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THE STATUTE OF FRAUDS AND THE CONFLICT OF LAWS

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I

A study of the American decisions relating to the statute of frauds from the standpoint of the Conflict of Laws reveals the fact that there exists the greatest divergence of opinion with respect to contracts falling within the fourth and seventeenth sections of the original English statute of frauds. It is the purpose of this article to consider the problems that have been raised in connection with these cases, and to suggest a solution. Of the contracts falling within the fourth section of the statute of frauds those presented to the courts involving the Conflict of Laws have been generally contracts not to be performed within a year, contracts of guaranty, and contracts relating to land.

ENGLISH LAW—The leading case on the subject, *Leroux v. Brown*,¹ laid down the English law with respect to cases falling within the fourth section of the statute of frauds. An oral agreement had been entered into at Calais, France, between the plaintiff and the defendant under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of 100 pounds per annum, to collect poultry and eggs in that neighborhood for transmission to the defendant in England, the employment to commence at a future day, and to continue for one year. In a suit for breach of contract evidence was given on the part of the plaintiff to show that by the law of France such an agreement was capable of being enforced, although not in writing. For the defendant it was insisted that notwithstanding the contract was made in France, when it was sought to enforce it in England, it must be dealt with according to

¹ (1852) 12 C. B. 801.

English law, and, being a contract not to be performed within a year, section 4 of the statute of frauds required it to be in writing. The judges of the Common Pleas Court unanimously held that the defendant's contention was sound and that a nonsuit should be entered. This conclusion was based upon the particular wording of the fourth section ("no action shall be brought") and the decisions of the courts which had held that a writing subsequent to the agreement and addressed to a third person was a sufficient memorandum of the agreement, showing that the above section involved "procedure" and not "the right and validity of the contract itself." The cases of *Carrington v. Roots*² and *Reade v. Lamb*,³ which had considered all contracts falling either within the fourth or the seventeenth section of the statute of frauds as void, were overruled. In his opinion Jervis, C. J., said:⁴

"I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at the words of the 4th section of the Statute of Frauds, and contrasting them with those of the 1st, 3d, and 17th sections, this conclusion seems to me to be inevitable. The words of section 4 are, 'no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized.' The statute, in this part of it, does not say, that, unless those requisites are complied with, *the contract shall be void*, but merely that *no action shall be brought upon it* and, as was put with great force by Mr. Honyman, the alternative, 'unless the agreement, or some memorandum or note thereof, shall be in writing,'—words which are satisfied if there be any written evidence of a previous agreement,—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced in writing. This therefore may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice."

Referring to the difference in the wording between the fourth and the seventeenth sections, Maule, J., said:⁵

"But we have been pressed with cases which it is said have decided that the words 'no action shall be brought' in the 4th section, are equivalent to the words 'no contract shall be allowed to be good,' which are found in another part of the statute. . . . It may be, that, for some purposes, the words used in the 4th and 17th sections may be equivalent; but they are clearly not so in the case now before us; for, there is

² (1837, Exch.) 2 M. & W. 248.

³ (1851) 6 Exch. 130.

⁴ (1852) 12 C. B. 801, 824.

⁵ *Ibid.* 826-827.

nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we say, is, that they prohibit the Courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract.”

Accordingly, because of its special phraseology, the 4th section was deemed not to enter at all into the validity of the contract, not even into its form, but to render it merely unenforceable.

Story's view that “all the formalities, proofs, or authentications of them which are required by the *lex loci*, are indispensable to their validity everywhere else”⁶ was called to the attention of the court, but was not accepted.

The suggested distinction between the fourth and seventeenth sections, because of the difference in their wording, was never fully adopted by the English courts. The prevailing view has been that such difference was unintentional, both sections relating only to the enforceability of the contract.⁷ In accordance with this view the English Sale of Goods Act has changed the former wording of the seventeenth section to bring it into conformity with the fourth section.⁸ It now provides that a sale of goods not complying with the terms of the statute “shall not be enforceable by action.”

The English law on the subject is therefore one of extreme simplicity. So far as a contract falls within the fourth or the seventeenth section of the English statute of frauds, it is unenforceable in England, if the requisites of the English statute have not been met, irrespective of the requirements of the law of the place of contracting, of the law of the

⁶ Story, *Conflict of Laws* (1st ed. 1834) sec. 262. After the decision in *Leroux v. Brown* a note was added in which the result of the English case was accepted. Story, *Conflict of Laws* (8th ed. 1883) sec. 576, note a.

⁷ *Bailey v. Sweeting* (1861) 9 C. B. (N. S.) 843; *Sievwright v. Archibald* (1851) 17 Q. B. 103; Brett, L. J., in *Britain v. Rossiter* (1879, C. A.) L. R. 11 Q. B. Div. 123; Lord Blackburn, in *Maddison v. Alderson* (1883, H. L.) L. R. 8 A. C. 467; Viscount Haldane, in *Morris v. Baron* [1918, H. L.] A. C. 1, 15. See, however, Lord Finlay to the contrary. *Ibid.* 11. The same construction has been placed upon the seventh section of the statute of frauds. *Rochefoucauld v. Boustead* [1897, C. A.] 1 Ch. 196.

Dissenting voices have not been lacking, however. “I am not satisfied that either of the sections of the statute of frauds to which reference has been made warrants the decision [of *Leroux v. Brown*].” Willes, J., in *Williams v. Wheeler* (1860) 8 C. B. (N. S.) 299.

⁸ “Sec. 4 of the Sales of Goods Act,” says Viscount Haldane, “relates to evidence and procedure, and not to substantive validity.” *Morris v. Baron*, *supra* note 7, at p. 15. Lord Finlay was of the opinion that the distinction referred to in the text had become established in English law and concluded therefore that the Sale of Goods Act altered the law. *Ibid.* 11.

place of performance, or, if the contract relates to land, of the situs of the property.

AMERICAN LAW—Contrary to the English law, the law of the United States is in an unsettled condition. This situation results in the first place from the variations in the wording of the two sections of the statute of frauds under consideration. While the wording of the fourth section of the original English statute has been followed by the majority of states, there are many in which it has been modified. Instead of providing that "no action shall be brought" it is frequently said that the contract shall be "invalid"⁹ or "void."¹⁰ Sometimes the statute reads that the contract shall not be "binding."¹¹ By providing that "no evidence . . . is competent, unless it be in writing," the Iowa statute¹² makes it clear that the statute of frauds is intended to lay down a mere rule of evidence.

The wording of the seventeenth section of the original English statute of frauds providing that such contracts "shall not be allowed to be good" was retained in a number of states.¹³ In many states such a contract was declared to be "invalid"¹⁴ or "void,"¹⁵ or not "binding."¹⁶

⁹ Calif. Civ. Code, 1915, sec. 1624; Idaho, Comp. Sts. 1919, sec. 7976; Mont. Rev. Code, 1921, sec. 7519; N. D. Comp. Laws, 1913, sec. 5888; Okla. Comp. Laws, 1909, sec. 1089; S. D. Rev. Code, 1919, sec. 855-856. The section of the Idaho statute adds the following: "Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents."

¹⁰ Ala. Code, 1907, sec. 4289; Colo. Rev. Sts. 1908, secs. 2662, 2666; Mich. Comp. Laws, 1915, sec. 11981; Minn. Gen. Sts. 1913, sec. 7003 (contracts relating to land); Neb. Comp. Sts. 1922, sec. 2458; Nev. Rev. Laws, 1912, sec. 1075; N. Y. Cons. Laws, 1909, ch. 41, sec. 31; N. C. Cons. Sts. 1919, sec. 988 (contracts relating to land); Or. Rev. Laws, 1920, sec. 808; Utah, Comp. Laws, 1917, sec. 5817; Wash. Codes & Sts. 1910, sec. 5289; Wis. Sts. 1921, secs. 2304, 2307; Wyo. Comp. Sts. 1920, secs. 4719, 4726.

Or. Rev. Laws, 1920, sec. 808, adds that "evidence therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents."

¹¹ Ark. Dig. of Sts. 1921, sec. 4862. In Georgia the agreement is not "binding on the promisor." Code, 1911, sec. 3222.

¹² Ann. Code, 1897, sec. 4625.

¹³ Conn. Gen. Sts. 1902, sec. 1090; Fla. Rev. Gen. Sts. 1920, sec. 3873; Hawaii, Rev. Laws, 1915, sec. 2662; Mass. Rev. Laws, 1902, ch. 74, sec. 5; Hemingway's Ann. Miss. Code, 1917, sec. 3123; Mo. Rev. Sts. 1919, sec. 2170; S. C. Laws, 1912, sec. 3738.

¹⁴ Calif. Civ. Code, 1915, secs. 1739, 1624 (4); Idaho, Comp. Sts. 1919, sec. 7976 (4); Burns' Ann. Ind. Rev. Sts. 1914, sec. 7469; Me. Rev. Sts. 1916, ch. 114, sec. 5; Mich. Comp. Laws, 1915, sec. 11835; Mont. Rev. Code, 1921, sec. 7519(4), 7591; N. H. Pub. Sts. 1901, ch. 215, sec. 3; N. D. Comp. Laws, 1913, sec. 5888; Okla. Comp. Laws, 1909, sec. 1089(4); S. D. Rev. Code, 1919, sec. 857; Vt. Gen. Laws, 1917, sec. 1877.

