THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES

II. Formal and Essential Validity

The Hague Convention requires a bill or note to be designated as such, the provision being intended to give to the instrument an earmark which will readily identify it.[1] The bill or note must indicate also the date, the place of issue and the name of the payee.[2] Anglo-American law is different in all of the above respects.

The only form of acceptance recognized by the Convention of the Hague is an acceptance upon the face of the bill itself.[3] In England and the United States it need not be upon the face of the bill.[4] Under the Negotiable Instruments Law it need not appear even upon the bill.[5] An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person, who, on the faith thereof, receives the bill for value.[6]

In England a bill or note may be void for want of a stamp.[7] The Hague Convention prohibits its members specifically to subordinate the validity of engagements taken in matters of bills and notes to a compliance with the stamp laws, and authorizes them only to suspend the exercise of the rights conferred until the prescribed stamp duties have been paid.[8]

What is the rule in the Conflict of Laws governing the formal validity of a bill or note?

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1. According to Article 2 of the Convention any contracting state may prescribe, however, that bills of exchange issued within its territory which do not bear the designation "bill of exchange" shall be valid, provided they contain the express indication that they are payable to order.
2. Art. 1, Uniform Law.
   Where a bill of exchange does not bear the name of the place of issue it is deemed to have been drawn at the place designated beside the name of the drawer. Art. 2, Uniform Law.
3. Art. 24, paragraph 1, Uniform Law.
4. B. E. A., Sec. 17 (2) (a).
5. N. I. L., Sec. 134.
6. N. I. L., Sec. 135.
7. See Stamp Act, 1891, 54 and 55 Vict., Ch. 39.
8. Art. 19 of the Convention.

1. *English Law*: The rules of the English law are contained in Section 72 of the Bills of Exchange Act, which provides as follows:

"Where a bill drawn in one country is negotiated, accepted or payable in another, the right, duties and liabilities of the parties thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

"Provided that:

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

Proviso (a) is restricted in its application by the words "where a bill drawn in one country is negotiated, accepted or payable in another", so that it would not cover the case where suit is brought in England upon a bill drawn, negotiated, accepted and payable in a foreign country.[9] In so far as it applies it adopts the rule laid down by some of the English courts which have declined to enforce the revenue laws of a foreign country.

Proviso (b) departs from the ordinary rules governing the formal validity of contracts in the Conflict of Laws. Though the lex loci contractus is not satisfied, as regards requisites of form, a foreign contract shall be regarded as valid as between persons who negotiate, hold, or become parties thereto in the United Kingdom for the purpose of enforcing payment thereof, provided it conforms to the laws of the United Kingdom. It will probably be held to apply also to foreign acceptances and indorsements. Under this proviso, as its words imply, a party who drew, accepted, or indorsed a bill or note in a foreign country can not be held in England unless his contract satisfies the lex loci contractus. A mandatory and not merely

9. See James v. Catherwood, (1823) 3 D. & R. 190.

a permissive effect is thus given to the rule locus regit actum, proviso (b) constituting but a partial exception.

2. *American Law*: There are comparatively few cases discussing the question of the formal validity of bills and notes. Those that deal with the matter have involved usually the validity of an oral acceptance of a bill of exchange or the validity of bills and notes not complying with stamp requirements. The two leading cases on the subject of oral acceptances are *Scudder v. The Union National Bank*[10] and *Hall v. Cordell.*[11] In the former it was held that a parol agreement made in Illinois to accept a draft previously drawn upon the promisor at St. Louis, being valid by the law of Illinois, would support an action against the promisor or acceptor of the draft notwithstanding that by the law of Missouri, where the draft was payable, such parol promise was not sufficient. In the opinion of the Supreme Court, speaking through Mr. Justice Hunt, "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the state where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance."[12] This statement is generally cited in support of the doctrine that the law of the place of execution governs the formality necessary for the validity of a contract. This expresses, no doubt, the opinion of the court, for Mr. Justice Hunt quotes from Wheaton on the Conflict of Laws, and Parsons on Bills and Notes to the same effect. Nevertheless the statement was a mere dictum under the facts of the case.[13]

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10. (1875) 91 U. S. 406, 23 L. Ed. 245.

