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California Conflict of Laws in Regard to Contracts

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CALIFORNIA CONFLICT OF LAWS IN REGARD TO
CONTRACTS
JOSEPH M. CORMACK*

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I. NATURE OF THE PROBLEM, AND THE VARIOUS SOLUTIONS.

When a contract is entered into in one State, and to be carried out in
another—the States will be referred to as the places of execution and of
performance, respectively—problems of conflict of laws arise.1 It will be
assumed that the places of execution and of performance are known, although
a number of difficulties arise in that connection.2 This article will be devoted

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The author desires to express his appreciation of the kindness of the American Law Institute, through its Adviser on Professional Relations, Dean Herbert F. Goodrich, in permitting examination, in galley proof, of the California annotations to the
portion of the Restatement of Conflict of Laws relating to contracts.

1The same problem arises when different countries are involved; but the principles applicable are the same, and for purposes of simplicity and clarity only States
will be referred to in the text.


Readers are reminded that the section numbers in Professor Beale's great work
on Conflict of Laws (1935) are the same as in the Restatement, so that a citation to
to the ascertainment of the California rule as to the law to govern matters relating to the entering into and carrying out of contracts in general, omitting special problems having to do with capacity,\(^3\) agency,\(^4\) transfers of contractual rights\(^5\) and the assessment of damages.\(^6\) Special difficulties arising when there are several places of performance are also outside the scope of the present discussion.\(^7\) The problem with which we are concerned may therefore be defined as the selection by a court of the law to govern the entering into and carrying out of a contract between competent parties when made in one State and to be performed in another.

The law relating to contracts has a number of facets of practical importance, and in dealing with them, from the standpoint of conflict of laws, several alternatives are possible. They may all be treated from the standpoint of a single body of law, of the place of execution or of performance, or they may be divided between the two. There is still another possibility, that of applying the law of the State where litigation occurs. In conflict of laws parlance, that State is known as the forum, whether or not it is also the place of execution or of performance. This last possibility may be briefly rejected, as it has always been felt that, while each State must determine its own methods of judicial procedure,\(^8\) it manifestly would be unjust to the parties to apply the substantive law of a State because of the accident that one of its courts is applied to for relief. The law of the domicile of one or both of the parties is another possibility. While there has been a tendency to make use of the law of the domicile for purposes of interpretation,\(^9\) it never has been suggested that it should govern all contract matters. Problems arising in connection with consideration of the intention of the

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\(^1\)Beale's section numbers include a decimal point, and several may relate to material covered in a single section of the Restatement; but this can not lead to confusion.

\(^2\)See Conflict of Laws Restatement (1934), §§332(a), 333, 351, 366 (especially illustration 1), and, negatively, 358-360, and California Annotations.

\(^3\)See Conflict of Laws Restatement (1934), §§314-320, 324, 326, 328-331, 342-345, and California Annotations.


\(^6\)When there are several places of performance it has been felt, when the point has been considered, that \textit{ex necessitate} all matters must be governed by the law of the place of execution. See the leading case of Morgan v. New Orleans, M. & T. R. R., Fed.Cas. No. 9804 (C.C. La. 1876). With some types of contracts, such as transportation and sales, it is difficult to determine whether they should be regarded as having several places of performance, or whether the ultimate destination should be regarded as the sole place of performance. Throughout the country generally this seems not to have been worked out in the decisions. Bertonneau v. Southern Pacific Co., 17 Cal.App. 439, 445, 120 Pac. 53, 55 (1911), treats a transportation contract as having several States of performance. See 2 Beale, Conflict of Laws (1935), 1187, §337.1.

\(^7\)See Conflict of Laws Restatement (1934), §§584-625.

\(^8\)Beale, Conflict of Laws (1935), 1201, §346.2 Outside the field of contracts, see Conflict of Laws Restatement (1934), §§214(3), 251(3), 285, 296, 308.
parties as to what law shall govern, whether or not it be that of the domicile of one or both, will be discussed later.\textsuperscript{10}

At first blush the most plausible method of dealing with our problem would seem to be to determine matters of execution by the law of the place of execution, and matters of performance by the law of the place of performance. As an abstract statement, this method would seem to offer no difficulties, and to result in complete fairness to the parties. This has, indeed, been the historic method of approach, as set forth in the classic statement of Mr. Justice Hunt, of the United States Supreme Court, in the leading \textit{Scudder} case:

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit was brought."\textsuperscript{11}

Because this is the historic view, and perhaps that of the majority of American jurisdictions today, it has been adopted by the Restatement of the Conflict of Laws.\textsuperscript{12} The difficulty with it, as is recognized by the framers of the Restatement,\textsuperscript{13} is that it is based largely upon a distinction which it is logically impossible to draw. The validity of a contract in its every aspect determines every detail of performance, or, to take the reverse method of approach, whether and how a contract is to be performed will completely determine the nature of its validity. Thus from a legal standpoint the execution and the performance aspects of a contract cannot be separated. The best that can be done is to do as is done in the Restatement—act as though such a distinction were possible, divide up the various matters relating to contracts, and allocate them to the places of execution or of performance. In spite of the theoretical objection to this method of procedure, and the question whether any layman or lawyer can fairly be expected to know the law of two States, it is often true, as pointed out in the comment of the drafters of the Restatement:

"Regardless of the lack of logic, however, problems arising out of disputes upon contracts are settled as if certain acts pertained to the making of the contract and other acts to its performance."\textsuperscript{14}

\textsuperscript{10}See text, \textit{infra}, p. 342.
\textsuperscript{12}Conflict of Laws Restatement (1934), §§332, 358, quoted in text, \textit{infra}, p. 352.
\textsuperscript{13}Conflict of Laws Restatement (1934), §332, comment (c).
\textsuperscript{14}Conflict of Laws Restatement (1934), §332, comment (c).
Good practical results may be accomplished in this way. It is not the purpose of this paper to discuss what the law should be, but to ascertain what the California law is. In the field of conflict of laws any problem as to what should be the law of a particular State requires study of the law of all the other jurisdictions. The present discussion will be limited to a consideration of the California statutes and decisions. The details of the Restatement method of dealing with the problem will be set forth later, immediately prior to examination of the cases decided in this State.16

The historic and Restatement view may well be termed the "splitting up" rule; while awkward, the appellation is descriptive. Instead of adopting it, many States have held that all contract matters are to be governed by the law of the place of performance, known as the "performance" rule.17 The "execution" rule, that all matters are to be governed by the law of the place of execution, has very seldom been followed.18

II. THE FIELD CODE PROVISIONS

In California, the problem must be approached from the viewpoint of the relevant code provisions. The one about to be mentioned stands out like a very sore thumb to handicap the courts of this State in dealing with the problem. Section 1646 of the Civil Code19 provides:

"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."

