

EHRENZWEIG AND THE STATUTE OF FRAUDS: AN INQUIRY INTO THE "RULE OF VALIDATION"

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A historian of philosophy—or was it a philosopher of history?—has been quoted to the effect that one of the most difficult of all intellectual feats is to take a familiar set of data and re-evaluate it in the light of a novel hypothesis. In his treatise Professor Albert Ehrenzweig has performed just such a feat: he has taken the familiar cases on the Statute of Frauds in the conflict of laws, heretofore treated chiefly as establishing that the distinction between substance and procedure is determinative, and has reviewed them in the light of the hypothesis that there exists a "Rule of Validation" such that "contracts have been quite generally upheld," irrespective of "ambiguous and irrelevant" choice-of-law rules, "where they have satisfied either the formality requirements of the law of the forum or those of another proper law."¹ You will not be surprised—those of you, that is, who have read the treatise—to be informed that Ehrenzweig found his hypothesis confirmed by the data. In this paper I propose to review the same cases and consider the extent to which I think they support the Ehrenzweig hypothesis.² I shall not attempt a feat similar to Ehrenzweig's—that is, to re-evaluate the same familiar data in the light of my own rather novel hypothesis, which is that the courts in deciding problems of the Statute of Frauds in the conflict of laws do so (or should do so) by reference to the policies and interests of the states involved, upholding legitimate domestic interests even when they truly conflict with those of another state, and certainly when there is no such conflict; but that they do not often indulge in either unconstitutional discrimination or

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¹ EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* 473 (1962); see also *id.* at 353 [hereinafter cited as EHRENZWEIG].

² This symposium was conceived as a tribute to Ehrenzweig and his treatise. Except that the sheer industry and diligence demanded by such an achievement are grounds for appreciation and congratulation, I know of no sincere way to honor a scholar except to subject his scholarship to critical analysis. If for this occasion I have chosen a phase of his work that is more vulnerable to criticism than others (I have already predicted that his hypothesis as to the Statute of Frauds will not survive analysis: Currie, Book Review, 1964 *DUKE L. J.* 424, 429-31), I regret the generally negative impression that will inevitably result. I should like it to be distinctly understood that there are many aspects of the treatise I find wholly admirable. I should find it simply tiresome, however, and not very constructive, to write about those things with which I am in full agreement.

in short-sighted provincialism, nor do they often apply domestic law when the forum state has no interest in the matter. I have no confidence that I could demonstrate that these data vindicate this hypothesis. Consistently with my usual experience in research in choice-of-law matters, I find the cases rather in a mess, and in no mood to have order imposed upon them. To me the cases seem to be determined by a large variety of considerations. All too often the results seem dictated by devout and orthodox commitment to the fundamentalist theology of territorialism and vested rights; sometimes they seem to reflect simple provincialism; sometimes the courts seem to be manipulating traditional rules for choice of law in order to achieve what appears to them to be the "just" result—which usually, though not always, means upholding an informal contract. I dare not claim that these cases demonstrate that, as a matter of living law, cases are decided on the basis of the governmental interests involved, though many of these turn out to be consistent with that analysis. The most I can offer by way of competition with Ehrenzweig is that my hypothesis furnishes a better guide than his for predicting the result that a court will reach in such a conflicts case—though not the reasons the court will give. In addition, I may venture to suggest that we should all be better off if my hypothesis had, indeed, been the principle actually informing the decisions of the courts.³

Ehrenzweig begins with the advantage that his hypothesis is not altogether novel but enjoys some support from Corbin,⁴ a respected and sophisticated writer on contracts, and Lorenzen,⁵ a respected and sophisticated writer on conflict of laws. With becoming modesty, Corbin did not offer his opinion as that of an expert on the conflict of laws;⁶ indeed, like other eminent jurists, including Cardozo,⁷ he confessed a degree of be-

³ On this occasion I find it desirable for several reasons to limit myself to the data—the cases—on which Ehrenzweig bases his conclusion. I have found it necessary further to limit the discussion to the cases cited in the treatise, omitting those cited only in Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874 (1959). At a later time, perhaps, I will examine both the cases cited in the article and relevant cases not cited by Ehrenzweig at all. The treatise cites some 97 cases, the article 24 more. 2 CORBIN ON CONTRACTS §§ 293, 294 (1950, Supp. 1964) [hereinafter cited as CORBIN] cites 32 cases not cited by Ehrenzweig; LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS ch. 11 (1947), cites 67 more; and HEILMAN, THE CONFLICT OF LAWS AND THE STATUTE OF FRAUDS (1961) cites 78 more.

⁴ 2 CORBIN, §§ 293-94.

⁵ Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L. J. 311 (1923), reprinted in LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS ch. 11 (1947).

⁶ 2 CORBIN, § 293 n. 57, citing RESTATEMENT, CONFLICT OF LAWS (1934), and works by Cook, Goodrich, and Beale; he placed special faith in Professor Lorenzen's conclusions. *Id.* at § 294, n. 77 and related text.

⁷ CARDOZO, THE PARADOXES OF LEGAL SCIENCE 67-68 (1928).

wilderment concerning the esoterics of our specialty: “. . . [T]here is conflict even in the rules applicable in making a choice among conflicting laws, a conflict that is perhaps greater and more puzzling than that to which we are accustomed in other matters.”⁸ As I interpret his discussion of this subject, he took an Olympian view of the law of contracts, as he was entitled to do, and believed that detached reason, oriented toward the practical affairs of life, should be able to construct, at least within a fairly homogeneous society, a consistent and reasonably uniform law of contracts, blemished by a minimum of aberrations resulting from ignorance, local officiousness, and historical anomaly. Thus the law of contracts and its handmaiden in certain situations, the law of conflict of laws, could facilitate “movement, communication, or commercial transactions across State lines or even across the boundaries of most nations.”⁹ In the purely domestic context the Statute of Frauds seemed to him at best an anachronism and a poorly devised instrument of governmental policy. “Such gain in the prevention of fraud as is attained by the statute is attained at the expense of permitting persons who have in fact made oral promises to break those promises with impunity and to cause disappointment and loss to honest men.”¹⁰

This is a conclusion with which I heartily agree, and it is no wonder that, as Corbin says, courts have in consequence been disposed “to interpret the statute so narrowly as to exclude many promises from [the statute’s] operation on what may seem to be flimsy grounds.”¹¹ When this attitude is transferred from the domestic to the interstate level, however, it leads Corbin to embrace to some degree a philosophy of nullification with which I cannot agree, although Ehrenzweig quotes him with enthusiasm: “If a court is convinced that a contract has been made as alleged and that there has been no fraud or perjury, it has no sympathy for a party whose only excuse for repudiation is the lack of a statutory formality.”¹² The Statute of Frauds we have with us, whether we like it or not; and while courts may construe it narrowly or even with hostility, sheer judicial nullification of clear legislative intent is indefensible according to my conception of the

⁸ 2 CORBIN at 66.

⁹ *Id.* at 65. See also *id.* at 66: (“achieving such a degree of nearness to uniformity as [the court] may”); *id.* at 73: “[In certain situations] our courts have nearly always enforced the contract, just as sound moral and commercial policy requires”; *id.* at 74: (“[a statute of the forum commanding local courts not to enforce a contract wherever made or to be performed, unless it complies with local requirements of formality] would be unreasonable and out of harmony with our system of free interstate commerce.”).

¹⁰ *Id.* at 3.

¹¹ *Ibid.*

¹² *Id.* at 69, quoted in EHRENZWEIG at 470-71.

judicial function; and, as I have said before, the deed is not justified merely because it can be cloaked in the obfuscations of conflict-of-laws theory.¹³ I once suggested that "In a conflict-of-laws case a court should have just that degree of freedom to escape the compulsion of a disagreeable law that it has in a purely domestic case, and no more."¹⁴ To avoid misunderstanding I should rephrase that suggestion somewhat, since in the conflict-of-laws situation the process of construction or interpretation may involve an important factor never present in the domestic situation: the interest of another state.¹⁵ Thus in the conflicts case the court, while confining itself to the method of statutory interpretation as distinguished from conventional choice-of-law theory, has a little more latitude to escape the compulsion of a disagreeable law than it has in the domestic case: recognition of the interest of the foreign state is always a legitimate, and often an admirable, approach to solution of the choice-of-law problem.¹⁶ But the escape should be accomplished avowedly as a feat of construction or interpretation, so that it is plainly susceptible of legislative correction if that should be thought desirable, rather than as one of deliberate nullification, or of prestidigitation under the diverting influence of conflict-of-laws theory.

Lorenzen, in contrast, justifiably offered his opinion as that of a careful and critical student of the problems of conflict of laws; and while he evinced no great affection for such formalities as those prescribed by the Statute of Frauds, he stopped well short of advocating anything that could be stigmatized as nullification in interstate cases.¹⁷ His principal concern was to destroy the conventional notion that the problem of the Statute of Frauds is essentially solved by classification of the statute as pertaining to substance or to procedure—especially in so far as that notion was founded on the sterile literalism of *Leroux v. Brown*.¹⁸ This he did with remarkable persuasiveness, demonstrating that characterization of the forum's statute as procedural, with the consequence that any noncomplying contract is unenforceable notwithstanding its validity under the laws of one or more interested foreign states, is largely devoid of any credible policy basis, results in commercial inconvenience and injustice, and is out of harmony with the laws of a number of states and foreign countries. His

¹³ Currie, Book Review, 1964 DUKE L. J., 424, 431.

¹⁴ CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 106 (1963) [hereinafter cited as CURRIE].

¹⁵ *Id.* at 93-94, 118, 279, 280, 368, 370, 422, 592, 604, 689, 717-18; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757, 762 (1963).

¹⁶ *Cf.* Bernkrant v. Fowler, 55 Cal.2d 588, 12 Cal.Rptr. 266, 360 P.2d 906 (1961).

¹⁷ LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS ch. 11 (1947) [hereinafter cited as LORENZEN].

¹⁸ 12 C.B. 801, 138 Eng.Rep. 1119 (C.P. 1852).

thesis was that all statutes of frauds should be treated as substantive, not procedural, so that the validity of any contract would be tested not by the law of the forum merely as such but by the law of that state whose law otherwise determined the validity—at least the formal validity—of the contract. In the beginning he tended to assume that this was the law of the place of contracting;¹⁹ but when he arrived at the point of designating the specific state whose law should appropriately supply the substantive rule of decision he deliberately left the question open: “Whether [formalities] should be deemed controlled by the law of the place of contracting, or by the law of the place of performance, or, if the contract relates to land, by the law of the situs, cannot be gone into here.”²⁰ His closest approach to a position that would support Ehrenzweig’s “Rule of Validation” was a reference to an article on another subject in which he had suggested that “a rule in the alternative” would “best meet the needs of interstate or international business,”²¹ to which he added a suggestion that “the same arguments would be applicable to the statute of frauds.”²²

There is much to be said for a rule of alternative reference when there has been substantial compliance with the essential policy expressed in the law in question.²³ Ordinarily, said Lorenzen, the allowable alternatives should be the laws of states having a close connection with the transaction at the time of its execution. “*When, however, the mutual agreement of the parties is conceded, and the required mode of expressing that agreement is alone in issue, as in the case of the statute of frauds, it might not be improper to enforce such foreign contract if it meets the requirements of the lex fori, though it is unenforceable under the lex loci or the law governing the transaction in other respects.*”²⁴ (Emphasis added.)

Observe that this qualified endorsement of a rule of alternative reference is a far cry from a plea for an indiscriminate “Rule of Validation.” The suggestion applies only where the mutual agreement of the parties is *conceded*, and such concessions by no means occur routinely. Moreover, Lorenzen hesitated to affirm with conviction the propriety of validation by the law of the forum state when, apart from being the place of trial, it has no significant relation to the parties, the subject matter, or the transaction. Substantially the same suggestion is repeated with somewhat more conviction in the last of his three frequently quoted conclusions: “The

¹⁹ LORENZEN at 339.

²⁰ *Id.* at 345-46.

²¹ *Id.* at 346, especially n. 76 and related text.

²² *Ibid.*

²³ See CURRIE at 186, discussing *inter alia* minor variations in the interest rates allowed by laws regulating the small-loan business.

²⁴ LORENZEN at 346.

peculiar nature of the statute of frauds makes it desirable, at least as a matter of legislative policy, that contracts not enforceable under the law of the state whose law determines the formalities of contracts in general shall be enforced nevertheless if they meet the requirements of the statute of the forum."²⁵ Unless he meant that the Statute of Frauds is rather generally disliked and has been badly in need of at least repair for three centuries, I am not sure just what Lorenzen meant by his reference to its "peculiar nature"; and I call attention to the fact that again he qualified his suggestion, this time by reference to legislative policy (to be distinguished from judicial activism). Even so, I have serious reservations as to the propriety and even constitutionality of validation according to the law of the disinterested forum when this entails subversion of an actual protective policy of the interested foreign state—as distinguished from equating modes of proof that serve the same basic policy but differ in minor detail.

As for Lorenzen's two other conclusions, I am in substantial agreement with the first, which affirms that all statutes of frauds should be construed as substantive rather than procedural. Perhaps I go farther than he did when I advocate that the substance-procedure dichotomy be discarded altogether as worse than useless. I would, however, concede that a typical statute of frauds may conceivably be given one or both of two interpretations: one, that it is for the protection of parties who are sued for non-performance of alleged promises informally made (which roughly corresponds to the concept of the "substantive" statute); the other, that it is a regulation of the administration of justice in the enacting state, designed to relieve the courts from the embarrassment and frustration of attempting to extract the truth from a welter of contradictory testimony without some reasonable indicia of reliability, and to prevent their use as instruments of extortion (which roughly corresponds to the concept of the "procedural" statute). Of these two interpretations, however, the latter seems to me implausible, and Lorenzen's examination of the treatment of the statute in the purely domestic cases convincingly supports this view. I would stop short, however, as I believe Lorenzen did, of denying to a court the prerogative of construing its Statute of Frauds as one designed to regulate the administration of justice in the forum state.²⁶ Though many a court has characterized its Statute of Frauds as "procedural," I can hardly imagine any modern court's deliberately holding that it expresses a policy designed to regulate the administration of justice in the courts; I would expect reasonable men to agree today that the policy of the statute is designed

²⁵ *Id.* at 351.

²⁶ *Cf.*, *Perkins v. North Carolina*, 234 F.Supp. 333 (W.D.N.C. 1964).

simply for the protection of defendants. Yet such is the colorable case that can be made for the "housekeeping" characterization that I think it cannot be stigmatized as utterly arbitrary and without foundation.

Lorenzen's second conclusion, that the Statute of Frauds "is not expressive of a public policy from the standpoint of the Conflict of Laws, so as to preclude the enforcement of a foreign contract,"²⁷ Ehrenzweig quotes with relish;²⁸ but plainly, Lorenzen is here speaking the idiom of conventional choice-of-law doctrine. According to that doctrine, once it has been determined that an appropriate foreign law gives rise to a valid claim, the forum will not decline to enforce it on grounds of "local public policy" unless (to use Lorenzen's moderate statement of the formula) "[m]oral considerations of a paramount character, sufficient to warrant a disregard of private rights," are involved.²⁹ Within the framework of conventional doctrine this is an impeccable statement, clearly supporting Lorenzen's antipathy to the invocation of the forum's Statute of Frauds on grounds of "local public policy" alone. If, however, forsaking the conventional system of choice-of-law rules, we seek our solution in construction or interpretation of the laws of the respective states, in an effort to determine the governmental policies expressed in them and the scope of each state's interest in the application of its policy, we move policy from the status of a disfavored, last-ditch device for escaping some of the most disagreeable effects of the system to a front-line instrument of analysis. In this light, Ehrenzweig can hardly find legitimate support in Lorenzen for his rather remarkable reference to "the demise of the anti-fraud policy in both domestic and conflicts cases."³⁰ The Statute of Frauds in some form is, I believe, in force in every state of the Union,³¹ and some temerity is required to say that it does not express an anti-fraud policy of some sort.³²

²⁷ LORENZEN at 351.

²⁸ EHRENZWEIG at 472 n. 10.

²⁹ LORENZEN at 351. For a more revealing formulation, see *McGirl v. Brewer*, 132 Ore. at 445, 285 Pac. 208, 313 (1930), discussed in *CURRIE* at 423; "The phrase 'public policy' is a term which seems difficult of precise definition. Mr. Greenwood, in his work on public policy, at page 46 thereof, has this to say about the expression: 'But when a contract is valid under the public policy of the state where made, it will be enforced in another state, although the same would by the statute laws of the latter state be void, unless its enforcement would exhibit to the citizens of the state an example pernicious and detestable.'"

³⁰ EHRENZWEIG at 472.

³¹ *Cf.* 2 CORBIN at 66.

³² The strongest support for Ehrenzweig's thesis is perhaps to be found in HEILMAN, *THE CONFLICT OF LAWS AND THE STATUTE OF FRAUDS* (1961), which Ehrenzweig cites only once in this narrow context (EHRENZWEIG at 470-71 n. 1), and then only as generally supporting the thesis. Heilman was a disciple of Corbin and, like Corbin, acknowledges his debt to Lorenzen and Cook. Ehrenzweig's slight reliance on this book, coupled with the pressure of time and space limitations, precludes a separate analysis here of Heilman's thesis.

I begin with no such distinguished, though qualified, backing, though I do not claim originality for my hypothesis and do expect to find most of the cases at least consistent with it. I do begin with an abiding conviction that the common-law tradition is fundamentally one of dedication to common sense; and that, while courts sometimes do rather silly things—chiefly under the influence of academic theorists—they will not lightly nullify policies clearly expressed in legislation, nor often arrive at results that are capriciously discriminatory, especially when the discrimination is against local people.

I

THE ANCESTRAL CASE: *LEROUX V. BROWN*:
SUBSTANCE VERSUS PROCEDURE: LITERALISM

Clearly Ehrenzweig can derive no comfort from the “ill-famed”³³ but mischievously influential decision in the leading English case of *Leroux v. Brown*,³⁴ and he claims none.³⁵ His treatment of it, however, is oddly at variance with that of Lorenzen, on whom he so strongly relies. “Obviously, [the English Statute of Frauds] originally demanded its application to both domestic and foreign contracts in view of its policy which was directed against perjury and fraud.”³⁶ I agree with Lorenzen that the anti-fraud policy was probably designed for the protection of alleged promisors, not of courts; accordingly, it never “demanded” application to actions in English courts involving transactions abroad between people in whom England had no interest. Ehrenzweig does deplore, as both Lorenzen and I do, the perverse literalism of the Court of Common Pleas, and also that court’s emplacement of the notion that, on the basis of literalism or otherwise, the line of classification between substance and procedure is decisive.³⁷ Yet he finds a peculiar kind of personal satisfaction in the decision: had the court faithfully interpreted the anti-fraud policy of the statute (as Ehrenzweig interprets it), the decision “would have foreclosed that express recognition of the Rule of Validation [sic], which is now quickly becoming necessary in view of the demise of the anti-fraud policy in both domestic and conflicts cases.”³⁸ I am almost tempted to terminate my discussion at this point. I have already remarked that Ehrenzweig has no warrant for signing a death certificate for the anti-fraud policy; and his admission

³³ EHRENZWEIG at 472, quoting Rabel.

³⁴ 12 C.B. 801, 138 Eng. Rep. 1119 (C.P. 1852).

³⁵ EHRENZWEIG, note 33, *supra*.

³⁶ EHRENZWEIG at 471.

³⁷ EHRENZWEIG at 471-72.

³⁸ EHRENZWEIG at 472.

(or assertion) that *Leroux v. Brown* was in its rationale (though not in result) a subversion of the original policy of the statute, without which the "Rule of Validation" would be foreclosed, sounds like the death knell of the "Rule of Validation" rather than of the anti-fraud policy.³⁹

Such is my own dislike of the crass literalism and the progeny of *Leroux v. Brown* that I almost disdain to seek any support in it for my thesis. It must be noted, however, that the decision not only effectuated any judicial-administration policy that might be attributed to the Statute, but also effectuated the unquestioned personal protective policy for the benefit of an Englishman transacting business with another Englishman residing in France. Resort to the continental theory of the time, according to Ehrenzweig, might have validated the contract by reference to the law of the place of contracting or of performance, or to the "intention of the parties."⁴⁰ That would have subverted any policy that could reasonably be attributed to the Statute. So would a "Rule of Validation." The fact that the decision may be said to have undermined a policy of *France* designed to vindicate the reasonable expectations of its residents including British subjects) does not disturb me. Any other result, to be acceptable to me, must be the product of a *Bernkrant* type of operation:⁴¹ the court might have recognized the protective policy of the Statute, but, in deference to the presumed contrary interest of France, might have declined to assert

³⁹ Corbin also took a peculiar view of *Leroux v. Brown*. After saying that "in the interests of justice and of commerce, the contrary should have been held," 2 CORBIN at 67-68, and characterizing the reasoning as "mere verbalism," he concluded that the reasoning is further vitiated by "the more important fact that the true basis for decision is the prevailing business mores and the commercial interests of Englishmen." *Id.* at 68. I assume he did not mean that such was the true basis for *this* decision, for that would be nonsense, and Corbin did not, to my knowledge, write nonsense. I assume he meant that such *ought* to have been the basis of decision, and that it would have produced the contrary result. Still the comment is remarkable. How did Corbin determine the prevailing business mores in England and/or France circa 1852? And is not an Act of Parliament, however dated, a relevant consideration in determining the commercial interests of Englishmen in the matter of judicial enforcement of alleged oral promises?

⁴⁰ EHRENZWEIG at 471. If the question is, as it usually (though not always) is in statute-of-frauds cases, whether any promise has been made at all, how can the "intention of the parties" be a relevant consideration?

⁴¹ See *Bernkrant v. Fowler*, 55 Cal.2d 588, 12 Cal.Rptr. 266, 36 P.2d 906 (1961). As I construe that case the court said in effect: Our Statute of Frauds expresses a policy for the protection of decedents' estates. We would be constitutionally justified in applying that policy to deny this claim against the estate of a local domiciliary; but in the light of the sister state's evident policy of vindicating the reasonable expectations of its people, in the circumstances of this case we shall not attribute to our legislature an intention that the Statute be applied to invalidate the contract. If we are wrong the legislature can correct us.

If, in the subsequent course of this discussion, I use some such expression as "to perform a *Bernkrant*," this is the technique to which I shall be referring.

for England an interest in the application of that policy in the circumstances of the case. That kind of operation would have been rather difficult on those facts, however, and in any event the court said nothing remotely resembling what I have just suggested it might have said. In short, everything about the case except the result is indefensible.⁴²

II

THE "RULE OF VALIDATION"

A. *Lip Service to Official Doctrine and the Quest for Just Results by Resort to Precarious Devices*

"Pending . . . [express recognition of the 'Rule of Validation' [sic]], courts, while paying lip service to official doctrine, have been compelled to seek just results by such precarious devices as . . ."⁴³ those to be listed immediately below:

1. "[A]rbitrary (primary or secondary) characterizations. . ."

The cases cited in the note following this statement will be individually considered, care being taken to note any qualification appended to the citation:

a. *Global Commerce Corp. v. Clark-Babbitt Indus., Inc.*⁴⁴ ("best practical result").⁴⁵ In this action by a Mexican corporation against a New York corporation for breach of a contract to sell copra, the New York Statute of Frauds being pleaded, the court did indeed hold the contract valid and enforceable, but hardly by paying "lip service" to "official doctrine," unless Ehrenzweig means that such doctrine is embodied in modern decisions of the New York courts and in the nascent restatement of the *Restatement*.⁴⁶ I do not see that characterization, primary or secondary, has anything to do with the decision. Applying as he understood it the New York mystique for choice of law in contract cases, Judge Learned Hand found the validating Mexican law applicable because (1) the transaction had its "center of gravity" in Mexico; (2) Mexico had the "most signifi-

⁴² As if to discredit the authority of *Leroux v. Brown*, Ehrenzweig cites at this point (p. 471, n. 6) *Reade v. Lamb*, 6 Exch. 130, 155 Eng. Rep. 483 (1851), and *Carrington v. Roots*, 2 M.&W. 248, 150 Eng. Rep. 748 (Exch. 1837). These are not conflicts cases, but merely hold that for certain purposes in the domestic context the difference between the language used in §§ 4 and 17 of the Statute is not significant. That the difference should have no significance for conflicts purposes I, of course, not only concede but stoutly maintain.

⁴³ EHRENZWEIG at 472. All the cases under this subhead A are cited in *id.* at 472 nn. 11-16.

⁴⁴ 239 F.2d 716 (2d Cir. 1956).

⁴⁵ The italics here and in similar instances indicate that the language, treated as part of my caption, is taken from EHRENZWEIG.

⁴⁶ RESTATEMENT (SECOND), CONFLICT OF LAWS, § 332b (Tent. Draft No. 6 (1960)).

cant contacts"; (3) Mexico was most intimately concerned with the outcome; and (4) application of Mexican law produced the "best practical result." I do not begrudge Ehrenzweig any comfort he may find in the decision. Because of its subordination of New York's apparent interest in protecting New York enterprises it is inconsistent with my version of governmental-interest analysis, unless a *Bernkrant* operation⁴⁷ can be justified. I derive little comfort from the vague way in which the early-modern New York cases groped toward something like governmental-interest analysis.

b. *Renault v. L. N. Renault & Sons*.⁴⁸ This case upholds an informal contract in an interstate situation, but hardly by tricky characterization as a device to evade official doctrine. As I read the case there was simply no conflict. The plaintiff, a resident of Pennsylvania, as widow and executrix of a sometime president of the defendant New Jersey corporation, sought to recover on a 27-year-old unsealed demand note issued by the corporation to the decedent, its president at the time. It is clear that at one time the claim was time-barred, so that the plaintiff's only reliance was on a new promise, express or implied. Two statutes requiring a writing were involved: the New Jersey statute of limitations required a writing for a promise to pay a barred debt; and the New Jersey Statute of Frauds required a writing for a contract not to be performed within a year. The court *assumed*, without deciding, that New Jersey was the place of contracting and that therefore both that state's statute of limitations (!) and its Statute of Frauds were controlling. Even so, it reversed the lower court's judgment for the defendant and remanded for a jury trial because (1) according to the plain terms of the New Jersey statute of limitations, the requirement of a writing did not alter the effect of part payment as tolling the statute, and the jury might find that certain payments that had been made were in partial payment of the note; and (2) the New Jersey Statute of Frauds, according to New Jersey authorities, applied only where neither party was to perform within a year, and moreover did not apply, though performance *might* have been had within a year. This, of course, is familiar doctrine. There is no suggestion that Pennsylvania law in any way presented an obstacle to the enforcement of the promise. There being no conflict, I cannot see how the case supports Ehrenzweig's strictures on the methods employed by the courts to reach just results; nor can I comment on its consistency with governmental-interest analysis.

c. *Marie v. Garrison*.⁴⁹ ("A body of literature has grown up

⁴⁷ See note 41, *supra*.

⁴⁸ 188 F.2d 317 (3d Cir. 1951).

⁴⁹ 13 Abb.N.Cas. 210 (N.Y.Super.Ct. 1883).

about [this case], which applied two characterizations.") This undeservedly famous case has been grossly oversimplified by almost everyone who, to my knowledge, has ever commented on it, including Ehrenzweig and me.⁵⁰ This is understandable: the case is hardly worth reading and well-nigh unreadable. I doubt that Ehrenzweig or anyone else has read it in full in this century;⁵¹ even for this occasion I have been unable to force myself to read it line by line. In the past I (for one) have relied on casebook condensations.⁵² This negligence is understandable if not pardonable. The decision is not only that of a trial court; the opinion is by a referee. It consumes 123 to 130 pages in the reports, depending on whether preliminary matter is counted. The opinion is meticulous and learned to the point of tedium and pedantry. This may not be surprising in view of the fact that the referee, one Dwight, was a law professor: indeed, he was the famous Theodore Dwight, founder of the Columbia Law School.⁵³

We all think of the case as presenting the singular paradox that a contract made in Missouri and sued on in New York was held enforceable despite noncompliance with the statute of either state, although the two statutes were similar. The conventional explanation lies in the fact that the excessively learned referee, as Ehrenzweig suggests, characterized the Missouri statute as procedural, and hence inapplicable to actions in New York, and the New York statute as substantive, and hence inapplicable to contracts made in Missouri. This the referee did in fact do, primarily on familiar literal grounds;⁵⁴ nonetheless, this explanation of the seeming

⁵⁰ CURRIE at 153 n. 80.

⁵¹ When I said this in my oral presentation at Chicago, only one person came forward to correct the statement. Professor Joseph Laufer, of the University of Buffalo, said that he had once struggled through the whole opinion. Professor Arthur von Mehren, of Harvard, has since told me that in preparing his recent casebook he read *almost* all of it.

