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CONFLICT OF LAWS AS TO CONTRACTS THE RE-
STATEMENT AND MINNESOTA DECISIONS
COMPARED

By HENRY L. McCLINTOCK*

IN a former article¹ the Minnesota cases dealing with the conflict of laws as to contracts were summarized. Since that article appeared the tentative draft of the Restatement of the Conflict of Laws containing the chapter on contracts² has been published, and it is the purpose of the present article to compare that Restatement with the Minnesota cases.

The first topic of the chapter in the Restatement deals with the place of contracting. The first section³ defines the term "place of contracting" as meaning "the state where the agreement was made." In the case of *Thompson-Houston Electric Co. v. Palmer*,⁴ our court, after stating the rule to be well settled that personal contracts are to have the same validity, interpretation, and obligatory force in every other country (unless against its public policy) which they have in the country where they were made, continued

"The *lex loci contractus* (referring to the place of the seat of the contract as distinguished from the place where it may casually happen to have been signed) is *prima facie* that which the parties intended to apply"⁵

From this it would seem that our court uses the term "*lex loci contractus*" or its English equivalent "law of the place where the contract is made" as synonymous with Dicey's term "proper law of the contract,"⁶ and the use of either of those terms in a case where the court is considering only the question whether the law of the forum or the proper law of the contract shall govern, does not make that case authority for the proposition that the law of

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¹McClintock, *Conflict of Laws as to Contracts: Minnesota Decisions* (1926) 10 MINNESOTA LAW REVIEW 498.

²American Law Institute, *Tentative Restatement No. 4 of the Conflict of Laws, Chapter 8*. (1928). Hereafter this draft will be cited simply as the Restatement.

³Section 332.

⁴(1892) 52 Minn. 174, 53 N. W. 1137 38 Am. St. Rep. 536.

⁵In *Swedish-Amer. Nat'l Bank v. First Nat'l Bank*, (1903) 89 Minn. 98, 111, 94 N. W. 218, 61 L. R. A. 448, there is a similar definition of "*lex loci contractus*."

⁶Dicey, *Conflict of Laws*, 4th ed., p. 591.

the place where the contract is entered into is the proper law of the contract.⁷

Section 333 of the Restatement reads as follows

"A contract is made in the state where the last act toward the completion of the contract is done by a party to the contract, or by an agent who makes a contract for a principal."

In *Walsh v. Selover, Bates & Co.*,⁸ this proposition was presented to our court for decision. An earlier case⁹ had held that the Minnesota statute for termination by notice of a contract for the purchase of lands, applied to a contract for the sale of lands situated in another state where the contract was made and performable here, between parties domiciled here. In the later case the facts were the same except that the purchaser was domiciled in North Dakota and there signed the contract and mailed it to the vendor, who was in Minnesota. Counsel for the purchaser expressly argued that the signing of the contract was the last act necessary to make it binding and, since that occurred in another state, the Minnesota statute did not apply. Vendor's counsel argued both that the contract was completed by negotiations and payment of a deposit in Minneapolis, and that the law of the place where it was casually entered into did not govern. The court, in holding that the case was not distinguishable from the *Finnes Case*, said.

"The fact that the contract, after the terms thereof had been agreed upon in this state, was subsequently reduced to writing and mailed to Walsh at his residence in North Dakota, and by him there signed and returned to Bates at Minneapolis, does not make it a North Dakota contract."

This language, considered with the facts in the case and the arguments of counsel, may be construed either as meaning that the contract was made where the negotiations for it took place, rather than where the last act toward its completion occurred, or as meaning that the place of making in the sense defined in this section of the restatement does not determine what law shall govern the contract. It is certainly a holding that the law of

⁷Professor Beale in his article, *What Law Governs the Validity of a Contract*, (1910) 23 Harv. L. Rev. 260, 270, in arguing that the law of the place of making should always govern, says "Even those judges and writers who finally lay down the different rule state this, first, as the natural one." This argument clearly does not apply to the use of the term "place of contracting" by our court.

⁸(1909) 109 Minn. 136, 123 N. W. 291.

⁹*Finnes v. Selover, Bates & Co.*, (1907) 102 Minn. 334, 113 N. W. 883.

the place where the last act toward the completion of the contract is done does not, necessarily, govern the contract.