¹⁵ Colo. Rev. Sts. 1908, sec. 2666(4); Minn. Gen. Sts. 1913, sec. 6999; Neb. Comp. Sts. 1907, sec. 6028; Nev. Rev. Laws, 1912, sec. 1076; N. J. Comp. Sts. 1911, p. 2615, sec. 6; N. Y. Cons. Laws, 1909, ch. 41, sec. 31; Or. Laws, 1920, sec. 808(5); Utah, Rev. Sts. 1898, sec. 2469; Wis. Sts. 1921, sec. 2308; Wyo. Comp. Sts. 1910, sec. 3752.

In Iowa, on the other hand, it was provided again that "no evidence is competent unless it be in writing."¹⁷

Many of the above states have adopted in recent years the Uniform Sales Act, which has accepted the wording of the English Sale of Goods Act, so that the contract is now "not enforceable by action," if the requisites of the statute are not met.¹⁸

The different holdings by the American courts with respect to the statute of frauds from the standpoint of the Conflict of Laws cannot be accounted for, however, solely by the above differences in the wording of the statutes. Even where the wording of the statute was identical with that of the English statute not infrequently a different conclusion has been reached from that of *Leroux v. Brown*, the English doctrine not being deemed sound on principle nor in harmony with the requirements of business. The cases on the subject may be roughly classified as follows:

(1) Some courts have been inclined to adopt the distinction suggested by *Leroux v. Brown*,¹⁹ according to which, if the statute of the forum provides that "no action shall be brought" or words of similar import, it is deemed to affect "procedure." In such jurisdictions no contract not complying with the terms of the statute can be enforced, even though such contract is valid and enforceable under the law of the place of contracting, the law of the place of performance, and of the situs of the property. On the other hand, if the contract is declared to be "invalid" or "void," it is deemed to affect the "substance" of the contract. Under such a statute the contract is not controlled by the internal law of the forum, but by the law of the place of contracting, the law of the place of performance, or the law of the situs of the property, as the case may be. Contracts for the sale of goods were accordingly

¹⁷ Ark. Dig. of Sts. 1921, sec. 4864. The Georgia statute provides that it shall not be "binding on the promisor" [Code, 1911, sec. 3222(7)] and the Washington statute provides that the contract shall not "be good and valid" (Codes & Sts. 1910, sec. 5290).

¹⁸ Ann. Code, 1897, sec. 4625.

¹⁹ Alaska, Laws, 1913, ch. 66, sec. 4; Ariz. Rev. Sts. 1913, sec. 5152, Conn. Gen. Sts. 1918, sec. 6131; Idaho, Laws, 1919, ch. 149, sec. 4; Smith's Ill. Rev. Sts. 1921, ch. 121½, sec. 4; Iowa, Laws, 1919, ch. 396, sec. 4; Md. Ann. Code 1911, art. 83, sec. 25; Mass. Gen. Laws, 1921, ch. 106, sec. 6; Mich. Comp. Laws, 1915, sec. 11835; Minn. Gen. Sts. Supp. 1917, sec. 6015(4); Neb. Comp. Sts. 1922, sec. 2473; Nev. Rev. Laws, 1919, p. 3034, sec. 4; N. J. Comp. Sts. 1910, p. 4648, sec. 4; N. Y. Cons. Laws, 1909, ch. 41, sec. 85 amended by Laws, 1911, ch. 571; N. D. Laws, 1917, ch. 202, sec. 4; Ohio, Gen. Code, 1921, sec. 8384; Pa. Sts. 1920, sec. 19652; R. I. Gen. Laws, 1909, p. 911, sec. 4; S. D. Laws, 1921, ch. 355, sec. 4; Tenn. Laws, 1919, ch. 118, sec. 4; Utah, Comp. Laws, 1917, sec. 5113; Vt. Laws, 1921, No. 171, sec. 4; Wis. Sts. 1921, sec. 1684t(4) (the old wording is still found in sec. 2308); Wyo. Comp. Sts. 1920, sec. 4726.

²⁰ *Third Nat. Bk. v. Steel* (1912) 129 Mich. 434, 88 N. W. 1050 (representations as to credit of another); *Kleeman & Co. v. Collins* (1872, Ky.) 9 Bush. 460 (contract not to be performed in a year).

held by most courts to be controlled in the matter of the statute of frauds by the *lex loci contractus*.²⁰ In view of the change in the language of the seventeenth section, introduced by the Uniform Sales Act, the courts belonging to this group and sitting in states in which the Act has been adopted, may feel compelled, on the ground of consistency, to hold that the section in its new form affects procedure only.

(2) Another group of cases holds that the difference in the wording of the fourth and seventeenth sections of the statute of frauds is purely accidental and does not justify therefore a difference in the operative effect of the sections. There is no agreement, however, as to whether the statute affects "substance" or "procedure." Some courts agree with the English courts and hold that both sections concern only the "enforceability" of the contract, or "procedure," or prescribe the "evidence" by which the agreement must be proved.²¹ Others, declining to accept the English view, have reached the conclusion that both sections of the statute of frauds affect the "substance" of the contract, which is controlled therefore also in this regard, from the standpoint of the Conflict of Laws, by the law governing its substantive requirements in general.²² One of the leading cases supporting the latter view is *Cochran v. Ward*, in which suit was brought in Indiana for the breach of a parol lease of lands in the State of Illinois, the contract having been entered into in the latter state. The Illinois statute of frauds provided that "no action shall be brought to charge any person upon any contract for the sale of lands . . . , or any interest in or concerning them for a longer term than one year, unless such contract, or some memorandum or note thereof, shall be in writing. . . ." In answer to the argument that the statute of frauds related to "procedure" and was controlled by the internal law of the forum, the learned court said:²³

²⁰ *Hunt v. Jones* (1879) 12 R. I. 265; *Perry v. Mt. Hope Iron Co.* (1886) 15 R. I. 380, 5 Atl. 632; *Houghtaling v. Ball* (1853) 19 Mo. 84, (1855) 20 Mo. 563; *Jones v. Nat. Cotton Oil Co.* (1903) 31 Tex. Civ. App. 420, 72 S. W. 248; *Brockman Commission Co. v. Kilbourne* (1905) 111 Mo. App. 542, 86 S. W. 275; *D. Canale & Co. v. Pauly* (1914) 155 Wis. 541, 145 N. W. 372; *Franklin Sugar Refining Co. v. Holstein Harvey's Sons, Inc.* (1921, D. Del.) 275 Fed. 622.

²¹ *Townsend v. Hargreaves* (1875) 118 Mass. 325 (contract for sale of goods); *Bird v. Monroe* (1877) 66 Me. 337 (contract for sale of goods).

²² *Cochran v. Ward* (1892) 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581 (parol lease); *Miller v. Wilson* (1893) 146 Ill. 523, 34 N. E. 1111 (contract for sale of land); *Halloran v. Jacob Schmidt Brewing Co.* (1917) 137 Minn. 141, 162 N. W. 1082 (contract of guaranty); *Matson v. Bauman* (1918) 139 Minn. 296, 166 N. W. 343 (agreement to repurchase stock).

Judge Holt, in *Halloran v. Jacob Schmidt Brewing Co.*, *supra* note 22, said: "We believe no distinction should be made between the two sections because of the use of the language 'no action shall be maintained' in the one, and 'every contract shall be void' in the other; but that the phrases, in the connection in which they are used, mean one and the same thing, namely, to make a valid contract in this state, concerning subjects mentioned in said sections, a writing is required." 137 Minn. at p. 146, 162 N. W. at p. 1084.

²³ (1892) 5 Ind. App. 89, 94-95, 29 N. E. 795, 797.

"It is impossible to consider a contract separately from the remedy given by the law for its enforcement, because it is this that supplies it with legal vitality. The law is an essential factor in every contract, and is presumed to be considered by the parties in their deliberations. If the law of the place stamps upon an agreement the quality that it shall be voidable, and that its performance shall be a pure matter of conscience or grace with the parties, that quality becomes a part of the substance of the agreement, and characterizes it wherever it may be. A right without a remedy for its enforcement is a mere fiction. Thus it was said by Swayne, J., for the court in *Edwards v. Kearzey* (1877) 96 U. S. 595, 'it is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement.'

"At another place in the opinion the learned judge said: 'The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than its means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy are the same thing."'

"There can be no doubt, we think, that to the extent that the remedy affects the validity and obligation of a contract it is imported into and becomes an essential part of it, and characterizes it wherever it is the subject-matter of litigation.

"The Illinois statute of frauds became part of the agreement in suit and the provision that no action should be maintained for damages for the breach of the agreement became as much a part of its character and substance as if specifically incorporated therein. The right to defend against a contract growing out of any of its inherent qualities, becomes vested, and a right of property as much as the right to enforce any other beneficial provision. *Pritchard v. Norton* (1882) 106 U. S. 124, 1 Sup. Ct. 102; *Cooley, Constitutional Limitations*, 362, 369.