⁵² *E.g.*, CHEATHAM, GRISWOLD, REESE, AND ROSENBERG, *CASES AND MATERIALS ON THE CONFLICT OF LAWS* 423 (5th ed. 1964).

⁵³ The referee is identified as Prof. Dwight in *Hotel Woodward Co. v. Ford Motor Co.*, 258 Fed. 322, 328 (2d Cir. 1919) (note 128, *infra*). The Centennial History of Columbia Law School recounts Dwight's participation in the case and cites prior and subsequent events in the litigation, including a reference to an invaluable (if one is interested) account of the case by Tremain in SWIFT (ed.), *A TRIBUTE TO THEODORE WOOLSEY [sic] DWIGHT . . . PRESENTED ON HIS RESIGNATION FROM THE WARDENSHIP OF THE COLUMBIA COLLEGE LAW SCHOOL* 26-27 (1891). See GOEBEL (ed.), *A HISTORY OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY* 40-41 (1955).

⁵⁴ In justice to the referee, it should be recorded that he thought *Leroux v. Brown* a harsh decision, productive of commercial inconvenience, and had more pragmatic reasons for being disinclined to hold the New York Statute applicable in the choice-of-law sense (as distinguished from its applicability to a comparable domestic transaction). See 13 Abb.N.C. at 248-70, esp. at 250, 258-59. Even more charitable to the referee is this more nearly contemporary comment: "The judicial repose, pungent reasoning, and fearless conclusions exhibited by him in his treatment of the issues in this notable cause, and the relentless application through a web of legal intricacies of the fundamental principles of law and equity, help to make up a severe standard

paradox is considerably less than a half truth. If one is willing to suffer the flagellating experience of reading the whole case, however, one finds at least one alternative ground of decision, and that is usually enough to prompt Ehrenzweig to distinguish a case that reads against his thesis; perhaps it should also serve to distinguish a case that seems to lend him support. To simplify the case, as one inevitably must, one Garrison, the holder of a third mortgage securing dubious railroad bonds, wrote a group of stockholders a *letter* to the effect that if they would desist from their opposition to his foreclosure suit, and if he should become the purchaser at the sale, he would convey "the railroad" to a new corporation in which the promisees were to have the stock and he was to have the lion's share of the bonds. This letter is treated as a contract made and to be performed in Missouri. There was a subsequent oral agreement, made in New York but to be performed in Missouri, treated as an attempted modification of the original letter. The stockholders did their part but Garrison, having bought the railroad at the foreclosure sale, decided to enjoy the fruits of the deal while repudiating his promise under cover of the New York Statute of Frauds.⁵⁵

Putting aside for the moment the attempted oral modification, one may wonder what the problem was so far as the Statute of Frauds was concerned. Remember that the original promise was contained in a letter signed by the promisor himself. The catch was that, although this would seem to be a memorandum sufficient to satisfy the requirement of any halfway reasonable statute, the New York law required that the writing express the consideration. As any man of common sense would be, the referee was inclined to think that the very detailed letter did express the consideration; at least it was a close question; but in the end, for rather technical reasons, he decided he was "not prepared to hold that the consideration of the letter is [sufficiently] expressed in it."⁵⁶ However, he then proceeded to hold that, purely as a matter of interpretation of the New York statute in its domestic context, it did not apply to this promise because (in so far as it concerned land) it was (1) not a contract for a *sale* of anything, and (2) that it was not a contract for a sale of *land* nor of any interest therein.⁵⁷ As to the Missouri statute, not only was it cast in

of judicial industry and of learning, that may fairly be contrasted rather than compared with many of the lazy compilations currently reported in the books to-day as 'opinions.'" Tremain, in SWIFFER'S TRIBUTE, supra note 53, at 27.

⁵⁵ Thus far, at least, the facts are more succinctly and intelligibly stated in *Marie v. Garrison*, 83 N.Y. 14 (1880), the same case at an earlier stage.

⁵⁶ 13 Abb.N.C. at 276.

⁵⁷ *Id.* at 271, 272-74. These holdings are rather obscure, and I do not undertake to defend them. I do note and emphasize the fact that the referee held, wholly apart from any

“procedural” terms, but it did not contain the unusual New York requirement that the memorandum express the consideration.⁵⁸ As for the subsequent oral agreement, the referee was firm in his conclusion that it was an attempted modification of the original letter. This raised the question whether a contract, if within the Statute of Frauds, may be orally modified; but the referee decided that, even if the parol modification was voided by the New York statute, the result was merely to leave the original written promise in effect, and the plaintiffs were content to recover on either basis.⁵⁹ Finally, the referee held that, even if one statute or the other should be construed as barring an action at law, the plaintiffs were entitled to recover in equity, the defendant having retained the fruits of the plaintiffs’ performance.⁶⁰

In summary, (1) while the referee did hold that neither statute was applicable because that of Missouri, where the contract was made and was to be performed, was procedural only, and that of New York, where the action was brought, was substantive only, he also held that (2) there was no conflict, because there was a written memorandum satisfying any requirement under the Missouri statute (if it were applicable on any theory), and neither statute was applicable in the domestic sense because under neither was this a contract for the sale of an interest in land; and he also held that (3) if the oral modification was voided by New York law the original memorandum remained in effect, giving the plaintiffs all they needed in order to recover; and he also held that (4) in any event, if either statute barred recovery at law on the express promise, plaintiffs were entitled to relief in equity on the theory of unjust enrichment.

This ought to be enough, but a word more must be added. If there was ever a case justifying a rule of alternative reference such as Lorenzen advocated,⁶¹ this is surely it. There was a detailed memorandum in writing signed by the party sought to be charged—by himself, not by his agent. It came very close even to spelling out the consideration as required by the New York statute. The only defect, if the New York statute had been ap-

choice-of-law problem, that the New York statute would not have invalidated this contract even if it had been a transaction wholly domestic to New York.

⁵⁸ *Id.* at 279.

⁵⁹ *Id.* at 298-99. Also in connection with the alleged oral modification the referee, treating the agreement as governed by Missouri law as the place of performance, held that under the Missouri statute the agreement was likewise not a contract for the sale of an interest in land. *Id.* at 304-09. In so far as the agreement related to rolling stock and other personalty, the referee had no difficulty in holding that neither statute applied to invalidate the contract.

⁶⁰ *Id.* at 309.

⁶¹ *Supra* notes 21-23 and related text.

plicable, would have been the failure to express the consideration with sufficient specificity. On any reasonable view the protective policies of both statutes were satisfied. The statutes, if applicable, varied only in minor detail. It must be evident, also, that the policy underlying the requirement that the writing express the consideration differs somewhat from the protective policy of the typical Statute of Frauds. To be sure, the legislature may feel that one man may defraud another as readily by falsely swearing that the other promised to sell him Blackacre for a pittance as by falsely swearing that he promised to sell him Blackacre at all; but when the promise itself is not only in writing but admitted, and when the consideration as deducible from the writing and from parol evidence is clearly adequate and fair—as it certainly was to Garrison, of all people—how could any court in its senses refuse enforcement, whether the case is interstate or domestic?⁶²

2. “[A]ssumption of renvoi which, if anywhere, is certainly inadmissible in the law of contracts. . . .” For this point Ehrenzweig cites no cases; thus, according to my plan, there is nothing for me to discuss. Besides, this is no time to talk about renvoi.

3. “[R]esort to the dangerous cure-all of public policy. . . .” *Rubin v. Irving Trust Co.*⁶³ My organization of this paper, which is designed to track Ehrenzweig’s exact route, becomes confusing at times; but try to remember that Ehrenzweig is saying that, pending express recognition of the “Rule of Validation,” courts, while paying lip service to official doctrine that would require invalidation, have been compelled to seek just results by “precarious devices”—in this case by resort to the dangerous cure-all of public policy. That seems to mean that in the *Rubin* case the court applied the notion of local public policy to validate an agreement that would have been invalid according to “official doctrine.” Since the court did nothing of the sort, Ehrenzweig must have been thinking of something else; indeed, I feel sure he was thinking of something else, for otherwise his subsequent reference to *Rubin* as a deviation from the “Rule of Validation,” explainable on the ground that the parties contracted outside the

⁶² I am constrained to add that, even on the conventional, or casebook, interpretation of the decision, the paradox of a valid contract that does not comply with the Statute of Frauds of either state is not altogether irrational, nor even necessarily the product of a devious design to evade the statute. Conceivably the statute of State *X* might be construed as expressing only a judicial-administration policy, while the statute of State *F* might be construed as expressing only a party-protective policy. Then, if the action is brought in State *F*, and if that state has no interest in protecting the defendant, and no obligation under the Constitution to do so, non-compliance with either statute should not result in invalidation.

⁶³ 305 N.Y. 288, 113 N.E.2d 424 (1953).

state for the very purpose of evading a strong policy of the forum,⁶⁴ would be flatly inconsistent with this citation.

This was an action in New York to enforce specific performance of a contract not to modify a will, the plaintiff having performed his part and the decedent having died domiciled in New York. The alleged agreement had been made in Florida, by whose law it was valid. The New York Personal Property Law, however, required a writing for a contract to bequeath property or to make a testamentary disposition of any kind. Not unreasonably, the New York court held this statute broad enough to encompass agreements not to change an existing will; it therefore affirmed a summary judgment for the defendant. The court found it unnecessary to decide whether the New York statute was substantive or procedural: it simply expressed a deeply rooted policy of New York for the protection of decedents' estates—at least those of New York domiciliaries. Citing *Emery v. Burbank*,⁶⁵ the court intimated that the statute might be construed as both substantive and procedural—that is, as invalidating any contract reachable by New York law at its inception, and preventing all suits in New York courts on oral promises to make or not make a will, wherever made. I find in the decision strong support for governmental-interest analysis. New York's policy and its interest in applying it are discussed in detail: The difficulty of refuting such claims after the death of the alleged promisor is enormous; such claims tend to hamper expeditious and orderly administration of estates; the state is deeply concerned to protect the decedent's testamentary privilege and with the welfare of his dependents and creditors. "Strike" suits based on such alleged promises are often brought to force settlement as the price of avoidance of delay in distribution of the assets to the true beneficiaries. The court even discusses the problem in terms of the governmental-interest analysis employed in the cases dealing with the problem of due process in the choice of law.⁶⁶ There was, in fact, no real conflict: Florida's only connection with the matter was that the alleged promise was made there (the residence of the plaintiff, brother of the decedent, does not appear; but presumably it was not Florida). At all events, the court did not resort to "precarious devices" in order to validate a contract: it vehemently and (I think) properly invalidated the contract.

4. "[A]rbitrary adjustments of the general rules of localization. . . ." *Specialties Development Corp. v. C-O Two Fire Equip. Co.*⁶⁷ This case

⁶⁴ EHRENZWEIG at 474 n. 32.

⁶⁵ 163 Mass. 326, 39 N.E. 1026 (1895), discussed *infra* in text at note 277.

⁶⁶ 305 N.Y. at 304, 113 N.E.2d at 428.

⁶⁷ 207 F.2d 753 (3d Cir. 1953).

does not involve the Statute of Frauds at all, nor does it even deal with any question of the validity of contracts. It therefore seems irrelevant to a discussion of the "Rule of Validation." This was an action by the licensor of a patent to recover the royalties unpaid by the licensee. Defense, that the licensor had failed to prosecute infringers in a certain market area as he had bound himself to do. *Held*, this was a material breach, giving the licensee the option to terminate the contract and sue for damages or to treat the contract as still in force. If he elects, as this defendant did, to continue to operate under the license he must pay royalties. Since this was a diversity case arising in New Jersey the court was required to follow New Jersey choice-of-law rules; New Jersey would apply the law of New York as the place of contracting. It is at this point that Ehrenzweig quotes from the opinion: "The fact that . . . copies were taken later to California, for the signature of an attesting witness and the affixing of the corporation seal, does not change the conclusion that the contract was a New York transaction."⁶⁸ It does not appear that the result would have been different if the contract had been treated as made in California. The court's conclusion as to the effect of the breach under New York law is based mainly on *Williston*. Why drag in an irrelevant case, involving no problem of validity and no apparent conflict of any kind, to accuse the courts of using "precarious devices" to reach "just results" because we are not blessed with a recognized "Rule of Validation"? And wherein, for that matter, did the "arbitrary adjustment of the general rules of localization" consist?

5. ". . . [A]nd even assumption of a 'waiver' of invalidating laws . . . (French law)." *Mandelbaum v. Silberfeld*.⁶⁹ Pass the fact that this was a decision by an inferior court. One reads the case in vain to discover any remarkable "waiver" doctrine resorted to in order to validate a contract invalid according to official doctrine. This was an action on a contract of employment between two parties residing in France when and where the alleged agreement was made. New York law did not require a writing; French law did, though it also permitted oral testimony upon "commencement of written proof"—upon the production of any writing tending to make the alleged fact probable. Expert testimony was to the effect that the French law was procedural only. Hence, though the New York court considered that the law of France, as the place of contracting and performance, was applicable, it did not apply the French procedural statute. Quite incidentally the concept of "waiver" enters the case when the court points out that under French law the defendant may lose the benefit of

⁶⁸ See EHRENZWEIG at 472 n. 14.

⁶⁹ 77 N.Y.S.2d 465 (City Ct. 1944).

the statute by failing to raise the point or by taking steps in the litigation inconsistent with an intention to rely on the defense. Is this any more remarkable than the familiar doctrine that the defense of the Statute of Frauds must ordinarily be pleaded? The case presents no real conflict if we believe the expert testimony and interpret it as meaning that the French policy is one of regulating the administration of justice in French courts, nor if we believe, as seems possible, that the defendant had in the New York court satisfied the requirements of the French statute by "commencement of written proof," or by failing properly to invoke the French statute, or by taking steps in the litigation inconsistent with an intention to rely on the statute as a defense. Finally, and significantly, the court said that in view of its decision there was no occasion to determine whether the contract was valid under the French Code of Commerce, broadly permitting oral proof.

A stronger case from Ehrenzweig's point of view would have been the French decision cited by the court⁷⁰ enforcing an oral contract made in England, where it was valid, though it did not comply with the French requirement of a writing. This may indicate that the French do not consider their statute requiring the formality of a writing an inflexible rule of judicial administration, and so might tend to support a statement that French courts exert themselves to bend their laws in an effort to achieve validation and thus accomplish "just" results. One hopes that the results are just in fact.

6. "... [A]nd even assumption of a ... 'moral impossibility' of ... invocation [of invalidating laws]."

a. *Lenn v. Riche*.⁷¹ Again I must come to the aid of my confusing scheme of organization. Ehrenzweig is unquestionably saying here that, deprived of the boon of a "Rule of Validation," courts go into contortions to reach just results by validating contracts invalid according to the official doctrine—this time by resort to the notion that *invocation of the invalidating laws* is a "moral impossibility." The case does not even remotely support any such suggestion. The plaintiff's uncle had treated her almost as a daughter, her father having died. Among other things he had given her valuable objects of art. In 1935 (he then living in France, she in Italy) he suggested that she turn these over to him for safekeeping, promising to return them; this she did. In 1940, both parties then residing in Paris, he told her he wanted to store her property along with his in the vault of a Paris bank. This also was done. He was sent to a concentration camp and

⁷⁰ 77 N.Y.S.2d at 469.

⁷¹ 331 Mass. 104, 117 N.E.2d 129 (1954).

she never saw him again. His widow remarried and, with her husband (the defendant administrator in Massachusetts), removed the property from the vault, failing to account for the plaintiff's. The court held that French law was controlling. Although some difficulty was encountered on account of the lack of expert testimony, the court found that under French law there had been a loan for use, or *commandatum*. For such a transaction involving objects of such value French law required a writing, and the court assumed this to be "substantive" rather than "procedural." Thus the contract was apparently invalid under the law of the place of contracting and performance, though presumably valid under the law of the forum. But the French Code contained an exception to the requirement of a written instrument whenever "it has not been possible for the creditor to procure written proof of the obligation."⁷² Impossibility need not be absolute in the physical sense but may be "moral impossibility":

"It would seem that a moral impossibility exists [according to French authorities] whenever it would be inconsistent with established custom or social convention or even good manners or when it would be seriously embarrassing to ask for an instrument in writing. The existence of a close and intimate relationship . . . has been taken into account in determining whether it was morally possible to obtain an instrument in writing. In view of the seeming great liberality of French law in discovering moral impossibility, we think that the jury could find the existence of such an intimate relationship between [the uncle] and the plaintiff that she could not reasonably be expected to insist upon receiving a legal document from him when he offered to receive and care for her property, and that a practical or moral impossibility existed."⁷³

In short, there was no conflict. The contract was valid under both French and Massachusetts law. There is no reference whatever to the "moral impossibility" of invoking invalidating laws. I can think of nothing more to say.⁷⁴

With his citation of *Lenn v. Riche* Ehrenzweig couples a reference to *In re Bulova's Estate*,⁷⁵ "applying New York law to a Swiss consular contract between New York residents 'for the simple reason that contemplation of Swiss law as applicable to the operation of a New York statute upon

⁷² 331 Mass. at 110, 117 N.E.2d at 133.

⁷³ *Id.* at 110-11.

⁷⁴ This case is familiar to users of casebooks because of its holding that the plaintiff was entitled to sue the uncle's widow's husband in Massachusetts as ancillary administrator with the will annexed, and was not required to resort to the courts of France to sue the "universal legatee."

⁷⁵ 216 N.Y.S.2d 26 (Surr.Ct.), aff'd 220 N.Y.S.2d 541 (App.Div. 1961).

New York property would have been an absurdity.’⁷⁶ The purpose of this reference is hard to discern. Husband and wife, domiciled in New York, executed a property settlement agreement in Switzerland; this they did with great ceremony before a United States consul, thus complying with the formalities required by New York law for a waiver or release by the wife of her right to elect to take against her husband’s will as in case of intestacy. Before the surrogate, from whose opinion Ehrenzweig quotes, there was no issue as to the adequacy of the formalities. Apropos of an argument that the alleged abandonment of the wife by the husband constituted a breach and a failure of consideration (and a rather obscure argument likewise unrelated to formalities), the surrogate said: “The assertions that Swiss law is involved in *either the interpretation or the operation* of this agreement are not deserving of serious consideration.”⁷⁷ He then continued, in the same context, to make the remark quoted by Ehrenzweig, to the effect that in view of the domicile of the parties in New York and the subject of the contract the suggestion that they contracted in contemplation of Swiss law was an absurdity.

Thus far there appears to be no question of formal validity and no conflict. On appeal, however, the wife asserted fraud in the inducement and noncompliance with formalities required by Swiss law. As to fraud, summary judgment was ordered against the widow. But Swiss law required that a post-nuptial agreement be signed by two witnesses, approved by a public officer, and filed by him. This had not been done. Justice Breitell, a knowledgeable man in matters of conflict of laws, rejected the generalization that formalities are governed by the law of the place of contracting. According to established rules, he thought, it could be held that this Swiss contract was governed by the law of New York as that of the domicile of the parties *except* with respect to Swiss real estate; as to that, Swiss law governed, *invalidating* the agreement. As to all other property, including movables situated in Switzerland, New York law governed, giving validity. In sum, Swiss law was applied to *invalidate* the contract as to Swiss land, and New York law was applied to validate it as to all other property. The decision is consistent with governmental-interest analysis if we can justify a *Bernkrant* operation deferring to the interest of Switzerland in regulating title to land within its borders. Justice Brietel’s opinion is notable in that it discusses New York’s “grouping of contacts” formula in terms of the impact of the decision on *state policy*.

Ehrenzweig concludes this portion of his discussion by citing the *Rubin* case again, this time for the proposition that “courts, by these and

⁷⁶ EHRENZWEIG at 472 n. 16.

⁷⁷ 216 N.Y.S.2d at 28-29.

other formulas have done 'little more than restate[d] the problem.' . . ."⁷⁸ (Emphasis added.)

I conclude by noting that what the court said in *Rubin* was that "*the characterization of the problem as substantive or procedural* was [formerly] recognized as being determinative of the problem. But the principle, concerned as it is with nebulous legal conclusions, does little more than restate the problem."⁷⁹ (Emphasis added.)

III

THE INAPPOSITE CASES

Before embarking on his effort to demonstrate that "If the traditional language is disregarded and the courts' actual holdings are analyzed in terms of their results, judicial practice can be fairly said to have created a new rule: the Rule of Validation [sic],"⁸⁰ Ehrenzweig cites certain cases to be eliminated from the analysis for the reasons to be enumerated below. Since Ehrenzweig claims no support for his thesis in these cases, I am strongly tempted to pass them over and get on with the argument; but for several reasons I have resisted the temptation. For one thing, discussion of the cases that Ehrenzweig expressly disclaims as support will give me the opportunity to agree with him from time to time; for another, despite his "elimination" of the cases from the analysis, he subsequently relies on some of them; for another, his treatment of some of the eliminated cases throws interesting light on his methods of case analysis.

A. "*Cases that, although purporting to apply, and often cited to support traditional conflicts rules, do not involve a conflict between different laws.*"

1. *Continental Collieries, Inc. v. Shober*.⁸¹ I should like to agree, and for present purposes do agree, that this case involves no true conflict, though it is not possible to be certain of this without further research into the laws of Pennsylvania and Ohio. Given an alleged oral contract to assign a contract for the exclusive right to sell the product of coal mines, the federal court in Pennsylvania looks first to the law of Ohio (place of con-

⁷⁸ EHRENZWEIG at 472. The *Rubin* case is cited in note 63, *supra*.

⁷⁹ 305 N.Y. at 298, 113 N.E.2d at 427. Coupled with this citation of *Rubin* is a reference to *In re Rosenburger's Estate*, 131 N.Y.S.2d (Surr. 1954) ("a candid application of the intended validating law . . . (Netherlands)"), EHRENZWEIG at 472 n. 17. Since this case is cited as supporting the "Rule of Validation" its consideration will be deferred to a later section of this paper.

⁸⁰ EHRENZWEIG at 472. The cases to be discussed in this part III are all cited in *id.*, n. 18.

⁸¹ 130 F.2d 631 (3d Cir. 1942).

tracting). Finding the Statute of Frauds of that state "procedural," the court reverts to the Sales Act as in force in Pennsylvania and finds that law also procedural, and hence controlling. The issues appear to be: (1) whether this contract to assign an exclusive contract for a sales agency is a contract for the sale of goods within the Pennsylvania statute (*held*: it is, but no indication of the answer under Ohio law); and (2) whether the memorandum signed by the purported agent of the party to be charged (assignee) is sufficient, since the signer may also have been an assignor and so incompetent to act as agent for the assignee. Result: No dismissal; the plaintiff is given a chance to prove that the signer was not disqualified to act as agent for the defendant. It is true that there is no indication of any difference between the laws of the states concerned, yet Ehrenzweig might have been well advised not to exclude the case. The end result is to hold Pennsylvania law applicable as the procedural law of the forum, which may or may not result in validity. Without further information it is not possible to evaluate the case in terms of governmental interests, unless one is prepared to take seriously the suggestion that the Pennsylvania statute states a policy of judicial administration always binding on a Pennsylvania court (as well as a federal court in Pennsylvania). Quite possibly this is a case for validation under an alternative reference rule, since there was a memorandum signed by one purporting to act as agent for the party sought to be charged, though there may possibly be minor differences between the two laws as to the authority or competency of the agent.

2. *Hamilton v. Glassell*.⁸² I quite agree. Both Louisiana and Texas regarded contracts for oil and gas leases as within the Statute of Frauds; and though there was here a memorandum signed by the party sought to be charged, it recited only his agreement to drill wells, not the alleged consideration (the promise in suit) involving leases to him. On literal grounds the federal court in Louisiana dismissed the Texas statute as procedural, but applied the Louisiana statute (strongly worded to affect both substance and procedure) to defeat recovery. The result is reached the more readily because it would be the same in the Texas court. The plaintiff was a citizen of Texas and the defendant a citizen of Louisiana. The Louisiana statute was applied to invalidate the contract and protect the local defendant, serving both asserted Louisiana interests (judicial-administrative and party-protective), without impairment of any interest of Texas.

3. *Macias v. Klein*.⁸³ I am inclined to agree, especially for the rea-

⁸² 57 F.2d 1032 (5th Cir. 1932).

⁸³ 106 F.Supp. 107 (W.D.Pa. 1952), *rev'd* "on other grounds," 203 F.2d 205 (3d Cir. 1953), *cert. denied*, 346 U.S. 827, 74 Sup.Ct. 47, 98 L.Ed. 352 (1953).

son that no contrary law was called to the attention of the court. But there is more to the case than this. We begin with an oral contract for the sale of goods, validated by part payment; then comes an alleged interstate telephone conversation purporting to increase quantity and price. Not only was no contrary law made to appear; the place of contracting itself did not appear, since the acceptor may have been speaking from any one of three states (and under the weird theory that the place of contracting is that where the words of acceptance are spoken into the telephone, one must know where the acceptor was). In the district court the Pennsylvania Statute of Frauds was treated as procedural and controlling in any event; but that statute was held inapplicable (as a matter of domestic interpretation) on the ground that a contract, once taken out of the statute by part payment, needs no further formalities for modification. In the court of appeals, says Ehrenzweig, this decision was reversed "on other grounds." I would not put it in just that way. At that level it appeared that the plaintiff seller, Macias, placed the modification call from Los Angeles and believed that the buyer's agent, Klein, who spoke the words of acceptance, was in Detroit or Pittsburgh; but the evidence did not establish the fact. Thus we still do not know "where the contract was made" (though it should not have been terribly difficult to find out, from the telephone company's records if necessary, where the call placed in Los Angeles was consummated). Like the district court, the court of appeals treated the Pennsylvania Statute of Frauds as procedural, but reversed on the ground that there was no authority in *any* state for the lower court's domestic construction, permitting informal modification after part payment. It is true that no conflicting law was made to appear. At the same time, the court invalidated the contract under the Pennsylvania Statute of Frauds, holding that statute procedural. The case hardly supports a rule of validation; at least on the assumption that the defendant was a Pennsylvania enterprise, it is consistent with governmental-interest analysis. But probably, as Ehrenzweig says, it should be excluded on the ground that no conflict appears.

4. *Mulroy v. Sessions*.⁸⁴ I entirely agree. The court treated the law of Texas (as the place of contracting), as controlling, but both Texas and New York agreed that a contract to acquire and share an interest in land is not a contract for the sale or lease of an interest in land within the Statute of Frauds. It was generous of Ehrenzweig to exclude this case, validating the oral agreement as it does.

B. "*Also inconclusive are those cases involving alternative grounds for the holding or for the choice of law. . . .*"

⁸⁴ 38 N.Y.S.2d 853 (Sup.Ct. 1942).

1. *Joseph v. Krull Wholesale Drug Co.*⁸⁵ While I am dubious about any general principle that alternative grounds for a decision may be disregarded, here I agree that the ruling on the Statute of Frauds was quite unnecessary to the decision and hence dictum. The defendant, a Pennsylvania enterprise, made an offer of employment to the plaintiff, a resident of New York. He accepted by telephone from New York and commenced work, only to be fired after about six months. Alleging that the contract was for a fixed term ending more than a year after its date, he was met by a plea of the Statute of Frauds. The district court in Pennsylvania, looking to Pennsylvania choice-of-law rules, decided that Pennsylvania would apply the law of the place of contracting⁸⁶—New York!—and, treating the New York statute as substantive, invalidated the agreement. Before doing so, however, it had submitted to the jury a special interrogatory in response to which the jury found that the contract was one terminable at will. If the ruling on the Statute of Frauds had come first it would have been significant; coming as it did after the jury verdict it was quite unnecessary. In addition, there is no suggestion that the Pennsylvania law was different. I claim no support in this case for governmental-interest analysis. New York had no interest in disappointing the expectations (unwarranted, in view of the special verdict) of its resident, unless it was compelled by the Constitution to give foreign promisors the same protection it gave domestic ones. The opinion is highly conceptualistic, exalting the place of contracting, applying *Adams v. Lindsell*⁸⁷ mechanically to contracts by telephone, and disregarding almost entirely considerations of policy.

2. *Marvel v. Marvel.*⁸⁸ Here I must reject Ehrenzweig's suggestion that the case should be laid aside as explainable on the basis of alternative grounds for the decision. The plaintiff, while a resident of Illinois, conveyed Illinois land to his brother. After the plaintiff had moved to Nebraska the brother sold the land, and the plaintiff here claims the proceeds, alleging an oral trust or agency for sale. The defendant brother pleaded (1) the Statute of Frauds and (2) that in any event the plaintiff was indebted to him in such an amount that an accounting would show no balance due the plaintiff. The court held the oral agreement not provable under the Nebraska Statute of Frauds, though conceding that the Illinois Statute might permit its enforcement—and Illinois was both the place of contracting and the situs (strangely enough, there was no reference to the possible sig-

⁸⁵ 147 F.Supp. 250 (E.D.Pa. 1956) *aff'd per curiam*, 245 F.2d 231 (3d Cir. 1957).