11. (1891) 142 U. S. 116, 12 S. C. R. 154, 35 L. Ed. 956.

12. At pp. 412-413.

13. "There is no statute in the state of Illinois", says the learned Justice, "that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance and a parol promise to accept are valid in that state, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance." At p. 413.

In *Hall v. Cordell* the defendants of Chicago at Marshall, Missouri, verbally agreed with plaintiffs, bankers at the latter place, that defendants would accept and pay all drafts drawn upon them by one Farlow for cattle bought by Farlow and shipped by him to the defendants from Missouri. The defendants refused to pay upon presentation a draft drawn upon them under this agreement. By statute in Missouri an agreement to accept bills of exchange must be in writing. The defendants contended that by reason of that statute the contract could not be the basis for a recovery in Illinois. The Supreme Court of the United States held, however, as follows:

"We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that state can have no application to an action brought to charge a person, in Illinois, upon a parol promise to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the state of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties."[14]

If the statement in the Scudder case that matters bearing upon the execution are determined by the law of the place of execution means to say that the lex loci contractus is the only law which, in the nature of things, can give binding force to the will of the parties, it is, of course, inconsistent with the case of *Hall v. Cordell* which applies the intention of the parties as the test. The cases can be harmonized if the rule locus regit actum, which Mr. Justice Hunt mentions in quoting from Wheaton, were recognized by the Supreme Court of the United States as having a permissive sense, according to which a transaction would be valid, as regards formalities, if it complied with the lex loci contractus or with that of the state which governs the validity of the transaction in other respects. The Scudder case would then fall within the first branch of the rule and *Hall v. Cordell* within the second. The objection to this interpretation is that there is no evidence in the opinion of the two cases to indicate that the Supreme

14. At p. 120.

Court meant to adopt the rule locus regit actum in an optional sense. Nowhere does it appear that the court would subject the formal requirements to a rule differing from that determining the validity of the contract in general. It seems to be assumed throughout that all matters bearing upon the execution of a contract, including all formalities, are subject to one law. This law is said to be the lex loci contractus in the Scudder case and the lex loci solutionis, on account of the presumed intention of the parties, in *Hall v. Cordell.*[15] In both cases the agreement was upheld. Hence it might be suggested that just as is held in the usury cases, so in the matter of the formal validity of contracts, the parties will be presumed to have contracted with reference to the law of the place that will support the contract. The difficulty with this conclusion is that the Supreme Court in the Scudder case appears to lay down the rule that the lex loci contractus governs all matters bearing upon the execution of contracts as an absolute rule and not on the ground of presumptive intent. All that can be safely said is, therefore, that in the opinion of the Supreme Court the validity of a contract, as regards form, aside from the Statute of Frauds, which brings in the question of Procedure, is subject to the law controlling the validity of the contract in other respects, and that the Supreme Court, in a desire to uphold the contract, accepted the lex loci contractus as the governing law in the Scudder case and the lex loci solutionis in *Hall v. Cordell.*

Very few cases appear to have arisen in the state courts since the decision of the Scudder case and *Hall v. Cordell.*[16] Most of the decisions prior to the above cases favored the lex loci contractus.[17] The lower federal courts have dealt with

15. The Supreme Court of the United States has never followed a consistent theory governing the validity of contracts in the Conflict of Laws. See Pritchard v. Norton, (1882) 106 U. S. 124; 1 S. C. R. 102, 27 L. Ed. 107; Cox v. The United States, (1832) 6 Pet. 172; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., (1889) 129 U. S. 397, 9 S. C. R. 469, 32 L. Ed. 788; Equitable Life Ins. Co. v. Clements, (1891) 140 U. S. 226; 11 S. C. R. 822, 35 L. Ed. 497; London Assurance v. Companhia de Moagens do Barreiro, (1897) 167 U. S. 149, 17 S. C. R. 785, 42 L. Ed. 113.

