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# Conflict of Laws: Does R.C.M. 1935, Section 7537 Require the Conclusion That the "Place of Performance" Governs the Essential Validity of a Contract?

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should the question come before it, to reach a decision compatible with the better reasoned principles of modern authority. The decisions of other CODE jurisdictions<sup>7</sup> may be easily distinguished as governed by provisions not in our CODE. In any event they are not controlling and the question is left open to the court.<sup>8</sup>

—J. Chandice Ettien

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**CONFLICT OF LAWS: DOES R. C. M. 1935, SECTION  
7537 REQUIRE THE CONCLUSION THAT THE  
"PLACE OF PERFORMANCE" GOVERNS  
THE ESSENTIAL VALIDITY OF  
A CONTRACT?**

It is quite generally conceded that the weight of authority<sup>9</sup> throughout the United States is that where a contract is made in one state either to be performed there or elsewhere the law of the state where the contract was entered into governs its validity; i. e., whether any legal rights or duties arise from the contract against either party in favor of the other.<sup>9</sup> Surprisingly enough the Montana Supreme Court has never as yet

<sup>7</sup>*Supra*, Notes 21, 23 and 24.

<sup>8</sup>In the event that the court does not see its way clear to accept the conclusions of this comment it is submitted that the Montana legislature should repeal the statute. The rule, as apparently reached in the jurisdictions of Dakota and Oklahoma, has no foundation in reason. Slight inquiry will show that it is contrary to the usual practice. Minors often act through agents in the ordinary course of their transactions.

It was suggested in 2 CALIF. L. REV. 312 (1914) that Section 33 of the California Code (corresponding to §5678 of the Montana Code) be amended to read: "A minor under the age of eighteen cannot directly or by a delegation of power make contracts relating to real property or personal property not in his immediate possession. . . ." If such an amendment were enacted, the section would become merely a limitation on the infant's personal capacity. Further, it would involve difficulties of interpretation. What does the commentator mean by the words "immediate possession"? Does he mean a present vested interest or actual physical possession?

<sup>9</sup>RESTATEMENT, CONFLICT OF LAWS §332, 2 BEALE, CONFLICT OF LAWS (1935) §332.4, p. 1090, GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §107, p. 273. Some writers disliking the generally prevailing rule cite the result of Beale's 1910 survey which shows a plurality of states favoring the rule that the place of performance governs the essential validity of a contract. See STUMBERG, CONFLICT OF LAWS (1937) p. 207.

<sup>10</sup>Historically, at least, three possibilities have been recognized: First, apply the law that the parties intend should apply; Second, apply the law of the place of performance; Third, the accepted weight of authority rule, apply the law of the place of contracting.

definitely determined this issue, although it has several times been presented with situations which might conceivably have called for its decision. In this connection it is interesting to note that two eminent authorities in the field of Conflict of Laws have, after examination of various Montana statutes and cases, reached opposite results in determining what the law in Montana is. Professor Beale concludes that on the strength of these cases Montana may "tentatively" be classified among those states following the rule of the place of contracting governs the validity and effect of a contract.<sup>3</sup> Professor Cormack, on the other hand, considering practically the same cases in the light of a CODE provision which he considers relevant, concludes that "all contract matters are governed by the law of the place of performance".<sup>4</sup> The statute which is apparently the basis of Mr. Cormack's conclusion was adopted by Montana in 1895, having been copied in its entirety from the FIELD CODE.<sup>5</sup> Its full text is as follows:

"A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."<sup>6</sup>

If one has in mind the Conflicts problem and regards this Section alone without reference to the other Sections of the Chapter<sup>7</sup> in which it is cited it may seem that the Section is a loose statement of the performance rule; that is, that the law of the place of performance governs the essential validity of

<sup>3</sup> BEALE, *CONFLICT OF LAWS* (1935) §332.34, p. 1152.

<sup>4</sup> Cormack, *California Conflict of Laws in Regard to Contracts*, 12 So. CALIF. L. REV. 335, 363 (1938-39).

<sup>5</sup> The FIELD CODE was compiled in 1865 by order of the New York State Legislature but was never adopted by that state.

<sup>6</sup> R. C. M. 1935, §7537. In this connection another CODE provision should be noted. R. C. M. 1935, §10518, provides: "The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place." If it be considered that the word "reference" establishes an exception only when the parties expressly stipulate that the law of the place of performance is to control, then the two sections are in conflict. But on the other hand, as Professor Cormack points out, it might well be considered that §10518 is simply a loose statement of the same principle as is advanced by §7537. In any event as §7537 refers to contracts and §10518 to writings, applying the canon of construction that the specific controls the general, as writings are broader than contracts, §7537 being more specific is controlling.