⁸⁶ *Cf. Joseph v. Krull Wholesale Drug Co.*, n. 85, *supra*.

⁸⁷ 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

⁸⁸ 70 Neb. 498, 97 N.W. 640 (1903).

nificance of situs). The reasoning was that the Nebraska statute was procedural—and this reasoning was based on the mischievous influence of *Leroux v. Brown*. There were alternative grounds for the decision for the defendant: set-off and laches. Any of the three grounds would have sufficed; but who is to say which of the three is to be disregarded?

As to governmental interests, the decision may be said to have served the dubious interest of Nebraska in protecting its *courts* from perjury; but the interest of Illinois (as of the time of the transaction) in protecting the expectations of its resident promisees is frustrated. Indeed, the most disturbing aspect of the case is that it may be one in which Nebraska, though it may have had no interest whatever in the parties at the time of the transaction (the residence of the defendant brother does not appear; and certainly Nebraska has no interest in the Illinois land), has disrupted the settled right of the parties as they originally existed under the law of the only interested state, and this without any apparent justification in terms of credible Nebraska policy and interest. This is the type of case to which I have referred as raising problems similar to those attending retroactive legislation: settled rights should not be unsettled without strong justification in terms of the urgency of the public interest to be served.⁸⁹ If the Statute of Frauds does indeed embrace a judicial-administration policy, it is difficult for me to conceive that that policy is nearly important enough to justify unsettling settled rights of this sort.

3. *Third Nat'l Bank v. Steel*⁹⁰ (“*involving writing requirements not related to the contract. . .*”). I agree. The statute here involved related to actions for the tort of misrepresentation; and although the court considered decisions on the Statute of Frauds relevant, the decision is beyond the scope of Ehrenzweig’s (and my) subject.

4. *Hooper v. First Exch. Nat'l Bank*⁹¹ (“*competing law . . . not pleaded*”). I agree with Ehrenzweig⁹² and he with me⁹³ that unless a competing foreign law is appropriately brought to the attention of the court the rule of decision is appropriately to be found in the law of the forum. But that is not this case. The plaintiff sued in the district court for Idaho alleging an oral agreement by the defendant to sell land in Washington. He did not seek to enforce the agreement but treated it as void, and sought only restitution of partial payments made. It was the *defendant*, by way of counterclaim, who sought enforcement of the agreement, asking damages

⁸⁹ See Currie, *Full Faith and Credit, Chiefly to Judgments*, 1964 SUP. CT. REV. 89, 91-99.

⁹⁰ 129 Mich. 434, 88 N.W. 1050 (1902).

⁹¹ 53 F.2d 593 (9th Cir. 1931).

⁹² EHRENZWEIG at 360, 367.

⁹³ CURRIE, ch. 1.

for plaintiff's breach of his promise to buy, and it was the *plaintiff* who pleaded the (Washington) Statute of Frauds. The court specifically holds the Washington Statute of Frauds *applicable*, as that of the situs and place of contracting, to void the contract. Hence we have here not a case to be discarded because no competing foreign law was pleaded (though it might possibly be discarded on other grounds if we knew that the Idaho statute was identical with that of Washington); instead we have a case invalidating a contract by invoking a foreign Statute of Frauds, flawing the "Rule of Validation."

As for governmental interests, I have only this to say, but it is a bit of a new twist: Why was not the plaintiff's complaint, setting forth the terms of the oral agreement, a sufficient memorandum to satisfy the statute and bind him? Probably the answer is that in some states, while the memorandum may be executed subsequent to the agreement, it must precede the filing of the action.⁹⁴ But in all conscience this complaint should suffice as a memorandum in any case, domestic or interstate; and for that reason, though not for the sake of an indiscriminate "Rule of Validation," I think the plaintiff's promise should have been enforced—even if Washington law required a pre-action memorandum and Idaho did not—because as to such detail a *rule of alternative reference* is greatly to be desired. The complaint substantially serves any policy that can be credibly attributed to either statute.⁹⁵

5. *A. S. Rampell, Inc. v. Hyster Co.*⁹⁶ ("the parties had agreed on an applicable law"). I can say only that this is rather an over-simplification, though there may be another reason for excluding the case from the discussion. Of six claims set forth only the fifth is relevant: The defendant, an Oregon corporation doing business in New York, entered into a written dealership contract with plaintiff terminable at will by either. The alleged oral modification was an agreement not to terminate without notice and just cause, and this claim was for damages for breach of that agreement. At Special Term the defendant objected only that the allegations were too indefinite, and on that ground the action was dismissed with leave to replead.⁹⁷ The Appellate Division modified the judgment by ordering [unconditional?] dismissal of this count.⁹⁸ So far there has been no mention of

⁹⁴ I shall not clutter this paper with citations on this collateral matter.

⁹⁵ A possible additional reason for not treating the complaint as sufficient to permit the counterclaim to succeed is that the defendant tried to improve on the terms of the agreement as alleged; but that seems irrelevant to the main question, which is whether the agreement alleged in the complaint could be enforced.

⁹⁶ 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957).

⁹⁷ 1 Misc.2d 788, 148 N.Y.S.2d 102 (1955).

⁹⁸ 2 App.Div.2d 739, 153 N.Y.S.2d 176 (1956).

any requirement of formality. That comes only in the Court of Appeals, and relates not to the Statute of Frauds but to section 33-c of the New York Personal Property Law, requiring a writing for modification of a written agreement so providing.⁹⁹ What the court said was that the objection based on section 33-c was "not well taken upon this motion addressed to the face of the complaint, since it is alleged therein that Oregon law was agreed to govern the contract."¹⁰⁰

We do not know whether the allegation concerning the agreement on Oregon law was supportable by the evidence; thus it seems hasty to toss the case aside on the ground that the parties had agreed on the applicable law. However, since the case does not deal with the Statute of Frauds, it may well be put aside, but for one remark: According to some authorities, such statutes as section 33-c raise problems analogous to those raised by the Statute of Frauds.¹⁰¹ If we treat the case accordingly, we may raise the question: Should a party be allowed, by adopting the law of another state, to waive the protection intended for him by such statutes?¹⁰² Offhand, I see no reason why not, especially since there are so many other ways in which he may waive it. But not all the protections provided by law are or should be thus waivable: *e.g.*, the disability of infancy, or of coverture.

6. *Wilson v. Lewiston Mill Co.*¹⁰³ ("the parties had agreed upon an applicable law"). Not so. Ehrenzweig clearly implies that this is a "party autonomy" case. Most of those who advocate autonomy for the parties in determining what law shall govern—as everyone does, within limits (though my limits would be tighter than Ehrenzweig's)—would agree that in this particular case a specific agreement by the parties that the law of a particular state should govern as to the particular matter should be respected. But that was not this case. There was no specific agreement between the parties that the law of Maine should govern. What happened was simply that, at the trial, counsel for both parties assumed that the law of Maine applied and treated the case accordingly.

Plaintiffs, cotton brokers doing business in New York, sued on a contract by defendant, a Maine manufacturer, to buy 1,000 bales. There

⁹⁹ The general law (and the law in Oregon) appears to be otherwise: oral modification of written contracts is permissible, despite a contract prohibition, unless the contract as modified is within the Statute of Frauds. See CORBIN § 1295; 6 WILLISTON ON CONTRACTS § 1828 (1938); RESTATEMENT, CONTRACTS, § 407 (1932).

¹⁰⁰ 144 N.E.2d at 380.

¹⁰¹ See CORBIN at 212 (remembering Ehrenzweig's indebtedness to and reliance upon Corbin).

¹⁰² I assume that the Oregon corporation, since it was doing business in New York, was clearly within the scope of New York's protective policy.

¹⁰³ 105 N.Y. 314, 44 N.E. 959 (1896).

were preliminary negotiations that it would serve no useful purpose to recite; by traditional standards, the agreement (if there was one) was "made" in New York. The court discussed various approaches to choice of the law governing formalities, rejecting the place of contracting as an absolute. It considered the place of negotiation and the place of performance as also deserving of consideration. In the end, the clearest rationale of the decision is the familiar one, so vulnerable and yet so popular in New York (until recently) and still in some other jurisdictions: the law "intended by the parties" must govern. If you think that means the court upheld this agreement you are mistaken. Oddly enough, the "law intended by the parties" (if they made any contract at all, which would seem to be a prerequisite to any intelligent talk about the intention of the parties to a contract as to what law should govern their agreement) turns out to be the law of Maine, of which the Statute of Frauds operated to *invalidate* the contract. That is to say, the parties, assuming that they made a contract at all (which is the very issue), intended it to be an *invalid* one.¹⁰⁴

IV

THE "RULE OF VALIDATION" IN FULL DRESS

*"Contracts have been quite generally upheld where they have satisfied . . . the formality requirements of the law of the forum. . . ."*¹⁰⁵

1. *Hall v. Cordell*.¹⁰⁶ Ehrenzweig first cites this case¹⁰⁷ as the American equivalent of the tendency of European courts "to give weight to the true intention of the parties by giving validating effect to both the law of the place of contracting and that of the place of performance." It is difficult for me so to read it.¹⁰⁸ This was an action by plaintiffs, of Missouri, against defendants, of Illinois, on an oral agreement to accept a bill of

¹⁰⁴ Perhaps I overstate the paradox. It might reasonably be pointed out that one useful purpose served by the Statute of Frauds is to allow parties, in the course of negotiations, to make tentative statements that may sound like promises prior to the time when they may finally decide to commit themselves. In such a state of mind, the hesitant quasi-promisor may have this or that law in mind—possibly. But at that stage there is presumably no contract and no "intention of the *parties*." In this respect the Statute of Frauds may perhaps be regarded as modifying the "objective" theory of contracts.

¹⁰⁵ EHRENZWEIG at 472. Except as noted, all the cases to be discussed under this heading are cited in support of the proposition stated in the caption in *ibid.*, n. 19.

¹⁰⁶ 146 U.S. 116, 12 Sup.Ct. 154, 35 L.Ed. 959 (1891).

¹⁰⁷ EHRENZWEIG at 471 n. 4.

¹⁰⁸ In passing, it may be worth noting that as a pre-*Erie* diversity decision announcing a federal common-law rule for choice of law the case has, strictly speaking, lost its authority, whatever it stands for; but let that pass.

exchange. Missouri law, if applicable (as the law of the state of contracting, perhaps), would invalidate; the law of Illinois would not. *Held*: The law of the place of *performance* governs. It happens that the promise (if there was in fact a promise) was performable in Illinois. *Ergo*, the promise is valid and enforceable. There is some talk of the "intention of the parties," but only as supporting the rule that the law of the place of performance governs. To me, this seems only another of those rather odd cases, deviant from "official doctrine" as that is embodied in the original *Restatement*, perhaps to be written off by conformists on the ground that it was decided before the "true rules" had quite crystalized. A full analysis of the case in terms of governmental interests would be difficult in the space here available, but let me make this brief attempt: *Prima facie* the law of the forum (Illinois, at least in post-*Erie* terms) is controlling. The Missouri law requiring a writing is primarily for the protection of Missouri defendants, not Illinois defendants.¹⁰⁹ Thus no reason appears for displacing the law of the Illinois forum by Missouri law unless the Constitution requires Illinois to give Missouri plaintiffs the same protection (in the form of vindication of their reliance on oral promises) that it provides for its own residents. But Illinois might reasonably classify foreign plaintiffs into two categories: those whose home states give them the same protection Illinois gives its residents and those whose home states do not provide such protection. On this basis (I emphasize that there is nothing in the decision to suggest such a rationale) the case is consistent with governmental-interest analysis. But I don't count on it.¹¹⁰

¹⁰⁹ Conceivably, but not likely, for the protection of Missouri courts, which are not here involved.

¹¹⁰ In this case the Court refers to *Coghlan v. South Carolina R.R.*, 142 U.S. 101, 12 Sup.Ct. 150, 35 L.Ed. 951 (1891), a case earlier cited by Ehrenzweig as belonging to "an unbroken line of authority according to which the *lex contractus* will yield to any law in view of which the parties have entered into the contract. . . ." EHRENZWEIG at 461, n. 4 and related text. *Coghlan*, in my analysis, is not a choice-of-law case in the sense that it involves choice of the rule of decision. It is one of those peculiar cases in which, the rule of decision being clear, some law must be chosen for the purpose of finding a relevant datum. See CURRIE, ch. 1, esp. at 66-72. Bonds issued by the railroad were payable in London with interest at a stated rate until maturity, and after maturity simply "with interest"; the contract was made in South Carolina. Did "interest" mean the English legal rate of 5 percent or the South Carolina legal rate of 7 percent? Apparently no question of usury was involved; if there was any such issue, remember that Ehrenzweig excludes such contracts from the "Rule of Validation." EHRENZWEIG at 482. The Court held simply that, as a matter of interpretation of this undisputed, written contract, the parties intended the London rate to apply, especially since the pre-maturity interest had been stated in terms of the London rate. Is it this type of case that gives rise to the talk of "intention of the parties" in cases in which the question is *not* one of resolving an ambiguity in an undoubted contract, but of selecting the law regulating the mode of proving that a contract exists *at all*? If so (and it seems likely), the legal engine is off the rails. Cf. Hancock, *The Fallacy of the Transplanted Category*, 37 Can. Bar Rev. 535 (1959).

2. *Scudder v. Union Nat'l Bank*.¹¹¹ If it has not already become clear, this case makes it clear that we cannot proceed further without pausing to discuss the question of how to read cases—or, indeed, the question of *whether* to read cases. Ehrenzweig is an adherent of the movement in legal thought known as “American Legal Realism.” A similar leaning might with some justice be attributed to me, though I believe I incline more to the earlier sociological jurisprudence. At all events, Ehrenzweig and I would agree that a judicial opinion need not be taken at face value; it is permissible to look behind the reasons given in the opinion for the “real” reasons leading to the result.¹¹² The question is, what occasions justify assertion that a decision was motivated by considerations other than those stated by the court? To me it seems that Ehrenzweig takes realism to an extreme hardly intended by the founders of the movement when he (apparently) takes the position that what the court says as to its reasons is to be treated as of no importance whatever (except to the extent that the court may say something tending to support choice of the validating law). On this basis, any interstate case involving the Statute of Frauds and resulting in the application of the validating law, for whatever *stated* reason, can be cited in support of the rule-of-validation hypothesis. Any such case applying the invalidating law can be explained away on some pretext or other. Is this sound? Let us approach the question in the following way:

If a student in a class in conflict of laws were asked to state the *Scudder* case, which we are now discussing, and if he were to state it in the following way, I think it would be universally agreed that he would have to be given a passing grade:

This was an action in the United States Circuit Court for the Northern District of Illinois,¹¹³ based on diversity of citizenship, in assumpsit for breach of an alleged oral agreement to accept a bill of exchange. It seems that a firm of Chicago brokers, having bought pork from a producer for sale to the defendants, a Missouri firm, was in financial difficulty; in fact, it seems that its bank account had insufficient funds to cover the check it had sent, or must soon send, to its supplier. In this predicament the brokers called on their customer, the Missouri buyer, to help. A member of the Missouri firm went to Chicago to discuss the matter. As a result of this conference the Chicago broker drew a draft on the Missouri buyer for the contract price and sent it to a Chicago bank to be discounted; but the bank refused to discount the draft without security. When the messenger returned

¹¹¹ 91 U.S. 406, 23 L.Ed. 245 (1875).

¹¹² There is perhaps a hierarchy of “real” reasons. If my memory is not playing tricks, I recall Karl Llewellyn’s speaking of “real reasons of the first water,” and “real reasons of the second water,” and so on; but there is not time to document this.

¹¹³ Pre-*Erie* again; but let it pass.

with this report, the broker instructed him to return to the bank with the information that the Missouri firm *promised to accept* the draft. Allegedly this instruction was given in the presence of the representative of the Missouri firm, and he assented by not raising any objection. The bank, on being informed of this "promise," discounted the draft, credited the proceeds to the account of the broker, and used them, in part, to cover the broker's check to the producer. But when the draft was presented to the Missouri firm it was dishonored; the shipment of pork had for some reason been rejected. The bank, being thus out of pocket, and presumably unable to recover its outlay from the broker because of insolvency, sued the Missouri firm on its oral, or tacit, promise to accept the draft. There was a rather frivolous plea invoking the Illinois Statute of Frauds that it seems unnecessary to discuss. Illinois law required no writing for a promise to accept a bill of exchange; Missouri did.¹¹⁴ The Supreme Court held the oral promise valid and binding because Illinois law governed, and Illinois law governed, said the Court, because that was the state in which the contract was made, and the law of the place of contracting governs questions of validity—particularly of formal validity. More broadly, the Court set forth the general formula we have seen in other cases: questions of execution, interpretation, and validity are governed by the law of the place of contracting; questions of performance by the law of the place of performance; and questions of procedure by the law of the forum. Rather clearly the Court did not consider this a question of procedure, but one of substantive validity.

Having given the student a check mark indicating satisfactory performance, the instructor may now ask the student whether he thinks the reasons stated by the Court actually give the true explanation of the decision. Forsaking the role of student and resuming my own character, I would reply that there are several possibilities:

(1) That the Court actually believed in the rules it was reciting and applying. In 1875 a general belief in such rules was prevalent, though the rules were not uniformly formulated. This seems the most likely explanation.

(2) That at least the lower court (which decided the case the same way), was simply being provincial and protecting the local bank at the expense of the foreign promisor. This I am not cynical enough to credit for a moment; nor does it explain the affirmance by the Supreme Court.

(3) That the Court was hostile to statutes requiring formalities such as written instruments for oral promises, and, being convinced that the tacit promise had actually been made as alleged and relied on by the bank

¹¹⁴ It may be worth noting that the Missouri statute began, "No person *within this State* shall be charged. . . ." (91 U.S. at 406, 23 L.Ed. at 245) (emphasis added) but for present purposes, at least, I (Currie) seek to make no capital of this.

to its detriment, felt that justice required that the promisor be held to its promise; and so the Court manipulated the rules for choice of law to get the just result. This has a certain plausibility, but the manipulation is not easy to detect. Very few cases have held that the law of the place of performance governs formal validity (yet recall that in *Hall v. Cordell*, the case last discussed, this very Court, 16 years after the *Scudder* case now under discussion, held just that, mellowing the rule only a bit by referring incongruously to the "intention of the parties").

(4) The Court, while paying lip-service to conventional doctrine, was in fact applying the validating law, and would have done the same had the laws of Illinois and Missouri been reversed (*i.e.*, would have validated the contract under the hypothetical Missouri law by some such holding as that the law of the place of performance, or preferably the law intended by the parties, was controlling). This I do not believe for one moment.

(5) That the Court regarded the law of the forum (Illinois) as *prima facie* applicable, not to be displaced by the law of Missouri without good reason. The plain policy of the Illinois law (not requiring a writing) was to vindicate the expectations of those who acted in reliance on informal promises of this sort, and Illinois certainly had an interest in applying that policy for the protection of a local bank. This interest was in direct conflict with that of Missouri in protecting its merchants from the hazards of oral testimony that such a promise was made; but, unless a *Bernkrant* operation can be performed, the interest of the forum must prevail.

I do not believe this either—as an explanation of the decision made by the Court in 1875 (unless, perchance, the Court was subconsciously influenced by some latent racial memory of some ancient time when such problems were perhaps handled more rationally). I do believe that the Court may have been inarticulate about a felt need to implement the legitimate interest of the forum state in competition with the interest of another. But all I really maintain is that, for lawyers of yesterday, today, and tomorrow, this hypothesis as to how such problems are or ought to be resolved is a better predictive—and persuasive—device than any of the foregoing suppositions.

3. *Global Commerce Corp. v. Clark-Babbitt Indus.*¹¹⁵ Ehrenzweig has already cited this case as an example of how the courts, not blessed with an authoritative "Rule of Validation," have resorted to the "precarious device" of "arbitrary (primary or secondary) characterization" in search of the just result. I have already commented on it.¹¹⁶

¹¹⁵ 239 F.2d 716 (2d Cir. 1956).

¹¹⁶ See text at notes 44-47, *supra*.

4. *Woolley v. Bishop*.¹¹⁷ This case involves not the typical Statute of Frauds but a special statute requiring land brokerage contracts to be in writing; but I concede that similar considerations apply, so that the case is relevant to the discussion. I do *not* concede that the decision furnishes significant support for a "Rule of Validation." The broker, a citizen of Oklahoma, sued in a New Mexico court to recover a commission from the owner, a citizen of California, for finding a purchaser for oil and gas leases on land in New Mexico. The purchaser was found and committed in Texas. The case is really simple in the extreme. The defendant owner did not deny having engaged the broker to find a purchaser at the rate of commission claimed; he only denied having agreed to sell at the price and on the terms agreed to by the purchaser. Furthermore, it seems clear to me, as it seemed to the court, that the defendant welshed on the deal not because of uncertainty or dissatisfaction as to the price terms, but because of his belated understanding of the tax consequences. Now I should think an admission of the formation of an oral brokerage contract is as good as a memorandum thereof; and in this case the defendant not only admitted the oral contract but signed and sent to the broker a telegram treated by the court, reasonably enough, as a sufficient memorandum. Then what is the problem? Neither the special statutes on brokerage contracts involved here nor the typical Statute of Frauds requires that the memorandum state the consideration (as we have seen, a New York statute does, or did). Hence, regardless of the fact that one or more of the states that have been named might have had a statute requiring a writing for brokerage contracts, there seems no possibility whatever of any conflict in the true sense.

Of the states that have been named, California and Texas had such statutes; New Mexico did not; whether Oklahoma had one or not does not appear, and is immaterial. The California statute was dismissed on the ground that this was not a California contract (it might better have been dismissed on the ground that it was satisfied by the admission and the telegram). Correctly, I believe (from the standpoint of the law of contracts), the court construed the agreement as one for a unilateral contract, completed when the offeree (broker) performed by finding a ready and able buyer in Texas. The Texas statute, however, was dismissed on the ground that the controversy was between the Oklahoma broker and the California owner, and Texas, as the home state of the purchaser (who had no direct interest, at least, in the outcome of the litigation over the commission), had nothing to do with the case. Thus in traditional terms the court held that the law of the state of contracting governed, but not the

¹¹⁷ 180 F.2d 188 (10th Cir. 1950).

procedural law of that state; hence, I suppose, the law of the forum applied, since no law with a better claim to recognition had been established. I would say that this is consistent with governmental-interest analysis but for the fact that there was no conflict in the first place, all statutes having been satisfied by the admission and the telegram.¹¹⁸

5. *Rothenburg v. H. Rothstein & Sons*.¹¹⁹ Reasonable men may disagree as to the "real" reasons for a court's decision; but I suggest that no scholar should cite, in support of any hypothesis, a case that plainly holds *nothing whatever*. This was an appeal to the district court (in Pennsylvania) from a decision of the Judicial Officer (Department of Agriculture) imposing damages on the buyer of a carload of peas for wrongful rejection under the Perishable Agricultural Commodities Act.¹²⁰ In that court a jury again ruled against the buyer, who appealed to the court of appeals, invoking the (Pennsylvania) Statute of Frauds. We may pass the details for the moment, for as to that defense the court said: ". . . [W]e deem it inadvisable to dispose of this problem at this time."¹²¹ This was because the case, although involving more than one state, was not a pure interstate choice-of-law case, for the state laws and policies involved were intermingled with, and perhaps must be subordinated to, any relevant policies expressed by Congress in the act. Thus the *Erie-Klaxon* doctrine did not apply. The resulting problems were carefully stated by the court as four separate questions.

The court then said:

"Since the parties have not addressed themselves to the questions stated, we think it desirable, in the interests of fairness and as an aid to the Court, that the litigants have the opportunity to review them, and to submit their views in briefs and oral argument. To this end, we shall, *sua sponte*, order this case to be reargued before the full Court. . . ."¹²²

That is all.

There was a rehearing and a decision on the merits; but Ehrenzweig does not cite it. Shall we give Ehrenzweig the benefit of the doubt and assume that he had in mind the later decision on the merits, and only

¹¹⁸ Had there been a conflict (between, say, Oklahoma and California) this would have been a case of the disinterested third state, since no interest was asserted on behalf of New Mexico, the forum and situs. Indeed, the court expressly held that the governing law was that of the place of contracting as opposed to that of the situs. 180 F.2d at 192.

¹¹⁹ 181 F.2d 345 (3d Cir. 1950).

¹²⁰ *Cf.* "The Case of the Spoiled Cantaloupes," in HART & SACKS, *THE LEGAL PROCESS* 10 (1958).

¹²¹ 181 F.2d at 347.

¹²² 181 F.2d at 347-48.

inadvertently cited the nondecision? By all means. According to his own standards Ehrenzweig would have been justified in citing the decision on rehearing in support of his pet thesis, for the full bench unanimously upheld the contract, for purposes of the act, in an opinion by Judge Maris.¹²³ But observe the reasoning of the court: (1) The Perishable Agricultural Commodities Act does *not* supersede state laws as to the validity of contracts to sell such commodities; questions of validity are determined by the law of the state whose law is controlling under the rules for choice of law; (2) the Pennsylvania statute requiring formalities for contracts for the sale of goods is worded and construed by the Pennsylvania courts as procedural—*i.e.*, as not invalidating the contract but precluding its enforcement in Pennsylvania courts; (3) since Pennsylvania law did not render the contract void, and since (as the court had said in its earlier opinion) the *Erie* doctrine did not apply to enforce conformity with the result that would obtain in a common-law action in the state court, the statute had no application to an enforcement proceeding before the Secretary of Agriculture under the act; indeed, the act clearly provides a remedy in addition to any remedies available under state law, so that there is nothing to bar this federally created right to reparation; and finally, (4) the formalities required by the Pennsylvania statute, as modified by the federal act, were satisfied: for Pennsylvania treated acceptance of the goods as a substitute for the written memorandum, and under the express terms of the act (though perhaps not according to the Pennsylvania courts' interpretation of the formalities requirement of the local sales act), the actions of the defendant buyer amounted to acceptance—and as to this matter the federal act superseded state law.

Hence, in the end, supervening federal law wiped out any possible conflict between state laws. I can make nothing of this in support of governmental-interest analysis in ordinary conflicts cases, and Ehrenzweig can make nothing of it in support of his "Rule of Validation"—which from now on I propose to write in lower-case type.¹²⁴

¹²³ *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524 (3d Cir. 1950).

¹²⁴ Although the foregoing discussion would seem to make reference to the detailed facts unnecessary, for good measure I add: "It is *undisputed* that . . . the defendants, in Philadelphia, . . . accepted the offer of the plaintiff, in Buffalo, . . . to sell them a specific carload of fresh peas." 181 F.2d at 346 (emphasis supplied). [Then how can the defendant successfully rely on any Statute of Frauds?] Moreover, there was an exchange of telegrams that, in all common sense, should yield the required memorandum signed by the party sought to be charged, and the district court so held—though he mistakenly attributed to the defendant one telegram sent by the plaintiff. [If there was a sufficient memorandum, how can the defense of the Statute of Frauds prevail?] The car was rejected on the ground that the peas were not of the quality called for by the contract, but a jury found the contrary. [What has the Statute of Frauds to do with whether peas conform to the quality standard specified in an admitted contract?]

6. *Richmond-Carcia Oil Co. v. Coates*.¹²⁵ This is one of the strongest authorities in support of Ehrenzweig's thesis; but that very statement is perhaps the most damning indictment of the thesis that I can phrase. To me the decision makes no sense. The land was in Texas. The residence of the parties does not clearly appear, but one may infer (or guess) that the plaintiff broker was of Texas and that the defendant owner was of California. As we know from cases considered elsewhere,¹²⁶ both Texas and California have statutes requiring a writing for land brokerage contracts. No other states being involved, it would seem to require nothing short of a *tour de force a la* Professor-Referee Theodore Dwight to escape the invalidating effect of both statutes. This court escapes that effect (1) by holding, regularly enough, that the contract was not made in California, since it was completed when the broker found a purchaser in Texas, although the purchaser went to San Francisco to close the deal, and (2) by ignoring the Texas statute. We have seen that the Texas statute is worded and construed as procedural; but what, in the pre-*Erie* year of 1927, was the significance of that fact in an action in the federal court in Texas? Maybe the Texas statute was ignored because only the California statute was pleaded. Any attempt to apply governmental-interest analysis seems futile. I would say that each statute expresses a policy for the protection of its residents—in each case, for the protection of defendants who are alleged to have made expensive promises. That being so, there was no conflict of interests, and the California statute should have prevailed—vindicating the interest of California without impairment of any interest of Texas. Yet all this is skewed by the known Texas attitude that its statute expresses a procedural policy only. If one can believe that, there was a conflict of interests between Texas and California (*i.e.*, the residual Texas law expressed a policy protective of the expectations of promisees!), and barring a *Bernkrant* operation (clearly indicated on these premises), the court should apply Texas law to vindicate the submerged Texas policy. At any rate, the court protected the Texas broker.

