Maryland Law Review

Volume 6 | Issue 3 Article 7

The Statute of Frauds - Conflict of Laws - Coastwise Petroleum Company v. Standard Oil Company of N. J.

THE STATUTE OF FRAUDS—CONFLICT OF LAWS

Coastwise Petroleum Company v. Standard Oil Company of N. J.[1]

Defendant inquired of plaintiff as to a prospective purchase of a large quantity of benzol. Plaintiff replied by letter, offering to sell the desired quantity to defendant on named terms. Defendant, by telephone, said it was accepting the offer, but added other terms (thus it is questionable whether there was actually anything more than a counter-offer, although the opinion appears to assume an outright acceptance by defendant). Defendant then withdrew, notifying plaintiff, again by telephone. All this occurred in New York. Plaintiff sold the benzol at 14¢ per gallon instead of the 20¢ provided for in the alleged contract, and sued defendant in Maryland (in the Superior Court of Baltimore City) for the difference, which exceeded $30,000. Defendant demurred to plaintiff's evidence on the basis of the Statute of Frauds,[2] and the demurrer prayer was granted. Plaintiff appealed, contending that estoppel is a recognized exception to the Statute of Frauds, and that defendant was estopped to set up the Statute as a defense here. *Held:* Affirmed.

The Court of Appeals went into a rather elaborate discussion of the Maryland authorities to show that in Maryland estoppel is not an exception to the operation of the Statute. Then, seemingly as an afterthought, the Court, in the last paragraph of the opinion, said: "The negotiations were all in New York, and the law of that state would apply. The Statute there is substantially the same as it is in this state, and we have not been shown, nor do

---

[1] 19 A. (2d) 180 (Md., 1941).

[2] 29 Charles II, Ch. 3; 2 ALEXANDER, BRITISH STATUTES IN FORCE IN MARYLAND (Coe's Ed. 1912) 789. Sec. 17 of the Statute was re-enacted in effect by Sec. 22 of the Uniform Sales Act of 1910, Ch. 346, Sec. 273; Md. Code (1939) Art. 83, Sec. 22. The language of the re-enactment is "shall not be enforceable by action".

we find any decisions of the Courts of the State of New York applying or construing the Statute at variance with the decisions of this Court."

If, as the last paragraph seems to indicate, the Statute of Frauds of the place of contracting determines the validity *vel non* of the contract sued on in Maryland, then why the discussion of the cases construing the Maryland Statutes? This would appear to be wholly irrelevant to the real question in issue, namely: What construction have the New York Courts put upon the New York Statute of Frauds? A possible explanation is that the Court of Appeals used the Maryland decisions as indicia of the New York law in the absence of proof of the latter. Presumptively, however, this explanation is incorrect, for it assumes that the Court of Appeals violated its duty to make an independent search of the applicable foreign law—a duty imposed on it by the Maryland Judicial Notice Act.[3]

Then what is the explanation? Is the last paragraph of the opinion dictum, and does the decision rest on the Court's construction of the Maryland Statute? Or does the major part of the opinion consist of dicta, so that the actual decision is found only in the last paragraph? Or did the Court actually search the New York authorities on the question, find them in substantial agreement with the Maryland authorities, and feel that a discussion of the Maryland cases would be more valuable to the Maryland Bar than would a discussion of the New York authorities? Just what rule or policy of Conflict of Laws (if any) was the Court following when it rendered this opinion? The answers to these questions are anything but clear.

In other jurisdictions, several rules have developed with respect to the Statute of Frauds in conflict of laws cases. The majority of these rules rest on the same stated policy of conflict of laws, namely that substantive matters are to be determined by the law of the place of contracting, while procedural matters are governed by the law of the forum. The difficulties arise when the question of defining substance and procedure is reached.[4] Another underlying principle which sometimes appears is that even as to matters of substance the lex loci will not be followed

---

[3] Md. Code (1939) Art. 35, Secs. 56-62. This substantial adoption of the Uniform Act commands (not suggests) judicial notice.

