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Conflicts of Law and Usury - What Law Governs

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NOTES

CONFLICTS OF LAW AND USURY—WHAT LAW GOVERNS

A problem of great importance is the question of which law should apply to determine whether a contract for the payment of money is *usurious* when the contract is in fact related to more than one jurisdiction.[1] This question arises when a contract is made in one state and is to be performed in another; this being further complicated when the residence of the parties and location of the securities are still in other states.

INTENT AND GOOD FAITH

In determining the applicable law in cases of conflicting usury law, the fundamental principle recognized by the over-whelming weight of authority is to ascertain the intentions of the parties and to apply the law with reference to which they intended to contract.[2] This intent, however, must have been made in good faith so as not to evade the laws of the state to which the contract is otherwise referable,[3] even though reference would result in enforcing a contract that could not have been legally made in the state of the forum.[4]

The existence of good faith must be determined by a consideration of all the facts involved.[5] However, this method of determining good faith must not be applied too strictly. To do so could defeat the "intention rule" itself. The fact that the laws of the place intended by the parties to govern permit a higher rate of interest than that allowed by the law of the actual situs of the contract, or that the parties in selecting the applicable law were actuated by a motive to avail themselves of the higher rate of interest allowed by that law, is not in itself indicative of an intention to evade the

1. It is necessary to make a distinction between the validity of a "ordinary" contract on the one hand, and the validity of a "usurious" contract on the other. In the former the authorities are in great confusion as to what law governs the validity of a contract, and the same court will often enunciate inconsistent theories. The courts have laid down three general rules: (1) the law of the place of making; (2) the law of the place of performance; (3) the law intended by the parties. See GOODRICH, Conflict of Laws § 110 (3d ed. 1949); Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 945 (1920). This confusion is not apparent in usury cases, however.

2. Seeman v. Phliadelphia Warehouse Co., 274 U. S. 403 (1927); Pritshard v. Norton, 106 U.S. 124 (1882); O'Toole v. Meysenburg, 251 Fed. 191 (8th Cir. 1918), *cert. denied*, 248 U.S. 583 (1919); Kellogg v. Miller, 13 Fed. 198 (C.C.D. Neb. 1881) (the intention of the parties constitutes an exception to the rule that the law of the place where the contract is made must govern in enforcing it); State v. Rivers, 206 Minn. 85, 287 N.W. 790 (1939); Bowmen v. Price, 143 Tenn. 366, 226 S.W. 210 (1920).

3. Arnold v. Potter, 22 Iowa 194 (1867).

4. Bundy v. Commercial Credit Co., 200 N.C. 511, 157 S.E. 860 (1931).

5. Coghlan v. South Carolina R. Co., 142 U.S. 101 (1891); Arnold v. Potter, 22 Iowa 194 (1867); State v. Rivers, 206 Minn. 85, 287 N.W. 790 (1939).

usury laws of such situs of the contract.[6] The contract is enforceable providing the place whose law is selected to govern has a natural contact to some vital element of the contract.[7]

VITAL ELEMENT AND NATURAL CONTACT

The question then arises as to what are the vital elements to which the law must have a natural contact? There is authority to the effect that the parties may refer to the law of the place where payment is to be made,[8] and also authority to the effect that the parties may refer to the place of conracting.[9] Even though the choice of governing law is generally limited to these alternatives, the circumstances of the transaction may permit reference to the law of the state where a party is domiciled and which is also the situs of the security, although the contract was made and is payable elsewhere.[10] There is even dictum to the effect that validity under the law of the situs of the realty securing the contract sued upon would alone be sufficient to uphold the contract.[11]

PUBLIC POLICY

The "intention rule" is of course subject to the qualification that it would not be against the public policy of the forum to enforce a contract nonusurious as tested by the law designated by the parties, or other applicatory law, but usurious as tested by the local law.[12] Comity does not require courts of one state to enforce contracts made in another state when such contract is contrary to the public policy of the forum;[13] however, it is not, generally speaking, against public policy to enforce a contract usurious at the forum but valid at the situs.[14]

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6. See Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927).

7. Seeman v. Philadelphia Warehouse Co., *supra* note 6; Brierly v. Commercial Credit Co., 43 F.2d 730 (3d Cir. 1930). See London Finance Co. v. Shattuck, 221 N.Y. 702, 117 N.E. 1075 (1917) (the relation with the state to uphold the instrument must be actual and not fictitious).

8. Coghlan v. South Carolina R. Co., 142 U.S. 101, 109 (1891).

9. Miller v. Tiffany, 68 U.S. (1 Wall.) 298 (1864); RESTATEMENT, CONFLICT OF LAWS § 332 (1934).

10. Fahs v. Martin, 224 F.2d 387 (5th Cir. 1955); Armstrong v. Alliance Trust Co., 88 F.2d 449 (5th Cir. 1937). *Contra,* Patterson v. Wyman, 142 Minn. 70, 170 N.W. 928 (1919).

