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DISTINGUISHING SUBSTANCE AND PROCEDURE IN THE CONFLICT OF LAWS

H. L. McCLINTOCK.

In the spring of 1920 a sugar refining company which was engaged in business in Pennsylvania entered into a number of contracts for the sale of large quantities of sugar to be delivered during the summer or fall. The contracts were negotiated through different brokers who executed sales memoranda, specifying in each case only the total quantity sold and the base price, and giving the buyer the right to designate the proportions of each grade desired. Between the time of the sales and the times fixed for delivery the market price of sugar collapsed, and the seller found that many of its customers were repudiating their contracts. Actions upon these contracts brought in Pennsylvania were uniformly unsuccessful,¹ unless there had been part performance,² or defendant failed properly to plead the statute,³ the Pennsylvania court holding that the memorandum did not comply with the Statute of Frauds⁴ in that it failed to state some of the

¹Franklin Sugar Ref. Co. v. Howell, 274 Pa. 190, 118 Atl. 109 (1922); Franklin Sugar Ref. Co. v. Kane Milling & Grocery Co., 278 Pa. 105, 122 Atl. 231 (1923); Franklin Sugar Ref. Co. v. John, 279 Pa. 104, 123 Atl. 685 (1924).

²Franklin Sugar Ref. Co. v. Hanscom Bros., 273 Pa. 98, 116 Atl. 140 (1922).

³Franklin Sugar Ref. Co. v. Lykens Merc. Co., 274 Pa. 206, 117 Atl. 780 (1922).

⁴UNIFORM SALES ACT, PA. STAT. (West, 1920) § 19652.

terms of the contract, and trade usage could not supply the omitted terms.⁵ Actions were also brought on similar contracts in other jurisdictions. In all of these cases in which the conflict of laws question was raised⁶ the courts properly recognized that the contracts were governed as to matters of substance by the law of Pennsylvania, since they were made and were to be performed in that state. The important question was whether the requirement of a memorandum in writing affected the substance or right so as to be governed by the proper law of the contract, or the procedure or remedy so as to be governed by the law of the forum. Three courts which considered this question decided that by the law of Pennsylvania, the Statute of Frauds affected the right and, therefore, held the memorandum insufficient.⁷ The Circuit Court of Appeals for the Sixth Circuit in a case begun in Illinois decided on authority of two earlier cases in that circuit, that the statute affected the remedy and was governed by the law of the forum.⁸ In this case the court assumed that the law of the forum should determine whether the Statute of Frauds affected the right or the remedy. The courts which reached the opposite conclusion looked to the *lex loci contractus*. Thus, each court, in selecting the authorities on which it based its conclusion, assumed the conclusion.

⁵ The court also held that the notation that the goods were sold by the broker was not a signing of the memorandum by the agent of the buyer, even if the broker were authorized to contract for the buyer. In all of the cases in other jurisdictions in which the memoranda were held sufficient, there were later letters written by the buyers which were held to supply the lack of signature to the memoranda. Thus no conflicts question arose on that feature of the cases.

⁶ In several cases recovery was allowed on these contracts in other jurisdictions without any reference being made in the opinion to the conflict of laws question or the Pennsylvania decisions. See *Franklin Sugar Ref. Co. v. Eger-ton*, 288 Fed. 698 (C. C. A. 4th, 1923); *Luray Supply Co., Inc. v. Franklin Sugar Ref. Co.*, 6 F. (2d) 214 (C. C. A. 4th, 1925); *Franklin Sugar Ref. Co. v. William D. Mullen Co.*, 12 F. (2d) 885 (C. C. A. 3d, 1926). This last case is the more remarkable because it reversed a judgment of the District Court, 7 F. (2d) 470 (D. Del. 1925) which was expressly based on the proposition that the Pennsylvania law governed, and by that law the memorandum was insufficient.

⁷ *Franklin Sugar Ref. Co. v. Holstein Harvey's Sons, Inc.*, 275 Fed. 622 (D. Del. 1921); *Franklin Sugar Ref. Co. v. William D. Mullen Co.*, *supra* note 6, reversed by circuit court in *Franklin Sugar Ref. Co. v. W. D. Mullen Co.*, *supra* note 6; *Franklin Sugar Ref. Co. v. Martin-Nelly Grocery Co.*, 94 W. Va. 504, 119 S. E. 473 (1923).