The significance of this will be appreciated when it is realized, in the light of the preceding discussion, that it universally has been true that if the law of the place of execution has been used for any purpose it has governed the interpretation of the contract.20 To use the law of the place of perform-

16Infra, p. 351 et seq.
172 Beale, Conflict of Laws (1935), 1086, §332.3.
182 Beale, Conflict of Laws (1935), 1267 at line 17, §360.3; ibid. 1270 at line 1, §362.1. Resort to the law of the place of execution ex necessitate when there are several States of performance, or when the parties did not select a place of performance, is not considered an application of this rule. See footnote #7, supra.
19Enacted March 21, 1872.
20The following portion of the code provision relates to a situation where, from the standpoint of the present discussion, there really is no conflict of laws problem. If the parties have not selected a place of performance, ex necessitate the law of the place of execution must be applied to all matters.
21It is believed that the statement in the text is literally true as between the places of execution and performance. There has, however, been at times a tendency to look to the law of the domicile for interpretation, even though the law of the place of execution is used for other purposes. The Restatement of Conflict of Laws, in §332(f), which adopts the law of the place of execution for several purposes, is not as clear in regard to this as it might be. It states that the law of the place of contracting determines "the nature and extent of the duty for the performance of which a party becomes bound." It would seem naturally to follow that the system of law which determines "the nature and extent of the duty" will
Contribution to decide matters of interpretation, and at the same time to apply the law of the place of execution to other matters relating to the coming into effect of the contract, would result in a distorted, unnatural system not yet conceived of by any jurist. It seems reasonable to conclude that if the law of the place of performance is to be used to govern interpretation it is also to control all other matters relating to the contract, that is, that the performance rule is to be followed.21

Before reaching a final conclusion as to the state of the California statutory provisions, it is necessary to consider another portion of the codes. Section 1857 of the Code of Civil Procedure22 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."

At first glance the two sections quoted would appear to be in conflict, and the "reference" in the last clause of Section 1857 to establish an exception in case of an express stipulation by the parties that the law of the place of performance is to control. In view, however, of the practice, uncritical but often indulged in, of stating in the form used by the latter section the performance rule generally,23 it is altogether likely that that method of state-

govern the interpretation, and possibly this is indicated with sufficient clarity by the Restatement provision. As against this line of reasoning it may be argued, though erroneously, it is believed, that interpretation in this connection indicates ascertainment of the meaning of words, phrases, and clauses separately, as distinguished from the effect of the contract as a whole, the latter determining the nature and extent of the duty. Support for such a distinction may possibly be drawn from the Restatement comment (a) upon §332, which states that "the rules for ascertaining the meaning of the words of a contract" are not a question of the conflict of laws, and gives it as a cross-reference to the Restatement of Contracts. From the standpoint of organization of the materials covered by the various Restatements, it is possibly helpful to put the matter in this way. However, whenever the courts differ in regard to the rules of interpretation, a problem of conflict of laws is presented. It would then seem, to be in harmony with the Restatement position, that the law of the place of contracting should be applied.

21The performance rule is discussed in 2 Beale, Conflict of Laws (1935), 1086, §332.3.
22Enacted March 11, 1872.
23An illustration contemporary with the drafting of the Field Codes appears in Dyke v. Erie Ry., 45 N.Y. 113, 116, 6 Am.St.Rep. 43, 44 (1871), Mr. Justice Allen speaking: "The generally received rule for the interpretation of contracts, is that they are to be construed and interpreted according to the laws of the State in which they are made unless from their terms, it is perceived that they were entered into with a view to the laws of some other State. The lex loci contractus, determines the nature, validity, obligations and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation." (citing cases). To the same effect: Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 338, 143 Atl. 163, 164 (1928), quoting earlier cases.

This form of statement may be traced back to dictum by Lord Mansfield in Robinson v. Bland, 2 Burr. 1077, 1078, 1 W.Bl. 234, 256, 97 Eng.Rep. 717 (1760): "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country." This was accepted by judge
ment was what was in the mind of the draftsman of Section 1857. If so, the section should be interpreted as though it read as does Section 1646. The method of statement is uncritical, in that it is simply a round-about way of stating the performance rule.

If it is felt that "reference" in the limiting clause of Section 1857 must be interpreted to relate to an express stipulation by the parties, then, in the absence of such a stipulation, the two sections are in conflict. This makes it necessary to note that Section 1857 relates to "writings," whereas Section 1646 refers to "contracts." As a contract, unless oral or implied, is one form of a writing, the canon of construction is applicable that a specific provision controls a general. No good reason for a distinction between contracts and other forms of writings is apparent, but that is a matter of legislative policy, not of interpretation of the law. The controlling position of Section 1646 may further be supported upon the ground that it was adopted March 21, 1872, whereas Section 1857 was enacted ten days earlier, and was therefore subject to implied repeal to the extent of any repugnancy. A distinction between oral and implied contracts and those in writing could be worked out, but it seems that this far-fetched possibility may safely be disregarded, notwithstanding the fact that a slight measure of support for limiting Section 1646 to oral and implied contracts may be drawn from the fact that Section 1857 provides for the contingency of a "reference" by the parties to the law of a State other than that of execution. Such a reference is perhaps more likely to occur in a written contract than in connection with one which is implied or oral. On the other hand, Section 1646 provides for an "indication" by the parties of a place of performance, and this is perhaps more likely to occur in a written contract than in one which is oral or implied.

Story, who, after stating that in general the law of the place of the contract governs, adds: "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 . . . is to be governed by law of the place of performance." Story, Conflict of Laws (2d ed. 1841), §280. See also 3 Kent, Commentaries (1st ed. 1828), 481. The writer is here indebted to Stumberg, Conflict of Laws (1937), 209, c.VIII.

Mr. Justice Rhodes, of the Supreme Court of California, used the same form of statement, in 1867: "... The rule is that [contracts] are to be interpreted by the law of the place where they became complete contracts, unless they are to be performed elsewhere." Dow v. Gould & Curry S. M. Co., 31 Cal. 629, 632 (1867).

Again, Mr. Commissioner Searls said, in Palmer v. Atchison, etc., R. R., 101 Cal. 195, 35 Pac. 630, 633 (1894): "The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view." (citing cases)

Mr. Justice Brewer, in Pinney v. Nelson, 183 U.S. 144, 148, 22 Sup.Ct. 52, 54, 46 L.Ed. 125, 127 (1901), said that the State where a corporation is chartered "is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation and obligation. While this is so, it is also true that parties in making a contract may have in view some other law than that of the place, and when that is so that other law will control. That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into."
Section 1857 refers to the "language" of a writing, whereas Section 1646 refers to the interpretation of contracts, without mentioning the language; but, as a contract, unless implied, is entirely composed of language, and if implied is generally based upon language, it is difficult to see how this difference in phraseology can be of any significance. It seems safe to disregard the possibility that a distinction between implied and other forms of contracts is intended. Likewise it seems safe to disregard the far-fetched and altogether erroneous possibility of holding that Section 1857, because it speaks of the "language" of a writing, relates to interpretation of the language, considered narrowly and apart from the meaning of the writing as a whole, and that Section 1646, as applied to contracts, is to be given the latter and broader meaning because it does not refer to the "language" of the contract. While a distinction of that character is sometimes drawn between construction and interpretation, both the sections under consideration refer to interpretation.