7. *Straesser-Arnold Co. v. Franklin Sugar Ref. Co.*¹²⁷ This is simply a case in which, though the Pennsylvania Statute of Frauds was pleaded in an Illinois federal court, there was ample satisfaction of both statutory requirements. The parties dealt through a broker, who signed the

Finally, nothing is said as to the formality requirements of New York law. [Then where is the conflict of laws?]

¹²⁵ 17 F.2d 262 (5th Cir. 1927).

¹²⁶ *E.g.*, *Woolley v. Bishop*, *supra* note 117.

¹²⁷ 8 F.2d 601 (7th Cir. 1925), *cert. denied*, 270 U.S. 642, 46 Sup.Ct. 207, 70 L.Ed. 776 (1926).

order blank. According to the Supreme Court, the (pre-*Erie*) law was well settled to the effect that a broker may sign for both parties. In addition, there was an exchange of letters and telegrams amounting in all common sense to a sufficient memorandum, signed by the party to be charged; that party, the buyer, simply welshed because the market fell. The case does not support a "rule of validation" and, there being no conflict and no problem of an invalidating Statute of Frauds, further comment on my part would be absurd.

8. *Hotel Woodward Co. v. Ford Motor Co.*¹²⁸ This case is significant for me chiefly because it identified Referee Dwight, of *Marie v. Garrison*, as "Prof. Dwight."¹²⁹ Beyond that, it deals with a written memorandum, clearly sufficient to satisfy either statute, and the only question is whether the authority of the agent who signed on behalf of the party to be charged must be in writing or may be proved by parol. Ford, a Michigan corporation, planned an office and warehouse building in New York, but on account of the high cost of the land contemplated a high-rise structure with a view to leasing the upper floors to the adjoining hotel. Negotiations resulted in a draft lease sent from New York to Michigan; an officer of Ford replied that the draft was "entirely acceptable" subject to details to be settled later. In addition, the Ford directors, meeting in Michigan, adopted a resolution ratifying the agreement to make the lease. When construction costs were found to be greatly in excess of estimates Ford abandoned the project although the hotel was willing to abide by the draft provision calling for escalated rentals proportional to added construction costs. In answer to the hotel's suit for breach of the agreement to make a lease Ford pleaded the Statutes of Frauds of both New York and Michigan—and lost. The only difference, for present purposes, between the two statutes was that Michigan required the authority of the agent to be in writing while New York did not. There was no proof that the Ford officer's authority was written, and none was to be anticipated on the New York trial. But the holding is that his authority, express or implied, could be established by other proof. The court reviewed the general law, finding support for various theories: formalities in such cases are governed by the law of the place of contracting, or of the situs, or of the forum, almost *ad libitum*. In the decisions of New York's highest court, however, Judge Hough could find no support for the only theory on which the law of Michigan could be regarded as controlling—that referring to the place of contracting. New York would hold its statute applicable as the law of the

¹²⁸ 258 Fed. 322 (2d Cir. 1919), *cert. denied*, 256 U.S. 698, 41 Sup.Ct. 537, 65 L.Ed. 1177 (1921), 259 U.S. 588, 42 Sup. Ct. 590, 66 L.Ed 1077 (1922).

¹²⁹ 258 Fed. at 328.

forum and/or situs. Hence on retrial the plaintiff had an opportunity to prove the authority of the agent.

So what? When practically all the details of the contract have been spelled out in a very formal draft lease, and an officer of the lessor has signed a letter approving the draft as "entirely acceptable," is not every reasonable purpose of the Statute of Frauds of any state satisfied? When the Michigan legislature required written authority for an agent did it have in mind corporate officers? Would not a rule of alternative reference be admirable here? At all events, even if some pedant should object that this decision subverts Michigan's interest in protecting its corporations against written promises made by corporate officers not having *ad hoc* authority in writing, my answer is that the (federal) court in New York properly subordinated that Michigan policy to New York's policy of protecting the expectations of its corporations who rely on such promises, written authority or not.

9. *Young v. Pearson*.¹³⁰ Sometimes Ehrenzweig brushes aside decisions as aged; sometimes, as here, he reaches as far back as possible to find support for his thesis. But though the nugget here panned is almost as old as the California Gold Rush, it does not support the "rule of validation." The plaintiff sued for an accounting on the theory that in New Orleans he and the defendants agreed to join in a hegira to California as partners to trade in land. The Louisiana law does not appear; whatever it may be, the California Statute of Frauds does not apply to partnership or joint-venture agreements, even though the object of the enterprise is to deal in land. No problem, no conflict.

10. *Fimian v. Guy F. Atkinson Co.*¹³¹ Plaintiff, a citizen of Georgia, sued for breach of an oral contract of employment to last three to five years. The contract was made in Georgia, to be performed in the state of Washington. The two states had similar statutes of frauds, but Georgia, unlike Washington, excepted from the requirement of a written memorandum contracts partly performed. Here the plaintiff, relying on the promise made by defendant's agent, resigned his job in Georgia and moved his family to Washington, only to be discharged without cause after working for six or seven months. (The answer admitted all this except that it denied that the contract of employment was for a fixed period of time.)¹³² The

¹³⁰ 1 Cal. 448 (1851).

¹³¹ 209 Ga. 113, 70 S.E.2d 762 (1952).

¹³² See same case below, 85 Ga.App. 200 (1951). Actually there were two cases, decided together on appeal. The two corporate defendants, acting through a common agent, had (if the plaintiff's allegations as to the agreed term of employment were true) victimized two Georgia families.

Georgia Supreme Court, reversing the Court of Appeals, first restated [*sic*] the stock rules as to the law governing formalities, interpretation, performance, and procedure, and then held:

“Where, as in this case, a suit upon a contract executed in Georgia and to be performed in another State is brought in a court of this State, the question of whether or not the plaintiff’s right of action is barred by the statute of limitations or the statute of frauds, both relating exclusively to the remedy, must be determined with reference to the laws of Georgia. . . . The Court of Appeals erred, therefore, in holding that a Georgia forum is controlled by any foreign statute of frauds, relating exclusively to the remedy, and particularly so where such foreign statute is in conflict with the statute of this State.”¹³³

At least four “real” reasons for the decision are thinkable—not all, perhaps, mutually exclusive: (1) The Georgia court believed what it was saying about the procedural character of the statutes of frauds of both states, or at least felt bound to that characterization by precedent; (2) it was simply being provincial, favoring the local resident as against the (presumably) foreign corporation; (3) it was validating contracts at all costs by reference to the validating law; or (4) it was furthering the governmental interest of Georgia by applying the policy embodied in Georgia law for the protection of local residents, where the protective policy and interest of Washington was (or may have been) in conflict with Georgia’s policy and interest. Take your choice: Ehrenzweig has his and I have mine. Lest there be any doubt, my own belief is that the Georgia court really believed in the stock rules it was restating, but was inclined to resolve ambiguities in those rules (*e.g.*, it would have been possible, under the rules as stated, to hold that the law of the place of acting, or of performance,¹³⁴ was controlling) in such a way as to further Georgia’s interest in applying its domestic policy for the benefit of local people. Again let me emphasize that I do not pretend that the influence of this policy-oriented thinking was explicit in the opinion, or even consciously in the minds of the court.

11. *Kellum v. Robinson*.¹³⁵ Although Ehrenzweig assumes the prerogative of choosing among alternative grounds for a decision,¹³⁶ in this instance he does not scruple to cite in support of his thesis the merest dictum. Even the dictum lends no significant support to the thesis, since it stands for the proposition (rather clearly “correct”) that the agreement was not within the Statute of Frauds; hence there was no conflict.

¹³³ 209 Ga. at 114, 70 S.E.2d at 763.

¹³⁴ The court of appeals so held, denying recovery, 85 Ga.App. at 203-04.

¹³⁵ 193 Iowa 1277, 188 N.W. 821 (1922).

¹³⁶ See note 112, *supra*.

The plaintiff and the defendant (the latter a resident of Missouri) entered into an oral partnership agreement calling for the purchase of a farm in Missouri. Title was taken in the name of the defendant, who operated the farm for a year and then sold it, rather arbitrarily sending the plaintiff a check for less than the one-third interest claimed by the plaintiff, and refusing to account further. To plaintiff's petition for an accounting, defendant interposed two grounds of demurrer (if we disregard the rather odd ground that the "cause of action did not arise within the state of Iowa"). The first was the statute of limitations; the second was the Statute of Frauds. With respect to the statute of limitations the court held, interestingly enough, without mentioning the distinction between "substance" and "procedure," (1) that although the contract was allegedly made in Iowa, it was to be performed in Missouri; the intention of the parties governs, and that intention identified Missouri, the place of performance, as the source of the governing law; and (2) that, in the absence of proof of the applicable limitation period prescribed by Missouri, the Missouri statute would be presumed to be the same as that of Iowa.¹³⁷ That was five years, and the action was barred.

This was enough, was it not, to dispose of the plaintiff's action? Yet the court went on to discuss "for a moment" the ground of demurrer raising the Statute of Frauds. Thus everything said on that subject is pure dictum. Even so, all the court said (without clearly indicating whether it was talking about the Missouri statute or the Iowa statute) was that a partnership agreement, an incident of which is the purchase of land, is not within the Statute of Frauds. All the cases I have seen on the point are to the same effect. I almost forbear to add that the defendant had himself acknowledged the existence of the partnership agreement by making his own arbitrary accounting; that an exchange of correspondence included documents signed by the defendant fully adequate, it would seem, to satisfy the requirement of a written memorandum of the oral agreement; and that the court said (again by way of dictum, of course) that, even if the plaintiff could not succeed (because of the Statute of Frauds) in establishing a legal interest in the land, he could recover on the theory of a resulting trust.

12. *Meylink v. Rhea*.¹³⁸ To say the least, this furnishes inconclusive support for the "rule of validation." The suit, brought in Iowa (presumably by a resident of Iowa) was for specific performance of an oral agreement to sell land in Iowa. The defendants, husband and wife, were residents of South Dakota, where the contract was made. The hus-

¹³⁷ It is unusual for a court to presume that the statutory law of another state is the same as the statutory law of the forum. See CURRIE at 19-23.

¹³⁸ 123 Iowa 310, 98 N.W. 779 (1904).

band admitted the contract; so did the wife, except that she denied authorizing the husband to sell at the agreed price, which was lower than she had hoped to receive. At this point I begin to wonder whether the requirements of the Statute of Frauds were not in fact satisfied; but there is more. The purchaser had made a small down payment, which avoided the requirement of a writing under the Iowa, though not the South Dakota, statute. (The idea of a rule of alternative reference again suggests itself.) *Held*: The Iowa statute is procedural and controlling although the South Dakota statute "strikes at the contract itself";¹³⁹ thus the law of Iowa as the procedural law of the forum governs. The most explicit ground of decision, however, is that Iowa law governs as the law of the situs. Let us leave it that considerable literary license is required to list this as a decision favoring validation at all costs. Note in passing that (at least if we assume that the plaintiff was a resident of Iowa) the forum applied domestic policy to effectuate its interest in vindicating the expectations of local residents who had paid something in earnest to bind the oral bargain.

13. *Ellis v. Eagle-Pitcher Lead Co.*¹⁴⁰ The oral contract for the sale of zinc ore (treated as a contract for the sale of goods) was made in Kansas (the forum state), where it was valid. The ore was located in Oklahoma, according to whose law it was conceded (for unstated reasons) that the contract was invalid. *Held*: The law of the forum (Kansas), as the place of contracting, governs, and gives validity. Situs and place of performance, even if assumed to be in Oklahoma, are immaterial. Since the court applies the hornbook rule that the law of the place of contracting governs formalities, something like temerity is required to cite this case as upholding a "rule of validation." Compatibility with governmental-interest analysis is difficult to assess since the connections between the parties and the respective states are not given (though *Moody's Industrial Manual* (1964) lists the losing defendant as an Ohio corporation). This last circumstance suggests that full analysis would have to deal with problems of possible unconstitutional discrimination.

14. *In re De Gheest's Estate.*¹⁴¹ . . . ("loan agreement made in France between French residents"). This has nothing to do with the Statute of Frauds, nor with formality requirements of any kind. By a very formal agreement an American citizen residing in France during the German occupation promised to repay her French money-lender in dollars she had on deposit in a Missouri bank. The action was against her estate. The question at issue was the validity of the agreement under the "French"

¹³⁹ 123 Iowa at 311, 98 N.W. at 780.

¹⁴⁰ 116 Kan. 144, 225 Pac. 1072 (1924).

¹⁴¹ 362 Mo. 634, 243 S.W.2d 83 (1951).

currency control laws. The holding, expressed in a sophisticated opinion, was that Missouri law governed and gave validity because it was the law of the place of performance and the law intended by the parties.

If it is my turn to guess at the unarticulated "real" reason for the decision, I suggest that antipathy to Nazi currency control laws, the effect of which on private contract rights was not made clearly to appear, may have had something to do with the result. I prefer, however, to this brand of psychoanalysis the suggestion that Missouri had no relevant policy whatever except that honest debts be paid, and applied that policy despite potential conflict with the (possibly) contrary policy of a foreign government, repugnant or not. This is a satisfactory adjustment even if the decedent died domiciled in Missouri; I will not suggest that it is so *a fortiori* because one is tempted to guess that the Missouri administration was ancillary.

15. *Reilly v. Steinhart*¹⁴² . . . "*(option agreement made in Cuba)*." Here we have an agreement *in writing*, executed in Cuba between two American citizens domiciled and doing business there, whereby the plaintiff gave the defendant the option to buy a concession to build a railroad in Cuba, together with the necessary lands. The option itself was to cost the defendant \$50,000, of which \$15,000 was paid on execution, the remainder to be paid when the option matured. It is for this remainder, \$35,000, that the plaintiff sues. The defense is that under Cuban law it is not enough for such a contract to be in writing; it must be "protocolized," which is to say, it must be "authenticated before a notary or by a competent public official with the formalities required by law." Cardozo (who, I regret to say, was as conceptualistic as that other great judge, Holmes, when it came to conflict of laws), announced that the action must fail if the Cuban law was substantive, since "the existence of a contract must be determined by the Cuban law" (as the law of the place of contracting).¹⁴³ But the Cuban law was procedural rather than substantive, and this Cardozo, on the basis of expert testimony, was able to demonstrate in an unusually cogent way: In Cuba, if the defendant refused to protocolize a less formally executed agreement, the plaintiff could sue to compel him to do so. Thus the agreement was actually enforceable in Cuba, though, as Cardozo said, Cuba "recognizes the contract as valid, but prescribes a double remedy. The law of New York follows the law of Cuba in recognition of the contract, but prescribes its own [single] remedy, and pursues its own procedure."¹⁴⁴

¹⁴² 217 N.Y. 549, 112 N.E. 468 (1916).

¹⁴³ For this proposition he actually cited Holmes's outrageous decision in *Cuba R.R. v. Crosby*, 222 U.S. 473, 32 Sup.Ct. 132, 56 L.Ed. 274 (1912), discussed in CURRIE, ch. 1.

¹⁴⁴ 112 N.E. at 469.

Thus there was no conflict. I add only that it disturbs me when Ehrenzweig, while rightly adhering to Lorenzen's condemnation of the substance-procedure dichotomy, blandly cites a faithful and not especially perceptive application of that dichotomy in support of his "rule of validation" thesis. This is not, of course, to disagree with the *result* of the decision, which is clearly sound as comporting with the laws of both states.

16. *Bernstein v. Lipper Mfg. Co.*¹⁴⁵ The pattern of Ehrenzweig's analysis is reiterated here. The decision upholds the contract, applying the law of the forum; *ergo*, the "rule of validation" is demonstrated; never mind the reasons given by the court. But I am interested in those reasons. By an apparently admitted oral contract the defendant agreed to employ plaintiff as salesman for a year, only to discharge him prematurely because of alleged misconduct—a charge of which the jury absolved the plaintiff. The contract was valid according to Pennsylvania law, and no good reason appears for the displacement of that law by any other; the parties not being identified, one may assume (though it is not necessary to assume) that they may both have been identified with the forum state, Pennsylvania. Then why the talk of conflicting laws? The defendant invoked the New York statute, which would have invalidated the oral agreement (or so it was said)—because, forsooth, the plaintiff's employment—the performance by him of his part of the contract—was to take place partly in New York as well as in the South and Middle West. So the invalidating New York statute was dragged in on the theory that the law of the place of performance governs formalities. Nonsense, said the court. Precisely because, as here, performance of a contract may be split among many states, that rule for choice of law should be rejected in favor of one pointing to the place of contracting. While I am of course not overjoyed by this short-cut approach to the sound result, I find satisfaction in the fact that the court applied the law of the only state having any basis for an interest in the matter, so far as the record reveals.

17. *Perry v. Mount Hope Iron Co.*¹⁴⁶ The plaintiff seller, residing and doing business in Rhode Island (the forum state), sent his agent to call on the defendant, a Massachusetts corporation doing business in Boston, to solicit an order. Allegedly the defendant's officer made an oral offer which plaintiff's agent asked him to hold open until the next day, which the defendant agreed to do. On the next day the plaintiff accepted the offer by telegram dispatched from Providence to Boston. The defendant rejected the scrap, denying that it had made an offer, and alleging that if there was

¹⁴⁵ 307 Pa. 36, 160 Atl. 770 (1932). My statement of facts is based in part on the opinion below, 161 App.Div. 242, 146 N.Y.S. 534 (1914).

¹⁴⁶ 15 R.I. 380, 5 Atl. 632 (1886).

any offer it was only for No. 1 quality, which the shipment rather clearly was not. It also invoked the Massachusetts Statute of Frauds, on the theory that if there was an offer it was accepted only upon receipt of the acceptance by the offeror in Massachusetts. The Supreme Court assumed that the law of the place of contracting was controlling, but, affirming the trial court as to this point, rejected the heresy (in terms of the law of offer and acceptance) urged upon it by the defendant, and held the contract made when and where the acceptance was dispatched—Rhode Island, whose law gave validity. This is a slender reed on which to base a “rule of validation.” On its face the ruling simply accords with the simplistic though beguiling maxim that the law of the place of contracting governs formalities, and with the worse than simplistic notion that the *place* of contracting is determined in the same way as the *time* of contracting—an issue with quite different implications.¹⁴⁷ Significant to me is the fact that the court implemented the interest of the forum state in vindicating the expectations of its entrepreneurs despite the fact that this impaired the contrary interest of Massachusetts in protecting its entrepreneurs against the hazards of parol proof. This is consistent with governmental-interest analysis, though I would regard this as a good case for a *Bernkrant* operation since the plaintiff solicited the business by sending his agent to the defendant’s office in Boston.¹⁴⁸

18. *Hunt v. Jones*.¹⁴⁹ If Ehrenzweig would let it, this case could furnish him with some support for a “rule of validation,” though not with respect to the Statute of Frauds and otherwise narrower than Ehrenzweig’s broad rule; but Ehrenzweig will not allow this. Although he here cites the case as supporting the “rule of validation,” elsewhere he declares that that rule does *not* apply to the cases mentioned in this opinion in the only passage speaking favorably of a validating rule.¹⁵⁰ We have an oral contract made in Rhode Island for the sale of lime (in process of manufacture in Connecticut) to be delivered in New York. The parties are not identified with the states named, but a reasonable guess is that, since the plaintiff chose to sue in Rhode Island, he probably resided there, and, since the lime was to be delivered to New York, the defendant buyer was probably at least doing business there. The contract was plainly valid according to Rhode

¹⁴⁷ See CURRIE at 87, following the line laid down by Cook and Cavers.

¹⁴⁸ Although the judgment of the trial court was reversed on other grounds, that does not, in my judgment, make this ruling dictum, since it will constitute the law of the case on remand for new trial.

¹⁴⁹ 12 R.I. 265 (1879).

¹⁵⁰ EHRENZWEIG at 482, quoted and discussed in Currie, Book Review, 1964 DUKE L. J. 424, 431-32.

Island law and invalid under the New York Statute of Frauds. The *holding* is simply that the law of the place of contracting, rather than the proffered law of the place of performance, governs formalities. Permitted my assumptions as to the connections of the parties with the respective states are correct, I would say that the decision is consistent with the interest of Rhode Island in vindicating the expectations of its residents who have relied on oral promises. But Ehrenzweig could, if he would, find comfort in the following gratuity:

“There are cases which go farther and hold that a contract made in good faith to be performed in another, will be upheld if it conforms to the law of either State. . . . This rule has been applied especially to stipulations for interest on contracts for the payment of money, and is commended by Professor Parsons as reasonable and just. . . .

“The case at bar, however, involves the validity of the contract in matter of form rather than of substance, and seems to fall more appropriately under the former rule than the latter [*i.e.*, under the rule that the law of the place of contracting governs as distinguished from the rule of alternative reference, or the validating rule]; but it is immaterial whether the former or the latter is applied, for the contract in suit is valid under either of them.”¹⁵¹

Whereas Ehrenzweig states emphatically that the “rule of validation” applies to formalities such as the Statute of Frauds but not to usury cases (because he approves usury statutes as heartily as he disapproves the Statute of Frauds?), this court says just the converse: a rule of validation is all very well for usury cases, but the law of the place of contracting is preferred when the issue concerns formal validity.

19. *Cooper v. A.A.A. Highway Express, Inc.*¹⁵² . . . (“*secondary characterization holding a foreign statute ‘procedural’*”). Just why Ehrenzweig decided to append the explanatory squib to this particular citation is not clear; we have had abundant evidence that courts commonly decline to apply a foreign Statute of Frauds on the ground that it is procedural, especially if the foreign court so characterizes it. Here was a *written* contract made and to be performed in Georgia. The plaintiff was a citizen of South Carolina, the forum state; the defendant was a Florida corporation doing business in several states. After extensive discussion with some attention to Lorenzen, the court held that, since the Georgia courts themselves held the Georgia Statute of Frauds remedial, it did not affect the action in South Carolina. The contract was valid under South Carolina law, the only issue being whether the authority of the defendant’s agent to execute the

¹⁵¹ 12 R.I. at 267.

¹⁵² 206 S.C. 372, 34 S.E.2d 589 (1945).

written contract must also be in writing. Again the possibility of a rule of alternative reference where there is substantial compliance with the policy of both statutes suggests itself. As for governmental interests, the decision upholds the forum state's interest in vindicating the expectations of its residents who rely on *written* promises.

20. *Linn v. Employers Reins. Corp.*¹⁵³ . . . “*which, while purportedly based on a peculiar localization of telephone contracts, was probably motivated by the favor negotii.*” Indeed? Any localization of telephone contracts for purposes of choice of law is “peculiar,” I think; but all the cases I have read (and there are more to read than one might suppose) hold, as does this court, that the contract is made when and where the words of acceptance are spoken into the mouthpiece. That is no less and no more defensible than would be a contrary rule to the effect that the contract is made where the words reach the ears of the offeror—unless one is tempted to suggest that the prevailing rule has the advantage of economy for law students: they have only to learn *Adams v. Lindsell*, not one rule for written correspondence and another for telephonic communication. The rather passive attitude of the Pennsylvania court was that, while there is something to be said in criticism of the general current of authority favoring localization where the words of acceptance are spoken, the line of least resistance is to drift with the current.

What happened was this: the plaintiff, a Pennsylvania insurance broker, approached the defendant's agent in New York and offered to procure reinsurance contracts for defendant in return for a share of the premiums. The agent said he would have to communicate with his home office in Kansas City. On returning to Philadelphia plaintiff received a telephone call from the New York agent accepting the offer. The Pennsylvania statute, said the court, had no application because, being substantive, it had no application to contracts made elsewhere. The trial court had assumed that this contract was made in New York, and so held it invalid under the New York statute. This was *en rapport* in theory with the Supreme Court's “peculiar” localization, but in application it suffered a defect: there was nothing in the record to show that the New York agent, in telephoning the acceptance, had placed the call from New York! Hence there must be a remand and new trial. What do you suppose the plaintiff's chances were, on remand, of proving that the telephone call from the New York agent was placed not from New York but from some state with a validating law? As I judge those chances, the probable tendency of the decision was to doom the contract to *invalidity* under the law of New

¹⁵³ 392 Pa. 58, 139 A.2d 638 (1958).

York—not to validate it, as Ehrenzweig suggests, under some validating law. What, then, is the basis for the assertion that the decision was “probably motivated by the favor negotii”? The effect if the Pennsylvania statute had been held applicable does not expressly appear. To speak with precision, the case reaches no result on the merits, but only lays down an abstract rule to the effect that the law of the place of contracting governs, and the place of contracting is that where the words of acceptance were spoken—whatever the law of that place, or its connection (or lack of connection) with the matter may be. I derive no support, and want none, from an opinion so reasoned. If my suppositions are right, and assuming that the contract would have been valid under Pennsylvania law (if we do not assume that, there was probably no conflict), the Pennsylvania court undermined Pennsylvania’s policy and interest, unless one can justify a *Bernkrant* on the basis of the plaintiff’s aggressive initiation of negotiations in the defendant’s territory.

In his footnote¹⁵⁴ Ehrenzweig couples with his citation of the foregoing case the following: “In this connection, see *Linn v. Employers Reinsurance Corp.*, 397 Pa. 153, 153 A.2d 483, 485 (1959), recognizing a presumption for the *lex fori*.” Although Ehrenzweig does not say so, this is the same case, back in the Supreme Court after remand and retrial. Concerning what would appear to have been the vital issue in the light of the remanding opinion—the place where the telephone call of acceptance was placed—the defendant’s agent testified that he had made *no telephone call at all*, from New York or any other place. He admitted that he had received authority from the home office to accept the offer, and that the contract had been performed on both sides for twenty-seven years. Such an admission and such “part performance” should blow any defense under any Statute of Frauds sky-high, without the aid of any “rule of validation.” This was not the method used by the court, however, to sustain the jury’s verdict for the plaintiff. Under the charge given by the trial judge the jury might have found that there was a call of acceptance, placed from some state other than New York (the verdict was not necessarily based on a finding that the oral agreement had been concluded while the parties were together in New York—a finding that would have led to invalidation). In fact, the defendant at the trial (after remand) *admitted* that there was an oral contract, but contended it was made face to face in New York, and not by telephone at all. What kind of defense is that under the Statute of Frauds? May I admit in open court that I entered into an oral agreement in New York with a Pennsylvania businessman, and still invoke the aid of a New

¹⁵⁴ EHRENZWEIG at 473, n. 19.

York statute designed to protect me against fraudulent claims that such an agreement was made? The Pennsylvania court preferred not to deal with this question (thinking it, I suppose, an unfair and sophomoric attack on the majesty and wisdom of the law). It maintained its precarious stand that the place where the words of acceptance were spoken supplied the controlling law; it then placed the burden of proving where that place was on the defendant; and, since the defendant had not sustained the burden of proving that this contract was made in New York, it sustained the jury's verdict for the plaintiff. "Since it was not established that the laws of New York are applicable, the laws of the forum, Pennsylvania, are presumed to apply."¹⁵⁵ Observe that, although the court used the word "presumed," Ehrenzweig's reference to "a presumption for the *lex fori*?" is misleading. The court did not presume that the law of New York was the same as that of Pennsylvania; the contrary had been proved. The court simply applied the law of the forum as a matter of course, as it should do, when the party seeking advantage in a foreign law fails to establish its claim to displace the law of the forum as the source of the rule of decision.

In the end, then, the court did validate the contract by applying the law of the forum: only incidentally because of its "peculiar localization of telephone contracts"—primarily because the defendant failed to carry the burden of showing that foreign law should displace local law. And the clear interest of Pennsylvania in protecting the expectations of local businessmen, dealing in good faith for more than a quarter of a century on the basis that a man's word is as good as his bond, was finally vindicated. If any contrary interest of New York in protecting locally connected enterprises against fraud was subordinated (and who will undertake to demonstrate that this was so?), I couldn't care less. This was a decision by a *Pennsylvania* court.

21. *Watson v. Lehigh Valley Wood Work Corp.*¹⁵⁶ This case is cited, if one reads Ehrenzweig carefully, not as sustaining the "rule of validation" but in order to explain it away. In this case, he says, "the parties had agreed on the *lex fori*." If by this he means to suggest that the case is to be explained by reference to the theory of party autonomy (as he must be understood to mean in the context of his espousal of that theory)¹⁵⁷ I have two remarks to make. (1) Is it not odd, as I have tried to suggest before, that the theory that gives the parties freedom to choose the governing law

¹⁵⁵ 397 Pa. at 157, 153 A.2d at 485.