⁸ *Straesser-Arnold Co. v. Franklin Sugar Ref. Co.*, 8 F. (2d) 601 (C. C. A. 7th, 1925).

This is not an uncommon practice of courts in dealing with this problem, *i. e.*, whether a rule affects substance or procedure. In *St. Louis-San Francisco Ry. v. Cox*⁹ an action was brought in Arkansas to recover damages for personal injuries inflicted in Missouri. The defendant pleaded a release executed by the plaintiff in Missouri and alleged that under the laws of Missouri plaintiff would have to tender repayment of the amount received for the release before she could sue to cancel it for fraud. In applying the Arkansas rule, that repayment of the consideration was not a condition precedent to suit, but that credit for the amount received must be allowed on any judgment recovered, the court said:

“But the Missouri Supreme Court treats the matter of tendering or refunding of the consideration received for the release in such cases as ‘a matter going to the basis of the right of action itself.’ It is a matter of substance, a condition precedent to the maintenance of the action. But, under our decisions, as above stated, a failure to refund or make tender of the consideration for the release in such cases relates only to the remedy, and is not a matter of substance pertaining to the right of action itself.”

*Hoadley v. Northern Transportation Co.*¹⁰ was an action brought in Massachusetts against a common carrier to recover for goods destroyed by the Chicago fire while they were in the carrier's possession. The bill of lading contained a clause exempting the carrier from all loss or damage by fire. The contract for shipment was made in Illinois and it was not questioned that the law of Illinois was the proper law of the contract. The jury sustained plaintiff's contention that by the law of Illinois the mere receipt of a bill of lading containing such a stipulation would not raise a presumption that its terms were assented to. The Massachusetts rule, however, was stated to be that assent to the stipulation may be inferred from such acceptance of the bill of lading. The court held that the rule laid down in Illinois affected the remedy only and did not apply where suit was brought in Massa-

⁹ 171 Ark. 103, 283 S. W. 31 (1926).

¹⁰ 115 Mass. 304 (1874).

chusetts. It is not clear from the Illinois cases which were cited to support the Illinois rule whether that rule is one of substance, *i. e.*, a rule that mere receipt does not amount to an assent to a contract limiting the carrier's liability, or one of procedure, *i. e.*, a rule that evidence of receipt is insufficient to support a finding by a court or jury that there had been assent to such a contract.¹¹ If a similar action had later been brought in Massachusetts upon a bill of lading issued after the enactment of the statute in Illinois which made it unlawful for a carrier to limit its liability by any stipulation or limitation expressed in the receipt,¹² which statute the Illinois court has held not to prevent the enforcement by Illinois courts of such a limitation contained in a bill of lading issued in another state,¹³ would the Massachusetts court then hold there was no valid limitation of liability? Such a question was raised in Missouri, and the court in that state treated the Massachusetts case as "quite in point" but refused to follow it.¹⁴ If the Massachusetts view that the Illinois common law rule merely related to an inference to be drawn from certain facts was sound, the enactment of the statute furnished a clear basis for distinguishing the two cases. The Missouri opinion is another illustration of the frequent failure of the courts to notice the necessity of deciding what law shall determine whether a given rule is substance or procedure.

¹¹ This, of course, is a common situation. Seldom does the court or legislature which formulates a rule of law consider the question whether such a rule is substantive or procedural in the conflict of laws sense.

¹² Act March 12, 1874, ILL. REV. STAT. (Cahill, 1925) c. 27, p. 590, par. 1.

¹³ *Coats v. Chicago, R. I. & P. Ry. Co.*, 239 Ill. 154, 87 N. E. 929 (1909). Plaintiff's contention in that case appears to have been that the Illinois law ought to govern because the contract was to be performed there. For the proposition that the law of the place of making, rather than that of the place of delivery, governed the question, the court cited *Michigan Central R. R. Co. v. Boyd*, 91 Ill. 268 (1878), in which case the contract had been made in Massachusetts for shipment to Chicago, and *Hoadley v. Northern Transp. Co.*, *supra* note 10, was cited to establish the Massachusetts rule that acceptance of a bill of lading implied assent to limitation of liability stipulated therein, though that rule was held inapplicable in the case under consideration because the bill of lading was not issued and accepted until some time after the goods had been delivered to the carrier. No mention is made of the further holding that the former Illinois rule was one of procedure, from which it would follow that that rule ought to apply in an action in Illinois on a foreign bill of lading even though the Illinois statute did not.