16. In Bank of Laddonia v. Bright Coy Comm. Co., (1909) 139 Mo. App. 110, 120 S. W. 648, the St. Louis Court of Appeals applied the law of the place of performance, following Hall v. Cordell.

17. See Scott v. Pilkington, (1861) 15 Abb. Pr. 280; Lonsdale v. Lafayette Bank, (1849) 18 Ohio 126; Worcester Bank v. Wells, (1844) 8 Met. (Mass.) 107; Bissell v. Lewis, (1857) 4 Mich. 450. This is true also of the formal validity of contracts in general. Hunt v. Jones,

the matter only in one or two instances since the above decisions. In *Exchange Bank v. Hubbard*[18] the Circuit Court of Appeals of the Second Circuit applied the principle of the Scudder case without referring to *Hall v. Cordell.* When the case came up on a subsequent appeal [19] the court adopted the intention test laid down in *Hall v. Cordell* and, in the application thereof, reached the conclusion that the parties under the circumstances contracted with reference to the lex loci contractus.[20]

Where the formal requirement consists in the affixing of a stamp or the use of stamped paper for revenue purposes, non-compliance with such a law may result in the invalidity of the obligation, or it may simply preclude the admissibility of the instrument in evidence. In the latter event, the provision, being a procedural one, would have no extraterritorial effect.[21] Where the non-compliance with the stamp law renders the instrument void, there is conflict in the authorities. Some courts apply the ordinary rule and deny all relief.[22] Others have enforced the contract on the ground that no regard should be paid to foreign revenue laws.[23] A further complication is presented when there is a difference between the law of the place of execution of the contract and that of its performance; for example, where the law of the place of issue makes the contract void but the law of the place of performance either has no stamp law or its stamp law affects merely the admissibility of the instrument in evidence. Assuming that foreign stamp laws are entitled to recognition when they invalidate the contract, the question raised in this case would be similar to that discussed in connection with oral acceptances. In *Vidal v. Thompson*[24] the law of the place of issue was held to govern.

(1879) 12 R. I. 265; Perry v. Mt. Hope Iron Co., (1886) 15 R. I. 380; Dacosta v. Davis, (1854) 24 N. J. L. 319.

18. (1894) 62 Fed. 112.

19. (1896) 72 Fed. 234.

20. The lex loci contractus as such appears to have been applied in Russell v. Wiggin, (1842) 2 Story 213, Fed. Cas. No. 12,165, and Garretson v. North Atchison Bank, (1891) 47 Fed. 867.

21. Fant v. Miller, (1866) 17 Gratt. (Va.) 47; Lambert v. Jones, (1856) 2 Patten & H. (Va.) 144.

22. Satterthwaite v. Doughty, (1853) 44 N. C. 314; Fant v. Miller, (1866) 17 Gratt. (Va.) 47.

23. Ludlow v. Rensselaer, (1806) 1 Johns. 93; Skinner v. Tinker, (1861) 34 Barb. (N. Y.) 333.

24. (1822) 11 Martin (La.) 23.

3. *French Law*: A bill or note, its acceptance or indorsement is valid, as regards form, if it satisfies the law of the place of execution.[25] Although there is a tendency[26] on the part of the French courts to give to the rule locus regit actum, which was formerly imperative,[27] a permissive character, the law of bills and notes has scarcely been affected thereby.[28] Whether the above rule is applicable to foreign stamp laws is uncertain.[29]

4. *German Law*: Article 85 of the German Exchange Act reads as follows:

"The essential requirements of a bill of exchange drawn abroad, as also every other statement on such a bill, are to be decided according to the law of the place at which the statement is made. If, however, the statements inserted abroad on the bill satisfy the requirements of the inland law, no objection can be taken against the legal liability incurred by statements subsequently made within the Empire (Inland) on the ground that the statements made abroad do not satisfy the foreign law. Statements on bills by which one German citizen becomes bound to another German citizen in a foreign country, are also valid although they only comply with the requirements of the inland law."