¹⁵⁶ 198 F.Supp. 273 (E.D.Pa. 1961).

¹⁵⁷ See the entry, "Party Autonomy," in his Index, and pursue the sub-entries, especially the reference to the theory as applied to contracts at p. 316, where Ehrenzweig speaks of "the great principle of party autonomy."

should lead to a decision that the parties entered deliberately and intentionally into an invalid contract? (2) So far as the report shows, there is no evidence whatever that the parties at the time of the transaction had "agreed on the *lex fori*." For the trial record the parties (presumably through their counsel) had stipulated that the law of Pennsylvania (the forum state) was controlling. They did this not because of a "meeting of the minds" but for the simple reason that Pennsylvania precedents (as we already know from our consideration of the *Linn* cases) established that, so far as Pennsylvania was concerned, the law of the place of contracting governs formalities, and according to the plaintiff's contention, the contract was made when the defendant in Pennsylvania accepted by telephone (a proposition also established by the *Linn* cases).

Even though this should suffice to dispose of the citation, Ehrenzweig's "peculiar" techniques of case analysis force me to continue. This case, which Ehrenzweig attempts to distinguish, or extirpate from his rose garden as a noxious weed, does not even require distinction or extirpation, because it does not hold the purported contract invalid under any Statute of Frauds. It hardly matters, but the plaintiffs were of Nevada and the defendants were of Pennsylvania. The action was on an alleged agreement of guaranty. The court holds *not* that the oral agreement was invalid because not in writing; it holds, *on the merits*, that *no such contract was ever made*—for the convincing reason that the plaintiff himself, in letters, insisted on a *letter* of guaranty as being required by law and as a condition of his incurring an obligation to pay a commission to the guarantor. Thus it seemed clear to the court that any apparent promise to guarantee was merely an incident of preliminary negotiations. As an *alternative holding* the court holds that, in any event, the "guarantor" was discharged by plaintiff's extension of time to the debtor.

V

THE SAME: WITH IMPORTED FABRICS, YET

"Contracts have been quite generally upheld where they have satisfied . . . the formality requirements of . . . another proper law."¹⁵⁸

1. *Dow v. Shoe Corp. of America*.¹⁵⁹ Ehrenzweig's scheme of citation appears to call for federal decisions first, followed by state decisions in alphabetical order, with cases in each category arranged in inverse chronological order. This is logical and convenient enough, and is suffi-

¹⁵⁸ EHRENZWEIG at 473. All the cases discussed under this heading are cited in *id.*, n. 20, except as otherwise indicated.

¹⁵⁹ 276 F.2d 165 (7th Cir. 1960).

ciently arbitrary that it would be unfair to attach much importance to the happenstance that the very first case cited in support of the proposition quoted above very clearly does not sustain that proposition. The fact remains that, whereas Ehrenzweig gives it first place in his impressively long list of cases cited to sustain the proposition that contracts have been generally upheld when they have satisfied the formality requirements, not of the forum state but of another "proper law," this case holds nothing of the sort. So far as appears, there was not even a conflict-of-laws problem. The case simply follows the familiar construction of the provision of the Statute of Frauds relating to contracts not to be performed within a year: that provision does not embrace contracts for lifetime employment, since one or both parties may die within a year.¹⁶⁰ A superficial basis for regarding this as a case presenting a conflicts problem exists in the fact that, the action having been brought in a federal district court in Illinois and the agreement having been made in Wisconsin, the court stated that in matters of substance the agreement was governed by the law of Wisconsin. There is no semblance of a suggestion, however, of any conflict between the statutes of Illinois and Wisconsin. The contract would be valid under the typical Statute of Frauds of any state; it would be invalid only in a state such as New York, which has sought by special amendment of the statute to cure the "anomaly" of validating lifetime contracts while invalidating short-term contracts not to be performed within one year.

2. *Minella v. Phillips*.¹⁶¹ This, the second case cited by Ehrenzweig in support of this branch of his "rule of validation," is even more inapposite, if that is possible, than the first. No conflict appears, and there is not even a definitive ruling as to the validity under the Statute of Frauds of the alleged oral trust of land that is under discussion.

This is a *bankruptcy* case in which the bankrupt, doing business in Houston, Texas, applied for a discharge which was refused by the referee because he had failed to account adequately for his assets. There was a little matter concerning some claimed gambling losses, and it appeared to the accountants that the bankrupt had substantial assets not otherwise accounted for by him; but the missing asset with which I presume Ehrenzweig is concerned was a piece of land in Massachusetts that the bankrupt had acquired from his mother and stepfather and had sold for \$7,500. None of the proceeds of the sale were listed by the bankrupt as available to be applied to the claims of his creditors. His excuse was that his mother had told him, on conveying the land to him, that if he should sell the land

¹⁶⁰ See FULLER, BASIC CONTRACT LAW 954-55 (1947), citing WILLISTON § 495 and RESTATEMENT, CONTRACTS § 198.

¹⁶¹ 245 F.2d 687 (5th Cir. 1957).

she wanted the proceeds to go to the bankrupt's children and his son-in-law. His claim was that he had in fact given his daughters and his son-in-law \$5,000. This, of course, did not account for the remainder of \$2,500; but the question was whether it was a sufficient excuse for his failure to pay over even the \$5,000 to the trustee for the benefit of his creditors.

Since the bankrupt's position was that he had been trustee of a valid trust of land in Massachusetts, the court, assuming the applicability of Massachusetts law, gave some attention to the validity of the trust under the Massachusetts Statute of Frauds. Its conclusion on that point was that an oral trust of land is unenforceable, but becomes enforceable when the land is sold and "converted" into money. (Observe that since [in all probability] the beneficiaries were not parties to the bankruptcy proceeding, a ruling that the trust was invalid could not bind them, and so would be somewhat less than authoritative; and even this favorable ruling would not be pleadable by them, under the rule of mutuality of estoppel, in a good many states).¹⁶² But the court did not stop with this. It found no trust, but only an expression by one of the grantors of her hope or desire; and any old trust hand knows that "precatory words" do not give rise to a trust. Even this did not dispose of the question before the court. Trust or no trust, the question was whether the bankrupt had an excuse for not disgorging the price realized on the sale. Comes now the *ratio decidendi* of the case: *Under the bankruptcy act*, the bankrupt might be excused for having given two-thirds of the proceeds to his daughters and his son-in-law, and thus (as to this portion of his unreported assets) entitled to discharge, even if the trust were invalid under the applicable law, if he in good faith, though erroneously, believed he was under a legal obligation to pay over the money. Even this the court did not definitively decide, because the lack of accounting for other assets was sufficient, apart from the matter of the trust, to sustain the refusal of the discharge. "The admitted lack of any explanation of what became of \$30,000, exclusive of the claimed gambling losses, forms a sufficient justification for the denial of a discharge."¹⁶³ Thus there was no definitive ruling on the validity of the trust even under Massachusetts law; no conflict with the law of any other state appears; and this was a federal bankruptcy case in which the rule of decision was supplied by an act of Congress, not by the law of any state.¹⁶⁴

¹⁶² See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); *id.*, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

¹⁶³ 245 F.2d at 689.

¹⁶⁴ Challenging questions for governmental-interest analysis are presented when federal law build upon state law or relies on it to fill gaps in the federal regulatory scheme. *Cf.* Richards v. United States, 369 U.S. 1, 82 Sup.Ct. 535, 7 L.Ed.2d 492 (1962). Doubtless the draftsmen who

3. *A. M. Webb & Co. v. Robert P. Miller Co.*¹⁶⁵ Again, I am sorry to say, I cannot explain why Ehrenzweig thought it appropriate to cite this decision as supporting his thesis. I have read (though Ehrenzweig does not cite it) the same case on a prior appeal,¹⁶⁶ and the following discussion draws upon the prior opinion; but even it does not justify the citation.

We deal with a *written* agreement between a New York dealer and a Pennsylvania manufacturer, made in New York, whereby the defendant manufacturer was for five years to sell his entire output through plaintiff. On this appeal the court decides (1) that the jury verdict finding oral rescission after three months was supported by the evidence, written contracts being rescindable by parol (citing only section 222 of the *Restatement of Contracts*); and (2) that, as to alleged breaches prior to rescission, the New York Statute of Frauds does not require the price to be stated in an otherwise sufficient memorandum where the parties intend only to contract for a reasonable price. So far there is no problem of conflict of laws as to oral promises. On the prior appeal the court was concerned with the issue of vagueness or uncertainty. It held that under New York law an agreement silent as to price will be construed as referring to market or current rates. "We find no merit in the defendant's contention that the agreement fails for want of a sufficient memorandum to satisfy the New York Statute of Frauds, N. Y. Personal Property Law, Sections 31 and 85. . . ."¹⁶⁷ Neither of these statutes requires that the consideration be stated in the memorandum. No suggestion appears that the Pennsylvania law was in conflict. The Pennsylvania manufacturer was held to his contract, but not contrary to any Pennsylvania policy. The point as to the Statute of Frauds, in fact, seems merely a restatement of the vagueness point.

4. *Franklin Sugar Ref. Co. v. William D. Mullen Co.*¹⁶⁸ Curiouser and curiouser. The decision does sustain the validity of a contract as not in contravention of a Statute of Frauds other than that of the forum, but

have relied on such devices in the past have assumed that any conflicts between state laws will be readily solved by black-letter rules of thumb. We who believe that such problems must be approached in terms of governmental policies and interests are confronted with the serious question: What is the interest of the states on whose law the Federal Government relies in, say, a Federal Employers' Liability Act case raising a conflicts question as to the validity of a marriage between the injured employee and his dependent helpmeet? I can only say (1) that I hope to study some of these puzzling problems in the future, and (2) that the Federal Employers' Liability Act, at least, might be regarded as a statement by Congress of what is now the policy of each state for employees of interstate railroads. But this hardly goes far enough.

¹⁶⁵ 176 F.2d 678 (3d Cir. 1949).

¹⁶⁶ 157 F.2d 865 (3d Cir. 1946).

¹⁶⁷ 157 F.2d at 867.

¹⁶⁸ 12 F.2d 885 (3d Cir. 1926).

I am at a loss to know what the conflict was; and, to make matters worse, a little later on Ehrenzweig cites this case following the statement that "Even fewer are the cases which, under a foreign law, have held invalid a contract valid under the law of the forum," with the following qualifications: ". . . did not actually invalidate the contract."¹⁶⁹ How does Ehrenzweig understand the case? Did it validate a contract, invalid under the law of the forum, by reference to foreign law? Or was it one of the "few" cases invalidating under foreign law a contract valid under the law of the forum? If the latter, did it actually or in factually invalidate the contract? These are difficult questions. Let us return to the case itself.

The plaintiff, a Pennsylvania enterprise, sued for breach of a contract by the defendant, a Delaware enterprise, to buy sugar. The action was brought in the United States District Court for the District of Delaware. There was a written memorandum: that is, a printed form, entitled "Acceptance of Offer," on stationery of the plaintiff seller; it bore the type-written signature of one apparently acting as broker. Almost without discussion this (pre-*Erie*) decision holds that the Pennsylvania Statute of Frauds applies because the contract was made and to be performed there. The memorandum was held sufficient; cryptic though it was, it was complete and certain when read in the light of trade terms and customs fully pleaded and admitted by demurrer. As to the signature, any difficulty is obviated, first, by the demurrer's admission of the contract as alleged in the complaint, and second by the fact that, after receiving a carbon copy of the "acceptance form," the defendant wrote not one but three letters confirming the transaction, the last of which requested a price adjustment that was refused by the seller. The plaintiff seller won. This may have gone contrary to the interest of the local (Delaware) defendant, but not contrary, so far as appears, to any Delaware policy for his protection. There is no suggestion whatever that the law of Delaware would have invalidated the contract. Indeed, what was involved was the formalities provision of the Uniform Sales Act, and without looking it up I assume that Delaware's statute was the same as Pennsylvania's. There was simply no conflict—only a valid memorandum signed by the party to be charged, or by his agent on his behalf.

5. *Mullaly v. Carlisle Chemical Works*.¹⁷⁰ There is no conflict here. True the court holds—almost by way of dictum—that the contract is not within the New York (foreign to the New Jersey forum) Statute of Frauds; but the plaintiff does not necessarily win.

¹⁶⁹ EHRENZWEIG at 474-75, n. 33.

¹⁷⁰ 184 F.Supp. 701 (D.N.J. 1960).

Plaintiff was an officer and prime stockholder of a New Jersey corporation that was acquired by defendant, an Ohio corporation, whose parent was another defendant Ohio corporation. As part of the merger plaintiff was employed by *written* contract by the first defendant for a term of three years. This contract was terminable at will by the employer, but only on condition that payments of salary be continued during the term. Upon merger the old retirement plan of plaintiff's original corporation was liquidated and its benefits were commuted so far as the plaintiff was concerned; he was covered into an existing plan of the parent corporation permitting retirement after 25 years of service (including his service to his original corporation), or, in case of hardship, after 15 years of service. When his three-year term expired his total period of service was exactly 24 years and ten months—just short of the period that would have entitled him to retire on full benefits as a matter of right. He was not so retired, and he sued for the full benefits on the theory that the employer orally promised to certify him for hardship retirement if he was involuntarily retired prior to 25 years of service. *Held*, applying New York law as that of the place of contracting and performance, that the alleged oral agreement was not within the provision relating to contracts not to be performed within one year, since the employer could at any time terminate the three-year employment contract and certify the plaintiff for hardship retirement (since he had served well over 15 years when the employment contract was made). However, the court could find no consideration for the promise to certify. For this reason the court was tempted to order summary judgment for the defendant, but refrained and allowed plaintiff to go to trial because of the possibility that he might be able to establish consideration. Thus the ruling on the Statute of Frauds amounts to something like dictum, since we are not sure the plaintiff won; but let that pass. The point is that there was no conflict because no suggestion that the New Jersey law on the Statute of Frauds was different. Without looking it up, I assume that it was the same, this being in line with the usual interpretation of the one-year provision of the typical statute.

6. *Eckhart v. Plastic Film Corp.*¹⁷¹ The first thing to be noted about this case is that it has been overruled. It was overruled by a case cited a little later by Ehrenzweig, but Ehrenzweig does not note the overruling.¹⁷² The second thing to be noted is that (on the theory adopted by the court) no conflict appears. The plaintiff sued for breach of an alleged oral contract for lifetime employment. Under the law of Connecticut, appli-

¹⁷¹ 129 F.Supp. 277 (D.Conn. 1955).

¹⁷² Rubenstein v. Kleven, 261 F.2d 921 (1st Cir. 1958), cited in EHRENZWEIG at 474 n. 31, and discussed *infra*, text at n. 261.

cable by reason of the *Erie-Klaxon* doctrine, the contract was governed by the law of New York as the place of performance (plaintiff was to work out of a New York office serving as his base of operations). The reader may recall that, although the standard interpretation of the provision concerning contracts not to be performed within a year does not apply to contracts for lifetime employment, New York in 1933 amended its statute, to rectify this anomaly, by extending the requirement of a writing to contracts "performance of which is not to be completed before the end of a lifetime." Quite wrongly, even perversely, the federal district court in Connecticut held that the amendment did not mean what it said, and held the contract valid under New York law. That is why the decision was later overruled by the Court of Appeals for the First Circuit. But in the meantime note that presumably the contract was valid under the law of Connecticut, since few states have followed New York's example in amending the statute to rectify the anomaly. Thus, in a peculiar sense, we may say that there was no conflict between the laws of Connecticut and New York. But the main point is that this decision is plainly wrong, and has now been authoritatively declared wrong—not as a matter of conflict-of-laws theory but because of its perverse misinterpretation of the New York statute.

7. *Smith v. Onyx Oil & Chem. Co.*¹⁷³ Quite simply, this case involves no conflict. In the interest of brevity I omit the details. Referring to the New York Statute of Frauds (chiefly concerning sales of goods, though the one-year provision is also mentioned) because New York was the place of contracting, and so supplied the rule of decision under the conflicts law of the forum (Delaware), the court holds (1) there was an ample memorandum to satisfy the statute, and (2) the statute did not "even encompass" a contract for the sale of goods made to order for a particular buyer. There is no indication that the law of Delaware (or the law of New Jersey, also mentioned), was to any other effect.

8. *Canister Co. v. National Can Corp.*¹⁷⁴ Again no conflict appears. Omitting details, the law of Delaware points to the law of New York as that of the place of contracting. The one-year provision and the sale-of-goods provision are invoked. Neither is applicable because (1) the agreement was to terminate with the lifting of wartime production controls, which might happen within a year, and (2) the goods were manufactured to order for the particular buyer. These are standard constructions of the typical statute.

9. *Wolfe v. Burke.*¹⁷⁵ I should say, rather, that the contract here

¹⁷³ 120 F.Supp. 674, 681 (D.Del. 1954).

¹⁷⁴ 63 F. Supp. 361 (D.Del. 1945).

¹⁷⁵ 18 Colo. 264, 32 Pac. 427 (1893).

was upheld under the common law of the forum state, no conflict with the law of any other state appearing. The action was in Colorado for breach of a fairly formal contract, made in Idaho, for the purchase of land in Idaho (there was an escrow arrangement, part payments were made, time extensions were granted, etc.). While there was no plea of any specific Statute of Frauds, it must be remembered that at common law the defense could (at least sometimes) be asserted under a plea of the general issue. The court said that if the contract was to be held invalid by reason of the Statute of Frauds it must be the statute of Idaho, because the contract was made and to be performed there and the land was located there. But *no evidence was introduced as to any Idaho Statute of Frauds*. The statutory law of another state will not be presumed to be the same as the statutory law of the forum; the presumption as to common law does not apply to statutes (a standard holding).¹⁷⁶ This contract was valid at common law and hence enforceable unless stricken by the Colorado statute; but that does not apply because it is substantive and has no application to contracts for the sale of land in another state, made and to be performed in the other state. The parties are not localized. Perhaps this holding may be said to frustrate Colorado's policy of protecting domestic people asserted to have promised to buy land (if we assume that the defendant was a resident of Colorado); but Colorado has not construed its statute as announcing any such policy. Besides, it is hard to see why the trial court thought the note signed by one of the defendants was not a sufficient memorandum under any statute.

10. *Lams v. F. H. Smith Co.*¹⁷⁷ I cannot say *ex cathedra* that Ehrenzweig is not entitled to cite this case in support of his proposition, since the decision does uphold a contract by applying foreign law when it would be invalid by the law of the forum; moreover, as I read it, the case frustrates the interest of Delaware, the forum state, in protecting its own. But if one reads the case one must, I submit, take it as signifying something quite different from an indiscriminate "rule of validation." This is the familiar casebook case on which I relied (among others) when I predicted that analysis of Ehrenzweig's authorities would repudiate rather than substantiate his thesis.¹⁷⁸ I had discussed the case in considerable detail in an essay published in 1960—two years before Ehrenzweig's treatise appeared.¹⁷⁹ To me it seems very clear that the Delaware court was motivated by the kind of reasoning that goes into governmental-interest analysis: it

¹⁷⁶ See CURRIE, ch. 1, at 19-23.

¹⁷⁷ 36 Del. (6 Harr.) 477, 178 Atl. 651 (Super.Ct. 1935).

¹⁷⁸ Currie, Book Review, 1964 DUKE L. J. 424, 429-30.

¹⁷⁹ See CURRIE, ch. 19, at 450-55, originally published in 69 YALE L. J. 1323 (1960).

determined the policy of the Delaware Statute of Frauds (primarily to protect local people and enterprises) and recognized Delaware's interest in applying its policy to the fullest reasonable extent. It felt bound, however, to accomplish this through the alternatives made available by the traditional rules for choice of law, even though by such means it could only approximate the goal of the legislature, and that by indirection as distinguished from forthright declaration of policy and interest. The effective choice was between characterizing the statute as substantive or characterizing it as procedural. Then the court calculated the odds. It reasoned, rightly or wrongly, that most alleged promises by residents of Delaware would be made in Delaware. Hence the greater protection would be afforded local people—both at home and when they were sued in other states—if the statute were characterized as substantive. This is what I call governmental-interest analysis and policy effectuation by indirection and approximation. It is not a technique that I applaud, since it leads to some absurd results, including arbitrary discrimination against its own people that, in some instances, will some day be held unconstitutional. It is, however, a groping toward policy and interest analysis within the manipulable framework of the traditional system. It is most definitely not an indiscriminate "rule of validation," even though in the case in which the decision was announced a Delaware corporation was arguably deprived of the protection of Delaware's policy.

There is another way of looking at the case. The defendant corporation had contracted *in writing* to repurchase bonds sold by it to the plaintiff. The contract was allegedly made in New York, which had the one-year provision but did not require the agent's authority to be in writing, as the Delaware statute did. Rejecting the literalism of *Leroux v. Brown*, which would easily have led to a holding that the local statute was procedural, precluding enforcement, the court, as I have said, deliberately calculated the odds and held the statute substantive for the protection of Delaware people in the long run. Is this not also an appropriate case for a rule of alternative reference? There was a *writing*, signed by an agent of the defendant. Must there really be, under any statute, *ad hoc* written authorization for a corporate agent to make written promises not to be performed within a year, relied on in good faith by the buyer of bonds?¹⁸⁰

11. *Green v. East Tenn. & Ga. R.R.*¹⁸¹ The case does not deal with the Statute of Frauds; it does not even deal with the formal validity

¹⁸⁰ In criticism of Erhenzweig I do not seek to make capital of the fact that the decision was by an inferior court. I myself value the decision as a pragmatic, though constricted, approach to a sound method of solving conflicts problems.

¹⁸¹ 37 Ga. 456 (1867).

of contracts in any guise. The question is whether an arbitration award made pursuant to a (probably written) contract may be oral, not reduced to writing. The relevant considerations seem remote from the Statute of Frauds. It does not appear from the report that Georgia required an award to be in writing; the court said that the law of Tennessee, as the state of contracting, governed, and there was ample evidence that Tennessee law validated such an award. Independent investigation of the Georgia legislation of the approximate time discloses that a submission to arbitration could be by parol, and the award might be "verbal," when no more than \$500 was involved.¹⁸² Whether this legislation was applicable cannot be determined without research unjustified by the occasion: the 1861 Code was Georgia's first; the contract was made in 1850; this action was tried in 1867. Whether or not the original code provision was based on a law in force when the contract, or the award, was made, and whether or not more than \$500 was involved, I do not know, and I shall not attempt to find out because the whole thing has nothing to do with the formal validity of contracts.

12. *Oakes v. Chicago Fire Brick Co.*¹⁸³ I concede Ehrenzweig such comfort as he can derive from this decision. It does strain to hold a contract valid under the law of another state when presumably it would be invalid under the law of the forum (though it is not clear why it would be thus invalid). Moreover, the result can be squared with governmental-interest analysis only on the basis of an assumed *Bernkrant* operation.

The plaintiff, apparently then a resident of Pennsylvania, there (allegedly) contracted with the defendant corporation to work as salesman for a period of one year, to begin at a future date. In reliance on the informal promise he moved to Chicago and worked about a month before his discharge. Admittedly the agreement was valid according to Pennsylvania law (possibly because of part performance?). It was assumed to be invalid under Illinois law, though one wonders again whether part performance should not aid the plaintiff. The court says nothing about a preference for the validating law. On the surface, at least, it merely lays down a rule for choice, and one that, if followed, will certainly lead to invalidation under local law in cases to come: Ordinarily the law of the place of contracting applies to formalities; but where the contract is made in one state to be performed in another, the parties will be presumed to have intended the law of the place of performance. So far this points to invalidity. Here, however, performance was to take place not only in Illinois but in several states.

¹⁸² GEORGIA CODE § 2826 (1861); *id.* § 2834 (1868); *id.* § 7-104 (1933).

¹⁸³ 388 Ill. 474, 58 N.E.2d 460 (1944).

Defendant having failed to sustain the burden of showing that performance was to be *wholly* in Illinois, we are remitted to the law of the place of contracting. If I were an adherent of the "rule of validation" I would not be especially happy with this pronouncement that, in the next case, where the work is to be done entirely in Illinois, the agreement will be stricken down.

13. *Miller v. Wilson*.¹⁸⁴ A slender reed indeed. The action is on an agreement made in Kansas to purchase land in Kansas, where, of course, performance was to take place. The parties are not localized except as one may draw risky inferences. There was a receipt signed by the plaintiff (and accepted by the defendant), a note signed by the defendant, a letter of inquiry, and a chit signed by the defendant forfeiting his deposit—all of which the court said, it seems to me unreasonably, did not add up to a sufficient memorandum to satisfy the hungry Illinois statute, if it were applicable. But it had no application to such a contract as this. And no Kansas Statute of Frauds was pleaded. So whether by presuming the Kansas law to be the same as the *common* law of Illinois, or simply by default, the court held the defense of the Statute of Frauds must fail. "Rule of validation?" The case clearly says to me that the defendant has only to bring to the attention of the court in proper fashion the applicable Statute of Frauds of Kansas, and the Illinois court, a cathedral for harsh application of formal requirements (if the discussion of the sufficiency of the memorandum is a reliable guide), will instantly put the contract to death.

14. *Henning v. Hill*.¹⁸⁵ If Ehrenzweig can squeeze any comfort out of this case he is welcome to it. Perhaps he was captivated by an incidental remark to the effect that the Indiana Statute of Frauds (relating to brokers' contracts) did not declare a policy of the state. But what happened was this: The contract was made in Illinois at a time when both parties were residents of Illinois, and was fully consummated there. Only after the whole transaction (except payment of the commission) had been completed did the defendant move to Indiana. To me this is a clear case of a single interested state at the time of the transaction; to have applied Indiana law would have required a strong justification not to be found in a Statute of Frauds. No Illinois statute was pleaded. The court held the Indiana statute substantive and hence inapplicable; it was in this connection that the court remarked that the statute did not declare a (judicial-administration?) policy for Indiana. In the absence of proof of an invalidating Illinois statute, the court presumed the common law to be in force in all the former Northwest Territory, and upheld the contract. God helping it, it could do no other.

¹⁸⁴ 146 Ill. 523, 34 N.E. 1111 (1893).

¹⁸⁵ 80 Ind.App. 363, 141 N.E. 66 (1923).

15. *Lenn v. Riché*¹⁸⁶ . . . “(applying French law).” Now I am simply—or rather compoundly—confused. Ehrenzweig cited this case earlier¹⁸⁷ to support his statement that, for lack of an express “rule of validation,” courts resort to “precarious devices” to validate contracts—here the “moral impossibility” of invoking the invalidating law. We disposed of that, I think. Now he cites it to sustain the proposition that courts uphold contracts under foreign law although they would be invalid under the law of the forum. Whence he derives the notion that this *commandatum*, or bailment, would be invalid under the law of Massachusetts I have not the faintest idea.

16. *Dudley A. Tyng & Co. v. Converse*.¹⁸⁸ So far as I can judge, there was no conflict—and so no support for Ehrenzweig—if the Michigan statute was at all reasonably drafted and interpreted. At best, the case simply holds that the law of the place of contracting governs—determining place of contracting by the usual weird rule relating to acceptance by telephone. The defendant, apparently a resident of Michigan, wrote to the plaintiff broker in Illinois offering to buy certain shares of stock at a stated price. The plaintiff acknowledged and said he would treat the order as a standing one until cancellation. About a week later there was a telephone conversation in which the defendant did or did not cancel, depending on whose testimony one believes. A couple of weeks later plaintiff telegraphed that the order had been filled. Defendant replied that he would not “accept,” then wrote a letter saying, “I am very sorry I did not cancel my order with you,” and went on to make excuses about having bought all the stock he could finance. On the same day all this happened there was a telephone conversation to the same effect. I find it hard to understand why the letter signed by the defendant was not a sufficient memorandum. The court, however, concentrated its attention on the defendant’s argument that the contract was made in Michigan, holding that it was clearly made in Illinois and citing cases to the effect that acceptance by telephone takes place when and where the words of acceptance are spoken.¹⁸⁹

17. *Matson v. Bowman*.¹⁹⁰ I concede nothing here. At a time

¹⁸⁶ 331 Mass. 104, 117 N.E.2d 129 (1954).

¹⁸⁷ See text at note 71, *supra*.

¹⁸⁸ 180 Mich. 195, 146 N.W. 629 (1914).

¹⁸⁹ Concededly Illinois had no applicable Statute of Frauds. Assuming that the typical Statute of Frauds as it relates to the sale of “goods, wares, or merchandise” embraces corporate stock (a not unusual holding), the Michigan statute presumably in force at the time, though covering such a transaction, required only “some note or memorandum in writing” signed, etc., and would seem to be completely satisfied by the letter regretting failure to cancel the written order. 4 HOW. MICH. STAT. (2d ed.) § 11400.