¹⁴ *Hartman v. Louisville & N. Ry. Co.*, 39 Mo. App. 88 (1890).

The text writers who have discussed this problem have apparently assumed that a given rule of law, *e. g.*, the parol evidence rule, must be either substance or procedure. They do ordinarily recognize that, although the usual Statute of Limitations is generally held to affect the remedy only and not the right, a state may enact a statute which has the effect of terminating the right upon the expiration of a prescribed period of time, and that such statute will be given effect wherever the action may be brought.¹⁵ They also note that a distinction has been made by some courts between a Statute of Frauds which says "no action shall be brought" on a contract not evidenced by written memorandum, and one which says "no contract shall be allowed to be good," but they generally disapprove the distinction.¹⁶ If statutes of different jurisdictions which deal with the same general problem may in some cases deal with it by prescribing a rule of substantive law, and in other cases by prescribing a rule of procedure, we must recognize the possibility that the common law rules of different jurisdictions may do likewise, unless we are prepared to take the position that there exists a general common law, independent of the common law of any one jurisdiction and that conflict of laws questions are to be decided by reference to this general common law. Although this position finds support in some of the opinions of the courts,¹⁷ it is so inconsistent with our present-day conceptions of law that it cannot be accepted as an hypothesis for any critical examination of a legal problem.

The Restatement of the Conflict of Laws does recognize that there is a preliminary problem involved in these substance or procedure cases and provides:

"The forum determines what is matter of procedure and what is matter of substance according to its own law."¹⁸

¹⁵ STORY, CONFLICT OF LAWS (8th ed. 1883) § 582; 2 WHARTON, CONFLICT OF LAWS (3d ed. 1905) § 536; MINOR, CONFLICT OF LAWS (1901) § 210; GOODRICH, CONFLICT OF LAWS (1927) §§ 86, 87; DICEY, CONFLICT OF LAWS (4th ed. 1927) 799, 800.

¹⁶ 2 WHARTON, *op. cit. supra* note 15, § 689 *et seq.*; MINOR, *loc. cit. supra* note 15; Goodrich, *op. cit. supra* note 15, § 88; Dicey, *op. cit. supra* note 15, 800.

¹⁷ For a recent extreme statement of this position, see *Slaton v. Hall*, 168 Ga. 710, 715, 148 S. E. 741, 743 (1929).

¹⁸ CONFLICT OF LAWS RESTATEMENT, TENTATIVE DRAFT No. 5 (AM. L. INST. 1929) § 613.

The meaning of this section seems to be obscured rather than clarified by the comment thereon,¹⁹ but, on its face, it appears to assume that certain rules or principles of law must, regardless of the varying form they may take in different jurisdictions, be always either substance or procedure. The statement of the comment that the forum "will not enquire whether the foreign court would call the various rules involved in the transaction substantive or procedural" is manifestly contrary to the general theory of the Restatement that in the field of conflict of laws one deals principally with the jurisdiction of states to create rights, and the enforcement of the rights so created in other jurisdictions.²⁰ It is true that this general theory is not followed to the extent of a general acceptance of *renvoi*²¹ but that departure is justified by the practical impossibility of reaching any solution where both jurisdictions adopt the *renvoi*.²² With reference to questions of status and title to land where that practical objection does not exist, the Restatement requires the forum to decide the question as it

¹⁹ *Ibid.* comment to § 613:

(a) The court determines what is procedure and what is substance according to the law it administers and not as an isolated question of fact in each instance. This law it is the function of this Chapter to expound, and illustrations of the application of the law are shown in the sections of this Chapter.

(b) The rule stated in this Section is in accordance with the general principle (Section 5) that a court applies its own law of the Conflict of Laws.

(c) The forum, in determining in accordance with its own law whether an element of a foreign transaction is matter of substance or procedure, will examine the entire nature of the transaction, including the statute or principle of law which created the alleged right and the interpretation thereof; but will not enquire whether the foreign court would call the various rules involved in the transaction substantive or procedural. Then, supposing all the law and facts of the case as established had been law of or facts occurring in the state of forum, it will determine as to each rule whether it calls it procedural or substantive.