"This doctrine does not conflict with the general rule that in matters of procedure the *lex fori* controls. 'Procedure,' in this connection, applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial and the nature and effect of process, and perhaps to all other matters or remedy only, which are not incorporated into the contract as affecting its nature and obligatory character."²⁴

²⁴In the above case the law of the place of contracting and that of the situs coincided. Where they differ, the law is uncertain. There are a number of earlier cases which appear to sustain the application of the law of the situs. See *Davenport v. Karnes* (1873) 70 Ill. 467 (parol antenuptial contract); *Abell v. Douglas* (1847, N. Y.) 4 Denio, 305 (parol transfer of equitable interest); *Burrell v. Root* (1869) 40 N. Y. 496 (contract of sale); *Siegel v. Robinson* (1867) 56 Pa. 19 (contract of sale); *Bissell v. Terry* (1873) 69 Ill. 184 (authorization of agent to sell land); *Marie v. Garrison* (1883, N. Y. Super. Ct.) 13 Abb. New. Cas. 210; *Anderson v. May* (1872, Tenn.) 10 Heisk. 84 (oral lease for a longer term than one year). The cases were decided, however, before *Polson v. Stewart* (1897) 167 Mass. 211, 45 N. E. 737.

(3) There is another group of cases in which the fourth or the seventeenth section of the statute of frauds was passed upon without any expression of opinion regarding the other section.²⁵

(4) According to another view the statute of frauds is regarded as being based on moral grounds and as laying down a rule of public policy in the face of which a foreign contract, though valid and enforceable where made, cannot be enforced.²⁶

The federal courts deem themselves bound by the construction placed upon the statute by the Supreme Court of the state.²⁷

CONTINENTAL LAW—Statutes analogous to the English statute of frauds exist in certain continental countries, notably in those of the

The question was raised in the more recent case of *Meylink v. Rhea* (1904) 123 Iowa, 310, 98 N. W. 779 (contract for sale of Iowa land); and the view was there expressed that the law of the situs governs. The statement was not necessary for the decision, however, because the law of the situs and the *lex fori* coincided, and the evidence theory of the statute of frauds has been adopted by statute in Iowa. See also *Wilson v. Lewiston Mill Co.* (1896) 150 N. Y. 314, 44 N. E. 959.

As regards contracts not to be performed within a year and contracts of guaranty, a similar uncertainty exists as to whether the law of the place of contracting is applicable or that of the place of performance. No satisfactory cases in point have been found. *Turnow v. Hochstadter* (1876, N. Y. Sup. Ct.) 7 Hun, 80, and *Garnes v. Frazier* (1909, Ky.) 118 S. W. 998, would apply the law of the place of performance with respect to contracts not to be performed within a year, but that law coincided again with the *lex fori*. *Ringgold v. Newkirk* (1840) 3 Ark, 96, stated that the *lex loci* governed contracts of guaranty, but the statement was made merely by way of contrast with the *lex fori*. The contract was performable in the place of contracting.

²⁵ To the effect that the fourth section affects procedure or evidence see, in addition to cases mentioned in notes 19 and 21, *Heaton v. Eldridge* (1897) 56 Ohio St. 87, 46 N. E. 638 (agreement not to be performed within a year); *Buhl v. Stephens* (1898 C. C. Ind.) 84 Fed. 922; *Boone v. Coe* (1913) 153 Ky. 233, 154 S. W. 900 (contract for lease of land); *Downer v. Chesebrough* (1869) 36 Conn. 39.

To the effect that the fourth section affects the substance of the contract see, in addition to cases falling within this section, mentioned in note 22, *Fox v. Matthews* (1857) 33 Miss. 433 (contract for sale of slave); *Abell v. Douglas* (1847, N. Y. Sup. Ct.) 4 Denio, 305 (contract for sale of land); *Anderson v. May* (1872, Tenn.) 10 Heisk. 84 (contract for lease of land); *Wolf v. Burke* (1893) 18 Colo. 264, 32 Pac. 427 (contract for sale of land); *Howell v. North* (1913) 93 Neb. 505, 140 N. W. 779 (contract for sale of land).

To the effect that the seventeenth section affects the substantive rights of the parties, see *Hunt v. Jones* (1879) 12 R. I. 265; *Houghtaling v. Ball* (1853) 19 Mo. 84, (1855) 20 Mo. 563; *Kling v. Fries* (1876) 33 Mich. 275; *Brockman Commission Co. v. Kilbourne* (1905) 111 Mo. App. 542, 86 S. W. 275; *Canale v. Pauly* (1914) 155 Wis. 541, 145 N. W. 372; *Franklin Sugar Ref. Co. v. Holstein Harvey's Sons Inc.* (1921, D. Del.) 275 Fed. 622.

²⁶ *Barbour v. Campbell* (1917) 101 Kan. 616, 168 Pac. 879. See also *Emery v. Burbank* (1895) 163 Mass. 326, 39 N. E. 1026.

²⁷ *Buhl v. Stephens* (1898, C. C. Ind.) 84 Fed. 922; *Hotel Woodward v. Ford Motor Co.* (1919, C. C. A. 2d) 258 Fed. 322.

Code Napoléon. No contract involving more than 150 *francs* or *lire* can be proved, according to the provisions of the French²⁸ and Italian²⁹ Civil Codes, exclusively by parol testimony if the contract is civil and not commercial. In Austria and Germany, on the other hand, there is no similar legislation, all ordinary parol contracts being enforceable.

AUSTRIA—A contract falling within Article 1341 of the French Civil Code, which has been executed in Paris, will be enforced by the Austrian courts notwithstanding the absence of all written proof.³⁰ The Austrian courts say that the mode of proof is governed by the law of the forum and that the Austrian provisions relating to proof must therefore control. In reality the courts appear to be influenced by considerations of policy. As the contract was valid, though unenforceable, under the law of the place of contracting, and would have been both valid and enforceable, if it had been made within the territory of the forum, it seemed reasonable to the Austrian courts that such a contract should be enforced.

GERMANY—The German courts have taken the same view as the Austrian courts and for identical reasons.³¹

ITALY—The law of Italy is found in Article 10 of the Preliminary Dispositions of the Civil Code which provides as follows: "The means of proof of obligations are determined by the laws of the state in which the act was done."

For example, an oral contract of guaranty for less than 150 *lire* entered into in the United States and not complying with the statute of frauds of the place of contracting would therefore be unenforceable in Italy, notwithstanding the fact that it would have been valid and enforceable under Article 1341 of the Italian Civil Code. On the other hand, an oral contract of sale for \$100 would be enforceable in Italy, if it satisfied the *lex loci*, although there was no written evidence as required by Article 1341 of the Italian Civil Code.

FRANCE—There is no Code provision similar to that of Article 10 of the Preliminary Dispositions of the Civil Code of Italy, but the same conclusion has been reached by the courts. The leading case is *Benton v. Horeau*, decided by the Court of Cassation in 1880.³² A contract had been entered into in England involving more than 150 *francs*. The plaintiff sought to introduce evidence that no writing was required by English law and that the contract could be proved in England by oral testimony. The testimony was excluded by the trial court which relied upon Article 1341 of the French Civil Code. It was of the opinion

²⁸ Art. 1341, French Civil Code.

²⁹ Art. 1341, Italian Civil Code.

³⁰ Supreme Court, April 15, 1911, 8 *Revue de Droit International Privé* (1912) 147; Jan. 25, 1911, cited by Walter, *Internationales Privatrecht* (1921) 198.

³¹ *Obertribunal Stuttgart*, Sept. 25, 1858, 13 *Seuffert's Archiv* No. 182.

³² Aug. 24, 1880, *Dalloz*, 1880, 1, 447 (1880) 7 *Clunet*, 480.

that written evidence was required by the code not only in the interest of the parties, but in the interest of public order and public morality, the object of the provision being the prevention of multiplicity of suits. On the appeal Advocate General Desjardins urged before the Court of Cassation the following points: *First*. That the application of the law of the place of contracting to the mode of proof resulted as a necessary corollary from the adoption of the *lex loci* as the law governing the formal validity of contracts (*locus regit actum*), the mode of proof going *ad litis decisionem*, that is, to the rights and merits of the case. He relied in this connection upon several decisions of the Parliament of Paris which had taken this view with reference to a similar provision contained in the *Ordonnance Des Moulins*.³³ *Second*. That Article 1341 did not establish a rule of public policy, precluding the enforcement of a foreign contract, valid where made, which did not comply with its provisions. *Third*. That the enforcement by the courts of other states of a contract valid and enforceable under the *lex loci* would give effect to the intention of the parties, which governs in the matter of contracts.

The Court of Cassation adopted the conclusions of M. Desjardins and held that the mode of proof should be governed by English law, there being no French public policy opposed thereto.³⁴

SOUTH AMERICA—The rule that the means of proof are governed by the law of the place where the contract was made appears to be recognized generally in Latin America.³⁵

II

Before considering whether the English case of *Leroux v. Brown* or the decision by the French Court of Cassation in the case of *Benton*

³³ This provision, which was the prototype of Art. 1341 of the French Civil Code, required evidence in writing whenever the amount involved in a contract exceeded one hundred pounds.

