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Joseph M. Cormack  
*William & Mary Law School*

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## CONFLICT OF LAWS IN REGARD TO CONTRACTS IN FIELD CODE STATES OTHER THAN CALIFORNIA

JOSEPH M. CORMACK\*

The following discussion is supplementary to that in the preceding article by the present writer discussing the California conflict of laws rules in regard to contracts. The relevant statutory situation is the same in the other Field Code States, which are Montana, North and South Dakota, and Oklahoma. While in the preceding article five sections of the California codes are discussed, the conclusion is reached that the situation is controlled by the provision reading as follows, which appears in identical form in each of the other States:

“A contract is to be interpreted according to the law and usage of the place where it is to be performed; or,<sup>1</sup> if it does not indicate a place of performance, according to the law and usage of the place where it is made.”<sup>2</sup>

It is pointed out in the preceding article that this provision strongly indicates that the controlling principle is that all contract matters are governed by the law of the place of performance.<sup>3</sup> If in the courts throughout the country the law of the place of execution has been used for any purpose, it has always controlled interpretation, contrary to the statute quoted.<sup>4</sup> To use the law of the place of performance to govern interpretation, and that of the place of execution to govern other contract matters, would result in an unnatural and hitherto unheard of system of jurisprudence. The line of thought set forth in the preceding article will not be further repeated. If the reader is not familiar with conflict of laws problems relating to contracts, and the various solutions worked out by the courts in dealing with them, or there is any question in the reader's mind as to the scope of the present discussion, he may go over the first section of the preceding article. The second section of that article<sup>5</sup> discusses the various code provisions in detail; the third<sup>6</sup> deals with special problems having to do with the expressed or implied intention of the parties as to what law

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\*[Professor of Law, University of Southern California.]

<sup>1</sup>The following portion does not relate to a conflict of laws problem within the scope of the present discussion. If the parties have not indicated a place of performance, *ex necessitate* the law of place of execution must be applied.

<sup>2</sup>Cal.Civ.Code (1937), §1646. See discussion, preceding article, at footnotes ##18-21. The position of the quoted provision in the codes of the other States, and the situation in the other States with regard to the other statutory provisions discussed in the preceding article, will be indicated in a footnote in connection with the name of each State.

<sup>3</sup>See text, preceding article, at footnote #21.

<sup>4</sup>See qualification of this statement in text of preceding article, at footnote #20.

<sup>5</sup>See text, preceding article, at footnote #18.

<sup>6</sup>See text, preceding article, at footnote #27.

shall control. The present discussion will continue with a consideration of the decisions in each of the States.<sup>7</sup>

MONTANA<sup>8</sup>

In *Capital Finance Corporation v. Metropolitan Life Insurance Company*,<sup>9</sup> Mr. Chief Justice Callaway, citing the code provision quoted, said:

"The contract between Krogman and the defendant, made in this state, is governed by the laws of this state."<sup>10</sup>

As the opinion does not indicate where the contract under consideration was to be performed, it is consistent with the statement of the learned Chief Justice to believe that he meant to refer to the latter part of the code section, providing that the law of the place of execution is to control when no place of performance is specified. From the standpoint of the present discussion, this does not involve a conflict of laws problem, since, if no place of performance is designated, *ex necessitate* the law of the place of execution must be applied. As the suit involved a life insurance policy, it seems unlikely that there was no place of performance specified. If it was provided that New York was to be the place of performance, the code provision would seem not to require the court to look to the place of execution, and, inferentially, in accordance with previous discussion,<sup>11</sup> to require it to look to the law of the place of performance. If so, the statement of the court is in conflict with the statute. While the statement in the opinion is not technically dictum, the nature of the problem under consideration is such that it seems obvious that the same result would have been reached if the matter had been worked out as one of New York law. There was therefore no occasion for the court to give close attention to the conflict of laws aspects of the case, and the decision can not be regarded as having any appreciable weight in connection with our problem.

In *Bank of Commerce v. Fuqua*,<sup>12</sup> decided prior to the code provision,

<sup>7</sup>All decisions cited by Professor Beale in his discussion of the position taken by each State in regard to contracts have been examined; and independent search for authorities has been made. For Professor Beale's discussion, see 2 Beale, *Conflict of Laws* (1935), 1152, 1159, 1161 & 1164, §§332.34, 332.41, 332.43 & 332.48.

<sup>8</sup>The quoted code provision appears in *Mont.Rev.Codes* (1935), §7537, enacted 1895. The other code provisions discussed in the preceding article, and regarded as not controlling, appear in *Mont.Rev.Codes* (1935), as follows: *Cal.Code Civ.Proc.* (1937), §1857, discussed in text, preceding article, at footnote #22, is §10518; *Cal.Civ.Code* (1937), §3268, discussed in text, preceding article, at footnote #38, is §8597; *Cal.Civ.Code* (1937), §1643, discussed in text, preceding article, at footnote #52, is §7534; *Cal.Civ.Code* (1937), §3541, discussed in text, preceding article, at footnote #54, is §8770.