In the late case of *Gilbert v Fosston Manufacturing Co.*,¹⁰ our court used language substantially identical with that of this section, saying: "They (contracts) are not considered made until the last act necessary to give them effect has taken place," and citing *McKibben v. Ellingson*.¹¹ In the cited case the court considered the validity of an assignment for benefit of creditors executed by a North Dakota merchant while in Minneapolis, transferring the assignor's real and personal property, all of which was situated in North Dakota, to an assignee living in Minnesota. After execution, the assignment was recorded in North Dakota, as required by the statutes of that state, but not filed with the court in Minnesota. The court held that the final act which made the assignment effective was the recording and, since that took place in North Dakota, the contract was made in that state. The argument of the court in support of this position might be construed as basing the result upon the intention of the parties, rather than upon a general rule of law

In *True v. Northern Pacific R. Co.*,¹² negotiations for the sale of Washington land were conducted in Washington. The contract was submitted to the vendor's land commissioner in Minnesota for his approval, and then returned to Washington for formal execution and delivery. The court held the contract was a Washington contract saying that the place of approval by the commissioner would have been the place where the contract was made except for the provision for formal execution and delivery in Washington, which made the contract effective there.

On the whole, we may say that this section of the restatement accords with the Minnesota decisions, though, as will later be shown, the place of entering into a contract has much less effect in determining the choice of law in Minnesota than it does under the Restatement.

Restatement section 334 provides that the contract is made in a state where the force is set in motion by the last actor who is a party to the contract. In the case of *In re Kahn*,¹³ the court considered the validity of an agreement by a Minnesota debtor to prefer a Wisconsin creditor, performed by delivering to a carrier

¹⁰(1927) 174 Minn. 68, 218 N. W. 451.

¹¹(1894) 58 Minn. 205, 59 N. W. 1003, 49 Am. St. Rep. 499.

¹²(1914) 126 Minn. 72, 147 N. W. 948.

¹³(1893) 55 Minn. 509, 57 N. W. 154.

in Minnesota goods for transportation to the Wisconsin creditor. The court held that, if the action were treated as one on the contract, the Minnesota law made the contract invalid because every act of the debtor was performed here and those acts did not become lawful merely because the title to the goods did not vest in the creditor until they were delivered to him by the carrier in Wisconsin, which agrees with the Restatement.

The other nineteen sections in this topic of the Restatement contain applications of the principle of section 333 to different fact situations. Our court has had occasion to deal with three of these fact situations and each time has reached a conclusion in accord with the Restatement. In *Gilbert v. Fosston Manufacturing Co.*,¹⁴ the court considered the validity of a sale of bonds which had been pledged as collateral security for two notes, each signed in St. Paul but payable in Chicago to a Chicago payee. The first of these notes was mailed from St. Paul to the Chicago payee, the second was handed in St. Paul to an agent of the payee, but as to both it appeared that the payee had the privilege of accepting or rejecting the loans, after the notes had actually reached him. Under these facts the court held that the notes were Illinois, not Minnesota contracts. Though this seems on its face contrary to section 357 of the Restatement which states that when a document embodying a formal contract is to be delivered by mail, the place of contracting is where it is posted, that section is undoubtedly subject to the qualification stated under section 348, which contains a similar statement with reference to the place of making an informal bilateral contract, that the section does not apply to an offer made to take effect only when the acceptance is received.

Restatement section 341 provides that when an insurance policy becomes effective on delivery and is delivered to insured by the agent of the company, the contract is made at the place of delivery. In *Anderson v. Royal League*,¹⁵ our court cited, apparently with approval, *Coverdale v. Royal Arcanum*,¹⁶ which held a benefit insurance contract was made where the certificate was accepted by the beneficiary whose acceptance in writing was required, but the case was actually decided on the assumption the contract was governed by the law of the home state.

¹⁴(1927) 174 Minn. 68, 71, 218 N. W. 451.

¹⁵(1915) 130 Minn. 416, 153 N. W. 853, Ann. Cas. 1917C 691.

¹⁶(1901) 193 Ill. 91, 61 N. E. 915.

Restatement section 349 and *Kemper v. Hunter Land Co.*,¹⁷ agree in holding that where a contract is made by an agent, the place of contracting is where it would have been if the principal had acted personally where his agent acted, though our court qualified the holding by adding: "Unless a contrary intention of the parties is shown or clearly appears from the nature of the obligation."

The second topic of this chapter of the Restatement deals with the creation of a contract. The first section of that topic reads as follows

"The law of the place of contracting determines the binding effect of a promise with respect to

- (a) The capacity to make the promise,
- (b) The necessary form, if any, in which the promise must be made,
- (c) The legal requirements for making a promise binding, such as consideration, seal, etc.,
- (d) The circumstances which make a promise ineffective or a contract voidable,
- (e) The nature of the act to which a party becomes bound,
- (f) The time when and the place where the promise is by its terms to be performed,
- (g) The absolute or conditional character of the promise."

The other sections in the topic are mainly applications of the principle of this section to particular kinds of contracts—sealed instruments, mercantile instruments, contracts of carriage, informal contracts in general, contracts with regard to land and contracts creating relations. The Minnesota cases do not, as a rule, indicate that there is any difference in the proper law which ought to govern these various types of contracts so that it seems best to consider all Minnesota cases dealing with the creation of a contract in connection with this section of the Restatement, unless there is something in the case to indicate that the particular facts involved influenced the decision.