¹⁹⁰ 139 Minn. 296, 166 N.W. 343 (1918).

when both parties resided in Iowa the defendant, to induce plaintiff to buy stock in a corporation, executed and signed a formal, *written* offer to repurchase at the original price some five and one-half years later. On demand defendant refused to repurchase and plaintiff sued. Defendant pleaded the Minnesota (forum) Statute of Frauds. Can you guess why? Because, forsooth, it required that the consideration be stated in the memorandum, and that was not done. The court held simply that according to settled law the state where the contract was made and to be performed, and where the parties resided at the time, was controlling. The Iowa Statute of Frauds was not pleaded. The court refused to assume that, if pleaded, it would be found to contain the unusual requirement that the consideration be expressed in the memorandum. There was no conflict. Only a single state was interested in the parties and the transaction—Iowa. Iowa law was not shown to invalidate, and probably did not invalidate (I have not bothered to look up the Iowa law at this time, and do not intend to do so). Had there been a conflict a rule of alternative reference would have been indicated. No court in its senses would have invalidated the contract in these circumstances, and the holding does not remotely support a “rule of validation.”

18. *Halloran v. Jacob Schmidt Brewing Co.*¹⁹¹ This was an action to recover on the defendant's *written* promise to guarantee the rent of premises in Iowa to be used as a saloon. The lessor and lessee appear to have been residents of Iowa; the lease and the contract of guaranty were executed and to be performed in Iowa. The defendant was presumably, a Minnesota enterprise. The contract of guaranty conformed with the pleaded Iowa Statute of Frauds. The answer *admitted* the execution of the guaranty contract—though I must be careful not to make too much of this because of the strange ruling, occasionally uttered, that even a written admission, to take the case out of the statute, must precede suit. The only complaint was that the writing did not express the consideration, as required by the Minnesota statute. The court did *not* say, as I do, that it does not require much imagination to guess why a brewing company would undertake to guarantee payment of the rent of a saloon. Instead it gave long shrift to the argument that the memorandum did not satisfy the forum's statute, in the end holding the statute substantive for cases such as this, at least. Moreover, the requirement that the consideration be expressed was “at most an insignificant variance from [the typical Statute of Frauds], since it is generally held that a recital of ‘value received’ is a sufficient expression of consideration—an expression that leaves the actual

¹⁹¹ 137 Minn. 141, 162 N.W. 1082 (1917).

consideration wholly at sea so far as perjury is concerned." The fundamental policy of the statute, that such promises as this be proved by written evidence, was satisfied. Hence this was simply a case of holding applicable the law of the place of contracting and performance (and perhaps situs), a well-reasoned policy construction of the domestic statute, and in effect a declaration of a rule of alternative reference where differences are demonstrably and incontrovertibly nonessential to the basic policy of the statute.

19. *McKibbin v. Ellingson*¹⁹² . . . "(applying a foreign recording statute)." This does not concern the Statute of Frauds, and does not even (according to my comprehension of the expression) involve a question of the formal validity of a contract (at least in the sense of an executory promise). It concerns the validity of an assignment for the benefit of creditors—executed and performed—and the requirement that such an assignment be filed or recorded. It was duly filed in the foreign state. The policy of such a statute is so obviously different from the policy of the Statute of Frauds that further discussion would be as inexcusable as the citation itself; but, under provocation, I add the following quotation from the opinion:

"Though we were to deem [the assignment] executed in this state, still it would not come within our statute regulating assignments. That statute does not assume to regulate assignments executed in this state by nonresidents, who have no property and no place for carrying on business in this state, and the trusts created by which are to be carried out in another state."¹⁹³

20. *Hooker v. McRae*.¹⁹⁴ The defendant's son went to the plaintiff's place of business in Tennessee and asked plaintiff to buy cross-ties for the account of his father's company, giving the plaintiff a list, signed by him for his father's company, that specified kinds and prices. Plaintiff delivered the ties to the railroad right-of-way (presumably in Tennessee) as called for by the order, but defendant refused to take them up. Upon being shown the order signed by his son he said, "Well, you have me, and I will take the ties up as soon as I can get the cars placed." So how can any Statute of Frauds bar recovery? The court held simply that this was a Tennessee contract, and the Tennessee Statute of Frauds did not apply except where the price of the goods was \$500 or more—and the cross-ties were not worth that much. That is all. Independent investigation reveals,

¹⁹² 58 Minn. 205, 59 N.W. 1003 (1894).

¹⁹³ 58 Minn. at 210, 59 N.W. at 1003.

¹⁹⁴ 131 Miss. 899, 95 So. 744 (1923), explained on appeal from judgment on remand (not reversed on other grounds as Ehrenzweig says), 138 Miss. 439, 103 So. 197 (1925).

as expected, that the Mississippi statute used the more common figure of \$50.¹⁹⁵ But was there not a sufficient memorandum in any event? No question was raised as to the authority of the son as agent. Did not the buyer "accept" the goods, or part of them, and "actually receive the same" when, on being notified that they had been delivered to the right-of-way, he said he would take them up?

21. *Houghtaling v. Ball & Chapin*.¹⁹⁶ My notes read: "Absolutely inapposite." The plaintiff alleged that he had sold 2,000 bushels of wheat to the defendant at \$1.05 per bushel and delivered it to defendant's agent in Illinois, who was to ship it on to St. Louis, where payment was to be made on arrival. The defendants refused to accept delivery in St. Louis, or to pay. The answer was a general denial. The trial court instructed the jury that there was no evidence to warrant a verdict for the plaintiff. This court says it was error to take the case from the jury since the evidence tended to support the allegations of the complaint, above stated. If there was a question of law the court should have preserved it by putting a hypothetical question to the jury.

"... It is obvious that, as the case comes from the court below, there is no question of law for this court to decide. None was made, and, so far as the record is concerned, we are utterly at a loss to ascertain the point on which the cause was determined in the court below.

"It is not perceived how the statute of frauds could affect the contract, as stated in the petition. It is alleged that the wheat was sold and delivered. If so, the statute had nothing to do with the case. There being a delivery of the article sold, the contract was taken out of the operation of the statute. The allegation that payment was to be made upon the arrival of the wheat at St. Louis, serves only to designate the time of payment, and, by no means, subjects the contract to the laws of Missouri. The laws of Illinois alone operated on the agreement."¹⁹⁷

Observe that the court first spoke of the Missouri statute; suddenly the Illinois statute becomes material, but it was not proved; and we have reason to know that Illinois did not have a statute requiring a writing for sales of

¹⁹⁵ Also that the authority of the agent was not required to be in writing. MISS. CODE ANN. § 268 (1942); HEMINGWAY'S ANN. MISS. CODE § 3329 (1927). The later decision on appeal from the judgment on remand only makes it clear that the writing was not the integrated contract; parol evidence was admissible to prove that the defendant wanted softwood ties only, and was not obliged to take hardwood. If anyone is prepared to argue (against odds) that the Mississippi court should have protected its resident notwithstanding the memorandum and acceptance, I would suggest that the decision is justified on the basis of a *Bernkrant* operation, since the defendant sent his son into the plaintiff's home territory to instigate the deal.

¹⁹⁶ 19 Mo. 84, 59 Am. Dec. 331 (1853).

¹⁹⁷ 19 Mo. at 86, 59 Am. Dec. at 332-33.

goods.¹⁹⁸ The court refused to take judicial notice of Illinois law, holding that the burden was on the defendant to prove it. Otherwise the court would assume the Illinois law to be the same as the common law of Missouri. In short, the court seems to hold: (1) If there was delivery as alleged, and the jury could so find, the case was taken out of the Missouri statute, if that was applicable; and (2) Illinois law, not Missouri law, governs, and is presumed to be the common law, with no Statute of Frauds requiring a writing.

22. *Howell v. North*.¹⁹⁹ This case perhaps furnishes the strongest support thus far for Ehrenzweig's statement, yet it is slender support. The action is by an assignee of the right to a brokerage commission for the sale of land. Since, in my view, an assignment ordinarily should not change settled rights, I shall treat the case as if the original parties were the litigants. Both were apparently residents of Nebraska (the forum state), though, since they lived in different cities, they did business by correspondence. Defendant *wrote* to plaintiff offering a "fair commission" if he could find a buyer for Colorado land at a stated price. Plaintiff alleged performance and nonpayment; the trial court sustained a demurrer to the complaint. Reversed. The defendant had invoked the Nebraska statute, which required brokerage contracts for the sale of land to be in writing, subscribed by both the landowner and the broker (a rather unusual requirement), and stating the compensation of the broker. The defendant's letter had been very precise except as to the commission: it even enclosed a plat. The broker's acceptance was endorsed on the defendant's letter (signed by the brokerage company with the initials of the broker), all as shown by the *defendant's* brief. In addition, the broker wrote defendant a letter saying he had found a buyer but had heard that defendant had sold to another, and asking clarification so that he could proceed. Defendant replied by letter denouncing the rumor and impliedly authorizing the broker to proceed. Plaintiff proceeded to sell the land in Colorado, and from that state wired defendant that he had done so. The law of Colorado was that the broker was entitled to his commission upon procuring a ready buyer though his contract was not in writing and no specific commission had been agreed upon.

It would seem that even the Nebraska statute was satisfied, if "fair commission" can be taken, as it should be taken, as a sufficiently precise statement. The court treated the letter denouncing the rumor as clear authorization to proceed. Thus defendant had twice committed himself in

¹⁹⁸ See ILL. REV. STAT. ch. XLIV, § 1 (1845).

¹⁹⁹ 93 Neb. 505, 140 N.W. 779 (1913).

writing. Acceptance of the offer occurred when plaintiff performed in Colorado (a standard holding where the contract is unilateral). "This contract would appear to be binding in any event whenever the plaintiff's assignor discovered a buyer and sold the land to him."²⁰⁰ Some language of the court is worth quoting in order to make the point that imprecise reading of precise language can be misleading. The court said:

"The purpose of the [Nebraska] statute was to protect landowners from the fictitious claims of real estate dealers who never actually sold the land they claimed to sell and never earned the commission for which they were claimants, but it was never the intention of the legislature to protect the real estate owner against legitimate claims for services which he authorized in writing and which were honestly rendered."²⁰¹

This does not mean that the purpose of the statute is only to protect against dishonest dealers; if there is not substantial compliance with the (applicable) statute the dealer cannot recover, no matter how honest his claim. The court simply means that the substance, the spirit, and even the letter of the statute were complied with in this case. There is no discussion of the sufficiency of the provision for a fair commission. Thus the court actually holds the contract valid under the law of the forum. Almost as an afterthought it says that the contract related to land in Colorado and was to be performed there, and was valid under Colorado law.

23. *Anderson v. May*.²⁰² No conflict; this is rather clearly not a case in which a contract, in the sense of an executory promise, invalid by the law of the forum, is validated by foreign law. The action is on a *written* promise, constituting a perfect memorandum, and supported by sufficient consideration, to guarantee the rent on a one-year lease (to commence at a future date) of land in Arkansas. There is no question whatever as to the formal validity of the contract of guaranty. The question is whether the informal lease was valid, for presumably if there was no valid underlying obligation to pay rent there would be nothing for the guarantor to guarantee. Rather naturally, it seems, the Tennessee court looked to Arkansas law to determine the validity of the lease. Arkansas was the only state related to the primary transaction: the land was there, and, so far as appears, so were the lessor, the lessee, the making of the agreement, and the transfer of possession. The Arkansas statute, "similar" to the Tennessee statute, required a lease of land for more than one year to be in writing. Since this lease was for exactly one year and no more, it was not within the

²⁰⁰ 93 Neb. at 509, 140 N.W. at 780.

²⁰¹ *Ibid.*

²⁰² 57 Tenn. 84 (1872).

terms of either the Arkansas or the Tennessee statute. The statutes did not speak of leases, as they did of contracts generally, "not to be performed within the space of one year"; and the standard construction of the lease clause is that it does not encompass a lease for one year, though the term is to begin at a future date. So the court held here, although the question was one of first impression in both Arkansas and Tennessee. But the decision is buttressed by a further provision of the Arkansas statute, to the effect that an unwritten lease shall be treated as one terminable at will—with no greater effect than a lease for one year. The effect is that any oral lease, with or without entry, operates as a lease for one year from the date of the contract to make it. Judgment for defendant reversed.

This I regard not as a choice-of-law case in the sense that the forum refers to foreign law for the rule of decision but as a case in which, given the rule of decision (whether supplied by domestic or foreign law) the court looks to foreign law to find a datum made relevant by the rule of decision. There is no discussion of what law governs the contract of guaranty. The defendant mailed his letter from Memphis to Arkansas, but whether it was offer or acceptance does not appear. Presumably both states agreed that the guarantor was bound only if there was an enforceable obligation of the lessee to pay the rent. To find that datum, the court looked to Arkansas law and concluded that there was such an obligation.

24. *General Motors Acceptance Corp. v. Jenkins*.²⁰³ To quote again my notes: "Inapposite (polite way of saying case not remotely in point)." Action by holder of security interest to repossess automobile from allegedly innocent purchaser for value; question, whether the security instrument (conditional sale or chattel mortgage) must be recorded. This has nothing to do with the Statute of Frauds. In some remote sense it may be thought to concern "formal validity" of contracts; but the policy considerations involved are quite different. Interesting question; let's discuss it on some other occasion.

25. *Beach v. Gehl*.²⁰⁴ This was an action for breach by the lessees of an agreement to lease premises in Illinois for five years, defendant lessees having abandoned the premises after about a year and a half of occupancy. There was nothing wrong with the lease; the controversy was over the defendants' contention that there was an oral rescission. The plaintiff denied this, maintaining that he re-entered after abandonment simply to mitigate damages. On this issue the jury found, in defendants' favor, that there was an oral rescission (but this is vitiated by prejudicial instruc-

²⁰³ 234 S.C. 394, 108 S.E.2d 578 (1959).

²⁰⁴ 204 Wis. 367, 235 N.W. 778 (1931).

tions as to what would amount to an agreement of rescission). Hence there must be a new trial, but it was necessary to determine the validity of an oral agreement to rescind. For this purpose the court referred to Illinois law because "the premises as well as the transactions" were localized there. Under that law an oral agreement to rescind a written lease for a term of years was valid. Although this does not appear from the report, the law of Wisconsin appears to be otherwise, because rescission is a return to the lessor of an interest in land and is therefore within the Statute of Frauds.²⁰⁵ Hence it is true that the court here upheld under foreign law a contract invalid under the Statute of Frauds of the forum. Its motive, however, does not appear to be that of validating every contract if that can possibly be done by reference to any proper validating law. The holding is conventional. If it be suggested that Wisconsin failed to effectuate its interest in protecting the expectations of the lessees in reliance on the oral agreement (on the rather dubious assumption that the lessees, being sued in Wisconsin, resided there), to the advantage of the lessor (on the assumption that, as owner of the Illinois premises, he resided *there*), I would reply that this seems an excellent situation for a *Bernkrant* operation.²⁰⁶

26. *D. Canale & Co. v. Pauly & Pauly Cheese Co.*²⁰⁷ . . . "*dissenting opinion*)." Since Ehrenzweig cites this case only for the dissenting opinion, which of course is not authority, perhaps we should pass on without further comment. In fairness to Ehrenzweig, however, I think we should take into account the majority opinion, because (1) the dissenting opinion would *invalidate* the contract by applying the law of the *forum* (contrary to the statement in Ehrenzweig's text), and (2) the majority opinion furnishes perhaps the strongest support yet for Ehrenzweig's thesis, though he does not rely on it.

Taken in the light most favorable to the plaintiff, the facts were that the parties orally contracted in Tennessee for the sale of cheese by defendant to plaintiff, F.O.B. Wisconsin. (One may guess that the defendant was of Wisconsin and the plaintiff of Tennessee.) Rather clearly, under conventional doctrine, the contract (if any) was made in Tennessee and to be performed in Wisconsin (by delivery to the carrier). The contract did not comply with the sale-of-goods provision of the Wisconsin statute, but

²⁰⁵ See RESTATEMENT, CONTRACTS, § 222 (1932), and WISCONSIN ANNOTATIONS (1933).

²⁰⁶ I do not seek to make capital of the fact that we do not know the ultimate result since on the new trial the jury, properly instructed, may find there was no agreement to rescind. The decision rules clearly enough—and this will be the law of the case on remand—that by the applicable Illinois law an oral rescission is valid.

²⁰⁷ 155 Wis. 541, 547, 145 N.W. 372, 373 (1914).

was concededly valid under the law of Tennessee.²⁰⁸ The trial court dismissed the action, holding that the law of Wisconsin, as the place of performance, was controlling. This court reversed, holding that the *intention of the parties* determines what law governs; and that, while in the absence of other indications the place of performance is presumed to be the place whose law was contemplated by the parties, other considerations may rebut the presumption. The only counter-consideration mentioned is the intention of honest men that their agreements shall be valid and binding. This familiar argument for validation, quite reminiscent of Ehrenzweig's own argument, is set out at length at pages 545-46 of the official report. The mandate called for judgment in favor of the plaintiff. The dissent would apply the law of Wisconsin, invalidating the contract, because there were no circumstances in evidence sufficient to rebut the presumption that the parties intended the law of the place of performance to govern: "To say that the presumed intention of the parties to make a valid contract is potent to overcome the inferences of intention arising from the fixing of the place of performance elsewhere is to eliminate the latter as a factor in all cases, because everyone who seriously attempts to contract intends to make a valid contract."²⁰⁹

In terms of the result as distinguished from the reasons given, I greatly prefer the majority opinion, though it would have lent Ehrenzweig support if he had cited it. I welcome the result in spite of the reasoning, which indeed leads to an absurdity: to repeat, while the law intended by the parties may very well be relevant to the interpretation of an admitted contract, it is begging the question to speak of the intention of the parties to a contract as to the law governing validity, where the question is, as it most often is in cases concerning the Statute of Frauds, whether there was any contract at all. The law and policy of the Statute of Frauds, when it is applicable, is that the existence of a contract cannot be proved except by a written memorandum. If there is no such memorandum the court cannot know whether there was a contract or not, and must assume there was none. So what price the "intention of the parties to the contract"?

On its face the result reached by the majority impaired the interest of Wisconsin in protecting its own residents and enterprises against the hazards of informal proof of promises to sell cheese. I would not find it hard,

²⁰⁸ Apparently the Tennessee Statute of Frauds of the period did not contain a sale-of-goods provision. See TENN. ANN. CODE § 3142 (1917). *But cf.* the Hooker case, *supra* note 194.

²⁰⁹ 155 Wis. at 549, 145 N.W. at 374 (dissenting opinion). The dissent might have added that the assumed intention to make a valid contract eliminates not only the law of the place of performance but *any invalidating law*—which is about what Ehrenzweig advocates; yet remember that the dissent, which Ehrenzweig cites, was not urging such a rule but was employing the *reductio ad absurdum* argument against the majority's validating opinion.

however, to justify a *Bernkrant* operation supporting the result in view of the fact that the defendant's salesman presumably sought out the plaintiff buyer in his home territory of Tennessee, where merchants were not accustomed to the requirement of a writing when contracting for the sale of goods.

VI

THE CRUCIAL NEW YORK CASES

"Even if the parties have established the required contact for the purpose of evading a stricter law, the Rule of Validation [sic]^[210] should probably be applied since 'the parties do not need protection.'^[211] These conclusions^[212] based upon actual holdings rather than judicial language, have been exemplified elsewhere by an analysis of the case law of New York, one of our outstanding jurisdictions."^[213]

1. *Rubin v. Irving Trust Co.*²¹⁴ We have already discussed this case,²¹⁵ and I shall repeat only that the decision invalidated the alleged contract by reference to the law of the forum and domicile, and refused to validate it by the law of another state having only a fortuitous relationship to the matter—and did so, moreover, explicitly in terms of interpretation of the law of the forum in the light of the strong protective policy it expressed.

2. *Reilly v. Steinhart.*²¹⁶ This too has been previously discussed,²¹⁷ and I repeat only that there was no conflict: the contract was upheld because it was in writing and valid by the laws of both Cuba and New

²¹⁰ Ehrenzweig's emphasis.

²¹¹ For this remarkable pronouncement Ehrenzweig cites one Raape, who cannot be identified without some effort (see first EHRENZWEIG at 473 n. 21, referring to Ehrenzweig's earlier note 4, which refers to nothing; but the diligent researcher consulting the bibliography (EHRENZWEIG at XLV) may discover that, with his usual erudition, Ehrenzweig is referring to the author of a "leading treatise" in a foreign language, in this case German, published in 1955 and not available in translation. I tend to believe, perhaps naively, that American legislatures rather than untranslated German scholars should determine whether American parties need protection against oral proof of promises.

²¹² The reference is apparently to all three of the immediately preceding statements, the first two of which have been examined in parts IV and V of this paper.

²¹³ Here Ehrenzweig refers to his article in 59 COLUM. L. REV. 874 (1959). As has been indicated, this discussion must be limited to the cases cited in the treatise. The entire quotation in the text is from EHRENZWEIG at 471, and the cases to be discussed below are all, except as otherwise stated, cited in *id.* n. 22.

²¹⁴ 305 N.Y. 288, 113 N.E.2d 424 (1953).

²¹⁵ See text at notes 63-66, *supra*.

²¹⁶ 217 N.Y. 549, 112 N.E. 468 (1916).

²¹⁷ See text at notes 142-44, *supra*.

York; the only difference was that Cuba required the plaintiff to pursue two remedies while New York gave him satisfaction in a single action.

3. *Franklin Sugar Ref. Co. v. Lipowicz*.²¹⁸ Absolutely no conflict of laws was involved in this case. The question was whether a memorandum cryptic because of the use of trade jargon was sufficiently definite to constitute an enforceable contract; and, as many another court has done, this court held that it was, when read in the light of evidence as to trade custom and usage. Substantially identical statutes of frauds were satisfied by a memorandum in writing signed by the party sought to be charged or by his agent.

4. *Russell v. Société Anonyme des Établissements Aeroxon*.²¹⁹ A little farther on in his discussion Ehrenzweig cites this as an obstacle to be distinguished: as one in which the contract was *invalidated* under forum law "notwithstanding validating laws of the place of contracting or performance, or the intention of the parties. . ." because the foreign law was not pleaded.²²⁰ Which is it: a case supporting the "rule of validation," as clearly implied by the text and citation at page 473 note 22, or a deviant case to be distinguished away as clearly stated at page 474 note 30?

One thing is clear: the contract was not validated under either law. It was invalidated under the law of the forum, New York, on the ground that the party seeking advantage under foreign law has the burden of properly establishing that law to the satisfaction of the court. This is sound law, which I understand Ehrenzweig to approve.²²¹ In this case the plaintiff not only failed to plead and prove foreign law; he failed to lay a foundation for demonstrating the relevance of foreign law. He did not even allege the place where the contract was supposedly made. And how does one know that the foreign (Belgian) law would validate? The decision does not say it would. Ehrenzweig may know the answer; I do not. At all events, the court, perhaps sharing my ignorance, wanted to be informed of the answer before it upheld the contract as valid under foreign law.

Despite the absence of sufficient information, I am tempted to suggest that the decision supports neither of the propositions for which it is cited. The action was against a Belgian corporation and its vice president for breach of an alleged oral contract to give the plaintiff an exclusive agency for five years to sell the defendants' product. Only the individual defendant was served with process. It was clear that plaintiff had no written memorandum binding the individual defendant personally, though it may

²¹⁸ 247 N.Y. 465, 160 N.E. 916 (1928).

²¹⁹ 268 N.Y. 173, 197 N.E. 185 (1935).

²²⁰ EHRENZWEIG at 474 (text and n. 30).

²²¹ See CURRIE, ch. 1, and text at notes 92-93, *supra*.

have had one binding the corporation. The plaintiff argued that the vice president contracted "individually and as Vice-President of the Société"; but what court is likely to place that interpretation on a contract signed by a corporate official? I suppose I could incur personal liability by signing a contract purporting to award an exclusive franchise to sell General Motors products; but I imagine a court would require rather clear language on which to base an interpretation that I intended to assume such a personal obligation. If I were vice-president of General Motors, and signed such a paper, I imagine the court would suppose that I was purporting to bind the company rather than myself. The individual defendant pleaded the New York Statute of Frauds both as to the sale of goods and contracts not to be performed within one year. As to him the obligation, if any he had assumed, was voided. The defendant corporation was not served with process and so was not affected, at least directly. How can there be any complaint against the decision? And how can it support a "rule of validation"?

5. *A. S. Rampell, Inc. v. Hyster Co.*²²² Again, we have previously discussed the case.²²³ We did so because Ehrenzweig cited it as a case to be excluded from the analysis²²⁴ on the ground that the parties had agreed on the applicable law. Now, one page later, he cites it in support of his "rule of validation." We have seen that the case does not involve the Statute of Frauds at all, but rather the question whether a written agreement may be orally modified. All the court held was that the objection to the complaint, grounded on a New York statute requiring a writing for modification, was not well taken since the complaint on its face alleged that the parties had agreed on the validating Oregon law.

6. *Wilson v. Lewiston Mill Co.*²²⁵ This case, also, has been previously discussed. It, too, was excluded from the analysis,²²⁶ only to be served up one page later as a pillar of the "rule of validation" coming from "one of our outstanding jurisdictions."²²⁷ The case is appropriately cited for neither proposition. The parties had not contracted for a particular law to govern their relationship; their counsel had simply stipulated what they knew the court would rule as to the applicable law. And the case does not support the "rule of validation," since the decision holds the contract *invalid* under the law of Maine—the governing law as stipulated by counsel and dictated by precedent.

²²² 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957); 57 COLUM. L. REV. 1188 (1957).

²²³ See text at note 96, *supra*.

²²⁴ EHRENZWEIG at 472, n. 18.

²²⁵ 150 N.Y. 314, 44 N.E. 959 (1896).

²²⁶ EHRENZWEIG at 472, n. 18.

²²⁷ EHRENZWEIG at 473.

7. *Lindeman v. Textron, Inc.*²²⁸ If every case declining to apply the invalidating law of the forum, for whatever reason, supports a "rule of validation," then this case supports Ehrenzweig. But I believe in reading cases, and all I read here is that the federal court, applying the *Erie* doctrine and attempting to determine what a New York court would do, held that it would not apply New York's statute requiring a writing for contracts for real estate brokerage commissions where the case was not shown to be in any significant way related to New York: "Since none of the events of the case occurred in New York, it would be unreasonable to hold that provision applicable."²²⁹ The district court (136 F.Supp. at 157) erred in directing a verdict for the defendant, since the jury might justifiably have found for the plaintiff. The other states possibly involved, because "pivotal events" occurred there, were Massachusetts and Rhode Island. Without research into the statutes of these states at the relevant time, I take professorial notice that fewer states have statutes requiring brokerage contracts to be in writing than have the Statute of Frauds, modeled on the English statute, which contains no such requirement. A hasty look at the Massachusetts and Rhode Island statutes indicates superficially that neither had a statute directed specifically to brokerage contracts. The parties are not localized, except that their citizenship was diverse.

8. *Farmer v. Arabian American Oil Co.*²³⁰ The case is very simple, and simply does not support a "rule of validation." It supports only Ehrenzweig's dislike of the Statute of Frauds as an instrument of modern legal policy, domestic or interstate. The plaintiff, a doctor of medicine apparently residing in Texas, was unquestionably employed by the defendant to work in Saudi Arabia. The defendant was a Delaware corporation having its principal office in New York. The original agreement was made by telephone and confirmed by correspondence. The plaintiff went to Saudi Arabia and actually worked about eight months before he was discharged. The only problem relating to the Statute of Frauds arose from the fact that the writings did not state the term of employment. According to the defendant, the contract was terminable at will; according to the plaintiff, it was to last for the duration of the defendant's operations in Saudi Arabia. The issue was whether the contract was invalidated by the New York provision relating to contracts not to be performed within a year. Though there was some doubt arising from recent New York decisions, the court applied the standard rule that contracts terminable on an event uncertain in time

²²⁸ 229 F.2d 273 (2d Cir. 1956).

²²⁹ 229 F.2d at 276.

²³⁰ 277 F.2d 46 (2d Cir. 1960), *cert. denied*, 364 U.S. 824, 81 Sup.Ct. 60, 5 L.Ed.2d 53 (1960).

(such as termination of the Saudi Arabian operations) were not within the one-year provision. The New York statute was simply inapplicable as a matter of domestic interpretation, independent of any question of conflict-of-laws theory. The parties had stipulated for purposes of the litigation (they had *not* agreed as a matter of mutual consent at the time of the contract) that New York law governed. No other law was pleaded, though the contract may well have been "made" in Texas and was certainly to be performed in Saudi Arabia. I suppose Ehrenzweig's enthusiasm for the decision is accounted for by the following dictum contributed by the late, revered Judge Charles E. Clark: "The statute of frauds, *as applied to such a contract as this*, where plaintiff has *performed for many months*, is an anachronism in modern life and we are not disposed to extend its destructive force. 2 *Corbin, Contracts* § 444 (1950)." ²³¹ (Emphasis added.) I agree with this statement by Judge Clark and Professor Corbin, but not with the enlarged meaning Ehrenzweig would attribute to it.