Let us return to the limitation in Section 1857, "unless the parties have reference to a different place." If, contrary to the views expressed, this is to be interpreted as referring to an express statement by the parties, the question is presented whether a writing containing such a "reference" involves a more specific situation than that relating to contracts in general, covered by Section 1646, and is therefore to control the latter, using again the canon of construction that a specific provision controls a general. As the limitation in Section 1857 is attached to a statute relating to "writings," whereas all of Section 1646 relates to contracts, this would seem to be a strained construction, which may safely be disregarded. As "writings" are broader than "contracts," it seems clear that all portions of a statutory provision relating to "writing" should be treated as having the broader signification, leaving Section 1646, in regard to "contracts," still the more specific, and therefore controlling.

Another interpretation of "reference" in 1857 is possible, that it relates, not to a specific stipulation by the parties, but to certain types of fact situations which would make the jurisdiction of performance more intimately associated with the writing than the State of execution, and therefore more prominent in the minds of the parties. This would give the "reference" in Section 1857 a meaning different from that of the "indication" in Section 1646, but if applied would create a large hazy borderland through which the courts would have to thread their way, and would lead to limitless speculation in endeavoring to classify never-ending series of fact situations in accordance with such a distinction. As already pointed out, it is reasonable to believe that the framer of Section 1857 had an entirely different thought in mind, and the present hypothesis does not seem to justify further development.

Terminating our consideration of Section 1857, it seems safe to conclude that it may properly be eliminated, as controlled in regard to contracts by the more specific provisions of Section 1646. The logic of the statutory situation in California therefore seems to point inexorably to the controlling effect of what has been described as the performance rule. The dim light shed by the decisions of the courts of the State will be inquired into later. It has already been pointed out that the performance rule is at variance with the position taken by the Restatement and by many other jurisdictions.

III. INTENTION OF THE PARTIES

1. EXPRESSED INTENTION

Where any recognition is given by the courts to the intention of the parties that the law of a certain jurisdiction shall control, this is referred to as the "intention" rule. However, whatever rule is adopted—execution, performance or Restatement—it is commonly ascribed to the intention of the parties supposed by the court to exist. This means nothing, if, as is often true, in the clearest case possible—the express statement by the parties as to what their intention is—the same court will refuse to be bound by it. The student of the law must therefore be on his guard in connection with terminology relating to the intention of the parties.

It should also be noted that even the most consistent endeavor to follow the intention of the parties, and thus apply the intention rule, will not solve all problems. In many cases there will be no reason to believe that the parties have given any thought to choice of the governing law, or that if they had they would have had any definite intention. The contract may be valid or invalid, with varying effects, by the law of both the places of execution and of performance. In such a situation, the court is compelled to select one of the other rules. Adoption of the so-called intention rule is not, therefore, exclusive of the existence in the same jurisdiction of one of the other rules.

Section 1646 of the Civil Code, already discussed, seemingly requiring adoption of the performance rule, should not militate against the existence of the intention rule in this State. The latter, when it exists, has to do with a relatively specific problem, and should not be affected by such a general statute.

The first situation to be considered is where the parties have stipulated that the law of a certain State shall control. The viewpoint of Professor Beale, with all the weight of his outstanding leadership in this field, followed by the Restatement, is that no effect should be given to such a rule.

25 See text, infra, p. 347 et seq.
26 Conflict of Laws Restatement (1934), §§332 & 358, quoted in text, infra, at footnote #67; and see text, supra, at footnote #16, and infra, p. 351.
27 Beale, Conflict of Laws (1935), 1079, §332.2.
28 There is no provision in the Restatement for recognition of the intention of the parties.
stipulation. Professor Beale holds that to do so would permit the parties to make their own law, which should be done for them by the courts. This position is unsound, as it is entirely proper, from a jurisprudential standpoint, for the courts to take into consideration, as one of the operative facts, any relevant intention of the parties. That such intention relates to the legal result to be achieved is not a valid objection, provided the parties are acting in good faith in order to accomplish a legitimate purpose. Particularly in a field where there is so much confusion and difference of opinion among the courts, it is highly desirable, as a matter of social policy,

At times, at least in other connections, the courts, possibly unconsciously, have permitted an intention, that a certain system of law shall control, to militate against the reaching of that conclusion. Having found that a certain legal result, such as securing a domicile, is desired, an acute suspicion is aroused in regard to the facts, normally regarded as operative, which are put in evidence. A good example is Kerby v. Charlestown, 78 N.H. 301, 59 Atl. 645, L.R.A.1917D 783 (1916). The same line of thought may be observed in 1 Wharton, Conflict of Laws (Parmele's 3d ed. 1905), 126, §56a. A good case contra is Matter of Newcomb, 192 N.Y. 238, 84 N.E. 950 (1908).

Professor Beale, Conflict of Laws (1935), 1079, §332.2. Following Beale: Goodrich, Conflict of Laws (2d ed. 1938), 278, §107. Lorenzen feels that the expressed intention of the parties should control the carrying out of the contract, although not its validity. Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L.Jour. 565, 655 at 672, 31 ibid. 53, 72 (1921). Following Lorenzen: Stumberg, Conflict of Laws (1937), 211, 238. The present writer believes that the public policy in favor of certainty outweighs the logic of the distinction made, and justifies use of the expressed intention even as to validity. Too great adherence to logic in this connection becomes provincialism. Going the entire distance in favor of expressed intention: Cook, "Contracts" and the Conflict of Laws: Intention of the Parties, 32 Ill.L.Rev. 898, 919 (1938). It has even been argued that it would not do any good for the parties to make a statement of their intention, "for the court might find that they really intended a different law from the one they said they intended." Commentaries on Conflict of Laws, Restatement No. 4 (1928), 24, §353 (c)-(g), (§332 as adopted). A distinction has been suggested, imported from the civil law, between formal and essential validity, governing the former by the law of the place of execution and the latter by the intention of the parties. 2 Wharton, Conflict of Laws (Parmele's 3d ed. 1905), 501, 913, §§427e, 427f; 2 Beale, Conflict of Laws (1935), 1100, §332.6.

The International Law Association has approved giving effect to the expressed intention of the parties. Robinson, Conflicts of Laws in Contracts of Sale, 16 Geo. L.Jour. 386, 380 (1928).

Probably no court would hesitate to give effect to a contract provision because it followed the wording of a statute. It would seem to follow that incorporation by reference of a statute should be permitted. If so, is it not logical to let the parties achieve brevity by stipulating that the law of a certain State shall control?

If a jurisdiction is selected which is not the domicile of any of the parties, and does not have a substantial connection with any of the other facts which may be regarded as operative, it may properly be considered that the parties are not acting in good faith. Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L.Jour. 565, 655 at 672, 31 ibid. 53 (1921); Annotation, 112 A.L.R. 124 (1938).

The usury cases throughout the country are interesting in this connection. See, for example: Terry Trading Corp. v. Barsky, 210 Cal. 423, 202 Pac. 474 (1930); Kraemer v. Coward, 2 Cal.App.(2d) 506, 38 Pac.(2d) 458 (1934). Many cases throughout the country have held that the court will use either the law of the place of execution or of performance, whichever permits the higher rate of interest, provided the parties are acting in good faith. For a decision largely destroying the good faith requirement, see Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 Sup.Ct. 626, 71 L.Ed. 1123 (1927).