It is apparent that this section is based on the theory that the law governing the place where the agreement is completed is the only law which can attach to the act of completing the agreement legal obligations so that it becomes a contract.¹⁸ We find some statements in Minnesota cases supporting this proposition, but generally they are made in cases where there was no

¹⁷(1920) 146 Minn. 337, 178 N. W. 747

¹⁸See Beale, What Law Governs Validity of Contract, 23 Harv. L. Rev. 260, 270.

controversy as to what was the proper law of the contract.¹⁹ In other similar cases the court has qualified the statement,²⁰ or has applied a law which was the law of the place of performance as well as of making the contract.²¹ In only one case²² has the court applied the law of the place of making the contract as against the contention some other law ought to govern and there it commented on the fact that the adoption of plaintiff's contention that the law of the place of loss determined the validity of a carrier's agreement limiting its liability would not aid plaintiff because the proof did not show where the loss occurred. In one case²³ the law of the place of performance was applied, though the contract was made in this state, and in several cases²⁴ the court has applied the law which it has found or presumed the parties intended to choose as the proper law governing the contract.

Mueller v. Ober,²⁵ was a suit to foreclose a mortgage given to secure two promissory notes executed in Iowa by a debtor residing there, payable to plaintiffs, who resided in Wisconsin. The debtor wrote the notes on Iowa forms which contained a provision for interest at an increased rate if not paid at maturity. He struck out the provision for payment at an Iowa bank and

¹⁹*Keenan v. Stimson*, (1884) 32 Minn. 377, 20 N. W. 364; *Reiff v. Bakken*, (1887) 36 Minn. 333, 31 N. W. 348; *Midland Co. v. Broat*, (1892) 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312; *Powers Merc. Co. v. Wells-Fargo & Co.*, (1904) 93 Minn. 143, 100 N. W. 735; *Porteous v. Adams Exp. Co.*, (1911) 115 Minn. 281, 132 N. W. 296; *Fiske v. Lawton*, (1913) 124 Minn. 85, 144 N. W. 455.

²⁰"The law of the jurisdiction in which the parties to a contract reside and in which it is executed, especially if it is to be performed within that jurisdiction, is usually, so far as it affects the substance of the contract, to be deemed a part of it." *Stahl v. Mitchell*, (1889) 41 Minn. 325, 335, 43 N. W. 385.

²¹*Buckley v. Humason*, (1892) 50 Minn. 195, 52 N. W. 385, 36 Am. St. Rep. 637; *Culver v. Johnson*, (1915) 131 Minn. 75, 154 N. W. 739; *Patterson v. Wyman*, (1919) 142 Minn. 70, 170 N. W. 928; *Granite City Bank v. Tvedt*, (1920) 146 Minn. 12, 177 N. W. 767.

²²*Carpenter v. United States Exp. Co.*, (1912) 120 Minn. 59, 139 N. W. 154.

²³*Ames v. Benjamin*, (1898) 74 Minn. 335, 77 N. W. 230.

²⁴*Thompson-Houston Elec. Co. v. Palmer*, (1892) 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536; *Smith v. Parsons*, (1893) 55 Minn. 520, 57 N. W. 311, *Seamans v. Christian Brothers Mill Co.*, (1896) 66 Minn. 205, 68 N. W. 1065; *Swedish-Amer. Nat'l Bank v. First Nat'l Bank*, (1903) 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549; *Green v. Northwestern Trust Co.*, (1914) 128 Minn. 30, 150 N. W. 229, L. R. A. 1916D 739; *Jenkins v. Union Savings Association*, (1916) 132 Minn. 19, 155 N. W. 765; *Mueller v. Ober*, (1927) 172 Minn. 349, 215 N. W. 781, *Gilbert v. Fosston Mfg. Co.*, (1827) 174 Minn. 68, 218 N. W. 451.

²⁵(1927) 172 Minn. 349, 215 N. W. 781.

inserted the name of a bank in Minnesota as the place of payment. Neither the increased interest nor the place of payment had been a matter of agreement between the parties. Under the law of Minnesota the provision for increased interest would defeat the right to any interest and the trial court held that law governed and there was no default. The supreme court stated that the general rule that the validity of contracts is to be determined by the laws of the place of performance is based on the presumed intent of the parties to select that law. In this case that presumption is rebutted by the absence of plaintiff's agreement to the provision making the contract payable in Minnesota, and, as a general presumption, must yield to the particular presumption that the parties intended to choose a law which would make their contract valid. The opinion gives no reason for considering the presumption that the parties intended the law of place of performance to govern a more general one than the presumption that they intended to make a valid contract, and the proposition is not self evident.

