): "Hence it seemed to them [the judges] that the constitutional requirement of due process of law was violated by legislative attempts to restore status and restrict the contractual power of free men. . . ." Cf. Frank, J. in *Beidler & Bookmyer, Inc. v. Universal Ins. Co.*, (C.C.A. 2d, 1943) 134 F. (2d) 828 at 829: "True, once upon a time—and not so long ago—the word 'contract' cast a curious spell on legal thinking." Similar is Judge Frank's criticism in the most recent case, *Martin v. Campanaro*, (C.C.A. 2d, 1946) 156 F. (2d) 127.

<sup>149</sup> *Glavey v. United States*, 182 U.S. 595, 21 S. Ct. 891 (1901); *Wright v. State*, 223 N.Y. 44, 119 N.E. 83 (1918); *Matter of Flaherty v. Craig*, 184 App. Div. 428, 171 N.Y.S. 624 (1918); *Quayle v. City of New York*, 253 App. Div. 735 (1937); *State ex rel. Rothrum v. Darby*, 345 Mo. 1002, 137 S.W. (2d) 532 (1940); *Altenberg v. City of Superior*, 228 Wis. 272, 280 N.W. 342 (1938).

<sup>150</sup> 46 Stat. L. 1494 (1931), as amended by 49 Stat. L. 1011 (1935) and 54 Stat. L. 399 (1940), 40 U.S.C. (1940) § 276a ("every contract . . . to which United States . . . is a party . . . [concerning] construction of public buildings . . . shall contain a provision . . .").

<sup>151</sup> 49 Stat. L. 2036 (1936), as amended 56 Stat. L. 277 (1942), 41 U.S.C. (1940 and Supp. 1944) § 35 (contractors have to include certain stipulations and pro-

enacted in many states. Some of them provided that terms, even though not inserted into the contract, shall be deemed to be inserted anyway.<sup>152</sup> It was that way of expressing the legislative objective which put at rest the question of the effect which a failure to execute the contract as so prescribed carried with it.<sup>153</sup>

There still, of course, remains the difficulty of determining whether such statutes create direct rights of the employees against the contractor. Faithful to the axiom that there can be no contractual obligation without a promise, the courts have given the Walsh-Healey Act, for instance, a construction which barred a direct action on the part of the employee.<sup>154</sup> The farthest step which the courts were prepared to take was to read into the public contractor's contract an additional contract for the benefit of the employee; this step was taken by some federal courts with respect to the Davis-Bacon Act.<sup>155</sup>

Let us assume, for a moment, that such a statute was intended to create a direct action on the part of the employee.<sup>156</sup> Still, the distinction must be made between the status of a party to the contract and the status of a third party beneficiary. A legal compulsion can be brought to bear upon the former, but never upon the latter. Cannot the latter renounce the benefit? Can anyone be compelled to accept benefits against his will?<sup>157</sup> The question may be asked whether the old-fashioned requirement that those terms may be incorporated in the

hibitions concerning their employ of workers in the bids for federal government contracts).

<sup>152</sup> Recognized as constitutional in *Atkin v. Kansas*, 191 U.S. 207, 24 S. Ct. 124 (1903) (concerning a Kansas labor statute for works to be performed by contractors for the state).

<sup>153</sup> *United States v. Morley Const. Co.*, (C.C.A. 2d, 1938) 98 F. (2d) 781 at 789. In this case arising under the Davis-Bacon Act, 40 U.S.C. (1940) § 276a, the court denied the legality of any waiver on the part of the employees respecting the benefits of the act, adding: "We do not say that if the contract had not incorporated the statute, the laborers would have had the privilege at all. . . ."

<sup>154</sup> See *Greenstein v. Pan American Airways, Inc.*, 185 Misc. 429, 57 N.Y.S. (2d) 178 (1945).

<sup>155</sup> *United States v. Morley Const. Co.*, (C.C.A. 2d, 1938) 98 F. (2d) 781.

<sup>156</sup> I CONTRACTS RESTATEMENT, §§ 145 and 147.

<sup>157</sup> *Huston v. Washington Wood & Coal Co.*, 4 Wash. (2d) 449, 103 P. (2d) 1095 (1940). There the court, construing the rights of an employee under a collective bargaining contract as those of a third party beneficiary, held them, therefore, to be "waivable." Consequently, for the vast majority of collective contracts, namely those which fall within § 9(a) of the NLRA, the third-party-beneficiary-contract construction has become untenable, at long last, with *Order of R.R. Tel. v. Ry. Express Agency*, 321 U.S. 342, 64 S. Ct. 582 (1944), and *J. I. Case Co. v. NLRB*, 321 U.S. 332, 64 S. Ct. 576 (1944).

contract with the *government* has not led the courts to regard them by contrast as no part of the contract with the employee, a result traceable to the disinclination to regard statutory prescriptions in themselves as part of the contract. To be sure, subsequent to the method of the Fair Labor Standards Act directly prescribing an action to the employee, the use of the old method might imply the exclusion of an employee action.