²⁰ CONFLICT OF LAWS, TENTATIVE DRAFT No. 2 (AM. L. INST. 1926) § 43.

²¹ *Ibid.* § 7. There seems to be no logical escape from the proposition that the theory that conflict of laws deals with the enforcement of foreign created rights requires a decision of the question which is the same as would be reached by the courts of the jurisdiction in which the rights originated. See Cook, *Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457, 468. We have no other test to determine what those rights are. The fact that courts ordinarily look only to the local law of that jurisdiction, as pointed out by Professor Cook in *Recognition of "Massachusetts Rights" by New York Courts* (1919) 28 YALE L. J. 67, does not imply that they would continue to do so if the conflicts rule of the governing jurisdiction were brought to their attention. See *Guernsey v. Imperial Bank of Canada*, 188 Fed. 300 (C. C. A. 8th, 1911).

²² *In re Tallmadge* 109 Misc. 696, 181 N. Y. Supp. 336 (1919); Lorenzen, *Renvoi Doctrine in Conflict of Laws* (1918) 27 YALE L. J. 509; Schreiber, *The Doctrine of Renvoi in Anglo-American Law* (1918) 31 HAR. L. REV. 523.

would be decided by a court of the jurisdiction whose law is determined to be the proper governing law.²³ The same conclusion should be reached when the question is one of substance or procedure for on such a question there can be no perpetual succession of references by one law to the other and then back again. If the courts of the jurisdiction whose law is the proper governing law hold that a given rule or principle of law of that jurisdiction is one of substance, they would not refer the question to the law of any other jurisdiction; if they held it to be one of procedure, they would not expect it to apply to a suit in another jurisdiction.

Even if we reject the "vested rights" theory, and accept the view of those who hold that in all cases the court enforces only rights created by its own law, we should reach the same result in determining the extent of the right for the foreign law and the rights created by it are operative facts which the court should consider.²⁴ It certainly cannot be contended that in a conflict of laws case the court is to decide solely on the basis of what it conceives to be just, or socially expedient with reference alone to that particular controversy between those two parties. Such a procedure would disregard entirely the social interests which demand that law be certain and predictable. Those interests our common law technique recognizes by requiring the courts, in reaching their decisions, to apply to the facts principles which have been developed by past experience and tested in numerous cases. In the field of conflict of laws there is no principle better established than that the substantive rights and obligations of the parties, which have arisen because of some completed transaction, should not be affected by the subsequent selection of the forum in which redress is sought, whether that selection results from the voluntary choice of the plaintiff or is compelled by the necessity of obtaining personal jurisdiction over the defendant. Even though all do not agree with the statement of Lord Eyre:

²³ *Op. cit. supra* note 20, § 8.

²⁴ Cook, *op. cit. supra* note 21; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 *YALE L. J.* 743; Stumberg, *Foreign Created Rights* (1930) 8 *TEX. L. REV.* 173.

"I cannot conceive that what is no personal obligation in the country in which it arises, can ever be raised into a personal obligation by the laws of another, . . ." ²⁵

everyone should agree that it should not be raised into an obligation unless exceptional circumstances so require.

Concerning the sugar contracts referred to at the beginning of this article,²⁶ it would seem quite clear that any lawyer who was consulted by one of the buyers would feel safe in advising his client that the question was governed by the laws of Pennsylvania, where the contract was both made and to be performed, and that, by the decisions of the highest court of that state, the memorandum was not sufficient to make the contract binding. Both the client and the attorney would be justified in resenting, after the client had acted on such advice, a federal decision that the contract was binding merely because service on the client could be obtained in another jurisdiction which regarded the Statute of Frauds as affecting the remedy only and which did not have a statute as strict as that of Pennsylvania, or did not place as strict a construction upon it.

Those courts in other jurisdictions which contented themselves with looking at the Pennsylvania law and finding that such law, as a matter of substance, held that such contracts were not binding, or at least that breach of them did not give rise to a secondary right to recover damages if defendant chose to rely on the Statute of Frauds,²⁷ were, therefore, correctly applying the principles pertinent to the situation. The court which discussed the law of the forum as affecting the remedy²⁸ did not meet the first problem involved in that suit; only if a cause of action exists does it become material to determine whether the procedural rules of the forum permit the enforcement of such cause of action.