³⁴ To the same effect *Beaulieu v. Roy*, Trib. Civ. de la Seine, June 12, 1887, (1887) 14 *Clunet*, 332; *Rich y Trutana v. Suarez de Mendoza*, Trib. Civ. de la Seine, Feb. 9, 1906 (1908) 35 *Clunet*, 1132; *Lord Abdy v. Lady Abdy*, Cass. June 14, 1899, (1899) 26 *Clunet*, 804, Dalloz, 1900, 1, 45; *Abdy v. Lady Abdy*, App. Amiens, March 15, 1900, (1900) 27 *Clunet*, 977; affirmed by Court of Cassation, Feb. 6, 1905, Dalloz, 1905, 1, 481; see also *Princess Ronkia & Prince Fahar Ben Aiad v. Kramer*, Cass. May 23, 1892, (1892) 19 *Clunet*, 1176; *Begg v. Le Curateur de l'Arondissement de Fort de France*, Court of Martinique, May 18, 1878, (1878) 5 *Clunet*, 507.

³⁵ Art. 12, Intr. Brazilian Civil Code; art. 47 Brazilian Bills of Exchange Act (1908); Carrio, *Apuntes de Derecho Internacional Privado* (1911) 384; Verdía, *Tratado elemental de Derecho Internacional Privado* (1908) 302; Restrepo-Hernández, *Derecho Internacional Privado* (1914) 532.

Art. 2 of the Convention on Civil Procedure, concluded at Montevideo, provides: "The proofs will be admitted and appreciated according to the law of the place which governs the juridical act giving rise to the litigation.

"Excepted from this provision are modes of proof which, by reason of their nature, are not authorized by the law of the place where the action is brought."

v. Horeau represents the better doctrine in the Conflict of Laws, it will be expedient to study the American decisions other than those relating to the Conflict of Laws, which throw light upon the nature of the statute of frauds. The unsatisfactory state of our law in the matter of the statute of frauds in its relation to the Conflict of Laws has resulted largely from the confusion in the decisions relating to the nature of the statute in general. If it can be shown by a proper analysis of the cases that the statute of frauds affects the substance of the contract and not merely procedure, the greatest stumbling-block in the way of a proper solution of our problem from the standpoint of the Conflict of Laws will have been removed.

From the standpoint of internal law it has been held (1) that a contract not complying with the terms of the statute is *void*; (2) that such a contract is *voidable*; (3) that the contract is *unenforceable*. Those supporting the third view disagree again as to (a) whether the statute of frauds involves a rule of evidence; (b) whether it lays down a rule of remedial procedure; or (c) whether it affects the substance of the contract.

Let us consider these different views and try to ascertain the extent to which they are consistent with the decisions of our courts relating to the statute of frauds. We may test the matter by an examination of the following propositions; which most of the courts support:

(1) The note or memorandum may be executed at any time before suit is brought, but not later.³⁶

(2) The statute may be satisfied although the writing is not made by the parties as the expression of their agreement. A letter to a third party may be sufficient,³⁷ or a letter repudiating the agreement after stating the terms of the bargain.³⁸

(3) An oral agreement within the statute of frauds will be enforced unless the statute is affirmatively pleaded.³⁹

(4) The defendant may admit that there was an oral contract and yet rely on the statute.⁴⁰

³⁶ *Bird v. Munroe* (1877) 66 Me. 337; *Thayer v. Luce* (1871) 22 Ohio St. 62; *Sheehy v. Fulton* (1894) 38 Neb. 691, 57 N. W. 395; *White v. Dahlquist Mfg. Co.* (1901) 179 Mass. 427, 60 N. E. 791; *Mladich v. McEneely* (1918) 212 Ill. App. 435; see also *Bill v. Bament* (1841, Exch.) 9 M. & W. 36.

³⁷ *Jacobson v. Hendricks* (1910) 83 Conn. 120, 75 Atl. 85; *Spangler v. Danforth* (1872) 65 Ill. 152; *Marks v. Cowdin* (1919) 226 N. Y. 138, 123 N. E. 139; see also *Gibson v. Holland* (1865) L. R. 1 C. P. 1.

³⁸ *Dury v. Young* (1882) 58 Md. 546; *Louisville Asphalt Varnish Co. v. Lorick* (1888) 29 S. C. 533, 8 S. E. 8; *Willis v. Imperial Underwear Co.* (1916 Sup. Ct.) 159 N. Y. Supp. 729; see also *Bailey v. Sweeting*, *supra* note 7.

³⁹ 1 Williston, *Contracts* (1921) 1017. There is much disagreement concerning the manner of taking advantage of the statute. In many jurisdictions the defendant may do so under the general issue. See Page, *Contracts* (2d ed. 1920) sec. 1418; Ann. Cas. 1912 D. 46, note.

⁴⁰ *Carpenter v. Murphy* (1918) 40 S. D. 280, 167 N. W. 175.

(5) Although the contract is not enforceable, it may be proved if its relation to the suit is collateral only.⁴¹

(6) The statute of frauds does not affect contracts made prior to its enactment.⁴²

Do the above propositions lend color to the view that the contract is *void*? Manifestly not. A void contract is a contract without legal effect. The propositions above set forth show conclusively that a contract not satisfying the statute of frauds is not destitute of legal effect.⁴³ There are many cases, nevertheless, which inaccurately describe such a contract as *void*. Such statements are generally made in connection with statutes declaring a contract not complying with the terms of the statute as "invalid" or "void," but sometimes also when the statute provides that "no action shall be brought."⁴⁴ The result in these cases is generally the same as would follow if the contract were regarded as "voidable"⁴⁵ or "unenforceable."⁴⁶

If a contract not satisfying the statute of frauds is not void, should it be deemed to be "voidable" or merely "unenforceable"?

" A voidable contract," says Anson, "is a contract with a flaw of which one of the parties may, if he please, take advantage. If he chooses to affirm, or if he fails to use his power of avoidance within a reasonable time so that the position of parties becomes altered, or if he takes a benefit under the contract, or if third parties acquire rights under it, he will be bound by it."⁴⁷

"The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of proof owing to lapse of time, want of written form, or failure to affix a revenue stamp. Writing in the first cases, a stamp in the last, may satisfy the requirements of law and render the contract enforceable, but it is never at any time in the power

⁴¹ *Vaught v. Pettyjohn* (1919) 104 Kan. 174, 178 Pac. 623; *Wilhelm v. Herron* (1920) 211 Mich. 339, 178 N. W. 769; *Grisham v. Lutric* (1898) 76 Miss. 444, 24 So. 169; *Perkins v. Allnut* (1913) 47 Mont. 13, 130 Pac. 1; *Coe v. Griggs* (1882) 76 Mo. 619.

⁴² *Keefe v. Keefe* (1912) 19 Calif. App. 310, 125 Pac. 929; *Wilson v. Owens* (1897), 1 Ind. Terr. 163, 38 S. W. 976; *Chaffe v. Benoit* (1882) 60 Miss. 34; *Dunn v. Tharp* (1845) 39 N. C. 7; *Hodges v. Johnson* (1855) 15 Tex. 570; *Collin v. Kittelberger* (1916) 193 Mich. 133, 159 N. W. 482; *McGavock v. Ducharme* (1916) 192 Mich. 98, 158 N. W. 173; *Dean v. Williams* (1910) 56 Wash. 614, 106 Pac. 130; *contra: Baker v. Herndon* (1855) 17 Ga. 568; *Kingley v. Cousins* (1860) 47 Me. 91.

⁴³ Such a verbal agreement was regarded in the light of a continuing offer by Bigelow, J., in *Marsh v. Hyde* (1855, Mass.) 3 Gray, 331, which becomes binding upon compliance with the statute. If that were so, all the elements of a contract would have to exist at the time of the making of the note or memorandum. This is not the law, however.

⁴⁴ 2 Page, *op. cit. supra* note 39, sec. 1400.

⁴⁵ *Ibid.* sec. 1398.

⁴⁶ *Ibid.* sec. 1399.

⁴⁷ Anson, *Contract* (Corbin's ed. 1919) 19.

of either party to avoid the transaction. The contract is unimpeachable, only it cannot be proved in court."⁴⁸

According to Anson the statute of frauds would render the contract not complying with its terms "unenforceable" rather than "voidable."

Professor Corbin in his notes to the above passages from Anson agrees with his conclusion, but takes exception to the statement that the difference between a "voidable" and an "unenforceable" contract "is mainly a difference between substance and procedure." Says Professor Corbin:⁴⁹

"In the case of a *voidable contract*, the acts of the parties operate to create new legal relations. These are usually described as including present rights and duties just as in the case of a valid contract, but subject to the power of avoidance at the will of one of the parties. Another way of describing a voidable contract is to say that there are no contractual rights or duties existing but that one of the parties has an irrevocable power to create them.

"The term *unenforceable contract* includes both void contracts and voidable contracts after avoidance. The author uses the term so as to describe certain other legal relations. When a contract has become unenforceable by virtue of the statute of limitations, the obligor or debtor has a power to create a new right in the other party as against himself by a mere expression of his will and without going through the formalities of contract. He cannot, however, as in a voidable contract, destroy the existing rights of the other party or create new rights in himself as against that other. When a contract is unenforceable by reason of the statute of frauds, either party has the legal power to create rights as against himself by signing a written memorandum, he has no such power to create rights in his own favor. The case of the revenue stamp is somewhat different. In these cases a legal relation exists that is different from that existing in the case of a void contract or of a voidable one. It appears that this difference is not as the author says 'mainly a difference between substance and procedure.' The difference between a power to create a right against another person and a power to create a right against only oneself is not merely procedural."

In the light of the foregoing a contract not satisfying the requirements of the statute of frauds is neither void nor voidable, but merely unenforceable. The important question remains, however, whether such lack of enforceability results from a rule of evidence, from a rule of remedial procedure, or from a rule of substantive law.