Within two months from the rendition of that opinion, the court was called upon to decide a similar question in the case of *Gilbert v. Fosston Mfg. Co.*²⁶ The controversy was between the general creditors of an insolvent corporation and the purchaser of some of the corporate bonds which had been pledged to secure notes given for money loaned to the company which bonds had been later sold by the pledgee. The notes provided for seven per centum interest, the maximum permitted by the laws of either Minnesota, where the debtor conducted its business, or Illinois, where the creditor had its principal office and where the notes were made payable. From the amount stated in the notes, the lender deducted a substantial sum as bonus or commission. This made the transaction usurious by the laws of both Minnesota and Illinois, but by the law of the former, the consequence was the forfeiture of all interest and the principal as well, whereas by the law of Illinois only the excess interest was forfeited. After holding that, under the plain facts, the notes were made in Illinois, not in Minnesota, though the trial court found they were Minnesota contracts, the court said

"The general rule is that contracts, not relating to real estate or specific personal property, are governed as to effect and performance by the law of the place where they were made. They

²⁶(1927) 174 Minn. 68, 218 N. W. 451.

are not considered made until the last act necessary to give them effect has taken place.

The place where that act takes place therefore becomes, no more appearing, the place where the contract is made. The only alternative is to treat the notes as having been made in St. Paul but to be performed in Illinois. That view would bring us to the same end, for it would invoke the 'general principle well settled' that such contracts 'are to be governed by the law of the place of performance.'

In the *Seeman*²⁷ Case it is observed accurately (quoting Wharton) that where the bona fide intent of the parties was to fix the situs of the transaction at a 'place which has a natural and vital connection' with it, and intention to obtain the highest possible legal interest 'does not prevent the application of the law allowing the higher rate.'

It is hard to conceive how a paragraph could have been framed which would introduce more confusion than this does into the consideration of a question confusing enough at best. In the first place the court is not here faced with a question as to the effect of performance of a contract, but with the enforceability, that is legal validity, of a promise by a borrower of a sum of money to repay a larger sum with the maximum legal rate of interest calculated on the larger sum. If we were dealing with a question of performance we would not find a "general rule" that it was governed by the law of the place of making; even those who apply the latter rule to determine the validity and interpretation of a contract, apply the law of the place of performance to determine questions affecting the performance of the contract.²⁸ The "general rule" and "general principle" which the court invokes to reach the same conclusion on different fact hypotheses are inconsistent, they cannot both be the law in the same jurisdiction. The last portion of the paragraph seems to rely on the power of the parties to choose which of several possibly applicable laws shall govern their case.²⁹ Later portions of the opinion discuss this question in greater detail.

The trial court had found that the parties had no actual intent as to what law should govern the contract. In discussing this finding the court relied on the policy of the law to achieve the result intended by the parties and, in referring to the char-

²⁷*Seeman v. Philadelphia Warehouse Co.*, (1927) 274 U. S. 403, 47 Sup. Ct. 626, 71 L. Ed. 1123.

²⁸Restatement secs. 384-396. The case which is probably most often cited for this distinction is *Scudder v. Union Nat'l Bank of Chicago*, (1875) 91 U. S. 406, 23 L. Ed. 245.

²⁹Compare *Smith v. Parsons*, (1893) 55 Minn. 520, 57 N. W. 311.

acterization by an earlier case³⁰ of the process of imputing to parties an intent which they did not possess as a species of legal jugglery, asserted it was an "honest kind of legerdemain done in full view of the audience," and one in the interest of honesty, "only by considering the notes Illinois contracts can we escape putting the borrowers in the moral category of swindlers."

To continue the figure used by the court, this language is quite manifestly the "patter" used by the magician to divert the attention of the audience from the trick he is performing. The actual situation was that a corporation which was in need of money and unable to sell its bonds had to agree to the terms imposed upon it by the lender. If we accept the trial court's finding neither borrower nor lender considered the question of the effect of the law of either Minnesota or Illinois upon the agreement they made. The borrower probably intended in good faith to perform its agreement, in fact did make payments of both principal and interest as long as it was financially able to do so. Now the question is, not whether the borrower can keep the money, but whether the lender is entitled to enforce a pledge of assets to secure the repayment of the loan in preference to the claims of general creditors. Both Minnesota and Illinois say it is contrary to public policy to permit a lender to impose such terms on a borrower, Minnesota enforces its policy by refusing to aid a lender guilty of the prescribed act in collecting either interest or principal, Illinois merely refuses to aid in collecting the excess interest. To apply the Minnesota statute would not make the borrower a swindler any more than to permit one injured by the violation of a statute to recover double or treble damages makes that one a swindler, and especially where the benefit goes not to the borrower but to the general creditors.