Professor Beale points out that "almost every rule ever suggested for de-
that the parties be assisted, through the expression of their intention, in attaining certainty as to the law which will control. There will often be no other way that a lawyer will be able to advise the parties with certainty, and the ability to do this is one of the most important tests of the success of any legal system.

In California, in addition to Section 1857, relating to the interpretation of writings, which it is believed has already been sufficiently disposed of, there is another code provision which, at first glance, may seem to be applicable. Before quoting the code section it may be well to point out that its position in the code shows that in preparing it the draftsman did not have conflict of laws problems in mind. It is one of the most important basic principles in this field, sometimes violated, that a statute, in enacting which the legislature was not considering conflict of laws problems, should not be allowed to have any effect in determining what system of law shall control. At the expense of resorting to a possibly overly simple illustration, suppose that a statute in regard to contracts fails to mention infants—would any court hold that it had any effect as to the law of infancy?

Section 3268 of the Civil Code provides:

"Except where it is otherwise declared, the provisions of the foregoing fifteen titles of this part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."

The titles referred to in the section cover "Obligations Arising from Particular Transactions," but do not include the chapter which contains Section 1646, already discussed, adopting the performance rule in regard to the interpretation of contracts. Using the line of reasoning above set forth, it seems clear that this provision has no application to conflict of laws problems.

...terminating the law applicable to the validity of a contract which has ever been seriously urged in a common-law court has at one time or another been adopted by the Supreme Court of the United States as the basis of its decision; that each decision has been made apparently without realizing its inconsistency with former decisions; and that many of the decisions are self-contradictory." 2 Beale, Conflict of Laws (1935), 110S, 332.9. See also ibid., 1077, 3321.

36See text, supra, at footnotes #22-24.

37This is not applicable to Cal.Civ.Code, §1643, discussed in the following subdivision of this article, relating to the intention to validate principle. See text, infra, at footnotes #52-53.

38Enacted March 21, 1872.

39See text, supra, at footnotes #18-21.

40Cal.Civ.Code, §§1636 et seq., contain provisions relating generally to intention of the parties to contracts. Apart from §1643, discussed infra in the text, at footnote #52, it seems clear, "beyond peradventure of a doubt," that they have no application to conflict of laws problems.
A very fine opinion by Mr. Chief Justice Waste, then Presiding Justice of the First District Court of Appeal, holds squarely that the parties may stipulate what law shall control. The case, *Boole v. Union Mercantile Insurance Company*, involved a loss in San Francisco Bay under a marine insurance policy. It seemed to be assumed that, but for the provision in the policy to the contrary, the California law, different from the English, would have been applicable. The opinion reads:

"We are not aware of any legislative declaration that would prohibit the parties to such an insurance policy from contracting that the law of England shall govern in the determination of what shall constitute a constructive total loss under such policy. It is the general rule in this state that, except where it is otherwise declared, the provisions of the Civil Code, with respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties when ascertained in the manner prescribed by the laws relating to the interpretation of contracts. The benefit of such provision may be waived by any party entitled thereto, unless such waiver would be contrary to public policy."

In addition to Section 3268 of the Civil Code, the case of *Griffith v. New York Life Insurance Company*, involving a specific waiver of a requirement imposed by a New York statute, is cited in support.

In *Bertonneau v. Southern Pacific Company*, there is a dictum by Mr. Justice James that the expressed or implied intention of the parties is to control. *Flittner v. Equitable Life Assurance Society*, a poorly thought out opinion, contains a dictum that the intention of the parties, expressed or presumed, is to control as to the law governing the obligation of the contract, although intention is to be disregarded in determining whether a contract has come into existence. In *Palmer v. Atchison, Topeka & Santa Fe Railroad*, Mr. Commissioner Searls indicated a desire to give effect to the intention of the parties, saying:

"The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view. [citing cases]"

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4152 Cal.App. 207, 198 Pac. 416 (1921), hearing denied by supreme court.
43It is not entirely clear how the court meant to cite §3268. The case did not involve a waiver, so that the last sentence before the citations was a dictum. If §3268 was cited only in support of the dictum, it was correctly used. The further citation of a decision relating to a waiver would indicate that this was the court's intention. If §3268 was meant to support the entire statement quoted, the citation was erroneous, for the reason that, as is suggested in the text, it is not believed that that section properly has any application to conflict of laws problems.
43a101 Cal. 627, 36 Pac. 630 (1894).
43b17 Cal.App. 439, 443, 120 Pac. 53, 54 (1911).
46a101 Cal. 187, 35 Pac. 630 (1894).
There are exceptions to this rule founded upon the supposed intention of the parties, gathered from circumstances surrounding the transaction. [citing case] 46

Until it is overruled, the excellent Boole decision establishes as the law of this State the desirable rule that the expressed intention of the parties is controlling. Possibly it should be added that it seems clear that the range of choice by the parties is limited to those States having a substantial connection with the facts of the situation. 47 The domicile of each of the parties should be included. 48

2. INTENTION TO VALIDATE

There is another sense in which the intention of the parties has sometimes been used, although, apart from usury, probably never by more than a small minority of jurisdictions. It is said that the parties must have intended to have an operative legal transaction, and that therefore that system of law 49 will be held to be applicable which will have that effect. 50 That this is a genuine intention of the parties the writer can testify, from the number of times he has been told by farmers: "Now, young fellow, you fix that so it'll stick." Here, again, public policy seems clearly to justify use of the intention of the parties, in order to attain certainty, and there is no sound jurisprudential objection. 51

A California code section possibly was intended to incorporate this rule. Section 1643 of the Civil Code 52 provides:

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

The proximity of this section to Section 1646, discussed above at length, 53 adopting in part the performance rule, affords some basis for holding that in framing Section 1643 the draftsman had in mind conflict of laws prob-

46Palmer v. Atchison etc. R., 101 Cal. 187, 195, 35 Pac. 630, 633 (1894). The form of statement used by the learned commissioner indicates that he did not have in mind an express provision by the parties as to their intention; but presumably he did not intend to exclude such an intention.


48Annotation, Validity and Effect of Stipulation in Contract to the Effect That it Shall be Governed by the Law of a Particular State Which Is Neither the Place Where the Contract is Made Nor the Place Where it is to be Performed, 112 A.L.R. 124 (1938).

49Having a substantial connection with the facts of the case. See text, supra, at footnote #47.


51See text, supra, at footnotes #30-35, and footnotes #30 & 32.

52Enacted March 21, 1872.

53Consult text, supra, at footnotes #18-21.
lems. However, as most statutes do not relate to conflict of laws, there is a presumption against such an interpretation, and the internal character of this section indicates that it was not intended to apply to this field. The eisusdem generis canon of construction, if applied to the contents of the section, results in the conclusion that "operative," and "capable of being carried into effect," have to do only with legality under the domestic law of the State.

Section 3541 of the Civil Code is to the same effect. It reads:
"An interpretation which gives effect is preferred to one which makes void."

The position of this section in the code is entirely devoid of conflict of laws connotations, and here it seems even more clear that the provision should be held to relate only to validity under the local law.