11. Arnold v. Potter, 22 Iowa 194, 200 (1867). *But see* Gold-Stabeck Loan and Credit Co., v. Kinney, 33 N.D. 495, 157 N.W. 482 (1916) (where contract was made and payable in other states but situs of security was in North Dakota); J.I. Case Threshing Machine Co. v. Tomlin, 174 Mo. App. 512, 161 S.W. 286 (1913) (". . .[U]sury inheres in the loan and not in the property given to secure its payment. . .," so the law of the state where the loan is payable governs as to usury).

12. O'Toole v. Meysenburg, 251 Fed. 191 (8th Cir. 1918), *cert denied,* 248 U.S. 583 (1918).

13. Continental Supply Co. v. Syndicate Trust Co., 52 N.D. 83, 202 N.W. 404, 409 (1924).

14. O'Toole v. Meysenburg, 251 Fed. 191 (8th Cir. 1918), *cert denied,,* 248 U.S. 583 (1919); Personal Finance Co. v. Gibson, 26 Ala. App. 18, 152 So. 462, *cert. denied,* 228 Ala. 107, 152 So. 462 (1933); Bundy v. Commercial Credit Co., 200 N.C. 511, 157 S.E. 860 (1931).

INTENT EXPRESSLY STIPULATED

The question as to which law applies when the parties have expressly stipulated in the contract that it shall be governed by the law of a particular state is relatively simple. The parties have expressed their intention, and whether or not the contract is usurious will be determined by the law of the place designated and by that law only,[15] even though it is usurious by that law but not usurious by some other law to which it is equally referable.[16] The express intent is subject, however, to what has been previously said in regard to intention—that it is in good faith and not to evade the usury laws of another state, and that some vital element of the loan transaction is properly referable to the state intended.[17]

Thus, if all the important elements of a loan transaction have their situs in the same state, such transaction is governed, with respect to the question of usury, by the laws of that state[18] even though the express provisions of that contract provide that the law of another state shall govern.[19]

INTENTION NOT EXPRESSED

Where the parties have in no way expressed their intention as to which law should govern in usury situations, the broadest and most important rule is that the courts will presume that the parties intended to contract with reference to the law of that jurisdiction whose laws will uphold the contract, in preference to a law which will invalidate it.[20] This is founded on the principle that the parties may, in good faith and with no intent to evade the usury laws, make the contract according to their selection;[21] but it is limited to the law of that state having contacts vital to the transaction which would make the contract enforceable.[22] It is in the interests of commerce that the courts apply such a broad rule to uphold

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15. Armstrong v. Alliance Trust Co., 88 F.2d 449 (5th Cir. 1937); United States Savings & Loan Co. v. Shain, 8 N.D. 136, 77 N.W. 1006 (1898); Westchester Mortg. Co. v. Grand Rapids & I.R. Co., 246 N.Y. 194, 158 N.E. 70 (1927).

16. See Midland Loan Co. v. Solomon, 71 Kan. 185, 79 Pac. 1077, 1078 (1905); Goode v. Colorado Inv. Loan Co., 16 N.M. 465, 117 Pac. 856, 857 (1911).

17. Armstrong v. Alliance Trust Co., 88 F.2d 449 (5th Cir. 1937).

18. J.I. Case Threshing Machine Co. v. Tomlin, 174 Mo. App. 512 161 S.W. 286 (1914).

19. United Drivers Supply Co. v. Commercial Credit Co., 289 Fed. 316, 319 (5th Cir. 1923).

20. American Farm Mortgage Co. v. Ingrahamson, 174 Ark. 578, 297 S.W. 1039 (1927); Dupree v. Coss Mortgage Co., 167 Ark. 18, 267 S.W. 586 (1924); State v. Rivers, 206 Minn. 85, 287 N.W. 790 (1939); Gilbert v. Fosston Mfg. Co., 174 Minn. 68, 216 N.W. 778 (1927); Mueller v. Ober, 172 Minn. 349, 215 N.W. 781 (1927); 2 WHARTON, Conflict of Laws § 507 (3d ed. 1905).

21. Mueller v. Ober, 172 Minn. 349, 215 N.W. 781, 782 (1927).

22. State v. Rivers, 206 Minn. 85 287 N.W. 790, 792 (1939).

such contracts.[23] Thus, if the interest allowed by the law of the place of performance is higher than that permitted at the place of contracting, the parties may stipulate for the higher rate of interest without incurring the penalties of usury.[24] The converse of this proposition is also well settled. If the rate of interest is higher at the place of contracting than at the place of performance, the parties may lawfully contract for the higher rate in this case also.[25]

Although the general rule as to "choice of intention" is limited to the place where the contract is made or at the place of performance, it has been shown in the preceding section on intention and the corresponding footnotes that there may be other circumstances which would permit a presumption that the parties contracted with reference to the law of a state which would uphold the contract.[26] However, one must not forget that this principle must stand the test of good faith and that a vital element of the transaction must have some natural contact with the law of the state which is applied.