<sup>9</sup>75 *Mont.* 460, 243 *Pac.* 1061 (1925).

<sup>10</sup>*Capital Finance Corp. v. Metropolitan Life Ins. Co.*, 75 *Mont.* 460, 464, 243 *Pac.* 1061, 1062 (1925).

<sup>11</sup>See preceding article, at footnotes #3-4.

<sup>12</sup>11 *Mont.* 285, 294, 28 *Pac.* 291, 293, 14 *L.R.A.* 588, 590, 28 *Am.St.Rep.* 461, 466 (1891).

and *McManus v. Fulton*,<sup>13</sup> not referring to the code provision, there are dicta to the effect that the validity of contracts is to be governed by the law of the place of execution.

In *Styles v. Byrne*<sup>14</sup> it is held that the question of who may become beneficiaries under a fraternal benefit policy is to be determined by the law of the State of incorporation. This result is required under the full faith and credit clause by the cited decisions of the United States Supreme Court.<sup>14a</sup>

The value of these decisions as precedents in the present connection is negligible. It may therefore be concluded, in the light of the code provision, that it is the Montana rule that all contract matters are governed by the law of the place of performance.

#### NORTH DAKOTA<sup>15</sup>

While the existence of the quoted code section is recognized by dictum in an earlier decision,<sup>16</sup> the leading case is *Douglas County State Bank v. Sutherland*,<sup>17</sup> in which, without referring to the statutory provision, it was held that the validity of a contract is governed by the law of the place of execution. Dicta to the same effect appear in other cases.<sup>18</sup> An earlier dictum holds that the law of the place of performance controls.<sup>19</sup> There is no reference to the code provision in connection with any of the dicta. There are also dicta relating to the effect to be given to the intention of the parties as to what law shall apply.<sup>20</sup>

In two decisions, the public policy of the State was held to prevent application of a rule of substantive law in regard to contracts different

<sup>13</sup>85 Mont. 170, 183, 278 Pac. 126, 131, 67 A.L.R. 690, 698 (1929).

<sup>14</sup>89 Mont. 243, 253, 296 Pac. 577, 579 (1931).

<sup>14a</sup>Supreme Council of Royal Arcanum v. Green, 237 U.S. 531, 35 S.Ct. 724, 59 L.Ed. 1089, L.R.A.1916A 771 (1915); *Modern Woodmen v. Mixer*, 267 U.S. 544, 45 Sup.Ct. 389, 69 L.Ed. 783, 41 A.L.R. 1384 (1925). To the same effect: *Sovereign Camp. W. O. W. v. Bolin*, 304 U.S. 557, 59 Sup.Ct. 35, 83 L.Ed.(Adv.Ops.) 58 (1938).

<sup>15</sup>The quoted code provision appears in N.D.Comp.Laws (1913), §5906, enacted 1877. Cal.Code Civ.Proc.(1937), §1857, discussed in text, preceding article, at footnote #22, and regarded as not controlling, is not in force in North Dakota. The other code provisions discussed in the preceding article, also regarded as not controlling, appear in N.D.Comp.Laws (1913), as follows: Cal.Civ.Code (1937), §3268, discussed in text, preceding article, at footnote #38, is §7136; Cal.Civ.Code (1937), §1643, discussed in text, preceding article, at footnote #52, is §5903; Cal.Civ.Code (1937), §3541, discussed in text, preceding article, at footnote #54, is §7275.

<sup>16</sup>*Cosgrave v. McAvay*, 24 N.D. 343, 348, 139 N.W. 693, 695 (1913).

<sup>17</sup>52 N.D. 617, 627, 629, 204 N.W. 683, 685, 686 (1925).

<sup>18</sup>*Hanson v. Great Northern R. R.*, 18 N.D. 324, 328, 121 N.W. 78, 79, 138 Am.St.Rep. 768, 770 (1909); *Continental Supply Co. v. Syndicate Trust Co.*, 52 N.D. 209, 222, 202 N.W. 404, 409 (1924); *Storing v. National Surety Co.*, 56 N.D. 14, 20, 215 N.W. 874, 876 (1927).

<sup>19</sup>*United States Sav. & Loan Co. v. Shain*, 8 N.D. 136, 141, 77 N.W. 1006, 1008 (1898).

<sup>20</sup>*United States Sav. & Loan Co. v. Shain*, 8 N.D. 136, 140, 141, 77 N.W. 1006, 1008 (1898); *Storing v. National Surety Co.*, 56 N.D. 14, 20, 215 N.W. 875, 876 (1927).

from that of the forum.<sup>21</sup> Such cases throw no light upon our problem, as they do not involve a choice between the law of the places of execution and of performance. A court which completely followed the public policy of the forum in this sense would not require any other conflict of laws principle.