Both of these sections were used by the Supreme Court of California, however, in Robbins v. Pacific Eastern Corporation, in support of a conclusion that a stock sale was made in New York, rather than California, and was therefore unimpeachable under the Corporate Securities Act of this State. A dictum to the opposite effect, in the earlier District Court of Appeal Flittner case, already spoken of disparagingly, has been referred to, the court there stating that matters relating to the coming into existence of a contract "are in general governed by a fixed law, which is independent of and cannot be varied by the intention of the parties." The Robbins case seems to establish the desirable intention-to-validate rule as a part of the jurisprudence of this State.

IV. THE DECISIONS
1. CODE SECTIONS CONSIDERED

We shall now return to consideration of the central problem, that is, the law governing contracts apart from the intention of the parties. It will be recalled that the code provisions which have been discussed, in particular Section 1646 of the Civil Code, that a contract "is to be interpreted according to the law and usage of the place where it is to be performed," seem to require adoption of the performance rule, that is, that the law of the place of performance governs all contract matters. Only three decisions

Enacted March 21, 1872.
57Consult text, supra, at footnote #44.
60Text, supra, at footnotes #18-26.
in the history of the State have been found which refer to these code provisions. The first of these cases is the Blochman case, in the Second District Court of Appeal. It is a strong decision upon the facts, relating to a note executed in Mexico and payable in this country. The court was not confronted with a choice between two possible interpretations of an admittedly valid contract, but it was claimed "that under the laws of Mexico the note could not be enforced as a commercial instrument and was void because it was not in the form and substance required by those laws." Mr. Presiding Justice Conrey quoted Section 1646 in answer to that contention. Possibly unconsciously, the court is therefore applying the performance rule to a question of validity, notwithstanding the language of the code section that a contract is to be "interpreted" in accordance with the law of the place of performance.

In Utah State National Bank v. Smith, (technically not a precedent), turning upon the negotiability of a note, Mr. Justice Works said:

"The note was signed and delivered in California, but by its terms it was made payable in Utah. . . . The contention that the law of Utah governs the situation is correct. The terms of a promissory note are to be interpreted according to the law of the place at which it is to be paid. (Civ. Code, sec. 1646; Blochman Comml. & Sav. Bk. v. Ketcham, 171 Pac. 1084.)"

62 Upon the facts, the case also presents a very unusual problem, not considered by the court, relating to use of the law of the place of performance. The suit was brought upon a note executed and delivered in Mexico, with a blank after the word "at," referring to the place of payment. It was held that leaving the blank was an implied authority to the holder to insert any point, including one in this country. It is questionable whether the place of performance should be resorted to for any legal purposes (other than details of local custom) when its existence as such is due to the unilateral act of one of the parties subsequent to the contract's coming into effect.
63 In the California annotations to §334 of the Restatement, the following statement is made in regard to this case: "This is not really contrary to the Restatement, for the Court considered the question to be one of interpretation and applied §1646 of the Civil Code, under which a contract is to be interpreted according to the laws and usage of the place where it is to be performed." Assuming that the court was conscious of the nature of the case, it is inexact to state that the case is not in conflict with the Restatement, because, as is pointed out in the text, the question actually involved was one of validity. If interpretation is the proper standpoint from which to consider the case, interpretation would seem clearly to be included within the "nature and extent of the duty," which by §332(1) of the Restatement is assigned to the law of the place of contracting. In the annotations to §346 the case is cited as in accord with the Restatement. It is also cited with §336, and further discussed with §345.
Upon hearing in the same case in the supreme court, Mr. Justice Wilbur held:

"The note in question was dated and payable in Utah, and its negotiability must be determined by the law of the place of payment. (1 Daniel on Negotiable Instruments, 6th ed., secs. 865, 879; Wharton on Conflict of Laws, 3rd ed., 451d; notes, 61 L. R. A. 209; 19 L. R. A. (N. S.) 670, 671.)"

Notwithstanding the use of the expression "dated," the decision may be regarded as an authority in point.

The last decision, the Pray case, in the First District Court of Appeal, adds little. It involved a contract of sale of lumber, apparently made as well as to be carried out in California. The court applied the same code section, in a rather weak manner, to justify admission of evidence of a custom relating to inspection at the point of destination.

At any rate, the cases which have given consideration to the statutory elements involved have applied the performance rule as the law of this State.

2. VACUITY OF OTHER DECISIONS

As far as the remaining decisions dealing with the problem are concerned, as they are decided without reference to the code sections, their value is slight. As most of these cases were decided in blissful ignorance of prevailing statutory provisions, one is tempted to put those decided before the enactment of the codes upon the same level with the rest, and disregard their priority. However, in the few instances where such priority does exist, it will be here noted. It should also be observed that the California annotations possibly too uncritically follow the Restatement in

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66 80 Cal. 1, 179 Pac. 160 (1919).
68 If Utah were the place of execution as well as of payment, the portion quoted would be dictum. There is nothing else in the opinion to indicate that the supreme court meant to find the facts differently from the district court of appeal. Presumably a looser form of expression is being used than that in the opinion below, and reference made by "dated" to the face of the instrument, as distinguished from the place of coming into legal effect.
70 Mr. Justice Gray said, at 101 Cal.App. 490, 281 Pac. 1039: "Defendant also moved to strike all of the testimony of one plaintiff as to this custom on the ground that he testified he was unfamiliar with the custom at the place of performance. This witness, however, also testified that this custom was general in the business. Of course the contract was to be interpreted according to the usage of the place of performance. (Civ.Code, sec. 1646.) The error, if any, was cured by the testimony of Butterick, the defendant's witness, who, on direct examination, stated this custom existed at Los Angeles." It is likely that all jurisdictions would agree that such a local custom at the place of performance is to be complied with by the parties.
its adoption of the alternative "splitting up" rule—at least a perusal of the annotations would not lead one to suspect that the California law might be other than the Restatement rule, and, incidentally, most of the cases cited are not of any help one way or the other.

In reading many cases not referred to in this article, one can not help being struck by the number in which the facts involved more than a single State, and there is no reference to the conflict of laws possibilities of the situation. It may be that in these cases counsel had decided that no advantage could be gained from resort to conflict of laws principles, but this would seem to be a violent assumption. It seems not amiss to suggest that the cases indicate that the profession has not attached sufficient importance to the practical aspects of the subject of conflict of laws. An attorney's mind is largely occupied with problems involving only the law of his own State, especially in the smaller communities. This leads to lack of familiarity with the field of conflict of laws, and makes it necessary for him to guard against the likelihood that the existence of a problem in this field will be overlooked. It is overly easy to assume that the local law is applicable. The thought which has been suggested also occurred to an able practitioner. The late Edward W. Hinton, distinguished professor of law at the University of Chicago, told the writer that for about twenty years he represented a railroad at a division point in Missouri near the Kansas line, that suits were constantly being brought in Missouri upon causes of action arising in Kansas, and that it very rarely occurred to counsel that their clients might be able to derive benefit from the law of Kansas. When the writer was in practice there was a like innocence of constitutional law problems. It may be assumed that in recent years such childlike faith in the legality of statutes has been rudely disturbed.