<sup>7</sup> On examination of other Sections of Chapter 103, R. C. M. 1935, it will be noted that the entire chapter deals with the problem of ascertaining the intention of the parties. It would seem that this is certainly a strong indication of the proper meaning to be given to §7537.

the contract. It is obvious that whether or not this statute does refer to validity depends on the construction to be given to the word "interpret". "Interpret", like most other words, has been assigned a variety of meanings in the law as well as elsewhere. However, its generally accepted meaning<sup>6</sup> when used in connection with contracts indicates ascertainment of the intention of the parties as indicated by the meaning of the words, phrases, and clauses separately considered, as distinguished from the legal effect of the contract as a whole—the latter, on the other hand, involving its essential validity.

That the word does not and never was intended to include "essential validity" becomes apparent when one considers the annotations to this Section in the final draft of the original FIELD CODE as submitted by the Code Commission to the New York Legislature. Sections 270 and 280 of JOSEPH STORY'S work on Conflict of Laws are cited in support of the first clause of what now is R. C. M. 1935, Section 7537. Section 282 of the same work supports the second clause. In order to gather the full import of the cited sections it is necessary to consider other sections of that work bearing on the general problem. Sections 242, 243 and 244 advance the general rule that validity of the contract is to be determined by the law of the place where the contract was made. Section 263 states that the *place of contracting* governs the nature, obligation, and interpretation of the contract. The same section refers to and defines what is meant by the nature of a contract. Section 266 refers to the obligation of the contract, carefully distinguishing it from the nature of the contract. Section 270<sup>7</sup> refers to the interpretation of contracts, distinguishing this from both nature and obligation. After thus establishing the general proposition that the place of contracting governs the validity, interpretation, nature, and obligation of a contract, STORY qualifies this rule in section

<sup>6</sup> BEALE, CONFLICT OF LAWS (1935) §346.2, p. 1201; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §109, p. 288; 22 WORDS AND PHRASES 214; DICEY, CONFLICT OF LAWS (3d ed. 1922) p. 623; SAVIGNY, CONFLICT OF LAWS (2d ed. 1880) p. 243.

<sup>7</sup> ". . . the object is to ascertain the real intention of the parties in their stipulations; and when these are silent, or ambiguous, to ascertain, what is the true sense of the words used, and what ought to be implied in order to give them full effect. . . . But in many cases the words used have different meanings in different places by law or by custom; and where the words are themselves obscure or ambiguous, custom and usage in a particular place may give them an exact and appropriate meaning. Hence, the rule has found admission into almost all, if not all, systems of jurisprudence, that, if the common intention of the parties does not appear from the words of the contract, and if it can be interpreted by any custom or usage of the place, where it is made, that course is to be adopted. . . ."—STORY, CONFLICT OF LAWS (1834) §270, p. 225.

## NOTE AND COMMENT

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280<sup>20</sup> by stating that the rules already considered suppose that performance of the contract is to be in the place of making, but that if the contract is to be performed in another place, that law will govern. Section 282<sup>21</sup> is more or less a repetition of the rules previously stated but does serve to support the second clause of the Code Section.

The reader's attention is called to the fact that it is not the purpose of this article either to support or discredit the doctrines advanced by STORY in the cited sections. The sole purpose in referring to them is to indicate the clear distinction maintained therein between "interpret" and "essential validity". In the light of this distinction, it is logical to conclude that the framers of the CODE intended the word "interpret" in its normal sense as used by STORY in section 270, that is, to refer only to the ascertainment of the effect of words, phrases, and clauses separately, and not to "essential validity".<sup>22</sup>

However, also cited under the original FIELD CODE Section are several early cases,<sup>23</sup> all without exception involving commercial contracts for the payment of money. These cases seem to support STORY's position that the place of performance (when indicated) governs validity, nature, and obligation as well as interpretation,<sup>24</sup> but each consistently recognizes and maintains a distinction between the four. There certainly is nothing in any of these cases to justify the view that the Code Commission included them for the purpose of expanding the

<sup>20</sup>"The rules already considered suppose, that the performance of the contract is to be in the place, where it is made, either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. . . ." STORY, CONFLICT OF LAWS (1834) §280, p. 233.

<sup>21</sup>" . . . In general, it may be said, that, if no place of performance is stated, or the contract may indifferently be performed anywhere, it ought to be referred to the *lex loci contractus*. . . ." STORY, CONFLICT OF LAW (1834) §282, p. 235.