NORTH DAKOTA VIEW

North Dakota has a statute[27] which provides that "a contract is to be interpreted according to the law and usage of the place where it is to be performed, or if it does not indicate a place of performance, according to the law and usage of the place where it is made." No North Dakota case law is to be found applying this statute to cases involving usury; however, there is dictum in *United States Savings & Loan Co.* v. *Shain*[28] to the effect that if the contract is silent as to which forum should govern, the parties being residents of different states, the law would presume that they contracted with reference to the laws of that state where the contract would be valid and enforceable.[29]

23. Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927) Arnold v. Potter, 22 Iowa 194 (1867). See Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws*, 30 Yale L.J. 565, 655 (1921) and 31 Yale L.J. 53 (1922).

24. Berrian v. Wright, 26 N.Y. 208, 213 (1857). See Andrew v. Pond, 38 U.S. (13 Pet.) 65 (1839).

25. See Miller v. Tiffany, 68 U.S. (1 Wall.) 298 (1864).

26. See Buchanan v. Drovers Nat'l. Bank, 55 Fed. 223 (6th Cir. 1893) (where law applied was the jurisdiction in which the instrument was negotiated); Bascom v. Zedliker, 48 Neb. 380, 67 N.W. 148 (1896) (place where consideration given was used to determine intent); Nat. Mut Bldg. & Loan Assoc. v. Burch, 124 Mich. 57, 82 N.W. 837 (1900) (place where money to be used not controlling but to be used in determining applicable law).

27. N.D. Rev. Code § 9-0711 (1943).

28. 8 N.D. 136, 77 N.W. 1006 (1898).

29. *Cf.* Storing v. National Surety Co., 56 N.D. 14, 215 N.W. 875 (1927) (the validity of a contract is to be determined by the law of the place where it becomes effective. Where a contract is executed outside of the state, but sent to this state for delivery, the validity of the contract is to be determined by the law of this state *unless* a contrary intent is shown). *Contra,* Household Finance Corp. v. Sikorski, Unreported, Digested in 34 N.D. L. Rev. 86 (1958).

It is interesting to note that California has exactly the same statute[30] as North Dakota. It has one case[31] dealing with usury and conflict of laws which does not expressly mention the statute but in effect holds as if the statute had been applied.

Even in cases not involving usury, the courts of North Dakota have not applied this statute[32] in determining the validity of a contract when there is a conflict of laws. Instead, in such cases, North Dakota courts are inclined to apply the law of the place where the contract was made to govern validity.[33] It appears that they have merely used the statute to interpret the terms of a valid contract.[34]

It is not certain if North Dakota courts would apply the statute or the dictum of *United States Savings and Loan Co.* v. *Shain*[35] in cases involving usury and conflict of laws. One might conclude, however, that the above case would be authority for usury cases in North Dakota. As a result this state would follow the weight of authority, applying the law of the state which would uphold the validity of the contract when there is no express stipulation therein, so long as that law has some natural connection with a vital element of the contract.

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THE COURTS AND LEGISLATIVE REAPPORTIONMENT

INTRODUCTION

Disproportioned legislatures stem from two causes. One reason is that some state constitutions call for representation in one house based on things other than population. The other reason is that legislators fail to act on the provisions for reapportionment as outlined by their respective state constitutions.

Disproportion may also be of two different kinds. One type is the unequal population of the districts, while the other variety is encountered by physical manipulation of the shape of the districts. This article will primarily deal with the legislators failure to re-

30. Cal. Civil Code Ann. § 1646 (West 1954).

31. Kraemer v. Coward, 2 C.A.2d 506, 38 P.2d 458 (1934) (where place of performance was either California, Michigan, or at such place as holder of note should select. Payment was actually made in California; therefore, California law was used to determine usury).

32. N.D. Rev. Code § 9-0711 (1943).

33. Douglas County State Bank v. Sutherland, 52 N.D. 617, 204 N.W. 683 (1925) (dissent would apply place of performance); Continental Supply Co. v. Syndicate Trust Co., 52 N.D. 209, 202 N.W. 404 (1924).

34. Kansas City Life Ins. Co. v. Wells, 132 F.2d 224 (8th Cir. 1943); Cosgrave v. McAvay, 24 N.D. 343, 139 N.W. 693 (1913) (had the place of payment not been stipulated, the contract is to be *interpreted* according to the law and usage of the place where it is made).

35. 8 N.D. 136, 77 N.W. 1006 (1898).