9. *In re Bulova's Estate*.²³² Ehrenzweig has previously cited this case under the general heading of cases straining to reach a just result in spite of "official doctrine," parenthetically remarking that the court applied the law of the forum to validate a Swiss contract between New York residents because to have applied Swiss law would have been "an absurdity."²³³ On our first visit to the case²³⁴ we observed that in the lower court, from whose opinion Ehrenzweig quotes, there was no issue as to formal validity; and that on appeal the Swiss law was held applicable to *invalidate* the agreement as to Swiss land, though as to other property the law of the New York domicile was controlling.

VII

THE TROUBLESOME, "DISTINGUISHABLE" CASES

"Decisions of American courts which have applied an invalidating law to a contract valid under a relevant foreign law, are rare and can usually be explained on other grounds reconcilable with the general Rule of Validation[sic]."^[235]

"Perhaps the most important decisions in this category are those concerning forum land, including disputes over foreign commission agreements

²³¹ 277 F.2d at 51.

²³² 216 N.Y.S.2d 26 (Surr.Ct.), *aff'd* 220 N.Y.S.2d 541 (App.Div. 1961).

²³³ EHRENZWEIG at 472, n. 16.

²³⁴ See text at note 75, *supra*.

²³⁵ EHRENZWEIG at 473.

made by foreign brokers. . . . The courts have been ruled by a 'land taboo' not justifiable under present economic conditions."²³⁶

1. *Arnold v. Wilson*.²³⁷ This is an indefensible decision, but not because of any land taboo. It does unjustifiably invalidate a contract by application of the law of the forum; its faults are many. I agree that it is wrong, but there is nothing in its wrongness to stampede us for refuge to an indiscriminate "rule of validation."

The plaintiffs, residents of Arkansas, were engaged by the defendant, also a resident of Arkansas at the time, *by letter*, to find a buyer for a ranch defendant owned in Missouri, wishing to exchange the ranch for property in Texas. The plaintiffs performed, the exchange took place, and *then* the defendant moved to Texas. Plaintiffs sued him in the federal court there for their unpaid commission. The trouble was that the written offer did not state the terms of the commission. The Texas statute was construed to require a written promise to pay a specific commission—no such promise will be implied and none can be proved by parol. (A highly unreasonable construction, I should say at once, or a highly unreasonable statute.) Admittedly, an oral or implied promise to pay a commission was valid under the laws of Arkansas and Missouri. The court invalidated the written agreement on the familiar but highly questionable ground that the Texas statute is procedural only, and applies to preclude enforcement of any contract in the courts of Texas, regardless of its validity in other, really interested states. There was, however, no land taboo; the decision is *not* grounded on the fact that the land for which the Missouri ranch was exchanged had its situs in Texas; it was for sale of the Missouri ranch—the price being paid in Texas land—that the commission was claimed. The quarrel was over an alleged oral agreement to base the commission on a percentage of an agreed valuation of the Missouri ranch.

The worst aspect of the case is that Texas destroyed rights settled under the laws of the only conceivably interested states at the time of the transaction—Arkansas, the residence of both parties, and Missouri, the situs of the land to be sold or exchanged. A problem analogous to that of retroactive application of laws is introduced by the removal of the defendant from Arkansas to Texas after the transaction. That proved a profitable move, indeed; it saved him from paying a \$10,000 commission, justly earned by the broker. The Texas statute, held "procedural" by the court, was enacted in 1939 and was expressly made inapplicable to actions pending on its effective date—thus indicating that the legislature did not wish

²³⁶ EHRENZWEIG at 473-74 (Ehrenzweig's emphasis).

²³⁷ 107 F.Supp. 961 (S.D.Tex. 1952).

to disturb settled rights under informal domestic contracts antedating the statute. Then where can any justification be found for disturbing rights settled in other states, though after the enactment of the statute? A justification for such action is possible in some situations,²³⁸ but none is apparent here.

The real vices of the decision have nothing to do with land taboo but consist in sterile literalism, disregard of the party-protective purpose of the statute, and callous disregard of settled rights. I would not hesitate to argue that the decision is unconstitutional as a denial of due process of law and of full faith and credit to the laws of Arkansas and Missouri. Ehrenzweig would not agree.

2. *Murdock v. Calgary Colonization Co.*²³⁹ By an oral contract made and to be performed in Alberta, Canada, the defendant (presumably of Illinois) engaged the plaintiff, an Alberta corporation, to find a buyer for land in Alberta. If the law of Alberta is applicable as a matter of conflict-of-laws law it clearly invalidates the agreement, though Illinois appears to have had no similar statute. The court holds the Alberta statute applicable as that of the place of contracting. (Note that Alberta was also the place of performance, presumably, and was certainly the situs.) No emphasis was placed on the situs in Alberta except as that bore on the place of performance.

I do not deny that conflict-of-laws doctrine in general is plagued with a "land taboo." Yet I do not detect the influence of that taboo in this decision, as Ehrenzweig does. I find a court obsessed with the substance-procedure dichotomy, and one that, moreover, thinks itself pretty sophisticated because it rejects the literalism of *Leroux v. Brown* and holds the Alberta statute substantive although it uses the "procedural" language, "no action shall be brought." This is a court unjustly proud of its strong defense of territorially vested no-rights.

The court is rather clearly wrong when it says that "It is evident that the [Alberta] statute in question was designed to reach and bar exactly the kind of claim for which the plaintiffs seek recovery in this action."²⁴⁰ What is evident to me is that the statute was designed primarily to protect local defendants, and this defendant was (or so I have assumed) a resident of Illinois. This does not mean that Alberta wished to favor its own people at

²³⁸ See Currie, *Full Faith and Credit, Chiefly to Judgments*, 1964 SUP. CT. REV. 89, 91-99.

²³⁹ 193 Ill.App. 295 (1915). I pass over *Richland Development Co. v. Staples*, 295 F.2d 122 (5th Cir. 1961), cited in EHRENZWEIG at 474, n. 24, since, as Ehrenzweig indicates and I have confirmed, it concerns not formal validity but the problem of the unlicensed broker, which involves quite different considerations.

²⁴⁰ 193 Ill.App. at 300.

the expense of foreigners; it only means that, the basic purpose of Alberta being to protect local people—and perhaps, in addition, owners of local land, though that is quite doubtful—the next question to consider is how far it should extend that protection to foreigners. That it should stop short of the point of officiously meddling in the interests of other states is clear; the question is where the stopping point lies between the two extremes. Let us approach the question from the standpoint of Illinois, where, after all, the action was brought. Prima facie Illinois law controls. That law protects the expectations of local people who rely on oral promises to pay commissions. Should the same policy be applied to Alberta brokers who rely on oral promises made by Illinois residents? I should think, in common sense and humanity, it should, since so doing will interfere with no interest of Alberta in protecting its people against promises unreliably proved. If it were inclined to be as selfish as reasonably possible, Illinois might give the benefit of its policy of compensating those who rely on oral promises only to those foreigners who are similarly protected by the laws of their home state. That would justify this decision, but it would be a rather mean policy, costing more to apply than the gain in windfalls to local promisors (or protection to alleged promisors) would be worth.

3. *Brown & Brammer v. Wm. Pearson Co.*²⁴¹ I, too, find this a questionable decision, but hardly because of the land taboo. By an (alleged) oral agreement made and performed in Nebraska, defendant, a Canadian corporation having its principal office in Winnipeg, Manitoba, promised plaintiff brokers (of Iowa) a commission for finding a purchaser for Canadian land. Note that, while the land was unquestionably in Canada, it does not even appear in what province it was located. This helps to explain the lack of reference to the law of the situs. The defendant pleaded the Nebraska statute, which clearly required contracts for real estate brokerage commissions to be in writing. Apparently Iowa had no such statute. The plaintiffs argued that the Nebraska statute was “procedural” (though it used the term “void”), but the court was not impressed. Speaking with a pronounced territorialist accent, the court held the statute of Iowa, as the place of contracting and performance, applicable. It also emphasized the policy of the statute to protect alleged promisors from trumped-up claims that brokers had been commissioned to arrange land sales. (One gets the impression that, in Nebraska, every time there was a land transfer some deed-chasing broker showed up to claim that he had been hired to find the buyer and had been promised a commission.) The exact reasoning of the court was: the general rule is that the law of the place of contracting

²⁴¹ 169 Iowa 50, 150 N.W. 1057 (1915).

governs; an exception exists for the law of the situs where land is involved, but that is irrelevant here (because the exact situs did not appear?); there is also an exception for the law of the place of performance where that represents the intention of the parties, but that only leads back to the law of Nebraska (invalidating the contract).

The decision is conceptual and territorialist, but it does not reveal the influence of a land taboo. I regret that the court did not consider the Iowa policy of protecting the expectations of local people who rely and act on oral promises to pay commissions. Possibly the failure to do this was justified by considerations of the *Bernkrant* type, but this seems not a strong case for finding that Iowa should refrain from asserting an interest in conflict with that of Nebraska in protecting its people against parol proof (including this foreign corporation, doing business in Nebraska). The court is just strongly sympathetic with the Nebraska policy of protecting people—any people—against dishonest brokers, although not especially sympathetic with this particular defendant, which, said the court, was in the business of trying to “unload” Canadian lands “upon credulous Americans.”²⁴²

4. *Schoettle v. Sarkes Tarzian Inc.*²⁴³ There were two grounds for this decision. One, that the contract was illegal under the law of the (Pennsylvania) forum because the broker was not licensed, is not relevant to this discussion. Allegedly, plaintiff (a resident of New Jersey)²⁴⁴ had been engaged by the defendant, an Indiana corporation doing business in Pennsylvania,²⁴⁵ to find a purchaser of the stock or assets of the corporation. Service of process on the individual defendants, including the majority stockholder and president of the corporation, had been quashed. The other holding was that this gentleman had no authority, written or otherwise, to engage anyone to sell the corporate stock or assets. The corporation could not, in fact, have authorized this gentleman to sell the stock, a good deal of which was owned by other people. That would seem to be enough to dispose of the case, except, perhaps, as to some residual question relating to the sale of assets. The court went on, however, to hold that the action was barred because of an Indiana statute requiring land brokerage contracts to be in writing—not, apparently, because the corporate assets included land in Indiana, but because that was the place of contracting. I hesitate to keep reiterating that these cases are not explainable on the ground of land taboo, because that does not seem a fundamental issue be-

²⁴² 169 Iowa at 52, 150 N.W. at 1059.

²⁴³ 191 F.Supp. 768 (E.D.Pa. 1961).

²⁴⁴ See same case 167 F.Supp. at 172 (E.D.Pa. 1958).

²⁴⁵ *Id.* at 173 .

tween Ehrenzweig and me. But he insists on explaining away these cases as medieval, and thus as not impairing his "rule of validation," while they seem to me only rather routine cases employing conventional rules referring to the law of the place of contracting and the like—paying little or no attention to situs.

5. *Stricker v. J. P. Morgan*.²⁴⁶ Again I fail to find the land taboo, and this time I even fail to find any decisive role played by a statute requiring formalities. The plaintiff simply failed by any competent evidence to establish his claim that he and the defendant were partners in exploiting land in Louisiana purchased by defendant, or that there was a joint venture, or that he had an interest in the land by way of resulting trust or otherwise. Almost incidentally, the court holds that the law of Louisiana, as the law of the situs, governs, and requires a writing for any partnership or joint venture if any of the assets are to consist of real estate; the writing must even be recorded as if it were a conveyance.²⁴⁷

Before I risk the assumption that the plaintiff was of Mississippi, the forum state, and that that state's interest in vindicating his expectations was subverted (on the unsupported assumption that Mississippi law did not require a writing), let me pause to reflect that, since this was an action to establish an interest in foreign land, many a court would simply have dismissed the action out of hand as a "local" one, of which the Mississippi federal court had no jurisdiction. I regret the persistence of this medieval "land taboo," but there it is, in most states. Even if the court in Mississippi had given judgment for the plaintiff, there is substantial doubt (to my regret) that the judgment would have been respected or given full faith and credit in the only state in which it could have been enforced—Louisiana.²⁴⁸ Let me, therefore, not waste time deploring the fact that Mississippi's hypothetical governmental interests were neglected. The plaintiff was lucky that a Mississippi court was willing to hear his case at all. And he lost, in the end, not because of the Louisiana Statute of Frauds, but because he failed to make out a case under either Mississippi or Louisiana law. Since the appellate court did not even reach the question of the Statute of Frauds, I take it this means that he failed to prove his case on the merits, independently of any statutory requirement of a writing. He was aided

²⁴⁶ 158 F.Supp. 830 (S.D.Miss. 1958).

²⁴⁷ My discussion rests in part upon the affirmance of the decision on appeal, 268 F.2d 882 (1959), which is not cited by Ehrenzweig. Perhaps it is not quite fair to take into account what he has not cited—or Shepardized.

²⁴⁸ See the remarks of Mr. Justice Stewart for the Court in *Durfee v. Duke*, 375 U.S. 106, 115, 84 Sup.Ct. 242, 246, 11 L.Ed. 189, 192 (1963), quoted and discussed in Currie, *Full Faith and Credit, Chiefly to Judgments*, 1964 SUP. CR. REV. 89, 108.

in thus losing his case by the court's application of the Mississippi Dead Man Statute, barring his testimony as to transactions with the defendant—because, interestingly enough, the defendant had become insane while the case was pending.²⁴⁹

At this point Ehrenzweig digresses a bit to refer to two cases already discussed²⁵⁰ in which brokerage contracts had been upheld despite the possibility of application of an invalidating law. The reader is referred to my prior discussion of these cases.²⁵¹ In the same vein (unfortunately for my plan of organization, which devotes this part of the paper to a discussion of the troublesome, “distinguishable” cases), he cites also a new case for the proposition that “Contrary to the land taboo . . . and in conformity with the rule of validation, courts have applied the *lex fori* to allow local brokers to recover commissions for sales of foreign land even though the employment contract was made under a law that would deny such a claim.”²⁵² For this proposition he cites *Callaway v. Prettyman*,²⁵³ and it seems best to discuss the case here, though it does not fit comfortably into the context of this portion of the discussion.

There are some minor inaccuracies in Ehrenzweig's statement of the case that need not be emphasized, since the main point to be made is that, although the agreement was upheld under the law of the forum, that fact furnishes little support for a rule of validation, since the court applied a rule of thumb that could easily result in invalidity in countless cases to arise in the future. The action was in Pennsylvania by a New Jersey broker on an alleged promise, made in Pennsylvania, to pay a commission for finding a buyer for New Jersey real estate. After disposing of the defense of illegality the court, assuming the contract to have been made in Pennsylvania where the words were spoken (compare the usual ruling that such a unilateral contract is completed when and where the broker finds his buyer), the court ruled that evidence of the New Jersey statute requiring brokerage contracts to be in writing was inadmissible under a plea of the

²⁴⁹ He was adjudicated insane, and a guardian (“curatrix”) was appointed for him, by a court of Louisiana, presumably his domicile. Interesting questions: How does the plaintiff continue the action against the curatrix? And must Mississippi give full faith and credit to the adjudication of insanity? This latter question was not reached because plaintiff's counsel, after asking time to make their own investigation, satisfied themselves that the defendant was in fact *non compos mentis*.

²⁵⁰ *Woolley v. Bishop*, 180 F.2d 188 (10th Cir. 1950), and *Richmond Carcia Oil Co. v. Coates*, 17 F.2d 262 (5th Cir. 1927). I pass over *Polson v. Stewart*, 167 Mass. 211, 214, 45 N.E. 737, 738 (1897), since Ehrenzweig indicates that it concerns the problem not of formalities but of the unlicensed broker. See EHRENZWEIG at 474 n. 26.

²⁵¹ See text at notes 117-18 and 125-26, *supra*.

²⁵² EHRENZWEIG at 474.

²⁵³ 218 Pa. 293, 67 Atl. 418 (1907).

general issue. Only then did it hold that the contract was valid under the law of Pennsylvania, because the law of the place of contracting governs formalities.²⁵⁴

6. *Russell v. Société Anonyme des Etablissements Aeroxon*.²⁵⁵ Resuming his effort to dispose of the troublesome cases, Ehrenzweig revisits this case as one that, though invalidating under forum law notwithstanding validating laws of the place of contracting or performance, or the intention of the parties, does not support traditional conflicts rules as against a "rule of validation."²⁵⁶ At this late hour I simply refer the reader to my previous discussion of the case.²⁵⁷

7. *Bond v. Oak Mfg. Co.*²⁵⁸ Of this "troublesome" case Ehrenzweig says: "though giving credence to both Restatements with reference to their conflicts rules relating to contracts, [the decision] records the plaintiff's 'dropping the claim on the contract.'"²⁵⁹ Just what capital can be made of this off-beat decision, whether by Ehrenzweig or by me, is unclear. The action was in a federal court in New Jersey; the plaintiff, a Pennsylvania corporation, claims that defendant, an Illinois corporation, orally authorized it to proceed with efforts suggested by plaintiff designed to enlarge defendant's market. The district court found there was no contract, for want of definiteness and mutuality, but allowed recovery quantum meruit for benefits conferred. The court of appeals affirmed: "Whatever the contract was, it was unenforceable under the Illinois Statute of Frauds and the plaintiff dropped its claim for breach of contract at the beginning of the trial of the case. The parties have assumed that Illinois law governs. We think this is correct. Whatever agreement was made was entered into in Illinois and that state is the place where at least a large part of the undertaking was to be carried out."²⁶⁰ But the court goes on to hold that under Illinois law, and according to eminent authorities on the law of contracts, there can be no restitution of benefits conferred under a contract invalid under the Statute of Frauds. Judge Kalodner dissented.

Presumably, though the decision does not make it clear, it was the

²⁵⁴ There is neither time nor space to discuss the interesting implications of the court's remark (218 Pa. 294, 67 Atl. at 419) that the verdict of the jury, presumably based on parol evidence, established the fact that the defendant employed the plaintiff to sell or exchange the hotel.

²⁵⁵ 268 N.Y. 173, 197 N.E. 185 (1935).

²⁵⁶ EHRENZWEIG at 474.

²⁵⁷ See text at notes 219-21, *supra*.

²⁵⁸ 293 F.2d 752 (3d Cir. 1961).

²⁵⁹ EHRENZWEIG at 474 n. 30.

²⁶⁰ 293 F.2d at 753, citing both the *Restatement, Conflict of Laws* and the *Restatement (Second)*, as Ehrenzweig says.

not-to-be-performed-within-a-year provision that was involved; nor does the precise conflict of laws appear. The (federal) New Jersey forum appears to be in the position of the disinterested third state, where Illinois would protect the Illinois defendant (though it does not clearly appear that Pennsylvania has a policy of protection for the expectations of Pennsylvania promisees). Probably Ehrenzweig means only that this case does not sustain official doctrine, although the court cites both *Restatements* with approval, because the parties dropped the claim on the contract. They did this, however, did they not, because they were convinced by precedent that the court would hold Illinois law applicable to invalidate the contract? Or at least that the contract was invalidated by *some* Statute of Frauds?

8. *Reubenstein v. Kleven*.²⁶¹ This is a real beauty. According to Ehrenzweig, this apparently troublesome case (from the standpoint of his advocacy of the "rule of validation") is "explainable on special grounds"²⁶²—specifically, "concubinage with a married man."²⁶³

The plaintiff, a resident of New York, alleged that in New York the defendant, a resident of Massachusetts, entered into an agreement to pay her \$1,000 a month in consideration of her promise to furnish him companionship, the payments to continue "during the remainder of the plaintiff's natural life." This is a much abbreviated statement of the agreement as alleged, and I cannot resist quoting the complaint a bit more extensively:

" . . . in consideration of the plaintiff's agreement to devote all or substantially all of her time and attention to the defendant; to account to the defendant for all of her waking moments; be at the defendant's beck, call and direction at such times as the defendant should desire; and in furtherance of said relationship to obey the defendant's wishes, in regard to plaintiff's deportment, conduct, habits, associations, friends, time, entertainment, and education; to act as companion to the defendant at all times requested by the defendant; to accompany the defendant to restaurants, dinner, on travel, and elsewhere."²⁶⁴

The agreement as alleged said nothing about sleeping moments; yet one need not accuse Ehrenzweig of prurience for his suggestion of concubinage. Any of us, however pure-minded, might be tempted to read such evil thoughts between the lines—if this were all the available information. However, more information is available in the very decision of the district court that Ehrenzweig cites.

²⁶¹ 261 F.2d 921 (1st Cir. 1958).

²⁶² EHRENZWEIG at 474.

²⁶³ *Id.*, n. 31, citing same case below at 150 F.Supp. 47 (D.Mass. 1957).

²⁶⁴ 261 F.2d at 922.

At the trial level the case was heard by one Bailey Aldrich, now a judge of the Court of Appeals for the First Circuit, whose dry wit I have had the privilege of appreciating at first hand for the past five years or so. The defendant had pleaded both the New York Statute of Frauds (with its one-year provision, amended to extend to lifetime contracts) and the defense that the contract was contrary to public policy. The plaintiff had taken the defendant's deposition, and had asked certain questions to which affirmative answers might indicate adultery. The defendant refused to answer on the ground that his answers might tend to incriminate him. Comes now Judge Aldrich, with his New England astringency:

"Since it would be to plaintiff's disadvantage for defendant to testify to an illicit relationship, I inquired of her counsel why he was pressing for an answer. He replied that he was of opinion that the answers would, in fact, be in the negative, and that defendant, being unable to testify truthfully to anything of a criminal nature, was seeking to create the impression of such, to plaintiff's disfavor, by the inference which would attach to his refusal. The suggestion that the defendant is a sheep in wolf's clothing presents a novel reverse-English to the Fifth Amendment. [At this point Judge Aldrich, in a footnote, compared the question posed by an earlier case in the First Circuit: Whether it may be defamatory to call someone in a community of thieves an honest man.] I do not, however, find it necessary to pursue it. Defendant cannot work both sides of the street. Illegality is an affirmative defense. If he is going to assert it predicated upon criminal acts involving himself, to be established through the testimony of any witness, or even simply by inference, he cannot remain aloof, asking the jury to find that such acts occurred, and at the same time claim a privilege against self-incrimination on cross-examination. Since he refuses on deposition to incriminate himself, I will assume, as the rule of the case, that equally he does not intend to prove criminality, through his own testimony or otherwise, at the trial. Unless within twenty days he notifies plaintiff that he proposes to answer the questions, plaintiff's motion will be denied and the issue of criminality foreclosed."²⁶⁵

It seems clear that the defendant persisted in his refusal to answer the questions. In consequence, the issue of illegality disappeared from the case, and the court of appeals had to rule simply on the issue as to the Statute of Frauds. It was thus that the court, without Ehrenzweig's notice, overruled the *Eckhart* case,²⁶⁶ and held that (New York law governing as the place of contracting) the amendment to the New York Statute, extending the one-year provision to lifetime contracts, meant exactly what it said. Invalidity followed.

²⁶⁵ 150 F.Supp. at 48.

²⁶⁶ Text at note 171, *supra*.

Thus we have a case of invalidation by the forum not under local but under foreign law; presumably the contract would have been valid as to form so far as Massachusetts was concerned. In his attempt to distinguish the case on the ground that the contract was immoral Ehrenzweig seems to be carrying American Legal Realism—the search for the really motivating reasons for decisions—to an extreme bordering on contempt of court: for Judge Aldrich had specifically ruled out the defense of illegality because of defendant's invocation of the privilege against self-incrimination, and the court of appeals had accordingly confined itself to the issue concerning the New York Statute of Frauds.

9. *Appolonio v. Baxter*.²⁶⁷ "Cases in which a strong forum policy is given effect to invalidate a contract valid under a pertinent foreign law, are becoming increasingly rare and may now be virtually limited to contracts concluded outside the forum for the very purpose of evading the forum's laws."²⁶⁸ This statement is made with reference not only to the *Appolonio* case but also with reference to the two cases to follow, *Emery v. Burbank* and *Rubin v. Irving Trust Co.*²⁶⁹ As applied to all three cases, or any one of them, the statement is preposterous.

Appolonio involved a claim against a decedent's estate for breach of an oral contract to make a will. The decedent, who had died domiciled in Tennessee, had been president and principal stockholder of a corporation having industrial plants in Louisiana. The plaintiffs were five employees claiming that the deceased orally agreed, in consideration of their working for abnormally low salaries, to leave them all his stock in the corporation—each to share the stock in proportion to his salary. The decedent's will left all his property to his wife, who predeceased him. This rendered his will inoperative, so that he died intestate, his sole heir being his sister, the defendant-administratrix.

In the first place, this is not a Statute of Frauds case at all.²⁷⁰ By an improbable tour de force one might conceivably persuade the court that this was a contract "to sell or for the sale of . . . goods or choses in action";²⁷¹ but it should suffice to observe that the court does not so much as mention this possibility. The report (except for one remark by counsel that may have been inadvertent) does not treat the case as one involving the Statute of Frauds, but proceeds on the premise—which seems neither

²⁶⁷ 217 F.2d 267 (6th Cir. 1954).

²⁶⁸ EHRENZWEIG at 474.

²⁶⁹ EHRENZWEIG at 474 n. 32; see text at notes 277 and 282, *infra*.

²⁷⁰ The Tennessee Statute of Frauds (TENN. CODE ANN. § 7831 (Williams 1934)) contained no requirement that a promise to make a will be in writing. *Cf.* the statute of wills, TENN. CODE ANN., §§ 8098.1-8098.6 (Williams 1934, 1952 Supp.)

²⁷¹ TENN. CODE ANN. § 7197 (Williams 1934).

unsound nor unusual—that oral contracts to make a will must be definite, may not be proved by evidence of loose or casual conversation, must be fair, and must leave no doubt that the promise was actually made as alleged and that the plaintiff has performed his part of the bargain.

This standard of proof the plaintiffs conspicuously failed to meet. On the issue as to whether the decedent had ever made any such promise the testimony was only that he had represented that the company would some day “belong to the boys.”²⁷² Far from having worked for substandard salaries, they had in due course received salary increases and bonuses. Inconsistent with their claim was the fact that they had helped the administratrix sell the stock as her own without intimating any adverse interest.

As to choice of law, the parties conceded that the law of Tennessee²⁷³ was controlling because, while the contract was allegedly made in Louisiana, the decedent died domiciled in Tennessee, and a Tennessee statute provided that the transfer of personal property is governed either by the law of the domicile or that of the place of transfer.²⁷⁴

As to a purpose to evade the law of the forum (*what* law of the forum?) there was no evidence whatever. What can Ehrenzweig possibly have in mind? That the decedent built his plants in Louisiana to evade the law of Tennessee? (A rather questionable exercise of business judgment by a man who, as we shall see, amassed a considerable fortune.) That the decedent made the promise in Louisiana to evade the law of Tennessee? (The court paid no attention to the law of the place of contracting; and anyhow, was not Louisiana a logical place for such a promise to be made (if it was made at all), since the plants were there, the employees worked there, and the deceased, even if he did not live there at the time of the alleged promise, presumably spent some time there supervising the business?) That the company was incorporated in Louisiana to evade the law of Tennessee? (In the first place, we are not told the state of incorporation. In the second place, what could be more natural and less devious than incorporation in the state in which the company’s plants were located? In the third place, what could the state of incorporation, or its law, have to do with this case?)

Moreover, the relevant law of Louisiana, if any, is not made to appear.

Finally, the plaintiffs’ case was decisively lost because they were incompetent, under the Tennessee Dead Man Statute, to testify to transactions with the deceased.

²⁷² 217 F.2d at 270.

²⁷³ They said the Statute of Frauds of Tennessee, but this is the remark I have ventured to characterize as probably inadvertent since there seems to have been no relevant provision in that statute.

²⁷⁴ 217 F.2d at 271.

A word about governmental-interest analysis—and for the sake of constructing a realistic (though hypothetical) problem, let us assume that the remark about the Tennessee Statute of Frauds was not inadvertent. Let us *assume* (contrary to the apparent truth) (a) that Tennessee had a statute requiring a written memorandum of an oral promise to make a will, and (b) that under Louisiana law such a promise was valid and could be proved by oral testimony—even by the testimony of adverse parties concerning transactions with the defendant's decedent. Would any Tennessee court in its right mind put aside the Tennessee statute and apply the validating law of Louisiana—as the place of contracting, or of performance, or of situs, or of incorporation, or of the “center of gravity,” or as the state having the “most significant relationship” with the matter—or on any other conceivable theory for choice of law, including even the *Bernkrant* technique—on a record such as this?