<sup>22</sup>The fact is that Professor Cormack briefly recognizes the argument that "interpretation" simply has to do with determining meaning, and nothing more, but immediately rejects that position. Just what more, or how much more he thinks it should include, is not ascertainable from his paper. Cormack, *op. cit. supra* note 4, at p. 333, note 20.

<sup>23</sup>Thompson v. Ketcham (1811) 8 Johns (N. Y.) 189; Jacks v. Nicols (1851) 5 N. Y. 178; Bowen v. Newell (1855) 13 N. Y. 290; Curtis v. Leavitt (1875) 15 N. Y. 9; Everett v. Vendryes (1860) 19 N. Y. 436; Cutler v. Wright (1860) 22 N. Y. 480; Gibbs v. Fremont (1854) 9 Exch. (Eng.) 25.

<sup>24</sup>Courts in this period often accepted uncritically this rule as stated by Story. Such formulation of the rule has long since been abandoned.

meaning of the word "interpret" to the extent of including "validity", "nature", and "obligation" within its scope.

Possibly Professor Cormack does not deny that the two questions: "What law governs the essential validity of a contract", and "What law and usage governs the interpretation of a contract", are distinct and separate. He concludes, however, that if the law of the place of performance is to be used to govern interpretation it must also control all other matters relating to the contract. Had the Commission intended the CODE as framed to include "validity", "nature", and "obligation" as well as "interpretation", surely they would have either added those terms or formulated other Sections adopting the performance rule in relation to the essential validity of a contract. But Professor Cormack states that to use the place of performance to decide matters of interpretation and at the same time to apply the law of the place of execution to other matters relating to essential validity, would result in "a distorted unnatural system not yet conceived by any jurist."<sup>13</sup> But it is submitted that referring both to the place of performance to determine the "meaning" of the words and phrases used, and then looking to the *lex loci contractus* or any other relevant law to determine whether it creates any rights upon the words and phrases as used in the contract, is no more inconsistent than looking into a dictionary to get a more accurate definition of the words in the contract and then looking to whatever law the court thinks the appropriate one to ascertain the legal rights raised thereon, if any. This statement intends to emphasize that there are two fundamentally different problems involved—not contradictory, but rather complementary to each other; also that a given body of "law" may be referred to and utilized for fundamentally different purposes. So to refer to a given "law" simply as part of the usage of language in a given society does not even raise the question of what law should be considered to shape and measure and determine whether any rights arise from the contract.

Discussions by competent authorities as to the nature of the problem of "interpretation" support the above conclusions.<sup>14</sup> Both the RESTATEMENT OF CONTRACTS and WILLISTON

<sup>13</sup>Cormack, *op. cit. supra* note 4, at p. 339.

<sup>14</sup>3 WILLISTON, CONTRACTS (Rev. ed. 1936) § 601, p. 1726; RESTATEMENT CONTRACTS, §266; RESTATEMENT, CONFLICT OF LAWS, §332 comment f, p. 346. Professor Cormack indicates that the RESTATEMENT position in regard to what law will be referred to to determine interpretation is not clear, but he concludes that it reasonably follows that whatever law governs "the nature and extent of the duty" will govern interpretation and adds that this is perhaps sufficiently indicated by §332

consider the question to be one purely of fact," to be ascertained by any one (or perhaps a combination) of several different possible "standards" or canons of interpretation." R. C. M. 1935, Section 7537, seems to be a perfect example of a standard of "limited usage" (standard number 2 as given in footnote 19 supra) justified by a presumption based upon standard number "5"; i. e., what, at least at one time, the legislature presumed would be the "reasonable expectations" of the parties as to the meaning of the words used.

But it may be asked, "Does not the reference to the *foreign law and usage* necessarily make the CODE Section a rule governed by the same broad principles as determine what law governs essential validity?"<sup>17</sup> The answer is that the significance of the reference should be measured by the *purpose* of the reference. Such reference certainly can be for more than one purpose.<sup>18</sup>

(f). Cormack, *op. cit. supra* note 4, at p. 338, note 20. It is submitted that when §332 is considered in the light of §346, which clearly establishes the independence of the two questions, it becomes apparent that the framers of the RESTATEMENT had no intention of considering the question of "interpretation" in §332 comment (f). Indeed, comment a to §332 would seem to make that clear enough.