It is often said that a contract not complying with the statute of frauds is unenforceable for want of proper evidence. Anson appears to entertain this view. Browne⁵⁰ also, the learned writer on the

⁴⁸ *Ibid* 19-20.

⁴⁹ *Ibid*. 20; see also Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 169, 179-181.

⁵⁰ Browne, *Statute of Frauds* (5th ed. 1895) sec. 115, and note. In Iowa this view has been adopted expressly by legislation. Ann. Code, 1897, sec. 4625. As regards contracts for the sale of goods, the Uniform Sales Act has now substituted "shall not be enforceable by action" for the former provision. Iowa, Laws, 1919, ch. 396, sec. 4.

statute of frauds, has been instrumental in giving currency to this doctrine, which has been expressly adopted also in Iowa by statute.

"In previous editions of this treatise," says Browne, "the operation of the statute has been defined, as the prescription of a *rule of evidence*. It is still believed that this view is the true one, and that cases which are inconsistent with it rest upon uncertain ground."⁵¹

Notwithstanding the strong support which the above theory has received, it cannot be approved. The evidence theory is out of harmony with the propositions above mentioned. For example, most courts hold that a memorandum made after the suit has been started does not satisfy the statute.⁵² If the statute prescribed merely a rule of evidence a different result would have to be reached. The fact also that a parol agreement within the statute of frauds may be proved for purposes other than that of enforcing it shows that the want of enforceability does not result from a rule of evidence.⁵³ Were it true that the statute of frauds lays down a rule of evidence, a contract not complying with its requirements could not have been shown for any purpose.

The question remains therefore whether the statute of frauds lays down a rule of remedial procedure or whether it affects the substance of the contract. In this country Mr. Justice Loring⁵⁴ and Professor Williston⁵⁵ have taken the former view, while Professor Corbin⁵⁶ has reached the opposite conclusion.

Can it be said that any one of the six propositions above mentioned, which the courts have laid down with respect to the statute of frauds, indicates that the statute is one of remedial procedure? The answer will depend of course upon the definition of the terms "substance" and "procedure." If substantive law be regarded as defining *rights*, while procedure determines *remedies*, the statute of frauds would have to be classified as one of procedure. Salmond shows, however, that the above distinction between *jus* and *remedium* is inadmissible, for, as he points out, there are, on the one hand, many rights belonging to the sphere of procedure, and on the other hand, a rule defining the remedy may be as much a part of the substantive law as are those which define the right itself.

"To define procedure as concerned not with rights, but with reme-

⁵¹ Browne, *op. cit. supra* note 50, sec. 115a, note 1. See also *Heaton v. Eldridge* (1897) 56 Ohio St. 87, 99, 46 N. E. 638, 639; *Bulil v. Stephens* (1898, C. C. Ind.) 84 Fed. 922; *Crane v. Powell* (1893) 139 N. Y. 379, 34 N. E. 911.

⁵² See Proposition 1, *supra* p. 321.

⁵³ See Proposition 5, *supra* p. 322.

⁵⁴ (1875) 9 AM. L. REV. 453.

⁵⁵ Williston, *Sales* (1909) sec. 71; 1 Williston, *Contracts* (1920) sec. 527.

⁵⁶ *Cases on Contracts* (1921) 1475, note. See also Lorenzen, *Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws* (1911) 20 YALE LAW JOURNAL, 427, 461.

dies," says the learned writer,⁵⁷ "is to confound the remedy with the process by which it is made available.

". . . The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—*jus quod ad actiones pertinet*—using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained."

Expressing the latter in a somewhat different way, we may say that "substance" includes all rules determining the legal relations which the courts will declare when all facts have been made known to them, whereas "procedure" relates to the process or machinery by which the facts are made known to the courts.

Speaking of the statute of frauds, Salmond makes the following observations:⁵⁸

"An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing. In the former case the writing is the exclusive evidence of title; in the latter case it is part of the title itself. In the former case the right exists but is imperfect, failing in its remedy through defect of proof. In the latter case it fails to come into existence at all. But for most purposes this distinction is one of form rather than of substance."

As shown above, a contract within the statute of frauds and not complying with its terms is not void. Salmond's statement that such a contract is void is therefore not strictly accurate. The statute confers on the party who has not signed a memorandum or satisfied the seventeenth section in some other manner, a legal "privilege" not to perform what he has orally promised. One additional fact is required to make the contract perfect—the signing of the memorandum, or, if the case falls within the seventeenth section, the acceptance of part of the goods or the giving of earnest money to bind the contract, or in part payment. The party who has not signed the memorandum has the legal "power," by signing such memorandum, of creating in himself a legal duty to perform. The rule that a note or memorandum may be executed at any time before suit is brought, but not later, determines merely the *time* when the operative facts may come into existence. All agree that the "cause of action" must exist *when suit is brought*. "Cause of action" means the necessary *operative* facts to the creation of *present* or *instant* duty. Evidently a *writing* is one of these facts. The rule that the statute may be satisfied although the writing is not made by the

⁵⁷ Salmond, *Jurisprudence* (6th ed. 1920) 437-438.

⁵⁸ *Ibid.* 439.

parties as the expression of their agreement, defines the sort of fact that the law on grounds of social policy permits to have operative effect, showing the purpose with which the note or memorandum is made to be immaterial. The rule that an oral agreement within the statute of frauds will be enforced unless the defense is affirmatively pleaded is of course a rule of procedure, indicating which party must make known to the court the existence or non-existence of the writing. A similar rule exists with respect to contributory negligence, illegality, etc. But this does not prove that the statute of frauds, contributory negligence and illegality are procedural. The rule that a contract, although not enforceable because of the statute of frauds, may be proved for other purposes, shows that the statute does not embody a rule of evidence, which would exclude oral testimony in all cases. The rules also that the defendant may admit the execution of the contract and yet rely on the statute and that the statute of frauds does not affect contracts made prior to its enactment, indicate that the statute affects the substance of the contract.

All of the above goes to show that the lack of enforceability of the oral contract does not result from the violation of a rule of evidence, nor because the requirement of a written memorandum belongs to the process by which the operative facts are made known to the courts, but because a rule of substantive law has decreed that no rights or duties shall arise in the absence of such a memorandum. As the plaintiff has no legal *right*, but simply a beneficial liability, his offer to prove an oral contract is necessarily excluded, it being irrelevant to the issue raised by the plea of the statute of frauds. It is manifest, however, that as the statute of frauds determines the legal relations resulting from offer and acceptance, it affects substance and not merely procedure. This is true without reference to the particular wording of the statute, that is, whether it provides that "no action shall be brought," that the contract "shall not be allowed to be good," or that it shall be "invalid" or "void."⁵⁹

Even if it were conceded for the sake of argument that the statute of frauds falls fairly within the definition of a procedural rule, it would not follow that it may not be "substantive" as well. If substantive law be defined in the traditional manner as "rules determining

⁵⁹ If the nature of the statute of frauds were dependent upon the specific wording of the statute, whether it read that "no action shall be brought" or that the contract is to be "invalid" in the absence of a written memorandum, we might have the singular result that a contract unenforceable under the law of the place of contracting and void under the law of the forum will nevertheless be enforced. The statute of the forum would be inapplicable because the contract was made outside of the jurisdiction and the statute of the place of contracting would be disregarded on the ground that the procedural laws of a state are not entitled to extraterritorial recognition and enforcement. See *Marie v. Garrison*, *supra* note 24, at p. 279; Wharton, *Conflict of Laws* (3d ed. 1905) 1445-1446.

rights and duties," it is evident that the statute of frauds falls also within that definition. The test of a right-duty relationship is whether or not the breach of the duty is remediable. From this it follows that a statute affecting the entire existence of a legal remedy in a given state of facts is a rule determining rights and duties. If this be true, there is no reason why, if sound policy requires it, the statute of frauds should not be controlled by the *lex loci contractus* in the Conflict of Laws.

III

From the standpoint of the Conflict of Laws there is the greatest need of restricting the term 'procedure' to its proper signification, for, according to the traditional rule in this subject, all matters of procedure are submitted to the law of the forum. English and American courts have been too prone to say in the past that a particular matter belonged to procedure, and that it was controlled therefore by the law of the forum. They have given to the term a very wide meaning,⁶⁰ with the consequence, that many matters, which on principle and according to the established practice of other countries should be governed by some other law, are subjected to the law of the place where the suit happens to be brought. The reason for this attitude on the part of the Anglo-American courts is not far to seek. The tendency of the common law has always been to be exclusive. It is no wonder, therefore, that when the English courts were first asked to enforce rights "created" by a foreign system of law, the civil law, they should welcome any doctrines which would operate restrictively in the recognition and enforcement of such rights. They willingly accepted therefore the doctrine of the Dutch school which gave to the term "procedure" a very extensive meaning.⁶¹ By subjecting to the law of the forum all matters belonging to procedure and giving that term the widest possible meaning, the field for the application of "foreign law" became necessarily reduced. It was natural also that the continental countries, whose jurisprudence rests upon a common basis, the Roman law, should have been the first to apply a more liberal doctrine with reference to each other. There is no good reason, however, why, after an acquaintance with the continental system extending over a period of a century and more, the Anglo-American courts should not be willing to give to "foreign rights" the same effect that they have abroad.