The stock was sold for \$2,239,368.73. What court would take that sum of money from the decedent's sister and give it to five grasping strangers on such evidence? Any group of robed men who would do such a thing would not constitute a court; it would constitute a menagerie.

The Tennessee (federal) court did only what any sane court would have done. It applied Tennessee law and policy to effectuate Tennessee's interest in protecting the estates of Tennessee residents against trumped-up claims. This is true whether there was a relevant provision in the Tennessee Statute of Frauds or not; it is true regardless of the provisions of Louisiana law. If it be said that no jury would ever render a verdict for the plaintiffs on such evidence, I reply that no jury should be given a chance to do so. The mandate of the Statute of Frauds—if there is a relevant Statute of Frauds—is that such evidence shall not be submitted to a jury, even controlled by the usual power of the court to set aside a verdict not supported by the evidence.

For emphasis, let me say to Ehrenzweig, who delights to note alternative grounds on which a decision might be based, that there were the following defenses, not reached because of the dispositive ruling that the plaintiffs had failed to make out a credible case: equitable estoppel, laches, the statute of limitations, and “the unconscionable character of the claims for recovery.”²⁷⁵

This ought to dispose of the *Appolonio* case, but I must add one word more. Obviously, Statute of Frauds or not, a Tennessee court would not allow recovery in favor of its own resident plaintiffs in such a case if it were entirely domestic. Then why should it discriminate against its own resi-

²⁷⁵ 217 F.2d at 273.

dents, and in favor of nonresidents, because of some academic theory of choice of law, whether it be the "rule of validation," the place of contracting, the place of performance, the situs, the place of incorporation, the "center of gravity," the "grouping of contacts," the "most significant relationship," or *what have you?* I might hesitate to do so at this time—when the demolition of choice-of-law theology is still not complete, because it is a bit early for the courts to go back into the business of deciding choice-of-law cases on constitutional grounds on the basis of insufficiently matured theories—but, given a few years in which common sense can (hopefully) be restored to the treatment of choice-of-law problems, I would not hesitate to argue that such preferential treatment for nonresident plaintiffs would constitute, for resident plaintiffs similarly situated, a denial of the equal protection of the laws.²⁷⁶

10. *Emery v. Burbank*.²⁷⁷ This is another of the cases on which I relied in predicting that analysis of Ehrenzweig's "authorities" would refute rather than sustain his thesis.²⁷⁸ I have discussed the case at some length,²⁷⁹ and it is still a standby as a leading precedent in most modern casebooks. The opinion was written by Holmes in the period before his native spirit of pragmatism and common sense was crushed out, so far as conflict of laws was concerned. I regard it as an excellent example of governmental-interest analysis, although, as in the *Lams* case, governmental interests must be furthered within the framework of the traditional ideology, and hence by indirection and approximation.

The opinion is a forthright attack on the problem in terms of statutory interpretation. The clear legislative policy was to protect decedents' estates against dubious claims of promises to make wills. What decedents? Centrally, and as a minimum, those who died domiciled in Massachusetts. The question, therefore, was how best to characterize the statute in order to give the policy maximum effect. Although there was ample basis for giving the statute a literal construction that would make it "substantive," Holmes had little difficulty in holding it "procedural," with the result that the local estate was protected. Going beyond the necessities of the case, he did not hesitate to add that in a different sort of case, he would hold the statute substantive as well if that should be necessary to effectuate the purpose to protect the estates of local domiciliaries. He even went one step farther and intimated that if this dual characterization should lead to trouble in a rare but conceivable type of case in which Massachusetts would

²⁷⁶ See CURRIE, ch. 11.

²⁷⁷ 163 Mass. 326, 39 N.E. 1026 (1895).

²⁷⁸ Currie, Book Review, 1964 DUKE L. J. 424, 429-30.

²⁷⁹ CURRIE, ch. 10.

have no interest, he would be able to devise a way to avoid the statute's application.

I had thought all this perfectly clear. Yet Ehrenzweig repudiates the decision and "explains" it as one in which the contract was "concluded outside the forum for the very purpose of evading the forum's laws."²⁸⁰ Presumably Ehrenzweig knows something about the facts that does not appear in the report: if so, I think he should enlighten us by publishing it. The report makes it very clear that at the time of the promise the plaintiff resided in Maine, since the very promise in suit was made on the condition that she "leave Maine and take care of the testatrix."²⁸¹ This implies not only that the plaintiff then lived in Maine but also that the testatrix lived elsewhere—probably in Massachusetts, since this case was decided on appeal only five years or so after the promise was allegedly made, and we know that the testatrix died domiciled in Massachusetts. It is difficult to detect evasion here. Without, of course, knowing just what happened, I have tended to imagine that the testatrix became acquainted with the plaintiff while vacationing in Maine, and wanted her to accompany her back to her home in Massachusetts. However this may be, I find it difficult to imagine a dark conspiracy between the (presumably) elderly lady from Massachusetts and the (presumably) mature lady from Maine to form their contract in Maine for the deliberate purpose of evading the Massachusetts requirement of a writing. If this was, indeed, their devious (and cumbersome) design, they were, I think, ill advised as to the law; for, notwithstanding Judge Holmes' assumption that the *contract* (as well as the promise) was made in Maine, I imagine that any careful lawyer, if consulted by the scheming ladies, would have advised them that the promise was only an offer for a unilateral contract, and that the offer could be accepted only by complete performance. This could take place only in Massachusetts. Even today (I venture to suggest without cluttering this paper with citations on a collateral matter), the plaintiff's commencement of performance in Maine by packing her bags and boarding the train would not be deemed an acceptance completing the contract but would only make the offer irrevocable.

11. *Rubin v. Irving Trust Co.*²⁸² This case, also, we have discussed before.²⁸³ Ehrenzweig's current treatment of the case contradicts his own earlier treatment of it. Still I am not satisfied. Evasion? It seems abundantly clear that the testator, though domiciled in New York, traveled

²⁸⁰ See text at note 63, *supra*.

²⁸¹ 163 Mass. at 327, 39 N.E. at 1026.

²⁸² 305 N.Y. 288, 113 N.E. 2d 424 (1953).

²⁸³ See text at notes 63-66, *supra*.

and sojourned elsewhere on account of his health. The alleged promise was fortuitously made in Florida, where New Yorkers in the situation of the testator commonly sojourn for reasons other than a purpose to evade the New York law requiring written evidence of a promise to make a will.

12. *Brooks v. Yarbrough*.²⁸⁴ Ehrenzweig's purpose in citing this case is obscure. While it is in the same footnote that cites the three foregoing cases, and so is presumably cited as another case of invalidation under forum law to be explained by the court's reaction against deliberate evasion of that law by contracting elsewhere, the citation is preceded (though not immediately) by the warning signal: "But see supra § 120 note 31; note 21; . . ." Note 31 appears in a portion of section 120 subtitled "Avoidance of domestic law (fraus legis, fraude a la loi)" and is appended to this statement in the text: "Thus, contracts concluded abroad between forum citizens may be upheld if they comply with the form requirements of the *lex contractus* even though the foreign place of contracting was chosen for the purpose of avoiding the domestic statute of frauds."²⁸⁵ This, then, I take it, is offered not as a case of invalidation under the law of the forum because of a deliberate purpose to evade, but as a case of *validation* under the law of the forum *notwithstanding* the choice of a foreign place of contracting for the purpose of evasion.

In point of fact, it is neither the one nor the other. The plaintiff, a citizen of Missouri, sued the administrator c.t.a. of the testatrix in a federal court in Oklahoma, alleging that in Kansas the testatrix promised him that if he would live with her as her son for the rest of his life²⁸⁶ she would, among other things, devise to him her grape and lemon orchards in Texas. Joined as another defendant was the sole beneficiary under the actual will—a citizen of Kansas.

Note that this is another pre-*Erie* diversity case, so that it is (to say the least) not entirely clear what the source of the court's rules for choice of law may be. But the court begins not with choice of law but with the law itself. In a proper case, says the court, equity will enforce a contract to make a will; but the proof must be "clear, satisfactory and convincing, and must establish the contract beyond a reasonable doubt."

Let us digress here to consider the subject of evasion of the law of the forum, which figures both in the text to which this citation is appended

²⁸⁴ 37 F.2d 527 (10th Cir. 1930).

²⁸⁵ Note 21 in § 120 (if that is what is referred to) adds nothing except a notation that foreign law may be ignored when it "outrages the public policy of the forum."

²⁸⁶ And that's not all. There is enough more to lead one as skeptical as Ehrenzweig to suspect something comparable to concubinage (note 263, *supra*); but Ehrenzweig makes no such suggestion here.

and in that to which there is the "but see" cross reference. The promise (if any) was made in Kansas—and the clues as to why it was made there are too meager to support speculation. The law of Kansas does not appear. Moreover, this was again an offer for a unilateral contract, and the place of performance (thus the place of contracting?) is not specified. Finally, the court attaches no significance whatever to the place of contracting. Therefore, both references to the case as one in which the place of contracting was chosen for the very purpose of evasion are dead wrong.

Does Ehrenzweig mean instead that the parties chose land in Texas to evade the law of the forum? That would be an elaborate and rather footless scheme. Texas happened to be the state where the grapes and lemons were. But even if the testatrix bought the orchards in that state for the occasion, or selected them for the occasion from among her (possibly) widespread holdings, what kind of evasion would that be? Texas, it seems, had a statute requiring written evidence of a promise to devise land. But on top of all this the court held the Texas statute procedural and therefore inapplicable.

If there was an Oklahoma statute requiring a writing for promises to devise land (and this is not clear in view of the court's talk about proof "beyond a reasonable doubt"), it was satisfied by the plaintiff's performance, since, under Oklahoma law, that was the result if performance consisted of personal services not readily valued in money. Hence, applying the law of the forum, the judgment for the defendant was reversed and the case remanded with instructions to overrule the motion to dismiss with respect to the land.

This sounds complicated, but I find nothing especially remarkable or even interesting about it. The forum upheld a contract under its own law. No invalidating law with a better claim to applicability was brought forward except that of Texas, the situs, and that was held (familarly enough) to be inapplicable because procedural. The law of the place of contracting plays no role whatever. And evidence of evasion is nonexistent—unless, again, Ehrenzweig knows something that we do not know and that he has not disclosed.²⁸⁷

13. *McCabe v. Bagby*.²⁸⁸ This case, says Ehrenzweig, is "inconclusive (identical laws.)" The case is placed, though inconclusively,

²⁸⁷ Parenthetically, note that, under orthodox law, however regrettable, an Oklahoma judgment ordering the devisee to convey Texas land would not be entitled to full faith and credit in Texas. See Currie, *Full Faith and Credit to Foreign Land Decrees*, 19 U. CHI. L. REV. 620 (1954); but cf. 28 U.S.C. § 1963 (1958).

²⁸⁸ 186 F.2d 546 (6th Cir. 1951).

among those in which invalidation under forum law is explained by the parties' choice of a validating foreign law for the very purpose of evasion.

The contract was invalidated, all right, but under foreign, not forum, law. And evidence of evasion there is none. And the Statute of Frauds is not involved in the first place.

The plaintiff, adopted by her grandparents, claims after the death of the survivor of them (the grandmother and adoptive parent) that an incident of the adoption was an oral agreement made by them with her father to execute mutual or reciprocal wills treating her as the equal of their own two daughters, giving her a third of their joint estate. Grandmother's last will disinherited plaintiff except for \$1,000 (apparently because plaintiff had, as a beneficiary under grandfather's will, shared in his estate and, on her mother's death, had benefited by reason of gifts made by her grandparents to her mother). After all the operative facts had occurred (in Missouri) and after grandfather's death, grandmother went to Michigan to visit one of her natural daughters, expecting to return, but never did; she "resided" there until her death. The court simply held that the issues must be determined "by the law of Missouri where all of the wills were executed and where substantially all the commentary on their purpose or content was made."²⁸⁹ Almost a full page²⁹⁰ is devoted to a statement of Missouri rules concerning the quantum of proof necessary to sustain an action for breach of a contract to make a will: the contract must be "certain" and must be proved "beyond a reasonable doubt," and so on. To an argument that Missouri rules of evidence should not control in Michigan the court replied: "It is conceded that if there was an oral contract between [the grandparents and plaintiff's father] or between [the grandparents themselves] . . . it must be determined by Missouri law."²⁹¹ It went on to hold, I think reasonably enough, that the question whether there was a contract was inseparable from the question of the sufficiency of the proof that there was a contract, so that Missouri law was applicable; then it added that in any event the standard of proof in Michigan was substantially the same as that in Missouri, and that plaintiff had satisfied neither. In other words, the court held the contract invalid (or rather, unproved), though in terms under foreign rather than forum law; it did so in part because the laws of the two states were identical, as Ehrenzweig says; but what the case has to do with evasion evades me. Who was trying to evade what law? Everything happened in Missouri until grandmother went to Michigan on a

²⁸⁹ 186 F.2d at 548-49.

²⁹⁰ 186 F.2d at 549. By contrast, there is but one passing mention, possibly a *lapsus linguae*, of the Missouri Statute of Frauds. *Id.* at 551.

²⁹¹ 186 F.2d at 550.

temporary visit from which she happened never to return. Any application of Michigan law to change the rights of the parties as settled under the law of the only interested state at the relevant time would have required strong justification to escape being an indefensible unsettling of settled rights.²⁰²

"Even fewer are the cases which, under a foreign law, have held invalid a contract valid under the law of the forum."²⁰³

14. *Jones v. National Cotton Oil Co.*²⁰⁴ Of the cases cited by Corbin in his discussion of the Statute of Frauds in the conflict of laws this, says Ehrenzweig, is the only one that "clearly applies an invalidating *lex contractus*." I am happy to agree with Ehrenzweig that this case does, just as he says, invalidate under foreign law a contract valid under the law of the forum. Of course Ehrenzweig does not attach much importance to the case for purposes of the discussion, nor do I. The decision is conventional. Texas applied the invalidating law of Arkansas as the place of contracting and performance, and the place whose law was contemplated by the parties—having first rejected an opportunity to treat the Arkansas statute as inapplicable because procedural. Without more facts, analysis in terms of governmental analysis is not feasible. I limit my comment to a repetition of what I have said before concerning the incongruity of cases such as this, emphasizing the intention of the *parties to a contract* as critical in determining the governing law when the question at issue is whether there was a contract at all.

15. *Rohrer v. Rohrer*,²⁰⁵ *Coastwise Petroleum Co. v. Standard Oil Co.*,²⁰⁶ and *Castorri v. Milbrand*.²⁰⁷ In these cases, cited by Corbin as invalidating the contract under foreign law, Ehrenzweig says that the law of the forum was to the same effect.

The *Rohrer* case is one of those Illinois Appellate decisions in which only an abstract is published, and the official abstract is almost totally devoid of information about the case. The West Publishing Company's version is fuller, and should indicate that the decision is inapposite, but is still unsatisfying as to detail. The full, unpublished opinion²⁰⁸ makes it abun-

²⁰² Additional facts, not changing materially the picture as presented by the decision under discussion, may be found in *In re Kramer's Estate*, 324 Mich. 626, 37 N.W.2d 564 (1949), relating to the probate of grandmother's will in Michigan.

²⁰³ EHRENZWEIG at 474. The cases to be discussed under this rubric are cited in *id.* n. 33.

²⁰⁴ 31 Tex.Civ.App. 420, 72 S.W. 248 (1903).

²⁰⁵ 29 Ill.App.2d 362, 173 N.E.2d 589 (1961).

²⁰⁶ 179 Md. 337, 19 A.2d 180 (1941).

²⁰⁷ 118 So.2d 563 (Fla.App. 1960).

²⁰⁸ Researchers confronted with a similar problem are advised that a certified (why must it be certified?) copy of the unpublished opinion may be obtained by writing to the clerk of the appropriate district court of appeals and paying the required fee (in this case \$2.75).

dantly clear that the case has nothing whatever to do with the Statute of Frauds or any other issue as to formal validity, and nothing appears affirmatively to show identity of the laws in question—although such identity is probable as a matter of professorial notice. At a time when the husband was domiciled in Mexico and the wife in Pennsylvania, they made in Pennsylvania a *written* agreement whereby the husband agreed to treat his wife for a time as joint owner of stock listed in their names as joint owners but actually paid for by him. This was in consideration of the wife's agreement not to contest the Mexican divorce the husband was contemplating. The court held that, where performance was to take place in several states, the law of the place of contracting would govern, and that under Pennsylvania law the agreement, as a collusive one to facilitate divorce, was void as against public policy.

As to the *Coastwise* case Ehrenzweig is entirely right: there was no memorandum or anything else to take the case out of either the Maryland or the New York statute, and the contract was invalidated—or rather, as we ought to say in all such cases, not proved in accordance with law. While the court discussed Maryland law as if it were applicable, it concluded (interestingly) that “The *negotiations* were all in New York, and the law of that state would apply.”²⁰⁹ (Emphasis added.) But the New York statute and the cases construing it were to substantially the same effect as the law of Maryland.

As to the *Castorri* case I am not so sure, but the importance of the case to the discussion is too meager to justify the research necessary to resolve the problem. There was an alleged oral contract, made (if at all) in Michigan, to employ plaintiff for five years, performance to take place in Florida. The contract was clearly bad (or unprovable) under Michigan law, and the Florida court treated the Michigan statute as substantive, tending to assume that this means that the law of the place of contracting controls. Little attention was paid to the law of Florida either as the law of the forum or of the place of performance. While the defendants pleaded the Michigan statute, the plaintiff argued for the applicability of Florida law—whether as that of the forum or the place of performance is not clear. This posture of the argument casts doubt on Ehrenzweig's assertion that the laws of the two states were identical. Presumably Florida had the familiar provision concerning contracts not to be performed within one year, but perhaps the fact that plaintiff had worked for more than a year prior to his discharge operated to eliminate the requirement of a writing under the Florida statute. It should be possible to find the answer to this question,

²⁰⁹ 19 A.2d at 183.

but finding it would hardly be worth the necessary research. The decision is a purely conceptual one in any event, giving comfort neither to Ehrenzweig nor to me. While Michigan's interest in protecting its enterprises was sustained, Florida's interest in protecting its people was not—if the plaintiff was one in whom Florida had an interest. That we do not know. He had been in the Army and was in Rio when he met the defendants.

16. *Wilson v. Lewiston Mill Co.*³⁰⁰ This is another reprise,³⁰¹ this time the citation being to one of Corbin's cases, explainable on the ground that "the choice of law followed the choice of the parties." This is simply not so. There was no meeting of the minds of the parties as to what law should govern their "contract," if there was a contract. Counsel at the trial simply treated the contract as if it were governed by the law of Maine as the place of negotiations and performance although the contract was rather clearly "made" in New York. Again I am constrained to say that it is incongruous to speak of the autonomy of the parties to a "contract" when the issue is contract *vel non*—and especially so where the law "agreed on" by the parties *invalidates* the agreement.

17. *Jackson v. Jackson.*³⁰² This, another of Corbin's cases invalidating under foreign law, Ehrenzweig dismisses as "explainable on its peculiar facts." The "peculiar facts" elude me, unless what is meant is that the decision is justified on a basis unrelated to the Statute of Frauds. The plaintiff and her now deceased husband lived in Utah with their seven children and their marital disagreements. She went to California and procured a divorce and property settlement which she claimed she agreed to only because of the husband's prior oral promise to bequeath \$3,500 to each child. The husband remarried and died leaving each child only \$1,000, and the first wife, on behalf of the children, sued for the rest. She lost under a plea of the California statute requiring a writing for a promise to make a will, on the ground that the contract, if made at all, was made in California. There was no comparable Utah statute, yet the court said that whether an oral promise to make a will was valid under Utah law was a question not presented. Just possibly, Utah law might have required "clear and convincing evidence," or proof "beyond a reasonable doubt," which might amount to a requirement of written evidence.

The case hardly squares with governmental-interest analysis, since California had no interest in the application of its policy for the protection of estates and Utah had no discernible policy for the protection of estates. A sound reason for the result, however, is suggested by the concurring

³⁰⁰ 150 N.Y. 314, 44 N.E. 959 (1896).

³⁰¹ See text at note 103, *supra*.

³⁰² 122 Utah 507, 252 P.2d 214 (1953).

opinion: the parol evidence rule. Rather obviously, the plaintiff was trying to vary the terms of an "integrated" written agreement by evidence of prior oral promises. That, I think Ehrenzweig must agree, is not generally encouraged.

18. *Detroit & Cleveland Nav. Co. v. Hade*.³⁰³ Belonging to the same series, this case is disposed of as "based on unacceptable dogmatic reasoning." I could hardly agree less. The opinion is to a degree conceptual, and unconventionally so; but it reaches a result entirely consistent with governmental-interest analysis. In addition, it even holds that application of the invalidating law of Michigan is required by the Full Faith and Credit Clause. Of course, this latter circumstance alone is enough to rouse Ehrenzweig to stigmatize the decision as based on "unacceptable dogmatic reasoning";³⁰⁴ but I disagree.³⁰⁵ Here the defendant, a Michigan corporation, engaged the plaintiff, a resident of Michigan, to find a buyer for land in Ohio. The court treats this as a contract made and (in part) to be performed in Michigan although, as we have seen, such engagements are more commonly treated as offers for a unilateral contract, accepted when and where the broker finds a willing and able buyer. Rather fortuitously, this happened in Ohio (though that is a likely state in which to find a buyer for Ohio land). Michigan had a stern statute requiring a detailed writing for brokerage agreements; Ohio had none. What impressed the Ohio court was that the whole deal was between Michigan people, Ohio being involved only as the situs of the land (irrelevant) and as the forum (also irrelevant, since Ohio had no statute that could be construed as stating a judicial-administration policy). Having no interest whatever in the matter, Ohio abstained from applying its law to interfere in the rights and duties of Michigan parties to what was essentially (though not conceptually) a Michigan transaction, and kept hands off. With its conclusion that this abstention was required by the Full Faith and Credit Clause I am inclined to agree, though I am troubled by one consideration: The defendant admitted the agreement, except that it maintained it had authorized sale to any person whatever *except* the City of Toledo, which just happened to be the purchaser found by the broker. It seems to me that any reasonable Statute of Frauds should be satisfied by such an admission, and that the trier of fact ought to be trusted to determine the truth of the asserted limitation. But then, I do not make, nor do I have authority to interpret, the statutes of Michigan.

³⁰³ 106 Ohio St. 464, 140 N.E. 180 (1922).

³⁰⁴ See EHRENZWEIG at 28-33, 138.

³⁰⁵ See CURRIE ch. 5.

19. *Franklin Sugar Ref. Co. v. William D. Mullen Co.*³⁰⁶ The argument here becomes rather confusing. Previously Ehrenzweig has cited this case³⁰⁷ as upholding the contract under foreign law; now he cites it, as the last of Corbin's cases refusing enforcement because of noncompliance with the non-forum statute, only to dispose of it on the ground that it did not "actually" invalidate the contract. The only way to end the confusion is to revert to the case itself. There can be no possible question about the fact that the contract was upheld because there was a memorandum sufficient to satisfy any Statute of Frauds. Thus it appears to be true, if that is what Ehrenzweig means, that his mentor, Corbin, mis-cited the case; but I do not apprehend that the case itself, or the treatment of it by either Ehrenzweig or Corbin, tends to sustain in any way the supposed "rule of validation."³⁰⁸

VIII

EXCEPTIONS, PROSPECTS, AND HOPEFUL SIGNS

*"To be sure, there will remain situations in which validation under the lex fori of a foreign contract invalid under the foreign law would be undesirable because it would promote forum shopping. . . . This consideration may have been the basis of Cochran v. Ward³⁰⁹ . . . (Illinois contract as to Illinois land held invalid as against Illinois defendant under Illinois law.)"*³¹⁰ Despite the fact that Ehrenzweig goes on to explain away the phenomenon as the product of an "obsolescent law of transient jurisdiction," I find it difficult to reconcile this concession with a "rule of validation" to the effect that *any* forum should validate any contract under any "proper" (which I understand to mean any arguably, however implausibly, applicable) law. However this may be, I do not understand why this case should be singled out as a specific example of the (admitted) problem of forum-shopping. The action was on an alleged oral agreement by the defendant, a resident of Illinois, to lease land in Illinois to the plaintiff for a term of one year to commence in the future. In Illinois, though not in Indiana, such an agreement is within the Statute of Frauds. The residence of the plaintiff does not appear, though it seems that he intended to farm the land; Lawrence

³⁰⁶ 12 F.2d 885 (3d Cir. 1926).

³⁰⁷ EHRENZWEIG at 473 n. 20; see text at note 168, *supra*.

³⁰⁸ The 1964 pocket Supplement to 2 CORBIN § 293 n. 63 contains the following statement: "Of the cases cited in this note, Ehrenzweig . . . says: 'Only Jones v. National Cotton Oil Co. clearly applies an invalidating *lex contractus*. In other cases the *lex fori* . . . did not actually invalidate the contract (Franklin Sugar).' Ehrenzweig's views are, in general, in harmony with those expressed in this treatise." What goes on?

³⁰⁹ 5 Ind.App. 89, 29 N.E. 795 (1892).

³¹⁰ The italicized statement is taken from Ehrenzweig's text at p. 475 and n. 34.

County, Illinois, where the land was situated, is just across the Wabash River, which forms the boundary between the two states. The opinion is rather conceptual, holding that Illinois law applies as that of the place of contracting and situs. If the plaintiff was a resident of Illinois the decision seems clearly sound on the basis of the considerations suggested in connection with the case of *Detroit & Cleveland Nav. Co. v. Hade*.³¹¹ If, as seems plausible in the circumstances, he was a resident of Indiana, the decision did not vindicate that state's interest in protecting his reasonable expectations in reliance on the oral promise; but that may be explainable on the basis of a *Bernkrant* operation. True, an Indiana plaintiff may have been lucky to serve Indiana process on an Illinois defendant, near neighbors though they may have been; but I am at a loss to understand why Ehrenzweig is content to accept this case as a justifiable departure from his "rule of validation" on the ground that it is a commendable inhibition against forum shopping. Whenever a state commits itself to his "rule of validation," will not plaintiffs tend to flock to its courts?

Ehrenzweig concludes his discussion with hopeful reliance on two inapposite cases. The first is *Kossick v. United Fruit Co.*,³¹² and the only justification for his citation of it is that it cites Ehrenzweig. It is not a conflict-of-laws case in the usual sense at all, but one involving the question whether federal maritime law shall prevail over a state Statute of Frauds. The essential question was whether the contract was within the admiralty and maritime jurisdiction; if so, the supreme federal law clearly applied unless the problem was so strictly local that there was no necessity for insistence on the usual uniformity and harmony of the federal maritime law. The Court simply held that the contract was maritime and not local in this sense, so that federal law must prevail. It is surprising that such a case should be cited in support of a "rule of validation" in interstate conflicts cases by one who takes considerable pains to distinguish interstate from inter-heirarchical conflicts.³¹³

The other is the justly famous, though recent, decision of the Supreme Court of California in *Bernkrant v. Fowler*,³¹⁴ in which Mr. Justice (now Chief Justice) Traynor, for a unanimous court, ruled that the California statute requiring a writing for a promise to make a will was not intended by the legislature to apply to a contract involving Arizona plaintiffs, land, and negotiations, although the action was against the estate of a California domiciliary. Almost every conflict-of-laws pundit can claim some support

³¹¹ Text at note 303, *supra*.

³¹² 365 U.S. 731, 81 Sup.Ct. 886, 6 L.Ed. 56 (1961).

³¹³ EHRENZWEIG at 309.

³¹⁴ 55 Cal.2d 588, 12 Cal.Rptr. 266, 360 P.2d 906 (1961).

from this catholic opinion; I have staked my own claim.³¹⁵ Whether I have a better claim than anyone else is of course open to question;³¹⁶ I insist, however, on one point: to cite this sophisticated opinion as one supporting a "rule of validation" regardless of the governmental interests involved is not a high compliment to its distinguished author.

IX

CONCLUSION

Any attempt to summarize the foregoing argument would be largely a matter of arithmetic, which is not one of my fields of special competence. The question is: how many of Ehrenzweig's citations would be allowed by a responsible law-review editor to stand as appropriately invoking the case in supporting the proposition for which it is cited? I suggest that a tally would probably indicate that Ehrenzweig has totally failed to sustain his purported "rule of validation." The reader is cordially invited to make out his own score-card.

³¹⁵ See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757-58 (1964).

³¹⁶ Some light on the question may be shed by Chief Justice Traynor's review of my *SELECTED ESSAYS*, to appear in a forthcoming issue of the DUKE LAW JOURNAL.