The case of Andrews v. Zook is interesting in the present connection. The question was whether the statute of limitations had run upon the later installments of a note, this turning upon whether the acceleration clause operated automatically or as a matter of option upon the part of the holder. The note was dated and payable in Iowa, and presumably there executed. The court discussed the conflict of authority upon the point, and decided it entirely as a matter of California law, incidentally citing an Iowa case in harmony with the result reached. In the recent case of Sullivan v. Sulli-
van,\textsuperscript{72b} the same problem was presented in connection with a note executed and payable in New York, and when the conflict of laws point was presented to the court the decision was made as a matter of New York law.

The early case of \textit{Wild v. Van Valkenburgh}\textsuperscript{72c} is interesting as showing the mental processes of the court in the formative period of the law of a pioneer State. The case involved a note dated and payable in New York, and presumably there executed. The question was whether, in a suit against a maker, it was necessary to allege demand at the place fixed for payment. It was pointed out that the rule in this country, outside of Indiana and Louisiana, was that demand was not necessary, the English rule being contra. The court was greatly impressed by Story's argument, which is quoted, that it might be very inconvenient for the maker to have to pay in a different city from that agreed upon, when he might have funds ready in the latter. Mr. Chief Justice Murray then continued:

"The English and American authorities on this subject have been so ably reviewed by Judge Story and Chancellor Kent, both of whom agree that [the] English rule is correct, [that] nothing is left us to do except to adopt one or the other as a rule. If the American decisions were supported by the same reasoning and high authority as the English, we might be inclined to follow them; but this state is so far removed from the commercial world, and the rates of exchange so largely against our merchants and citizens, that it would be more proper to adopt a rule which, we think, is founded on some logic, and calculated to protect the interests of our people."\textsuperscript{73}

It seems reasonable to assume that if it had been pointed out to the court that, by adopting the English rule, it would, in all probability, be changing the character of the substantive obligation from that which existed where the debt was contracted and payable, it would have followed the majority American rule.

In view of the paucity of helpful judicial material,\textsuperscript{74} it is recommended that the busy attorney who has favored us with his attention thus far terminate his reading of this paper at this point. Those who, being inured to the laborious processes of the law, feel that they must examine all the cases, or whose professional duty requires them to do so, may continue. Student readers are urged to desist.

3. THE RESTATEMENT CRITERION

In considering the cases which have dealt with our problem without reference to the code provisions, it will be helpful to use the Restatement, or "splitting up," rule as a criterion. It is based upon, and an elaboration

\textsuperscript{72b} 25 Cal.App.(2d) 422, 77 Pac.(2d) 498 (1938).
\textsuperscript{72c} 7 Cal. 166 (1857).
\textsuperscript{72d} Id. v. Van Valkenburgh, 7 Cal. 166, 168 (1857) (italics added).
\textsuperscript{73} Professor Beale describes the state of the California law as "doubtful."
\textsuperscript{74} 2 Beale, Conflict of Laws (1935), 1124, §332.13.
of, the classic statement of the historical method of approach to these problems in the Scudder case, already quoted. The alternatives, it will be recalled, are the execution and performance rules, and, in part, the intention rule.

The Restatement rule is summarized in Sections 332 and 358:

§332. "The law of the place of contracting determines the validity and effect of a promise with respect to

(a) capacity to make the contract;

(b) the necessary form, if any, in which the promise must be made;

(c) the mutual assent or consideration, if any, required to make a promise binding;

(d) any other requirements for making a promise binding;

(e) fraud, illegality, or any other circumstances which make a promise void or voidable;

(f) except as stated in §358, the nature and extent of the duty for the performance of which a party becomes bound;

(g) the time when and the place where the promise is by its terms to be performed;

(h) the absolute or conditional character of the promise."

§358. "The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of 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) excuse for non-performance."

The logical difficulty in attempting to divide up the various facts and problems relating to contracts in this way has been discussed.

4. FOUR LOGICAL POSSIBILITIES

Continuing our discussion along the lines of the Restatement distinction, there seem to be four logical possibilities as to the character of the cases, and they will be considered in accordance with this classification:

(1) Apply the law of the place of execution to execution facts. This is consistent with the Restatement, but not with the performance rule.

(2) Apply the law of the place of execution to performance facts.

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17See text, supra, at footnote §11.

18See text, supra, at footnotes #13-14.
This is consistent neither with the Restatement nor the performance rule, and is done only under the execution rule. Throughout the country it represents a negligible minority.78

(3) Apply the law of the place of performance to performance facts. This is consistent with both the Restatement and the performance rule.

(4) Apply the law of the place of performance to execution facts. This is consistent with the performance rule, but not with the Restatement.

5. LAW OF PLACE OF EXECUTION—EXECUTION FACTS

Only two actual decisions to this effect have been found. In Palmer v. Atchison, Topeka & Santa Fe Railroad,79 a carriage case involving several jurisdictions of performance, Mr. Commissioner Searls said:

"The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view. [citing cases]"

"There are exceptions to this rule founded upon the supposed intention of the parties, gathered from circumstances surrounding the transaction. [citing case]"

"Thus much is said to indicate that the question is not overlooked. The cause, so far [as] can be determined from the record, was tried upon the theory that the law of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence.

"Under such circumstances we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume as a question of law that the law of that state is the same as our own."80

Applicability of the law of the place of execution could be supported upon the ground that there were several jurisdictions of performance, in which event it has become the settled rule throughout the country81 that, as a matter of necessity, the law of the place of execution must be applied.82

In Flittner v. Equitable Life Assurance Society,83 California law was used to determine the capacity of an infant to execute in California a contract to be performed in New York. In the opinion, Mr. Justice

78See text, supra, at footnote #17.
79101 Cal. 187, 35 Pac. 630 (1894); consult California Annotations, Conflict of Laws Restatement (1939), §338.
81Certain corporation cases, such as Thomas v. Wentworth Hotel Co., 158 Cal. 275, 110 Pac. 942, 139 Am.St.Rep. 120 (1910), discussed in text, infra, at footnote #102, and Pinney v. Nelson, 183 U.S. 144, 22 Sup.Ct. 52, 46 L.Ed. 125 (1901), being an exception.
82Except as to certain details of local practice, such as whether delivery from a ship is to be made to lighter or upon a wharf.
Kerrigan worked out a distinction something like that of the Restatement—that matters of execution, interpretation,\(^{84}\) validity and capacity are governed by the law of the place of execution, and matters of construction,\(^{88}\) legal effect, and performance by the law of the place of performance. The result reached is also supported by reasoning based upon the fact that California was the domicile of the minor (as well as the forum). This reasoning would indicate that capacity to enter into a contract is an attribute of status, and not a contract matter. It would, of course, be possible, although illogical, to deny capacity if found wanting from either a contract or status standpoint. The privileges and immunities clause prohibits a special rule to protect citizens of the forum.