<sup>17</sup>The word "fact" as used here is still different from that used when we speak of the forum referring to another state's law as a "fact". In the latter, the reference is made directly to determine whether and how any alleged right would be created by the other state. In the former case, the forum refers to that law simply to ascertain as nearly as possible what was in the parties' minds when they drafted the contract. This does not ignore the fact that an "objective" standard often will be applied, not necessarily establishing the actual meaning of the particular parties.

<sup>18</sup>The RESTATEMENT OF CONTRACTS, §227 enumerates among conceivable standards of interpretation the following: 1. The standard of general usage; 2. A standard of limited usage; 3. A mutual standard; 4. An individual standard; 5. A standard of reasonable expectation; 6. A standard of reasonable understanding.

<sup>19</sup>True, merely because such a word as "interpretation" is defined in a certain way for internal law purposes, it does not necessarily follow that the same meaning should be given it for Conflict of Laws purposes. (Neither does it follow that it must have a different meaning). But our real question here is whether the problem of interpretation ever enters the realm of Conflict of Laws. Neither because, at a later stage of the litigation, a Conflicts question may arise, or a rule having the appearance of a rule of interpretation but directly affecting the extent of the duty is applied, does it follow that the preliminary question of meaning of a particular instrument is a Conflicts question.

<sup>20</sup>That the forum may look to the extent of a foreign law for fundamentally different purposes, so that, in some cases it should not be considered as "law" in any sense, is strikingly recognized by Dicey in considering the difference in the significance of certain of his "principles" of Conflicts. In analyzing the legal import of the incorporation of a succession section of the Code Napoleon in an Englishman's will, to indicate how the latter's heirs shall take, he observes: ". . . It is, of course, perfectly plain that the Code would (not)

In this instance, we refer to the "law and usage" of the place of performance under a standard of limited usage for determining the meaning of the parties. Note especially that law and usage are stated as serving identically the same purpose. Here the "law" involved is only one of various possible sources for that meaning. It has no significance at all as "law" distinct from "usage"; they both equally are sources, and nothing more.

There is one further question, which, though somewhat collateral to the primary one of this comment, merits brief attention. Should this Section be deemed to raise a conclusive presumption as to what social unit should be looked to to determine the meaning of the words used, or should it be interpreted as only stating a prima facie presumption, overcome by direct evidence that the parties have selected language with reference to some other locality than the place of performance. Consistently with its primary purpose of serving as a direction to the court to ascertain meaning, it should be construed as only raising a rebuttable presumption. Although the common law view is generally stated in a form similar to that of this statute, writers conclude that such a rule will not prevent the forum from giving effect to an expressed contrary intention of the parties.<sup>21</sup> Although in its wording it gives the impression

be the *source* of the rights acquired by the will; the source would be the law of England giving effect to the intention of the testator. . . . What for our present purpose deserves particular attention is that reference to foreign law under Principle Number V and Number IV is due to different Causes. . . ." DICEY, *CONFLICT OF LAWS* (4th ed. 1927) pp. 51-2.

Likewise, it seems that, whether our own Code Section is a Conflict of Laws rule in any sense, may depend upon the purpose for which the forum refers to the foreign law. Since it may be referred to for fundamentally different purposes, the mere fact that it is referred to does not establish that the rule of reference is a choice of law, or any other *kind* of Conflict of Laws rule. Cf. Cormack, *op. cit. supra* note 4, at p. 338, note 20; Goodrich, *loc. cit. supra* note 8. Of course, if X, as the place of performance, declares that any contract calling for, say, delivery of "number one barley" shall entitle the buyer to demand barley testing 62, regardless of what the parties meant by that phrase, it would seem that that is what the contract as drafted would mean, but this is not a case of interpretation, but rather of the "legal effect" of the use of a certain "symbol" in the agreement. Also see 3 WILLISTON ON CONTRACTS (Rev. ed. 1936) p. 1728.

<sup>21</sup>As Dean Goodrich points out: "This is a wholly different point from that involved in allowing them (the parties) to choose the law to govern the obligation. Here there is no question of validity; the sole question is that of fixing the meaning of language, and there is no more difficulty in giving effect to a Texas use of a term in a Missouri contract than in giving effect to a French or German instead of English as a means of expression, providing the parties show what they mean." GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) §109, p. 290.

of being mandatory, referring again to its history it will be noted that it is merely a codification of the common law view expressed by STORY in sections 270 and 280; i. e., that reference to the place of performance for the purpose of interpretation is in conformity with the presumed intention of the parties. Hence, if the parties stipulate in their contract that they will use certain commercial or legal terms unknown elsewhere but in common usage in Shanghai, China, either because it is the place of performance, or is the domicile of either or both parties, or the place of contracting, or for whatever reason, the Court unhesitatingly would seek the meaning of those terms as found in Shanghai.