²⁵ *Melan v. Fitzjames*, 1 Bos. & P. 138, 141 (Eng. 1797).

²⁶ *Supra* notes 1-8.

²⁷ *Supra* note 7.

²⁸ *Supra* note 8. In this case the statute of the forum was the same as that of Pennsylvania, but had been construed differently.

In the release case presented to the Arkansas court²⁹ it is apparent that, before suit was begun in Arkansas, the Missouri right of action was barred by the release and that bar would continue until a return of the consideration given for the release was tendered. The bringing of the suit in Arkansas ought not to change the substantive rights and obligations of the parties. While the mode of pleading and proof by which such tender can be shown in the Arkansas court is governed by Arkansas law, the making of the tender ought still to remain a condition precedent to any right of action.

After the court has determined that, by the proper law governing the transaction, there is a recognized right of action to support the suit, it can then look to its own law to determine whether any of its procedural rules prevent the successful prosecution of the action in that forum. Keeping these two questions thus separate would have the great practical advantage of making obvious the effect of the judgment upon subsequent proceedings in another jurisdiction. If the decision is only that some procedural rule of the forum prevents maintenance of the action, the judgment can never be pleaded as a bar to an action elsewhere, whereas the determination that no substantive right existed, if rendered by a court of competent jurisdiction, would be conclusive on that question everywhere.

This approach does not, of course, eliminate all of the difficulties which have confused courts in dealing with this question. Whether the law of another state on a given subject is one which affects substance or procedure in the conflict of laws sense is a question which will seldom be found to have been decided by the courts of that state, and the language in which the rule is stated, either by the court or legislature, having ordinarily been chosen without considering the conflict of laws problem, is not a safe guide for the solution of that problem.³⁰ The only ade-

²⁹ *Supra* note 9.

³⁰ The holding of *Leroux v. Brown*, 12 C. B. 801 (Eng. 1852), that the fourth section of the Statute of Frauds which relates to contracts for the sale of goods provides that "no action shall be brought" on such a contract unless there is compliance with the statutory requirements, establishes a rule of procedure, and that a distinction should be made between that section and other

quate method for reaching a satisfactory conclusion is to examine the statute or rule in the light of the evils which led to its enactment or promulgation, the policy which underlies it, and all the consequences which have resulted from it.³¹

It cannot be safely assumed that the distinction between right and remedy adopted for other purposes, is always applicable in conflicts cases. It has been suggested that the test, determinative of whether the law of the forum affects remedy only, is this: if the law were a statute of the proper law of the transaction, enacted subsequent thereto, could it be constitutionally applied to that transaction without destroying vested rights?³² But there is at least one obvious distinction between the two situations. Even a statute which admittedly affects the remedy only cannot be applied to a past transaction, if the effect of such application is to cut off all remedy in that jurisdiction,³³ while no state is under any obligation to furnish a remedy for, or even a tribunal for the determination of, claimed rights originating under foreign laws.³⁴

Even if we find a precedent for holding a certain rule of one jurisdiction to be either of substance or of procedure, we must guard against the fallacy of assuming that such precedent is authority for a determination that the rule does not also affect procedure or substance. Where a court has held that a rule of its own jurisdiction does not apply to an action brought therein on a foreign cause of action for the reason that its rule is one

sections which state "no contract shall be allowed to be good," has been criticized. See 2 WHARTON, *op. cit. supra* note 15, §§ 690a-690d; GOODRICH, *op. cit. supra* note 15, § 88. Page, *Effect of Failure to Comply with Wisconsin Statute of Frauds* (1927) 4 WIS. L. REV. 324, shows that a change in the language of a New York section of the Statute of Frauds, which was copied in Wisconsin, and which was construed to make that section affect the right, apparently was made by the revisers of the New York statutes without any purpose of changing the law.

³¹ For an excellent illustration of the use of this method, see Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311, 320-331.

³² MINOR, *op. cit. supra* note 15, § 180.