So far as the process or *machinery* for the enforcement of "foreign" rights is concerned, each litigant must of course take it as he finds it, and

⁶⁰ "English lawyers give the widest possible extension to the meaning of the term 'procedure.' The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right." Dicey, *Conflict of Laws* (3d ed. 1922) 762.

⁶¹ See Lorenzen, *Huber's De Conflictu Legum* in Wigmore's *Celebration Legal Essays* (1919) 214.

so far as he is prejudiced thereby it is a loss which cannot be avoided. It is impossible to set up a special machinery for "foreign" causes of action that may be brought before a domestic court. "Foreign" substantive rights, however, should be enforced according to their original content. As regards the statute of frauds, there is no more difficulty in establishing its legal effect abroad than there is in proving the legal effect of any other foreign operative facts.

Much difficulty may be experienced in a given case in determining whether effect should be given to the foreign operative facts, but this is hardly true so far as they relate to the statute of frauds. The very fact that there are in the United States so many decisions involving the Conflict of Laws which have held that the statute affects the substantive rights of the parties would go to show the existence of a policy that a foreign contract should be controlled, as regards the statute of frauds, by the law governing such contract in other respects. Some of these decisions, it is true, base their conclusion upon the particular wording of the statute, which stated that a contract not complying with its terms should be "invalid" or "void," but it is safe to assume that the special wording of the statute was seized upon merely to support a conclusion which had been reached on other grounds, namely, the reasonable requirements of the situation. Moreover, in a number of strong decisions the same result was reached although the particular statute provided that "no action shall be brought." The authors also who have examined the problem from the standpoint of the actual requirements of interstate or international business, instead of disposing of it in a more or less mechanical manner, have felt the reasonableness of the doctrine laid down by the French Court of Cassation in *Benton v. Horeau* and the unreasonableness of the rule adopted by *Leroux v. Brown*.⁶² When a valid contract has been entered into in a certain state or country, which does not require a memorandum in writing, justice would seem to require the enforcement of the contract elsewhere. A non-resident of the state in which such contract was made should not be allowed to set up the statute of frauds of his residence if he fails to live up to the contract and suit has to be brought against him in the state of his residence. A person who in the execution of a contract has shown the care which is required by the *lex loci* should have the assurance that his interests will be protected by the courts of other states. As the failure to secure a written memorandum cannot be regarded as negligent in the above case, the law of the place of execution not requiring a written memorandum, sound policy would seem to require the enforcement of the contract abroad, without regard to the existence of a different local provision in the jurisdiction in which the suit may be brought. It is to be hoped therefore that the states which have adopted the Uniform Sales Act will not be misled by the fact that it has accepted in the matter

⁶² See Williston, *Sales* (1909) sec. 126; 1 Williston, *Contracts* (1920) sec. 600.

of the statute of frauds the wording of the English Sale of Goods Act, so as to conclude that the erroneous doctrine of *Leroux v. Brown* must be followed.⁶³

The conclusion reached is supported not only by strong American authority, but also by the law of continental⁶⁴ and South American⁶⁵ countries, and by the opinion of the great majority of foreign jurists.⁶⁶

There is no reason why even the courts of those states in which it is

⁶³ The correct view has been taken in *Mason-Heflin Coal Co. v. Currie* (1921) 270 Pa. 221, 113 Atl. 202; *Franklin Sugar Refining Co. v. Holstein Harvey's Sons Inc.*, *supra* note 20.

⁶⁴ *Supra* p. 319. The law of Austria and Germany is opposed, but these countries have no legislation similar to our statute of frauds. The contrary view leads therefore in these countries to the enforcement of foreign contracts which are valid but unenforceable under the law of the place of execution.

⁶⁵ *Supra* p. 320.

⁶⁶ A distinction is made between the "mode" of proof and its "administration." The former is deemed to go to the substance and the latter as belonging to procedure. Asser & Rivier, *Éléments de Droit International Privé* (1884) 167-168; Audinet, *Principes Élémentaires de Droit International Privé* (2d ed. 1906) 364; Bar, *International Law* (Gillespie's transl. 1892) 864; Bard, *Précis de Droit International Privé* (1883) 312; Bourdon-Viane & Magron, *Manuel Élémentaire de Droit International Privé* (1883) 297; Carrio, *Apuntes de Derecho Internacional Privado* (1911) 384; 3 Catellani, *Il Diritto Internazionale Privato* (1888) 586; (1905) 32 *Chunet*, 453 (1905) 453; 2 Conde y Luque, *Derecho Internacional Privado* (1907) 378; Despagnet & de Boeck, *Précis de Droit International Privé* (5th ed. 1909) 534; Diena, *Principii di Diritto Internazionale Privato* (1910) 374, 376-377; Donnedieu de Vabres, *L'Évolution de la Jurisprudence Française en Matière de Conflits des Lois* (1905) 217; Duguit, *Des Conflits de Législations Relatifs à la Forme des Actes Civils* (1882) 125; Esperson (1884) 11 *Chunet*, 175; 1 Fiore, *Le Droit International Privé* (Antoine's transl. 1907) 215-216; 1 Foelix, *Traité de Droit International Privé* (4th ed. 1866) 453; Foignet, *Manuel Élémentaire de Droit International Privé* (6th ed. 1921) 342; Gestoso y Acosta, *Nuevo Tratado de Derecho Procesal, Civil, Mercantil y Penal Internacional* (1912) 336; Kusters, *Het Internationaal Burgerlijk Recht in Nederland* (1917) 205; 8 Laurent, *Le Droit Civil International* (1881) 40; 2 Massé, *Le Droit Commercial dans ses Rapports avec le Droit des Gens et le Droit Commercial* (2d ed. 1861) 42; Meili, *Das Internationale Zivilprozessrecht* (1906) 407; Pillet, *Principes de Droit International Privé* (1903) 489; Restrepo-Hernandez, *Derecho Internacional Privado* (1914) 532; Rodrigues Pereira, *Projecto de Código de Direito Internacional Privado* (1911) art. 78, pp. 42-43; 3 Rolin, *Principes de Droit International Privé* (1897) 2-3; Surville & Arthuys, *Cours Élémentaire de Droit International Privé* (6th ed. 1915) 602; Synnestvedt, *Le Droit International Privé de la Scandinavie* (1904) 291; Torres Campos, *Elementos de Derecho Internacional Privado* (4th ed. 1913) 359; Valery, *Manuel de Droit International Privé* (1914) 755; 2 Vareilles-Sommières, *Synthèse de Droit International Privé* (1897) 284; Verdia, *Tratado Elemental de Derecho Internacional Privado* (1908) 302; Weiss, *Manuel de Droit International Privé* (6th ed. 1909) 655-656; 5 Weiss, *Traité de Droit International Privé* (2d ed. 1913) 509-512.

The Institute of International Law has expressed the same view. 2 *Annuaire de l'Institut de Droit International* (1878) 151.

A few writers would submit both questions to the *lex fori*. Beauchet, *Du*

established, as regards internal law, that the statute of frauds affects procedure, should not apply the *lex loci contractus* in the Conflict of Laws. The term "procedure" may have one meaning in matters of internal law, and a narrower meaning from the point of view of the Conflict of Laws. A precedent for this has been furnished us by the Supreme Court of the United States in the matter of "penal" laws. It is a well recognized principle in the Conflict of Laws that rights arising by virtue of a penal statute are not enforceable extraterritorially. In *Huntington v. Attrill*⁹⁷ the Supreme Court recognizes that the term "penal" may have a much wider meaning for purposes of internal law than it should have in the Conflict of Laws, that a statute might be "penal" for local purposes and yet "create" rights which should be enforced internationally. Instead of accepting a definition of what constitutes a "penal" law which had been found suitable for the needs of internal law and applying that definition mechanically in the field of the Conflict of Laws, it took the correct position of determining in the first place what sound policy demanded from the standpoint of the Conflict of Laws and of thereupon defining the term "penal" in a way to attain the end in view. Should the liability of directors imposed by statute for a failure to file certain reports be enforced by the courts of other states? The Supreme Court was of the opinion that it should, and it framed for

Conflic des Lois Française et Etrangère en Matière de Preuve Testimoniale (1892) 19 *Clunet*, 359; 1 Gierke, *Deutsches Privatrecht* (1895) 247; Mittermaier, 13 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* (1830) 316; Schöffner, *Entwicklung des internationalen Privatrechts* (1841) 205; Jettel, *Handbuch des internationalen Privat- und Strafrechts* (1893) 150; 1 Unger, *System des österreichischen Privatrechts* (1892) 208; Wach, *Handbuch des deutschen Civilprozessrechts* (1885) 127; Walker, *Internationales Privatrechts* (1921) 198.

Referring to the French provision (art. 1341 of the Civil Code), Bar says: "It is plain that in such a case the question is not one as to the weight of evidence in the true sense, i. e., as to whether the judge is persuaded of the truth of the alleged facts by the materials laid before him—but is rather one as to the form of the transaction and the consequences that attach to the neglect of, that form. This is obvious from the fact that, failing an admission by the defender, the pursuer must lose his action, even although far stronger evidence than that which is required should be tendered—e. g., instead of a private document, ten witnesses who with one voice speak to the agreement of the parties." *International Law* (Gillespie's transl. 1892) 864.