[4] Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 Yale L. J. 333; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. of Pa. L. Rev. 933; Cheatham, *Internal Law Distinctions in the Conflict of Laws* (1935) 21 Corn. L. Q. 570.

if to do so would violate the public policy of the forum. An exception to the former policy is the rule apparently prevalent in continental Europe, where the forum will enforce a contract which is valid and enforceable *either* by the lex loci or by the lex fori (at least as regards the Statute of Frauds).[5]

In England, the leading case is *Leroux v. Brown*,[6] which made the question of whether the Statute of Frauds is to be deemed "substantive" or "procedural" depend upon the particular wording used in the Statute. The 17th section was worded "no contract shall be allowed to be good" unless evidenced by a memorandum in writing signed by the party to be bound, and it had been held to be substantive. The contract in this case, however, was one involving employment, and could not be completed within a year, and so came under the fourth section, which was worded "no action shall be brought . . ." The Court deemed that this wording made the section procedural, and so refused to enforce the contract, although in France, where it was made, it was clearly valid and enforceable.

In the United States some cases follow the mechanical distinction laid down in *Leroux v. Brown*.[7] The chief justification for this rule is that it is a rule, from which future decisions may be predicted. The rule is criticized in that the wording of a statute in this respect is probably accidental; that a statute worded "no action shall be brought . . . " was really intended to have the same meaning and purpose as one worded "no contract shall be allowed to be good . . .". So, why say that the former is procedural and the latter substantive? Also, this approach (as is any approach based on purely internal law distinctions)[8] is open to the further criticism that it may allow the enforcement of a contract which violates the requirements of a writing under both the lex loci and the lex fori.[9]

---

[5] Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 Yale L. J. 311. Mention might be made also of some recent opinion to the effect that both the statute of the place of contracting and that of the forum should be satisfied. See Comment (1934) 47 Harv. L. Rev. 315, 320.

[6] 12 C. B. 801 (1852).

[7] Kleeman v. Collins, 9 Bush 460 (Ky., 1872); Boone v. Coe, 153 Ky. 233, 154 S. W. 900, 51 L. R. A. (N. S.) 907 (1918); Third Nat. Bank of N. Y. v. Steel, 129 Mich. 434, 88 N. W. 1050 (1902); Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29 (1869).

[8] See: Cheatham, *Internal Law Distinctions in the Conflict of Laws* (1936) 21 Corn. L. Q. 570.

[9] In RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 334, the American Law Institute takes the position that "the formalities required for making a contract" are governed by the lex loci—i. e., are substantive. But in Com-

However, this latter type situation might be met by the use of the public policy principle. This would be to deny enforcement on the theory that the forum's statute expressed a public policy such as would preclude recognition of a foreign contract which failed to meet the requirements of the forum's statute, no matter how valid the contract might be elsewhere.[10] Such argument harks back to the title of the original English Statute of Frauds in 1676, which included the words "Frauds and Perjuryes", resting in the thought that the Statute is directed against perjury and fraud, and cannot be set aside merely because a foreign contract is involved.[11] However, the authorities and writers do not give much approval to placing the Statute within the general public policy exception.[12]

Some cases have disregarded the mechanical distinction of *Leroux v. Brown,* and still held the statute procedural.[13] This result has been reached by saying that the Statute merely relates to the evidence which may be used in proving the contract, and rules of evidence are procedural; or by urging that the statute must be specially pleaded; or

---

ment b of this section, the Institute refrains from taking any position on the question whether the requirements of statutes of frauds are part of such essential formalities, and so substantive, or merely procedural. This question is left to the individual states, which seems regrettable. Comment b expressly sanctions even the absurd situation where the forum enforces a contract which violates the statutes of frauds of *both* the lex loci and the lex fori: "If the statute of frauds of the place of contracting is procedural only and that of the forum goes to substance only, *on oral contract will be enforced though* it does not conform to either statute". This is playing with words with a vengeance! The setup received judicial approval in Marie v. Garrison, 13 Abb. N. C. 210 (N. Y., 1883), in which a Missouri contract was sued on in New York, and the contract conformed to the statute of frauds of neither state; but the contract was enforced on the theory that neither statute was *violated* because neither applied, the Missouri statute being worded procedurally and the New York statute substantively.

The same complications may result from following any purely internal law test of substance and procedure, such a need for pleading specially, or whether or not a subsequent writing is sufficient to satisfy the statute, which would entail the question of whether the writing is mere evidence and thus procedural, or an essential part of the agreement itself, and so substantive. See in this regard, Cheatham, *Internal Law Distinctions in the Conflict of Laws* (1935) 21 Corn. L. Q. 570.