³³ 12 C. J. 974 *et seq.*

³⁴ Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 24 Sup. Ct. 92 (1903). Apparently no state has undertaken to enforce a right under a foreign compensation act unless that act provides for action in court instead of proceedings before a commission. See Dwan, *Workmen's Compensation and the Conflict of Laws* (1927) 11 MINN. L. REV. 329, 331.

affecting the substance,³⁵ the real holding is that it does not affect the procedure; likewise, where a court holds that a rule of another jurisdiction does not apply to an action before it, based on a cause originating in the other jurisdiction, for the reason that such rule is one affecting the procedure,³⁶ the real holding is that the rule does not affect the substance. On the other hand, where a court holds a rule of its own to be one of procedure and, therefore, applicable to an action on a foreign cause of action,³⁷ or holds a rule of another jurisdiction to be one of substance and, therefore, applicable to a transaction occurring in the other jurisdiction for which action is brought in the forum,³⁸ we cannot logically deduce therefrom that the former rule is not also one affecting substance, or that the latter does not also affect procedure. Both analysis and authority show that the same rule of a given jurisdiction may, and often does, affect both substance and procedure. It is this fact that leads to most of the difficulty in this portion of the field of conflict of laws, and the failure to consider this fact has led to much of the confusion therein.

Legal rights have been classified into primary, secondary and remedial rights.³⁹ To these might be added procedural rights auxiliary to the remedial right, or right of action, such as rights to certain process, rights to be heard by attorney and to testify, *etc.* Clearly primary rights are substantive, procedural rights are procedural.⁴⁰ It is more difficult to say how rights of the two intervening groups should be classified, but if we accept the classification which treats secondary rights as substantive and

³⁵ *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163 (1891); *Coats v. Chicago, R. I. & P. Ry. Co.*, *supra* note 13.

³⁶ *Downer v. Chesbrough* 36 Conn. 369 (1869).

³⁷ *Hoadley v. Northern Transport Co.*, *supra* note 10.

³⁸ *Hartman v. Louisville & N. Ry. Co.*, *supra* note 14.

³⁹ GOODRICH, *op. cit.* *supra* note 15, § 81.

⁴⁰ The holding of *Atchinson, T., & S. F. Ry. Co. v. Spencer*, 20 F. (2d) 714 (C. C. A. 9th, 1927), that a statute of the state in which the trial was held which required the issue of contributory negligence in all cases to be submitted to the jury, affects the substance has been generally criticized. See (1927) 41 HARV. L. REV. 254; (1928) 12 MINN. L. REV. 263; (1927) 6 N. C. L. REV. 102. The argument in (1928) 26 MICH. L. REV. 573 in favor of this holding is based on the view that the rule that the law of the forum governs matters of procedure should be abrogated or, at least, applied only where absolutely necessary to preserve orderly procedure in the court, rather than on any construction of the rule in question as one of substance in the analytical sense.

remedial rights as procedural, which is logically defensible and in accord with the weight of authority,⁴¹ we have made our division between substance and procedure at the point in our analytical scheme where the distinction between the two becomes the most blurred.

For example, suppose defendant has contracted to sell to plaintiff a chattel, the contract being made and performable in state *X*, and the chattel situated there, so that the law of that state clearly governs the substantive rights of the parties. Defendant has become insolvent, and plaintiff brings suit in state *Y* for specific performance of the contract. By the law of state *X* insolvency of the defendant is considered to make the remedy at law inadequate so that equity may decree performance of such a contract; by the law of state *Y* insolvency does not have that effect. That rule of state *X* gives, because of the breach of plaintiff's primary right to performance of the contract, a secondary right to a decree for specific performance, or to specific reparation for the breach. In the Anglo-American system the existence of that secondary right is only possible if it is accompanied by a remedial right in a court of equity. We cannot, therefore, say that a rule on this subject affects secondary right only nor that it affects remedy only; it affects both.⁴² Our only logical way out of the dilemma is to say that in so far as it affects the secondary right the rule of state *X* ought to govern; in so far as it affects the remedial right the rule of state *Y* ought to govern. In other words, the plaintiff has a valid secondary right to specific performance, but that right cannot be enforced in state *Y* because the remedial right is governed by the law of the forum, and that law, by denying access to its courts of equity in such a case, has denied the existence of such remedial right.

⁴¹ GOODRICH, *op. cit. supra* note 15, § 91; Note (1930) 14 MINN. L. REV. 665.