Until the effect of the code provision is considered, the law of North Dakota must remain in an uncertain condition. A forced reconciliation between the *Douglas case* and the code section can be effected by holding that the State has the novel and unreasonable rule that interpretation is governed by the law of the place of performance, and validity by that of the place of execution.<sup>22</sup> This would leave open the question as to what law shall govern other contract matters. A sounder solution of the entire problem would seem to be, to overrule the *Douglas case*, and hold that, in view of the code section, all contract matters are to be governed by the law of the place of performance.<sup>23</sup>

#### OKLAHOMA<sup>24</sup>

The leading case is *Security Trust & Savings Bank of Charles City, Iowa v. Gleichmann*,<sup>25</sup> adopting the rule that all contract matters are governed by the law of the place of performance.<sup>26</sup> Its authority is weakened by the facts that the contract was made prior to statehood, and that the decision is made entirely upon the basis of federal precedents. There are later dicta to the same effect.<sup>27</sup> Another dictum divides contract matters between the law of the places of execution and of performance, making a distinction such as that later set forth in the Restatement of

<sup>21</sup>Hanson v. Great Northern R. R., 18 N.D. 324, 121 N.W. 78, 138 Am.St.Rep. 768 (1909); Continental Supply Co. v. Syndicate Trust Co., 52 N.D. 209, 202 N.W. 404 (1924).

<sup>22</sup>See preceding article, at footnotes ##18-21, and text of this article, *supra*, at footnotes ##1-6.

<sup>23</sup>See preceding article, at footnotes ##18-21, and text of this article, *supra*, at footnotes ##1-6.

<sup>24</sup>The quoted code provision appears in Okla.Comp.Stats.Ann.(1921), §5049, enacted 1890. Cal.Civ.Code (1937), §1643, discussed in text, preceding article, at footnote #52, and regarded as not controlling, appears in Okla.Comp.Stats.Ann. (1921), §5046. The following California code provisions, discussed in the preceding article, and also regarded as not controlling, are not in force in Oklahoma: Cal.Code Civ.Pro.(1937), §1857, discussed in text, preceding article, at footnote #22; Cal.Civ. Code (1937), §3268, discussed in text, preceding article, at footnote #38; Cal.Civ. Code (1937), §3541, discussed in text, preceding article, at footnote #54.

<sup>25</sup>50 Okla. 441, 448, 150 Pac. 908, 910, L.R.A.1915F 1203, 1207 (1915).

<sup>26</sup>It does not appear from the opinion that this holding affected the result. While the note involved was payable in Iowa, and one Iowa decision is cited, the remainder of the opinion, following the discussion of the conflict of laws point, proceeds as though the problem were entirely one of general law, and in the process two earlier Oklahoma cases are overruled.

<sup>27</sup>Legg v. Midland Savings & Loan Co., 55 Okla. 137, 144, 154 Pac. 682, 684 (1916) (contracts made prior to statehood); Denison v. Phipps, 87 Okla. 299, 304, 211 Pac. 83, 87 (1922); Sheehan Pipe Line Const. Co. v. State Industrial Commission, 151 Okla. 272, 273, 3 Pac.(2d) 199, 201 (1931) (workmen's compensation case).

Conflict of Laws.<sup>28</sup> Three cases have given effect to the intention of the parties.<sup>29</sup>

No state decision has been found referring to the quoted code provision.<sup>29a</sup> The tenor of the decision is in harmony with the indication of the statute that all contract matters are to be governed by the law of the place of performance.<sup>30</sup>

#### SOUTH DAKOTA<sup>31</sup>

In two decisions, the later one in 1929, the quoted code provision is cited, and the rule that the law of the place of performance controls is applied to determine negotiability.<sup>32</sup> In an early decision there is a weak dictum to the same effect in regard to the validity of contracts generally.<sup>33</sup>

In two cases decided in 1928, without referring to the code provision, the view is adopted, along the lines of the Restatement, that contract matters are to be divided between the law of the place of execution and that of the place of performance.<sup>34</sup> In an early case it was held in regard to transportation contracts that the law of the place of execution is to govern construction as to the validity of a stipulation against liability for negli-

<sup>28</sup>Clark v. First National Bank of Marseilles, Ill., 59 Okla. 2, 4, 157 Pac. 96, 98 (1916). For discussion of the Restatement distinction, see preceding article, at footnotes ##12-15. The Restatement provisions are quoted in the preceding article, p. 351.

<sup>29</sup>Bell v. Riggs, 34 Okla. 834, 127 Pac. 427 (1912); Atchison, T. & S. F. Ry. v. Smith, 38 Okla. 157, 132 Pac. 494, Ann.Cas.1915C 620 (1913); Midland Savings & Loan Co. v. Henderson, 47 Okla. 693, 150 Pac. 868, L.R.A.1916D 745 (1915). The causes of action in these cases arose prior to statehood. As to effect to be given to intention of the parties, see preceding article, p. 342.