It may not be advisable for our court to adopt in all situations the rule of the Restatement that the law of place of making governs a contract, except as to performance or discharge, it often would lead to unexpected results where the parties casually meet and sign the contract in a place where neither of them resides or does business, it would certainly permit the parties to make any contract valid if they could find a state whose laws permitted that contract and there have the contract delivered and accepted by agents of the parties,³¹ but certainly we ought to have decisions

³⁰Green v. N. W. Trust Co., (1914) 128 Minn. 30, 150 N. W. 229.

³¹Restatement secs. 333, 338.

based on consistent principles, and not those arrived at by "leger-deman" even if it is "open and honest."

Restatement section 355 repeats in substance the provision of section 353 (b) that the law of the place of contracting determines the formalities required for making a contract. In two Minnesota cases³² in which the court refused to apply the law of the place where the contract was made to determine questions of essential validity, it intimated that such law might govern the formalities necessary to make the contract binding. But in *Halloran v. Jacob Schnudt Brwg. Co.*,³³ the court considered the sufficiency of a writing to support a guaranty of a lease of Iowa property executed in Iowa. The writing was sufficient under the Iowa statute of frauds but not under the Minnesota statute. The court overruled the contention of defendant that the question was one of remedy and, therefore, governed by the law of the forum. Treating it as a question of right the court said.

"The form of the writing must necessarily be determined either by the law where the contract is made or where it is to be performed." "That particular statute then enters into the contract, and may be said to form a substantive part thereof."

The decisions in *Farmers State Bank v. Walch*³⁴ and *Goedhard v. Folstad*³⁵ are in accord with the rule in Restatement section 360 that the law of the place of contracting determines whether a mercantile instrument is negotiable, but they cannot be considered to settle that proposition finally in Minnesota for in the first of those cases the note was also payable in the state where it was made and in the second no place of payment was specified.

A similar situation exists with reference to the rule of Restatement section 364 that the law of the place of contracting determines what are the provisions and obligations of a mercantile instrument. In *Schultz v. Howard*³⁶ the question was raised whether the obligations of parties to a note dated at Chicago and payable "at Globe National Bank" were joint or several. Counsel

³²*Thompson-Houston Elec. Co. v. Palmer*, (1892) 52 Minn. 174, 52 N. W. 1137, 38 Am. St. Rep. 536; *Swedish-American Nat'l Bank v. First Nat. Bank*, (1903) 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549.

³³(1917) 137 Minn. 141, 162 N. W. 1082, L. R. A. 1917E 777

³⁴(1916) 133 Minn. 230, 158 N. W. 253.

³⁵(1923) 156 Minn. 453, 195 N. W. 281.

³⁶(1895) 63 Minn. 196, 65 N. W. 363, 56 Am. St. Rep. 470.

for plaintiff cited in his brief an Illinois statute making all joint obligations joint and several, but that statute was not pleaded or proved. The court said

"Assuming that the Globe National Bank, at which the notes were payable, is in Illinois, this statute, if pleaded, would have been decisive of the case, for it is settled law that the place of the contract regulates its validity, interpretation, and the nature of its obligation."

Since the statute was not pleaded or proved the court assumed the law of Illinois to be the same as that of the common law of Minnesota. From this it would seem that the "place of the contract" is the place of performance rather than that of making.

The first section of the Restatement which deals with informal contracts in general, section 367, provides that the law of the place of contracting determines whether mutual assent has been expressed. In *Powers Mercantile Co. v Wells-Fargo & Co.*,³⁷ our court held that the law of the place of making the contract determined whether the acceptance of an express receipt which contained a clause limiting the liability of the carrier in case of loss amounted to an assent to that as a term of the contract. No contention was made that any other law should apply,³⁸ the carrier claiming that the evidence showed actual assent to the limitation. The application of the law of place of making the contract invalidated the limitation of liability in that case, but the principle enunciated was applied in two later cases³⁹ where the result was to make the limitation valid.

Restatement section 372 states that the law of the place of the place of contracting determines the binding effect of a promise to convey land. In a case involving the validity of a pledge of personal property our court said

³⁷(1904) 93 Minn. 143, 100 N. W 735.

³⁸The court did not consider the question whether the rule involved was one of substance as held in some cases, (see *Hartman v. Louisville & N. R. Co.*, (1890) 39 Mo. App. 88; *Coats v. Chicago R. I. & P R. Co.*, (1909) 239 Ill. 154, 87 N.E. 929) or one of evidence only and, therefore, to be governed by the law of the forum, as held in *Hoadley v. Northern Transp. Co.*, (1874) 115 Mass. 304. Compare Restatement, Tentative Draft of Conflict of Laws, No. 5, sec. 647 providing that the law of the forum governs presumptions, and comment (a) thereunder to the effect that a substantive rule of law stated in the form of a presumption is not governed by this rule.