There are a number of dicta that the law of the place of execution governs matters relating to execution—an easy assumption to make when of no immediate moment. In *Lawson v. Worms*,\(^{86}\) before the codes, it was argued that the English rule in regard to recovery back of advanced freight upon a voyage to this country was different from the American. The majority of the court found that this was not true, Mr. Justice Terry, however, concluding his discussion with the statement:

"I must hold it to be the rule which prevails in England, and it must consequently control the decision of this case."\(^{87}\)

The dissenting opinion was based upon a different view of the English law. It will be noted that here again there were several jurisdictions of performance. The opinion does not state why the English law was regarded as controlling.

In *Fenton v. Edwards & Johnson*,\(^{88}\) involving the validity of a general assignment for the benefit of creditors, Mr. Commissioner Cooper said:

"It is the rule of all the states of the Union that a contract valid in the place where it is made is valid everywhere. [citing texts and case]

"Certain exceptions are stated in the books in cases where a contract or sale affects property situate in a different state from the one in which the sale is made, or the revenue laws of another state, or if it conflicts with the interest of another state or its citizens."\(^{89}\)

\(^{84}\)It will be recalled that Cal.Giv.Code, §1646, quoted in the text, *supra*, at footnote #18, expressly requires that interpretation be governed by the law of the place of performance.

\(^{85}\)It is especially objectionable to look to the law of the place of performance for construction, and to the law of the place of execution for interpretation.

\(^{86}\)Cal. 365 (1856); consult California Annotations, Conflict of Laws Restatement (1939), §§337 & 346.

\(^{87}\)Lawson v. Worms, 6 Cal. 365, 371 (1856).

\(^{88}\)125 Cal. 43, 58 Pac. 320, 46 L.R.A. 832, 77 Am.St.Rep. 141 (1899); consult California Annotations, Conflict of Laws Restatement (1939), §350.

In *Navajo County Bank v. Dolson*, relating to a note made and payable in Arizona, Mr. Justice Angellotti said:

"Whether or not the note involved here was a negotiable instrument must be determined by the law of the place where the contract between the parties was made." [citing text]

In *Mercantile Acceptance Company v. Frank*, in which there had been removal to California of an automobile subject to Minnesota purchase money chattel mortgage, Mr. Justice Curtis said:

"It is a well-recognized principle of law in this state, as well as other jurisdictions, that the law of the place where a contract is made determines its validity." [quoting 5 Cal. Jur. 449 and citing texts and cases]

In *Bertonneau v. Southern Pacific Company*, the performance rule was recognized, but it was held that it could not be applied to a carriage contract because of the existence of several States of performance. However, before coming to discussion of the performance rule, Mr. Justice James said:

"It must be admitted that the general rule affecting the determination of the liabilities of parties to a contract requires that the law of the place where the contract is made shall govern. This rule admits of some variation in practice, dependent sometimes upon the question as to where the contract is to be performed, and always subject to the intention of the parties as expressed or implied from their acts and conduct at the time of making the contract. 'The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view.' (*Palmer v. Atchison etc. R. R. Co.*, 101 Cal. 187, [35 Pac. 630].) This case cites with approval, among other cases, that of *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, [9 Sup. Ct. 469, 32 L. Ed. 788], in which the supreme court of the United States exhaustively reviews different decisions touching this question, and, after noting the conflict existing among various of the authorities, deduces the general rule as follows: 'This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of

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92203 Cal. 483, 265 Pac. 190, 57 A.L.R. 696 (1928); consult California Annotations, Conflict of Laws Restatement (1939), §334.
making it have some other law in view, requires a contract of
affreightment, made in one country between citizens or residents
thereof, and the performance of which begins there, to be governed
by the law of that country, unless the parties, when entering into
the contract, clearly manifest a mutual intention that it shall be
governed by the law of some other country.' We cite, also: 2
Wharton on Conflict of Laws, sec. 471b; 1 Hutchinson on Car­
rriers, sec. 201 et seq. Unless, then, some fact, circumstance or
condition appears affecting the contract for shipment as it was
made in this case, which would entitle defendant to invoke the
law of this state in limitation of the amount of recovery, it follows
that the rights of the parties must be measured by the com­
mon-law rule.'98

6. LAW OF PLACE OF EXECUTION—PERFORMANCE FACTS

Nothing really in point upon this has been found. The public policy
elements present in workmen's compensation cases prevail against ordinary
contract principles. However, it may be worth noting that in Alaska
Packers' Association v. Industrial Accident Commission,99 it was said, per
curiam:97

"Where the duty to pay compensation is contractual, as under the
optional acts, the rights of the injured party, wherever the injury
is received, may, according to recognized principles, be controlled
by the law of the place of contract."98

7. LAW OF PLACE OF PERFORMANCE—PERFORMANCE FACTS

Application of the law of the place of performance here would seem
to be so clear as to require little discussion. It is in harmony with both
the Restatement and performance rules, and the California code provisions
lean in this direction. It has been pointed out that the rule applying the
law of the place of execution to all contract matters represents a negligible
minority.90

The Flittner case,100 already discussed,101, working out a distinction
something like that of the Restatement, recognized the performance rule
here by way of dictum. Cases as to stockholders' liability are hardly in

99Cal. (2d) 250, 34 Pac.(2d) 716 (1934), affd. 294 U.S. 532, 55 Sup.Ct. 518,
79 L.Ed. 1044 (1935) ; consult California Annotations, Conflict of Laws Restatement
(1939), §§346 & 347.
97The writer objects to per curiam opinions. First, judges, if not lawyers (under
the State Bar Act), are at least human beings, and the interest in an opinion is
lessened if the personal element is removed. Second, if a professor does not know
what judge he is talking about, he can not castigate him before his classes with the
proper scorching effect.
100Alaska Packers' Assn. v. Ind. Acc. Comm., 1 Cal.(2d) 250, 256, 34 Pac.(2d)
716, 719 (1934).
101Consult text, supra, at footnotes #17 & 78.
103Text, supra, at footnotes #83-85.
point as to contract matters generally. However, in such a case, *Thomas v. Wentworth Hotel Company*, it was said, by Mr. Justice Sloss:

“It is true, as contended, that the liability of stockholders rests upon contract and that the terms of the contract between the incorporators are ordinarily to be ascertained from the articles of incorporation, read in the light of the statute which authorizes the creation of the corporate body. But, as is pointed out by the supreme court of the United States in *Pinney v. Nelson*, 183 U. S. 144, [22 Sup. Ct. 52], when a contract is made with reference to the laws of a jurisdiction other than that of the place of contracting, the parties will be deemed to have incorporated into their agreement the law of the jurisdiction with reference to which they were contracting.” [Quoting *Pinney v. Nelson*].

After pointing out that it can make no difference whether the freedom of a stockholder from individual liability is by virtue of statute or constitution alone, or is, pursuant to statutory authority, set forth in the articles, the learned justice continued:

“. . . In so far as the charter or articles declare an intent to do business in another state, the law of that state becomes, so far as concerns business there done, a part of the contract.”

In *Losson v. Blodgett*, a contract in California for the sale of Mexican land was held void when it developed that, under Mexican law, the buyers as aliens would be unable to take.