⁴² No case has come to notice in which a court has been required to determine whether a rule allowing or refusing specific performance is one of substance or procedure. 2 WHEARTON, *op. cit. supra* note 15, § 498, says specific performance is governed by the law fixed for the performance of the contract, thereby implying that it is a question of substance, though his attention was not then directed to the distinction between substance and procedure. DICEY, *op. cit. supra* note 15, 802, says the right to specific performance is governed by the *lex fori*. Neither author cites any cases in support of his statement.

It may also be that the right to specific performance gives to the plaintiff in state *X* an equitable title to the chattel which, it would seem, should be classified as a primary right. That title, then, should be recognized and protected in state *Y* after the chattel has been taken into that state.

On the other hand, the determination of whether the secondary right is one for specific performance or one for damages for the breach of the primary right determines also the existence or non-existence of many procedural rights. It is apparent, then, that we cannot say without qualification that the rule of state *X*, that insolvency of the seller of a chattel makes the remedy at law inadequate so that a court of equity may decree specific performance of the contract, is a rule of substance only, or a rule of procedure only; it affects both.

Conversely, there are situations where a rule which seems to be clearly substantive has procedural consequences. Probably all would agree that the rule of Wisconsin, that a scroll on a document with the word "seal" written inside it is sufficient to make the document a sealed instrument, is a rule of substantive law. But if a deed, so sealed, contains covenants of warranty, and an action for breach of such covenants is brought in a jurisdiction where the common law forms of action are still in use, it is equally clear that the question whether the proper form of action is covenant on an instrument under seal or assumpsit on a simple contract is a question of the law of the forum. Thus, the United States Supreme Court has held in a case in which the law of the forum held such a scroll not to be a seal that the proper form of action was assumpsit, though admitting* that, for the purpose of determining compliance with the requirement of both the law of Wisconsin and the law of the forum that a deed to land must be under seal to be valid, the Wisconsin definition of a seal must be applied.⁴³

⁴³ *Le Roy v. Beard*, 8 How. 451 (U. S. 1850). Accord: *Steele v. Curle*, 4 Dana 381 (Ky. 1836); *Trasher v. Everhart*, 3 Gill & J. 234 (Md. 1831); *McClees v. Burt*, 5 Metc. 198 (Mass. 1842); *Douglas v. Oldham*, 6 N. H. 150 (1833); *Warren v. Lynch*, 5 Johns. 239 (N. Y. 1810); *Andrews v. Herriot*, 4 Cow. 408 (N. Y. 1825). In *Watson v. Brewster*, 1 Pa. 381 (1845), it was held that the Statute of Limitations affected procedure and, therefore, it did not run against an instrument which was under seal according to the *lex fori*, though it

The ordinary Statutes of Limitations are generally held to govern procedure and not substance, and undoubtedly the fear that judicial decisions and particularly verdicts of juries could not safely be based on testimony as to transactions long past had a great influence on the enactment of such statutes. In so far as that reason persists, it is proper to apply the law of the forum, and refuse to entertain an action after the lapse of time prescribed by the law of the forum, even though a longer time is allowed by the proper law governing the substance of the transaction. However, it is quite clear that the running of the statutory time prescribed by the law of the transaction terminates the secondary right, even if it does not destroy the primary right. In accordance with this view Judge Story argued that a cause of action barred by the statute in force where it accrued should be barred everywhere, but he felt constrained by precedent to hold that the statute affected only the remedy and that the statute of the forum alone applied.⁴⁴ The position advocated by Judge Story has been adopted by statute in many states⁴⁵ and is further vindicated by the increasing tendency of courts to construe the Statute of Limitations of the place where the cause of action accrued as one conditioning the right and not merely barring the remedy.⁴⁶ The result of both the statutes and the decisions to this effect is to require the action to be brought within the period limited either by the law of the forum or the law of the state in which the transaction was effected, whichever is the shorter, since the remedy is terminated by the former law or the right by the latter.

was only a simple contract according to the proper law of the contract. 2 WEARTON, *op. cit. supra* note 15, § 747, groups with these cases others which apply the law of the forum to the determination of the necessity for pleading and proving consideration for an instrument which is not sealed, according to the law of the forum, but is according to the proper law of the contract: another illustration of the confusion resulting from failure to recognize that the same principle of law may affect both substance and procedure.

⁴⁴ *LeRoy v. Crowminshield*, 2 Mason 151 (C. C. Mass. 1820).