³⁹*Porteous v. Adams Exp. Co.*, (1911) 115 Minn. 281, 132 N. W 296; *Carpenter v. United States Exp. Co.*, (1912) 120 Minn. 59, 139 N. W 154.

"The rule has always been that the validity of contracts and transactions concerning real property, both as to formality and essence, is to be determined by the laws of the place where the property is situated."⁴⁰

No case has been found which directly raises the question. In two cases⁴¹ the contract was made in the foreign state where the land was situated and there was no contention that the law of that state was not the proper law to govern the contract. In another case⁴² the question was as to the proper law to determine whether an assumption by a grantee of a mortgage could be enforced by the holder of the mortgage. The land was located in Iowa, but the deed was executed in Minnesota. The court held that the contract of assumption was presumed to be performable where made since it was silent as to the place of performance, and that there was nothing to show an intention that the law of Iowa should apply, so the court decided the case by applying the law of Minnesota. The court rejected plaintiff's contention that the assumption agreement was a covenant running with the land without stating whether that question was to be determined by the law of the situs of the land, as provided by Restatement section 374.

Comment (b) to Restatement section 372 points out that the law of the situs of land determines whether a contract to convey the land transfers an interest in the land, while the law of place of contracting governs the personal rights and obligations under the contract. This distinction has been recognized by our court in two cases,⁴³ but the question involved in each case was the termination, rather than the validity of the rights and obligations, and in the latter of the cases it is doubtful whether the contract was made in Minnesota, whose law was held to be the proper law of the contract.⁴⁴

Restatement sections 377-383 comprise Topic III which deals with the assignment of contractual rights. These sections are based on the general principle that the assignability of a contract is determined by the law of the place of contracting, but, if it is

⁴⁰Swedish-American Nat'l Bank v. First Nat'l Bank, (1903) 89 Minn. 98, 113, 94 N. W. 218, 99 Am. St. Rep. 549.

⁴¹Harris v. McKinley, (1894) 57 Minn. 198, 58 N. W. 991, Wood v. Johnson, (1912) 117 Minn. 267, 135 N. W. 746.

⁴²Clement v. Willett, (1908) 105 Minn. 267, 117 N. W. 491, 127 Am. St. Rep. 562.

⁴³Finnes v. Selover, Bates & Co., (1907) 102 Minn. 334, 113 N. W. 883; Walsh v. Selover, Bates & Co., (1909) 109 Minn. 136, 123 N. W. 291.

⁴⁴See comment on Restatement sec. 333, *supra*.

assignable, the assignment is governed by the law of the place of assignment. No Minnesota cases appear to have involved any of the principles of this topic. In two cases⁴⁵ our court has had to pass on assignments for the benefit of creditors where foreign operative facts were present but in both cases the controversy related to the title to tangible chattels, not to contractual obligations.

In *Lewis v Bush*⁴⁶ an assignee under an Illinois assignment intervened in Minnesota garnishment proceedings, claiming priority over the plaintiff though he had not notified the debtors as required by Illinois law to make the assignment fully effective. The court applied the Minnesota rule as to notice because the question did not concern the contract of assignment, which might be governed by the law of the place where it was made, but the remedy, which was governed by the law of the forum.

Topic IV of the Restatement, containing sections 384-396, relates to the performance of contracts. Section 384 and the comments under it define the term "place of performance." In no Minnesota case has there been any controversy as to where a contract is to be performed, but in *Clement v. Willett*⁴⁷ our court stated that if no place of performance is specified a contract is presumed to be performed where made, which accords with comment (a) of this section of the Restatement. No intimation is given by the Restatement as to what is the place of performance of a promise which is performable in more than one place, such as a promise to carry goods through several states. Our court answered a contention that the law of place of performance determined the validity of a limitation of carrier's liability for loss of goods it undertook to transport from New York to Minnesota by stating that the weight of authority was against the contention and that it was unavailing since the proof did not show where the loss occurred,⁴⁸ thereby intimating the place of performance was the place where the carrier was performing when the breach occurred, not the place of final performance by delivery to the consignee.

⁴⁵In re Paige & Sexsmith Lumber Co., (1883) 31 Minn. 136, 16 N. W. 700; Swedish-American Nat'l Bank v. First Nat'l Bank, (1903) 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549.

⁴⁶(1883) 30 Minn. 244, 15 N. W. 113.

⁴⁷(1908) 105 Minn. 267, 117 N. W. 491.

⁴⁸*Carpenter v. United States Express Co.*, (1912) 120 Minn. 59, 139 N. W. 154.

Restatement section 385 reads as follows

"The law of the place of performance governs the performance of the promise with respect to

- (a) The manner of performance,
- (b) The time and locality of performance,
- (c) The person or persons by whom or to whom performance shall be made or rendered,
- (d) The sufficiency of performance,
- (e) The discharge of the obligation,
- (f) The breach of the obligation."