"The exercise of a right is assured in a complete manner only if its existence can be proved in case of contest. The mode of proof is inseparable from the right itself There is a close connection between the right and the means by which its existence is proved, and it is this connection which our opponents fail to recognize." Asser & Rivier, *Eléments de Droit International Privé* (1884) 167-168.

"The object of these laws is to compel the parties to prepare the best proof, and to punish them, if they have not done so But such a law cannot, without unjust retroactivity, be applied to an omission which occurred in a country where it was permissible and lawful." 2 Vareilles-Sommières, *Synthèse de Droit International Privé* (1897) 284-285.

⁹⁷ (1892) 146 U. S. 657, 13 Sup. Ct. 224.

that purpose an international definition of what constitutes a "penal" law.⁶⁸ In the same way, as regards the statute of frauds. The good policy of enforcing a foreign contract which is valid and enforceable under the foreign law being apparent, the term "procedure" should be defined in a way to exclude therefrom questions involving the statute of frauds.

May it not be, however, that the suggested narrower definition of "procedure" in the Conflict of Laws is impossible, in view of the established law in the matter of the statute of limitations? This argument was made by counsel in *Leroux v. Brown* and the opinion of Maule, J., shows that it had great weight with the court. In this country also the doctrine that the ordinary statute of limitations is deemed to affect procedure and to be subject therefore to the *lex fori* has had a tendency to fasten the same doctrine upon our courts in the matter of the statute of frauds. We have seen, however, that a good many courts in dealing with the statute of frauds have declined to be bound by the suggested analogy. Analytically the statute of limitations and the statute of frauds present more or less the same problem. Upon principle both affect the substantive rights, duties, privileges, etc., of the parties.⁶⁹ The contrary became, however, early established in the Conflict of Laws of both England and the United States as regards the statute of limitations.⁷⁰ On the continent, on the contrary, both are deemed, by the French and other courts, to go to the substance and to be controlled by the law governing the substantive rights of the parties.⁷¹ Story also originally took the view that a cause of action barred by the law of the state or country governing it in other respects should be regarded as barred everywhere else.⁷² Although Story's view did not prevail in our courts, it is significant that in this country it has been adopted through legislation in many states. In the matter of statutory causes of action also the fundamental rule is frequently abandoned and the time within which suit must be brought regarded as a substantive part of the cause of action.⁷³ All this goes to show that if the question were *res integra* policy might demand, to the extent indicated, a recognition of the statute of limitations existing at the place whose law controls the transaction in

⁶⁸ So also *Huntington v. Attrill* [1893, P. C.] A. C. 150.

⁶⁹ "The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting; the latter leaves no right at all. But save in this respect their practical effect is the same, although their form is different." Salmond, *Jurisprudence* (6th ed. 1920) 440.

⁷⁰ *Townsend v. Jemison* (1850, U. S.) 9 How. 407; *McElmoyle v. Cohen* (1839, U. S.) 13 Pet. 312; *Don v. Lippmann* (1837, H. L.) 5 Clark & Fin. 1.

⁷¹ As to the statute of limitations, see COMMENTS (1919) 28 YALE LAW JOURNAL, 492, 493; as to the statute of frauds, see *supra* p. 319.

⁷² *Leroy v. Crowninshield* (1820, C. C.) 2 Mason, 151.

⁷³ *Davis v. Mills* (1904) 194 U. S. 451, 24 Sup. Ct. 692.

other respects. However that may be, it manifestly cannot determine the policy of our law with respect to the statute of frauds. The problem of the statute of limitations in the Conflict of Laws is quite different from that raised by the statute of frauds, so that the conclusions reached as regards the former cannot reasonably afford a solution for the latter. We must beware lest we determine legal questions, which should be controlled by considerations of social utility and policy, by a purely mechanical process.

The wide meaning given to the term "procedure" in the Conflict of Laws has already done much mischief. Our courts would do well to keep in mind the real meaning of the rule that all matters of procedure are governed by the local law of the forum. The sole object of the rule is to enable the courts to operate the judicial machinery in the customary manner. There are vast differences in the technical rules controlling the conduct of litigation under the systems of procedure prevailing in the different countries and any attempt to try a "foreign" cause of action in accordance with the rules of the state or country in which it arose would be doomed to failure. A foreign litigant must therefore of necessity conform to the procedure of the court in which he seeks to enforce his claim. There is no reason, however, why a matter affecting the merits of the case or the operative effect of facts when once proved should not be controlled by the law governing the substantive rights of the parties, provided it is of a nature to pass conveniently and without ethical shock through the legal machinery of the forum.⁷⁴ The label attaching to such matter from the standpoint of internal law matters little. It may be clearly "substantive" or both "substantive" and "procedural" or possibly even *exclusively* "procedural," as these terms may have been defined in the past.

IV

In the light of the above we may concur in the view prevailing on the continent and in Latin-America that the "modes of proof" should be governed, at least in the matter of the statute of frauds, by the law controlling the contract in other respects. More accurately speaking, the statement should be that it is governed by the law determining the *formalities* with which contracts must be executed.⁷⁵ Whether these

⁷⁴ Even the "burden of proof," as distinguished from the "burden of going forward," may have to be controlled by the law governing the substantive rights of the parties.

⁷⁵ "The laws concerning proof relate closely to those concerning the form of acts, although they are not fully identical therewith. The rule *locus regit actum*, which authorizes parties to an act to make use of the forms prescribed by the law of the place where they are, signifies necessarily also that as regards the proof of these respective rights they may invoke the same law of the *lex loci actus*. If it were otherwise, the rule would mean nothing." Pillet, *Principes de Droit International Privé* (1903) 489.

should be deemed controlled by the law of the place of contracting, or by the law of the place of performance, or, if the contract relates to land, by the law of the situs, cannot be gone into here. In another place the writer has suggested that a rule in the alternative would best meet the needs of interstate or international business.⁷⁶ The same arguments would be applicable to the statute of frauds. The fact that a contract which does not meet the requirements of the statute of frauds comes into existence and is only unenforceable raises the question, however, whether the *lex fori* should not be recognized as one of the alternatives, so that such a contract will be enforced if it satisfies the law of the forum. Lainé,⁷⁷ a distinguished authority on the subject of the Conflict of Laws in France, has suggested in general that if a transaction satisfies the requirements of the forum as to form, effect should be given to it, although it does not comply with the requirements of the *lex loci* or the law governing the transaction in other respects. By reason of the fact that the statute of frauds has been so often regarded as procedural, it would seem that Professor Lainé's suggestion might perhaps afford a happy solution for the problem before us.⁷⁸ Policy requires that international transactions be sustained as far as possible; and as it is extremely difficult, if not impossible, to find a unitary rule that will give desirable results in its application to the multitudinous interstate or international transactions of ever varying character, there would appear to be no way of attaining the desired end except by a recognition of rules in the alternative. Ordinarily such alternatives will have reference to the laws of states or countries with which the transaction has a close connection at the time of its execution. When, however, the mutual agreement of the parties is conceded, and the required mode of expressing that agreement is alone in issue, as in the case of the statute of frauds, it might not be improper to enforce such foreign contract if it meets the requirements of the *lex fori*, though it is unenforceable under the *lex loci* or the law governing the transaction in other respects.⁷⁹ Such a solution of the problem would reconcile also the decisions of the continental courts. The statute of frauds is said to

⁷⁶ *Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws* (1911) 20 YALE LAW JOURNAL, 427, 455-462; *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 *ibid.* 655, 672-673.

⁷⁷ Lainé (1908) 35 *Clunet*, 681-685.

⁷⁸ A rule in the alternative has been advocated by eminent foreign jurists. Pillet, *Principes de Droit International Privé* (1903) 490; Surville & Arthuys, *Cours Élémentaire de Droit International Privé* (6th ed. 1915) 604; Synnestvedt, *Le Droit Privé de la Scandinavie* (1904) 291; Verdia, *Tratado elemental de derecho internacional privado* (1908) 302; 5 Weiss, *Traité de Droit International Privé* (2d ed. 1913) 512.

⁷⁹ An alternative rule in the above sense would do away of course with such difficulties as were raised by the Cuban requirement of "protocolization" in the case of *Reilly v. Steinhart* (1916) 217 N. Y. 549, 112 N. E. 468.

concern the substance of the contract in France and Italy,⁸⁰ while it is regarded as affecting procedure in Germany and Austria.⁸¹ If we look beyond the formal expression of the rule we find the following: Austria and Germany have no statute of frauds. When a contract made in France, which would be perfectly valid by French law were it not made unenforceable there by Art. 1341 of the Civil Code, is presented before a German or an Austrian court, it appears to be felt that policy requires the enforcement of such contract. The easiest way of reaching this result under the circumstances seemed to be to regard the foreign statute of frauds as a rule of evidence and therefore as procedural. If it were recognized that such a contract is enforceable if it satisfies either the law of the place of execution or the law of the forum there would be no need of stretching the term "procedure" in order to attain a result which appears desirable from an international point of view.

There are those, however, who assume a position which is the exact opposite to the one just stated. Instead of endeavoring as far as possible to enforce contracts not complying with the statute of frauds, they contend that the statute is expressive of a policy of such a fundamental character that no action will lie on a foreign contract, valid and enforceable under the foreign law, if the statute of the forum is not satisfied. This public policy argument has been advanced by Wharton, who says:⁸²

"Statutes directing that no suit shall be sustained, in certain classes of cases, except on written testimony, are based on moral grounds. Their object, as is shown by the title of that which served as the pattern of all others, is to prevent fraud and perjury. Here, then, comes into play the position on which Savigny lays such great stress—that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states."