<sup>29a</sup>Monahan v. New York Life Ins. Co., 26 Fed.Supp. 859, 862 (D.C. Okla. 1939), quotes the controlling code provision and applies it in harmony with the views expressed in the text. Under Erie R. R. v. Tompkins, 304 U.S. 64, 58 Sup.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938), this ruling is subordinate to the holdings of the state courts.

<sup>30</sup>See preceding article, at footnotes ##18-21, and text of this article, *supra*, at footnotes ##1-6.

<sup>31</sup>The quoted code provision appears in S.D.Comp.Laws (1929), §876, enacted 1877. The following California code provisions, discussed in the preceding article, and regarded as not controlling, appear in S.D.Comp.Laws (1929), as follows: Cal. Civ.Code (1937), §1643, discussed in text, preceding article, at footnote #52, is §873; Cal.Civ.Code (1937), §3541, discussed in text, preceding article, at footnote #54, is §73. The following California code provisions, discussed in the preceding article, and also regarded as not controlling, are not in force in South Dakota: Cal.Code Civ. Proc.(1937), §1857, discussed in text, preceding article, at footnote #22; Cal.Civ.Code (1937), §3268, discussed in text, preceding article, at footnote #38.

<sup>32</sup>Barry v. Stover, 20 S.D. 459, 461, 107 N.W. 672, 673, 129 Am.St.Rep. 941, 943 (1906); Sioux Natl. Bank v. Lundberg, 54 S.D. 581, 585, 223 N.W. 826, 827 (1929).

<sup>33</sup>Commercial Bank v. Jackson, 7 S.D. 135, 140, 63 N.W. 548, 550 (1895). The same case appears at 9 S.D. 605, 70 N.W. 846 (1897). As to the form of statement used in the dictum, see preceding article, at footnote #23, and said footnote.

<sup>34</sup>Security Holding Co. v. Christensen, 53 S.D. 37, 219 N.W. 949, 950, 60 A.L.R. 1173, 1176 (1928) (the opinion is not entirely clear that the holding is not dictum); State Bank of Alcester v. Weeks, 53 S.D. 260, 220 N.W. 502 (1928) (it is possible that the holding is dictum).

gence.<sup>35</sup> The principle upon which the holding is based is not stated. It could well be supported upon the ground that when a contract has several places of performance, *ex necessitate* the law of the place of execution must control.<sup>36</sup>

In a recent opinion it was held that the law of the forum<sup>37</sup> governs all defenses in actions upon contracts.<sup>38</sup> It is apparent that, in so holding, the court was impressed by the fact that the same result would have been reached by a presumption of similarity between the law of the place of execution and performance and that of the forum. It is hard to believe that the court seriously would contend that the South Dakota law would always be applied, regardless of the nature of the contract problem, if it happened to be presented in the form of a defense. Such a view would not be compatible with the requirements of the due process of law clause.<sup>39</sup>

In an early case, there was a weak holding in favor of the controlling effect of the expressed intention of the parties.<sup>40</sup>

The first two paragraphs of the discussion of the decisions of this State indicate that they are not in harmony, but the balance is in favor of the view that all contract matters are governed by the law of the place of performance, both because such is the direction of the latest expression of the supreme court of the State, and because, in making the contrary holdings, the attention of the court apparently was not directed to the relevant code provision.<sup>41</sup>

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<sup>35</sup>*Meuer v. Chicago, M. & St. P. Ry.*, 11 S.D. 94, 75 N.W. 823, 74 Am.St.Rep. 774 (1898), *passim*. It is illogical, in the sentence to which this footnote is appended, to speak of validity as a matter of construction, but the court is followed in so doing.

<sup>36</sup>See preceding article, footnote #7.

<sup>37</sup>That is, the jurisdiction in which the litigation occurs. See preceding article, at footnote #8.

<sup>38</sup>*First Natl. Bank v. Larson*, 53 S.D. 262, 220 N.W. 506, 508, 68 A.L.R. 940, 943 (1928).

<sup>39</sup>*Home Ins. Co. v. Dick*, 281 U.S. 397, 50 Sup.Ct. 338, 74 L.Ed. 926, 74 A.L.R. 701 (1930).

<sup>40</sup>*Jones v. Fidelity Loan & Trust Co.*, 7 S.D. 122, 129, 63 N.W. 553, 555 (1895). In regard to effect to be given to intention of the parties, see preceding article, p.342.

<sup>41</sup>That the quoted code provision is persuasive that all contract matters are to be governed by the law of the place of performance, see preceding article, at footnotes # #18-21, and text of this article, *supra*, at footnotes # #1-6.