In *Lewis v. Bush*⁴⁹ and *Johnson v. Nelson*⁵⁰ our court stated, in harmony with this section, that the general rule was that as to performance of contracts the law of place of performance governs, but the statements were dicta in both cases, and in the later case the authority cited⁵¹ for this statement was a case which involved usury, that is the validity, not the performance of the contract. In other cases our court has held or intimated that the law of the place of performance determines the validity of a contract.⁵² Generally our court seems to proceed on the assumption that there is one proper law of the contract. Thus in three cases⁵³ in which the question has been the termination of rights under a contract for the sale of land, which under subdivision (e) of this section of the Restatement would be governed⁵⁴ by the law of the place of performance, the court speaks of the law governing the contract without any intimation that the discharge of the contract may be governed by a law other than that which governs its formation and validity. In the recent case of *Gilbert v. Foss-ton Manufacturing Co.*,⁵⁵ the court said

"The general rule is that contracts, not relating to real estate or specific personal property, are governed as to effect and performance by the law of the place where they were made."

The question before the court in that case was the validity, not the performance, of a contract, but the statement confirms the

⁴⁹(1883) 30 Minn. 244, 15 N. W. 113.

⁵⁰(1915) 128 Minn. 158, 150 N. W. 620.

⁵¹*Ames v. Benjamin*, (1898) 74 Minn. 335, 77 N. W. 230.

⁵²*Supra*, notes 21 and 23.

⁵³*Finnes v. Selover*, *Bates & Co.*, (1907) 102 Minn. 334, 113 N. W. 883; *Walsh v. Selover*, *Bates & Co.*, (1909) 109 Minn. 136, 123 N. W. 291, *True v. Northern Pac. Ry. Co.*, (1914) 126 Minn. 72, 147 N. W. 948.

⁵⁴That is, if we accept the theory on which all those opinions proceed that the question of the applicability of the Minnesota statute which provides for the termination of the rights of a purchaser under a contract for the purchase of land is a question concerned with the termination of contract rights rather than of interests in land.

⁵⁵(1927) 174 Minn. 68, 218 N. W. 451.

view indicated by earlier cases that our court draws no distinction between the law governing performance of a contract, and that governing other questions relating to the contract.

Restatement section 387 reads as follows

"If performance of a contract is illegal by the law of the place of performance at the time for performance, there is no obligation to perform so long as the illegality continues. If the illegality of performance is temporary and the obligation of the contract still continues by the law of the place of contracting, the contract must be performed within a reasonable time after its performance becomes legal."

This section would not apply where the performance is merely unenforceable by the law of the place of performance so that our cases⁵⁶ which enforce payment of an instrument which is usurious by the law of the place of payment are not contrary to it. The illustrations given under this section in the Restatement are all cases where the performance has become illegal after the contract was entered into, but comment (e) implies that the section is also applicable where the performance was illegal at the time it was entered into, for that comment states that "If by the law of the place of performance the performance is illegal at the time the contract is made, the contract itself by the law of the place of contracting is void by the law of several states." That is, if a contract is entered into in Indiana, to stage a prize fight in Illinois in a manner prohibited by the laws of the latter state, and action is brought in Minnesota to compel the payment of training expenses, or of any other sum payable before the fight, so that the obligation to pay cannot be construed as conditioned on performance by the other party, Minnesota ought to hold the contract valid and give the relief asked unless it found that the local law of Indiana, as distinguished from its rules of conflict of laws, holds that a contract made there to do an act in another state is void if the act is prohibited by the law of the state where it is to be performed, and it ought to give such relief even though it knows there is no obligation to perform the act called for. This result is a logical deduction from the principle that only the law of the place where the contract is made can determine its validity, but it is safe to predict that no court would adhere to logic to such an extent. If we can assume that all jurisdictions which

⁵⁶Smith v. Parsons, (1893) 55 Minn. 520, 57 N. W. 311, Green v. N. W. Trust Co., (1914) 128 Minn. 30, 150 N. W. 229, L. R. A. 1916D 739.

follow the Restatement of Conflict of Laws will also follow the Restatement of Contracts, and we include in the latter a provision that a contract to do an act which is prohibited by the law of the state where it is to be done is invalid, the practical difficulty will disappear, but it seems it would be simpler and more effective to recognize that rule as one of conflict of laws, which is an exception to the general principle that the law of the place of making governs.

Restatement, section 390 provides that the law of the place of performance governs the postponement of performance by operation of law. *Hewitt v. Dredge*⁵⁷ was an action on notes executed and payable in Minnesota, but secured by mortgage on lands in Canada. The defense was the Canadian moratorium act. The court held it was too plain for argument that the notes were Minnesota contracts and the Canadian act could not affect an action on them. There was no intimation that this particular question was to be determined by a different principle from that which determines the proper law of the contract.