[10] Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57 (1895). See also Barbour v. Campbell, 101 Kan. 616, 168 P. 879 (1917).

[11] See Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57 (1895).

[12] Lorenzen, *supra,* n. 5. GOODRICH, CONFLICT OF LAWS (2nd Ed. 1938) 207, Sec. 85.

[13] Heaton v. Eldridge & Higgins, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 687 (1897); possibly Buhl v. Stephens, 84 F. 922 (D. Ind., 1898); and Straesser-Arnold Co. v. Franklin Sugar Refining Co., 8 F. (2d) 601 (C. C. A. 7th, 1925). And see cases, GOODRICH, *op. cit. supra,* n. 12.

by looking to internal law distinctions between substance and procedure.[14]

The preferable view, which at least a plurality of states have adopted, is to hold the Statute, regardless of wording, relates to substance in applying the conflict of laws rule.[15] This view seems to further the result normally sought for contracts, namely that a contract enforceable where made is enforceable everywhere. The Statute, to be sure, relates to the evidence by which agreements may be proved. But is it not fallacious to say that, *ipso facto*, the Statute is procedural? By denying a party the right to prove a contract by oral testimony it is in effect depriving him of his remedy on the contract, which in turn is tantamount to making the contract void—and this surely goes to substantive rights. It is playing with words to say that a valid contract cannot be enforced. A right without a remedy is only a ghost—just as unreal and just as useless. A recent Delaware case, after an excellent discussion showing awareness of the possible views, chose this result.[16]

The last paragraph of the instant case seems to be in accord with this view as to a contract not enforceable where made, but which is likewise not enforceable under the Maryland statute. Apparently our Court of Appeals has never been faced squarely with the question of what to do with a contract enforceable where made but unenforceable if governed by the Maryland Statute.[17] However, in the case of *Fort Worth Packing Company v. Consumers' Meat Company*,[18] the Court dealt with a suit in Maryland on a contract executed in Texas. The defense of the Maryland Statute of Frauds[19] was sustained without any reference

---

[14] *Ibid;* see also, Cheatham, *supra*, n. 8.

[15] Franklin Sugar Refining Co. v. Holstein Harvey's Sons, 275 F. 622 (D. Del., 1921); Franklin Sugar Co. v. William D. Mullen Co., 7 F. (2d) 470 (D. Del., 1925); Lams v. Smith, 36 Del. 477, 178 A. 651, 105 A. L. R. 646 (1935); Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111 (1893); Murdock v. Calgary Colonization Co., 193 Ill. App. 295 (1915); Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229. (1892); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082, L. R. A. 1917E, 777 (1917); Matson v. Bauman, 139 Minn. 296, 166 N. W. 343 (1918); Anderson v. May, 10 Heisk. 84 (Tenn., 1872); Franklin Sugar Co. v. Martin-Nelly Co., 94 W. Va. 504, 119 S. E. 473 (1923); GOODRICH, *op. cit. supra*, n. 12. But see Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 Yale L. J. 311.

[16] Lams, et ux., v. Smith, 36 Del. 477, 178 A. 651, 105 A. L. R. 646 (1935). See also to same effect, Oakes v. Chicago Fire Brick Co., 311 Ill. App. 111, 35 N. E. (2nd) 522 (1941), noted in (1941) 3 Wash. and Lee L. Rev. 103.

[17] See RESTATEMENT, CONFLICT OF LAWS (1934) MD. ANNOT., Sec. 334 and adjacent sections.

[18] 86 Md. 635, 39 A. 746 (1897). And see the material cited in the preceding footnote.

[19] Sec. 17 of the British Statute as then applicable in Maryland.

to Texas law. That was a tacit treatment of the Statute as procedural for Conflict of Laws purposes, which is inconsistent with the last paragraph of the instant opinion. However, no reference was made in the instant opinion to the earlier Maryland case or its discussion in the Maryland Annotations to the Restatement of Conflict of Laws. If the Court meant what it said in the last paragraph of the instant opinion, then the *Fort Worth Packing Company* case, with respect to the conflict of laws policy there tacitly adopted, is hereby tacitly overruled. One could wish that the Court would be less tacit about adopting and repudiating such doctrines. In a field as intricate as Conflict of Laws, it is certainly desirable that court opinions be as full as possible as to the possible choice of rules and the reasons for the one ultimately chosen.