Similar language is used by a number of courts.⁸³ In nearly all of them, following Wharton's example, the policy and procedure arguments are used interchangeably. Such a mode of reasoning leads, however, to confusion. The two arguments are in their nature quite distinct. If the statute of frauds affects "procedure" from the standpoint of the Conflict of Laws, the necessary consequence is that all foreign contracts will be tested by the requirements of the statute of frauds of the forum. If the contract satisfies the statute of the forum it will be enforced, although it is unenforceable under the law of the place of contracting. If it does not meet the requirements of the statute of frauds of the forum, it will not be enforced, although it is valid and

⁸⁰ *Supra* p. 319.

⁸¹ *Supra* p. 319.

⁸² 2 Wharton, *Conflict of Laws* (3d ed. 1905) sec. 690.

⁸³ *Heaton v. Eldridge*, *supra* note 25; *Barbour v. Campbell*, *supra* note 26.

enforceable under the *lex loci*. The public policy argument, as it is understood in the Conflict of Laws, comes into operation only when it is conceded that on principle the foreign law is applicable, and effect is denied to the foreign law only *by way of exception*, because of paramount considerations of policy arising in the particular case. The policy argument has, therefore, no meaning, so far as it relates to the statute of frauds, unless the statute is regarded as affecting the substantive rights of the parties. Where the contract does not satisfy the law of the forum it will not be enforced, if the policy argument is accepted, although it is valid and enforceable under the *lex loci*. In this case the result reached is the same as would be the case if the statute of frauds had been regarded by the law of the forum as procedural. The result is not identical, however, if the statute of the forum is satisfied, but the law of the place of contracting is not, so that the contract is unenforceable under the *lex loci*. As the substantive rights of the parties are controlled by the *lex loci* the contract would be unenforceable everywhere, whereas it would be enforced if the statute of frauds of the forum were deemed to be procedural.

If the suit is brought in a jurisdiction taking the correct view—that the statute affects the “substance” of the contract—no action will lie upon the foreign contract if it is unenforceable under the foreign law.⁸⁴ On the other hand, if the contract is enforceable under the foreign law, it should be enforced on principle. But if the statute of frauds of the forum is deemed to rest on paramount moral considerations, as Wharton contends, it would override the foreign law, in the interest of local morality, and allow no action on the contract. The question is, therefore, whether Wharton's contention is sound. It is submitted that it is not. So far as authority is concerned, there are cases which are inconsistent with the idea that the statute of frauds, while substantive, lays down at the same time a rule of public policy. In these cases effect was given to the foreign contract notwithstanding the fact that such a contract would have been void if it had been made in the jurisdiction of the forum.⁸⁵ This could not have been done if the statute of the forum were expressive of a stringent public policy.⁸⁶ There is but one case which lends support to the public policy argument—that of *Bar-*

⁸⁴ Where the foreign statute is not an ordinary statute of frauds, but contains a provision that no suit can be brought in the absence of “protocolization,” which may, however, be compelled by an action at law, the requirement may be disregarded by the courts of other states as a “procedural” one. *Reilly v. Steinhart* (1916) 217 N. Y. 549, 112 N. E. 468.

⁸⁵ *Wolf v. Burke*, *supra* note 25; *Houghtaling v. Ball*, *supra* note 20; *Halloran v. Jacob Schmidt Brewing Co.* *supra* note 22.

⁸⁶ Nor is the contract illegal or opposed to public policy from a purely internal viewpoint, so that if executed on both sides neither party could recover what he has given. *Craig v. Vanpelt* (1821, Ky.) 3 J. J. Marsh, 489; *Bates v. Babcock* (1892) 95 Calif. 479, 30 Pac. 605; *Hansen v. Uniform Seamless Wire Co.* (1917, C. C. A. 1st) 243 Fed. 177.

bour v. Campbell.⁸⁷ In that case suit was brought in Kansas upon an Idaho contract to pay the debt of another, which was assumed to be valid and enforceable under the Idaho law, the law of the latter state not having been proved. The Supreme Court of the state of Kansas declined to enforce the contract because it did not meet the requirements of the Kansas statute of frauds. The court put its decision on the ground of public policy, but relied exclusively upon Wharton, who appears to use the public policy and procedure arguments interchangeably. It is not certain, therefore, whether the court was aware of the distinction between these arguments, as shown above, and whether it meant in fact to subscribe to the doctrine that the statute of frauds is substantive.⁸⁸

Still less conclusive is the case of *Emery v. Burbank*,⁸⁹ in which suit was brought in Massachusetts against a resident of that state upon an oral agreement to make a will which he had entered into in the state of Maine. Under the Massachusetts statute an agreement to make a will was not valid unless in writing. Although it was assumed in this case also that the contract was good in Maine, it was held to be unenforceable nevertheless in view of the Massachusetts statute. One of the grounds relied upon was the public policy argument. In this connection Mr. Justice Holmes, speaking for the court, said:⁹⁰

"But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made."

The court expressly declined to express an opinion on the point whether the policy would apply also to agreements made by non-residents abroad.

This case lends no support to the proposition that the fourth and seventeenth sections of the English statute of frauds establish a fundamental policy in the face of which no foreign contract can be enforced. *Emery v. Burbank* differs from the cases falling within the sections just referred to in two respects. In the first place, the Massachusetts statute rendered the *contract itself* void, if it did not satisfy the requirements of the statute. The consequence attaching to non-compliance was therefore more severe than would follow from non-compliance

⁸⁷ *Supra* note 26.

⁸⁸ This is especially true in view of that fact that the Kansas statute uses the phrase "no action shall be brought" (Gen. Sts. 1915, sec. 4889) which is commonly regarded as laying down a rule of procedure.

⁸⁹ *Supra* note 26.

⁹⁰ *Ibid.* 163 Mass. at p. 328, 39 N. E. at p. 1027.

where the case falls within the fourth and seventeenth sections of the English statute of frauds. Of more importance, however, is the fact that the agreement in question related to the making of a will. The party sued was a resident of Massachusetts and the court felt that it was the intention of the legislator to protect residents of Massachusetts against agreements of that character unless they were in writing. Such protective policy was deemed to extend also to contracts made by residents of Massachusetts in other states. These special circumstances clearly distinguish the case from those falling within the ordinary statute of frauds.

On principle it is obvious that the doctrine of public policy should not be invoked in the Conflict of Laws, except in a clear case. Is the statute of frauds based upon such moral grounds, as Wharton alleges, that it must control in the interest of the local security all cases brought before its courts? The civilized countries are divided as to the wisdom of requiring written evidence of contracts falling within the fourth and seventeenth sections of the statute of frauds. Some legislators appear to feel that the local conditions are such that the requirement of written evidence is desirable. Others, taking account of the conditions existing in their own countries, appear to conclude that such a requirement would encourage fraud rather than prevent it. Even in England and the United States the opinions of the courts and writers are greatly divided as to the desirability of a statute of frauds.⁹¹ Under these circumstances it would seem that a contract which has been entered into in a foreign state or country where written evidence is not required should be enforced elsewhere. Moral considerations of a paramount character, sufficient to warrant a disregard of private rights, not being involved,⁹² the application of the local statute should be restricted to contracts made within the state.⁹³

What has been said above applies not only to the necessity of a memorandum in writing, but also to its sufficiency.

⁹¹ "It is only in respect of very special kinds of contracts that written evidence can wisely be demanded by the law. In the case of all ordinary mercantile agreements such a requirement does more harm than good; and the law would do well in accepting the principle that a man's word is as good as his bond. The Statute of Frauds, by which most of these rules of exclusive evidence have been established, is an instrument for the encouragement of frauds rather than for the suppression of them." Salmond, *Jurisprudence* (6th ed. 1920) 447.

⁹² See also Despagnet & de Boeck, *Précis de Droit International Privé* (5th ed. 1909) 534; 8 Laurent, *Droit Civil International* (1881) 51; Weiss, *Manuel de Droit International Privé* (6th ed. 1909) 656; 5 Weiss, *Traité de Droit International Privé* (2d ed. 1913) 519-520.

⁹³ If the principle were adopted in the Conflict of Laws as regards the statute of frauds that a contract is enforceable if it satisfies *either* the law of the place of contracting, *or* the law of the place of performance, the local statute of frauds of the state in which suit is brought would be applicable only if the contract were both made *and* to be performed within such state.

The conclusions of this study may be summed up as follows :

(1) The fourth and seventeenth sections of the statute of frauds affect the substantive rights of the parties and not merely procedure, and matters falling within their provisions are controlled by the law governing the formalities of contracts in general.

(2) The statute of frauds is not expressive of a public policy from the standpoint of the Conflict of Laws, so as to preclude the enforcement of a foreign contract. A contract satisfying the requirements of the proper foreign law will therefore be enforced, although it does not meet the requirements of the statute of frauds of the forum.

(3) The peculiar nature of the statute of frauds makes it desirable, at least as a matter of legislative policy, that contracts not enforceable under the statute of frauds of the state whose law determines the formalities of contracts in general shall be enforced nevertheless if they meet the requirements of the statute of the forum.