So we may conclude that Section 7537 involves a question anterior and preliminary to any real Conflict of Laws question; one that the forum will assume that it shall decide as a matter of course, and which hence, at least in traditional terms, is procedural<sup>28</sup> in character. Likewise, it would seem not unreasonable further to classify this Section as an "internal" rule. Although each of these statements merit extended discussion, the mere fact that it is arguable that our Section may be so classified, suggests the conclusion that no particular rule controlling the legal rights growing from a contract, should be dragged into the law of Montana, merely because of the rule of presumption as to how to determine the meaning intended by the parties to a contract, found in that Section. The object of these comments will be served if the Montana Supreme Court (so far as Section 7537 is concerned) should consider itself wholly free to confirm the implication of the existing Montana cases that the place of contracting governs the essential validity

<sup>28</sup>There seems little doubt that Section 7537 is properly classified as "procedural" in that a Montana Court would apply it as a matter of course in all cases appearing before it involving the meaning of a contract. According to orthodox approach, this should be enough to raise a presumption that other courts referring to Montana law to govern the validity of a contract, should not include Section 7537 in their reference. Our interpretation of the proper purpose of that Section likewise would support that presumption in the absence of affirmative evidence that Montana law in some way intends that the Section should be treated as directly affecting the right-duty relationship growing from a Montana contract. The mere fact that the Section appears in our CIVIL CODE, instead of our CODE OF CIVIL PROCEDURE should not be treated as such affirmative evidence. Whether the technique of "interpretation" should be considered to be so intimately associated with the substantive rights of the contract that the foreign law's rules of interpretation always should be included in a reference by the forum, is an independent question that cannot be considered here. See Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L. J. 333. (1932-33).

of the contract," or to select some other rule determining that question if it feels that there are sufficiently persuasive reasons therefore.

—Shelton R. Williams.

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**CORPORATIONS: WHEN MAY A MONTANA CORPORATION COLLECT ON ITS SUBSCRIPTION CONTRACTS?\***

By a well established business practice in Montana a corporation generally commences business immediately upon receipt of the certificate of incorporation from the secretary of state. It is generally recognized that a corporation may sue on its pre-incorporation subscriptions as soon as it may begin business. Yet, the case of *Enterprise Sheet Metal Works v. Schendel*,<sup>1</sup> decided by the Montana Supreme Court in 1918, held that a stock subscriber was not obligated on his subscription until

\*As has been noted previously the Supreme Court of Montana has never conclusively answered this question. However at least two Montana cases, *Bank of Commerce v. Fuqua* (1891) 11 Mont. 258, 28 P. 291; *U. S. Fidelity and Guaranty Co. v. Bordeau* (1922) 64 Mont. 60, 208 P. 947, contain *dicta* to the effect that validity of a contract will be determined by the law of the place of execution. In *McManus v. Fulton* (1929) 85 Mont. 170, 278 P. 126, the place of making and of performance were the same. But the court applies the law of that place as the law of the place of making rather than as of the place of performance; thus justifying the presumption that a Montana Court will look to the law of the place of contracting to govern essential validity. *Capital Finance Corp. v. Met. Life Ins. Co.* (1926) 75 Mont. 460, 243 P. 1061, does not shed much light either way, both Beale and Cormack claiming it as authority for their respective arguments. While not conclusive these cases would seem to justify Professor Beale's contention that Montana may tentatively be placed among the state's applying to the law of the place of contracting. *McDonald et al. v. McNinch* (1922) 63 Mont. 308, 206 P. 1096 applies §7935 to a strictly domestic case to determine the meaning of the parties, which supports the conclusion that the section does not necessarily state a choice of law rule. *Story v. Stanfield* (C. C. A. 9th, 1921) 275 Fed. 401, cites this Section in enforcing a contract which apparently it assumes was completed in Montana. But the exact ground upon which the court includes this Section in its reference to Montana law is not clear.

\*The writer wishes to acknowledge that Henry I. Grant, Jr., of the graduating class of 1940 made a helpful study of this problem during the Fall and Winter of 1939 and 1940.

<sup>1</sup>(1918) 55 Mont. 42, 173 P. 1059. The case simply gives effect to a frequently recognized common law defense against calls on either pre-incorporation or post incorporation subscriptions to an *original* issue (but apparently not to a subsequent increase in capitalization), and concludes that there was nothing in Montana law either requiring or justifying a change in the rule admitting that defense. *Dodd & Baker, Cases on Corporations* (1940) p. 848. This "implied con-