Restatement section 392 reads as follows

"The law of the place of performance determines whether the obligation of a contract is discharged by the giving and acceptance of a promissory note or bill of exchange."

The question came before our court in the case of *Thompson-Houston Electric Co. v. Palmer*⁵⁸ and our court decided it in accordance with the proper law of the second contract, not of the original contract. This decision, rather than the quoted section of the Restatement seems consistent with the principles on which the rest of the Restatement is based. The question is whether one of the terms of the contract for the giving and acceptance of the note or bill of exchange is that the prior obligation shall be discharged. To be consistent with other parts of the Restatement,⁵⁹ this section ought to be limited to discharge by operation of law, but no law provides that a debtor may discharge a debt by giving a negotiable instrument for the amount. If the instrument is given it is because of an agreement subsequent to the

⁵⁷(1916) 133 Minn. 171, 157 N. W 1080.

⁵⁸(1892) 52 Minn. 174, 53 N. W 1137, 38 Am. St. Rep. 536. In this case it was not necessary to distinguish between the agreement to give and accept the note, and the promise to pay, embodied in the note. Where different laws would properly apply to those agreements, the proper law of the former ought to determine what term shall be supplied in it with reference to its effect on the prior obligation.

⁵⁹Compare Restatement sec. 390, supra.

debt to give and accept it, and the parties may by that agreement determine whether the prior debt is to be discharged or continued. If they do not provide for that in the agreement, the law must determine the question for them, but it ought to be the law which would supply the necessary clause of any contract made under the circumstances which surrounded the making of the contract to give and accept the instrument and not the law which governs the discharge by operation of law of the original contract.

In Topic V of the Restatement which treats of the discharge of the obligation of a contract, the first section, 397, reads as follows

"The law of the place of performance determines whether a release of one party to an obligation or extending the time for performance in favor of the principal party, or surrendering security, discharges the other parties."

A question somewhat analagous to this was presented in *Merchants State Bank v. Sunset Orchard Land Co.*,⁶⁰ an action against guarantors of a note made and payable in Minnesota but secured by mortgage on Montana land which had been foreclosed. The defense was that a statute of Montana required all liability on the note to be determined in the foreclosure suit. The court held the note was a Minnesota contract, making no distinction between the law which would govern the question of discharge and that which would govern other questions relating to the contract. It also held the Montana statute was a regulation of procedure and, therefore would not apply to an action in Minnesota.

Topic VI, the last topic of this chapter of the Restatement, deals with breach of contract, applying the law of the place of performance to the questions involved. The only provision of this topic which has been involved in a Minnesota case is that of section 403, that the law of the place of performance determines the measure of damages for breach. In *Kolliner v. Western Umon Tel. Co.*,⁶¹ plaintiff sought to recover the cost of a trip to Washington which was made futile by defendant's failure to deliver a telegram which he sent from the train in Montana to an addressee in Washington. Under a Minnesota statute such damages could be recovered. Plaintiff did not argue the question of the proper law to govern. Defendant argued that it must be either the law of Montana where the contract was made or Wash-

⁶⁰(1924) 158 Minn. 108, 196 N. W. 963.

⁶¹(1914) 126 Minn. 122, 147 N. W. 961, 52 L. R. A. (N.S.) 1180.

ington where it was to be performed and since neither Montana nor Washington law was pleaded, the question must be governed by the common law as interpreted in Minnesota. The court, in deciding for defendant, said.

"The contract was made in Montana, and there was no pleading or proof as to the statutes of that state."

In view of the facts and the argument this case is probably not authority against the Restatement, but it is another, and very striking illustration, of our court's failure to notice that different questions arising out of a contract may be governed by different laws.

From this comparison of our cases with the Restatement it is apparent that the latter proceeds on the theory that the law of the place where the contract was made determines all questions as to the formation and obligation of the contract, and the law of the place of performance governs all questions as to the performance, discharge or breach of the contract, while our court, in so far as it follows any consistent theory, applies the law chosen by the parties, actually or presumptively, as the law to govern all questions arising out of the contract. The fact that in many of our cases the result agrees with that which would be reached by applying the Restatement is merely accidental. It is hardly to be expected that our court will discard the theory which it has so often followed in the past for one which it has expressly refused to apply in numerous cases. In fact, it may well be argued that the strict application of the theory of the Restatement in all cases would make our law too rigid to be practicable. But it is to be hoped that our court, with the logical analysis in the Restatement of the various questions involved in this intricate field before it, will be led to make a more careful analysis of the problems involved and supplant the chaotic condition of our law today with a practically, if not logically, consistent body of rules, which will enable the lawyer to advise his client, with some degree of confidence, what law will be held to govern the various questions which arise out of a contract into which the client has entered, or desires to enter.