In any event, what the courts said about an employee's right of action as a third party beneficiary presupposed the view of prescribed terms as a basis for actions *ex contractu*. Most recently this was the issue in *Fata v. S. A. Healy Company*.<sup>158</sup> New York labor law requires the insertion in any contract on public works of a provision concerning the payment of not less than the prevailing wage rate; a schedule of wages, ascertained by the fiscal officer prior to the advertisements for bids, has to be annexed to, and to form a part of, the specifications.<sup>159</sup> The statute, aside from criminal sanctions, provides for the enforcement of the wage obligation by the fiscal officer.<sup>160</sup> The officer must, on the verified complaint of any person interested, make an investigation and determination.<sup>161</sup> Without such precedent determination, the courts, prior to the *Fata* case, would not have taken jurisdiction in an action of an employee for the recovery of the wage balance. Consequently, an employee was not authorized to claim back pay for a time which antedated the filing of his complaint with the fiscal officer.<sup>162</sup> The Appellate Division of the Supreme Court of New York dismissed the action upon the tenet that "...where the provisions of the contract relied upon are included pursuant to the command of the statute, no such voluntary intention [i.e., to benefit a third party] can be inferred."<sup>163</sup>

Said the New York Court of Appeals, reversing: "...It cannot be doubted that provisions requiring the contractor to pay such wages are

<sup>158</sup> 289 N.Y. 401, 46 N.E. (2d) 339 (1943).

<sup>159</sup> N.Y. Labor Law (McKinney, 1940) § 220(3).

<sup>160</sup> Id., § 220 (5) (c) (that is, Industrial Commissioner of the State or Comptroller of the City, respectively).

<sup>161</sup> Id., § 220 (7).

<sup>162</sup> *Matter of Carr v. Kern*, 279 N.Y. 42, 17 N.E. (2d) 762 (1938); *Olsen v. Brooklyn Ash Removal Co., Inc.*, 268 N.Y. 693, 198 N.E. 561 (1935). Consequently, the fiscal officer, so it was held, has to limit his investigation to the present time and to the future, but may not extend it back to the antecedent period. *Matter of Simpson v. Taylor*, 278 N.Y. 643, 16 N.E. (2d) 300 (1938), affirming 253 App. Div. 713 (1937).

<sup>163</sup> 263 App. Div. 725 at 726 (1941).

also inserted in contract, *whether voluntarily or under compulsion of the statute*, for the benefit of the laborers, as well as for the benefit of the public body which is a party to the contract."<sup>164</sup>

#### IV

##### SUMMARY

A. The law of contracts is not comprised exclusively of rules touching the formation of the contract and imposing prohibitions; for the contents of a contract consist not of party-made stipulations alone, as the common-law theories assumed. There has developed a substantial amount of optional law and beyond that there are terms and conditions imposed by law.

B. As an outcome of the old theories, on the one hand, optional law has been couched in a language derived from consent and intention, called implied terms until quite recent legislation. On the other hand, statutory law affecting in varying degrees the contents of contractual obligations which could not be bargained away by stipulations of the parties was regarded as noncontractual in character. This accounts also for the aversion of the English and American courts to the utilization of analogy as a suitable method for subsuming under a statute situations similar to those embraced in the statutory words.

C. With the increased resort to legislation, doctrines reserving the concept of contractual obligations to those which rest upon the free choice of the parties lost their basis. Thus the door was opened for an approach to the civil law classification of statutory rules, namely of optional terms and required terms both of which are regarded as parts of the contract.

D. In either case, the classifications are of greatest practical importance for both the domestic law and the conflict of laws.

E. The manner in which legislation creates rules which fall within the class of *jus cogens* varies with the subject matter and depends on whether emphasis is placed on homogeneity or variability of the prescribed terms. Considerations of this kind will determine whether a legislature may resort to standard forms, or to terms and conditions established through an administrative process, or to schedules incorporated by reference in statutes regulating the effect of collective bargaining contracts. The first-mentioned terms are distinguished by

<sup>164</sup> 289 N.Y. 401 at 405, 46 N.E. (2d) 339 (italics supplied).

constancy and homogeneity. The last-mentioned ones vary with the formation of new collective contracts.

F. The fact that terms are prescribed may affect their interpretation and make them more liable than are agreed terms to legislative impairment.

G. With the decline of the sensitiveness against an approach which does not deny contractual effects to obligations imposed upon the contracting parties, it seems to be no longer necessary to use legislative forms of disguise. Such a disguise was the direction which the legislature gave the contracting parties, to write the prescribed terms into their contract. The circuitous way, full of pitfalls, has now lost any right to exist. The correct way is to fix the terms in the statute, and to indicate whether or not they are subject to the control of the parties to the contract. However, in some cases, as in the standard insurance contracts, the complete expression in the contract of the statutory terms may serve to advise the parties of their rights.