⁴⁵ Note (1900) 48 L. R. A. 625, 630.

⁴⁶ "The ordinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori*, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued." Holmes J., in *Davis v. Mills*, 194 U. S. 451, 24 Sup. Ct. 692 (1904).

The original Statute of Frauds was likewise made necessary by the inability of our courts, because of the trial by jury and the restrictions on testimony by parties, to prevent the defrauding of innocent parties through the fabrication of perjured testimony as to the existence or terms of oral contracts. The difficulties which led to its enactment were procedural, but its effect was to deny at least any secondary right, as well as to deny any remedial right. On the other hand, the policy against permitting the substantive rights of the parties to be affected by the subsequent selection of the forum, which is particularly strong with reference to commercial contract rights, is violated by refusing relief on a foreign contract, valid by the proper law governing it, but which fails to comply with the Statute of Frauds of the forum. Perhaps the most satisfactory solution of this difficulty was suggested by the Minnesota court in an action brought on the guaranty of an Iowa lease.⁴⁷ There was no question but that the proper law of the guaranty as well as of the lease was Iowa law for both were made in Iowa and to be performed there, and the leased premises were situated there. The guaranty was in writing and complied with the Iowa Statute of Frauds, but it did not state the consideration, as required by the Minnesota statute. The court noticed that the main object of the statute was "to circumvent the occasion for perjury and consequent fraud by providing for written evidence in respect to certain contracts", but also was keenly aware that the lease and guaranty had been drawn with only the Iowa law in mind and that to deny relief because of the Minnesota statute would be an injustice. It held that, at least in actions on contracts made in other states where a Statute of Frauds was in force, the requirement of a writing, and the determination of its sufficiency, were matters of substance to be governed by the proper law of the contract, and not by the law of the forum. Is not that equivalent to a holding that the statute of the forum is procedural in so far only as it is necessary to protect procedural policy against the danger of perjured testimony, and that in other respects it is a substantive regulation of

⁴⁷ *Halloran v. Jacob Schmidt Brewing Co.*, 137 Minn. 141, 162 N. W. 1082 (1917).

the formal requisites of a contract, which does not apply to foreign contracts?

This solution of the problem meets the objection that has been made⁴⁸ to holding that one statute is procedural and another substantive, namely that under such holdings we might have an oral contract governed by the law where the former statute was in force, on which action is brought where the latter is in force so that the action would be maintainable because neither statute applied to that contract.⁴⁹ Under the reasoning herein suggested, the fact that the statute of the forum had, in other cases, been construed to affect the substance, would not preclude a holding that it also affected the procedure at least to the extent of requiring some written evidence of the contract.

A similar method of approach will aid in solving the other problems in this field of the conflict of laws. Those problems are difficult mainly because the rules involved in them actually do affect both substance and procedure, and any attempt to say they affect only one or the other produces confusion and disagreement. To recognize that they do affect both, and to apply the proper law of the transaction to the determination of what primary and secondary rights arose out of the transaction, either because that is a logical consequence of the common law principle of the territoriality of law, or because of the fundamental policy that substantive rights of the parties shall not depend on the subsequent choice of the forum, and then to apply the law of the forum only to the extent necessary to preserve its procedural policies, ought to lead to a reduction, if not to the entire elimination, of this confusion and disagreement. Such an approach, by keeping prominently before the courts the practical effect of denying relief on foreign causes of action, should also lead to a lessening of the area over which Anglo-American law has extended the scope of its procedure.⁵⁰

⁴⁸ 2 WHARTON, *op. cit. supra* note 15, § 690b.

⁴⁹ *Marie v. Garrison*, 45 N. Y. Super. Ct. 157 (1880), 13 Abbott's N. C. 210 (1883), apparently so holds.

⁵⁰ Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311, 327 *et seq.*

As a result of this approach, also, we eliminate the preliminary problem of ascertaining what law is to determine whether a given rule is substance or procedure, not by assuming, as has often been the case, the solution of that problem in the determination of the main problem, but by recognizing that no one law need classify the rule as one or the other for all situations. The law of the transaction should be employed to determine how far its applicable rules affect the substantive rights of the parties, while the law of the forum determines how far its applicable rules affect the procedure for enforcing whatever rights may have been given by the law of the transaction.