8. LAW OF PLACE OF PERFORMANCE—EXECUTION FACTS

Application of the performance rule here is in conflict with the Restatement. Before the codes, it was held, in *Young v. Pearson*, that a partnership agreement in Louisiana to conduct a business in California did not have to be in writing, Mr. Justice Bennett saying:

“Whatever the law of Louisiana may be, the law of California does not require that a partnership agreement should be in writing. The partnership business was to be prosecuted here, and the contract must be governed by the laws of this state.”

102 *S8 Cal. 275, 110 Pac. 942, 139 Am.St.Rep. 120 (1910); consult California Annotations, Conflict of Laws Restatement (1939), §345.
106 The Restatement, §360(1), provides as to this situation that there is “no obligation to perform so long as the illegality continues.”
107 1 Cal. 448 (1851); consult California Annotations, Conflict of Laws Restatement (1939), §§334 & 342.
108 *Young v. Pearson, 1 Cal. 448, 450 (1851).*
Also before the codes, in *Dow v. Gould & Curry Silver Mining Company*, the validity of a gift in California between husband and wife, domiciled in this State, of stock in a California corporation operating in Nevada, was involved. In addition to holding that the question was governed by the law of the domicile, Mr. Justice Rhodes said:

"A gift is not perfect, nor does any interest pass to the proposed donee, until there has been a delivery by the donor and an acceptance by the donee. Both of those acts were performed in this State, and for that reason, if there could be any doubt that the question was dependent upon the *lex domicilii*, the validity of the gift is to be determined by the laws of this State. No authority is cited upon this precise point, but it would appear that such must be the rule, both upon principle and in analogy to contracts between persons residing or being in different places. As to contracts made by persons thus situated, the rule is that they are to be interpreted by the law of the place where they became complete contracts, unless they are to be performed elsewhere. (Story Con. of Laws, Sec. 283.)"

It has been pointed out that the form of statement used in the closing sentence is a round-about method of stating the performance rule. 

*Progresso Steamship Company v. St. Paul, etc., Insurance Company,* while possibly dictum, because the place of execution is not definitely stated, is apparently an authority in point, although, because of the absence of disagreement between counsel, not a strong one. It involved construction of the clause "warranted free from all average and salvage" in a marine insurance policy. Mr. Commissioner Smith said:

"In discussing this question it is rightly assumed by the counsel that as the contract provides for performance in San Francisco, the California law must govern."

In *Pratt v. Dittmer*, while no Iowa law was presented to the court, it was held that notes executed in California and payable in Iowa were

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10931 Cal. 629 (1867); consult California Annotations, Conflict of Laws Restatement (1939), §311.
111Text, *supra*, at footnote #23, and said footnote.
112146 Cal. 279, 79 Pac. 967 (1905); consult California Annotations, Conflict of Laws Restatement (1939), §346.
113Insurance was issued upon two steamships, about to be towed from Portland, Oregon, to St. Michael, Alaska. The only performance contemplated was payment of the loss, so that different places of performance were not involved.
116The notes were attached to the contract in connection with which they were given, the contract providing that the notes were to be detached from the contract by the payee. The opinion states that the agreement between the parties, signed by the maker of the notes and by the duly authorized agent of the payee,
governed as to negotiability by the law of Iowa, Mr. Justice Craig saying:

"The notes were payable in Iowa and are to be interpreted,\textsuperscript{117}
therefore, under the law of that state."\textsuperscript{118}

\textit{Bertonneau v. Southern Pacific Company},\textsuperscript{119} by way of dictum,\textsuperscript{120} recognizes the controlling effect of the law of the place of performance.

\textbf{V. \textit{SUMMARY AND CONCLUSION}}

Disregarding the special problems relating to the intention of the parties, we have the following in favor of the performance rule as the law of this State:

(1) A code provision requiring its adoption at least in part.\textsuperscript{121}

(2) A district court of appeal decision citing Section 1646 of the Civil Code, and applying the law of the place of performance to a question of validity.\textsuperscript{122}

(3) A district court of appeal decision citing Section 1646 and applying the law of the place of performance to a question of negotiability.\textsuperscript{123} Hearing in this case in the supreme court is apparently to the same effect.\textsuperscript{124}

(4) A district court of appeal decision weakly applying Section 1646 to justify admission of evidence of a custom at the place of performance apparently within the same State as the place of execution.\textsuperscript{125}

\textsuperscript{118}\textsuperscript{The question was not really one of interpretation, but of negotiability. The decision was placed, also, on the ground of estoppel.}

\textsuperscript{119}Pratt v. Dittmer, 51 Cal.App. 512, 517, 197 Pac. 365, 368 (1921).

\textsuperscript{117}17 Cal.App. 439, 120 Pac. 53 (1911); consult California Annotations, Conflict of Laws Restatement (1939), §§337 & 346.

\textsuperscript{120}Bertonneau v. Southern Pac. Co., 17 Cal.App. 439, 444, 120 Pac. 53, 55 (1911). The dictum is inferential, as the court simply avoids giving effect to decisions applying the law of the place of performance.

\textsuperscript{121}Consult text, supra, at footnotes \#\#18-21.


\textsuperscript{124}The supreme court decision is discussed in the text, supra, at footnotes \#\#66-68.

(5) A supreme court stockholder's liability case applying the law of the place of performance (not really in point).126

(6) A district court of appeal decision applying the law of the place of performance to a problem of validity of a contract when illegal at the place of performance.127

(7) A supreme court decision before the codes applying the law of the place of performance to determine whether a contract must be in writing.128

(8) A supreme court decision applying the law of the place of performance to the interpretation of a policy of marine insurance.129

(9) A weak district court of appeal decision applying the law of the place of performance in a note case.130

(10) Three dicta, one in the supreme court before the codes and two in district courts of appeal since the codes131 (one only in part, along Restatement lines.)132

Against the performance rule we have:

(1) A supreme court decision, in a carriage case with several jurisdictions of performance, applying the law of the place of execution upon a presumption that it was the same as that of California.133

(2) A district court of appeal decision applying the law of the place of execution to the contractual capacity of an infant, also reasoning that the same jurisdiction was the domicile as well as the forum.134


127Losson v. Blodgett, 1 Cal.App.(2d) 13, 36 Pac.(2d) 147 (1934), discussed in text, supra, at footnotes #105-106.

128Young v. Pearson, 1 Cal. 448 (1851), discussed in text, supra, at footnotes #107-108.


130Pratt v. Dittmer, 51 Cal.App. 512, 197 Pac. 365 (1921), discussed in text, supra, at footnotes #115-118.


133Palmer v. Atchison etc. R. R., 101 Cal. 187, 35 Pac. 630 (1894), discussed in text, supra, at footnotes #79-82.

(3) Six dicta, one in the supreme court before the codes,\textsuperscript{135} four in the supreme court after the codes\textsuperscript{136} (one not really in point because relating to workmen's compensation acts),\textsuperscript{137} and one in a district court of appeal.\textsuperscript{138} The conclusion seems to be justified that it is the rule of this State that the law of the place of performance governs all contract matters.

\textsuperscript{135}Lawson v. Worms, 6 Cal. 365 (1856), discussed in text, \textit{supra}, at footnotes ##86-87.