It will be noticed that the German Exchange Act speaks of the essential requirements of bills and notes. From the standpoint of the German law of exchange, which is strictly formal, all essential requirements prescribed by the legislator are in reality *formal* requirements.

The lex loci contractus means the law of the place of execution; the law of the place of performance is of no importance.[30]

Two exceptions are made by the German Exchange Act to the application of the lex loci contractus, where the latter would operate to invalidate the contract. No exception exists where the contract is valid under such law. The first excep-

25. Trib. Civ. Marseilles, Sept. 5, 1876 (4 Clunet 425); Comm. Trib. Le Havre, March 19, 1881 (9 Clunet 80); Paris, Dec. 8, 1883, (11 Clunet 285); App. Bordeaux Jan. 24, 1880 (8 Clunet 360); June 7, 1880, (8 Clunet 155); App. Paris Jan. 12, 1889 (16 Clunet 291); App. Besançon Jan. 25, 1910, (Darras' Rev. 1910, 428).

26. Cass. June 14, 1899 (S. 1900, 1, 225) and note by Professor Pillet; Cass. Aug. 18, 1856 (D. 1857, 1, 39).

27. App. Douai, Jan. 13, 1887 (S. 1890, 2, 148); Trib. Civ. Rouen, July 22, 1896 (26 Clunet 578).

28. But see Comm. Trib. Nice, May 22, 1912 (40 Clunet 156).

29. See Vincent & Penaud, pp. 345-346; Weiss IV, pp. 452-453.

30. 6 ROHG 127.

tion provides that an acceptance or indorsement in Germany of a foreign bill or note, which is void for want of compliance with the formal requirements of the law of the place of issue, is binding, provided such a bill or note complies with the requirements of the German law. The second exception has reference only to German subjects. It lays down the rule that a contract between two German subjects entered into abroad shall be binding if it meets the requirements of the German law.

Article 11 of the Law of Introduction to the German Civil Code, paragraph 1, has now the following general provision:

"The form of a legal transaction is controlled by the laws governing the relation which constitutes the subject of the transaction. However, compliance with the laws of the place where the transaction is entered into is sufficient."

This article adopts the rule locus regit actum in a permissive sense, and sustains the contract, as regards formal requisites, if it satisfies the lex loci contractus or the law governing the contract, i. e. the lex loci solutionis or the lex domicilii.[31] It seems, however, that the above provision, which went into effect on January 1st, 1900, is not applicable to bills and notes and that the latter continue to be governed by the special provisions of Article 85 of the General Exchange Act of 1849.[32]

5. *Italian Law*: The Italian law is contained in Article 58 of the Commercial Code, which reads as follows:

"The form and essential requisites of commercial obligations * * * are governed by the law * * * of the place * * * where the obligations are created * * *, save the exception laid down in Article 9 of the Preliminary Dispositions of the Civil Code for those subject to one and the same national law."

According to Article 9 of the Preliminary Dispositions of the Civil Code the "extrinsic form of acts inter vivos * * * shall be determined by the law of the place where they are done. The * * * contracting parties may choose, however, to follow their national law, provided the latter be common to all of the parties."

31. The German courts generally apply the law of the place of performance. Reichsgericht, July 4, 1904 (15 Niemeyer 285) but sometimes the law of the domicile of the debtor. 61 RG 343, Oct. 12, 1905.

32. See Staub, Sec. 85; Planck, Bürgerliches Gesetzbuch, Art. 11 Law of Introduction.

Two principal questions are suggested by the preceding comparative statement of the law.

First—Should the rule locus regit actum be adopted as the law governing the formal validity of bills and notes, and if so, should it have an imperative or merely a permissive character?

Second—What exceptions, if any, should be recognized to this rule?

As regards the first question there can be no doubt that the lex loci contractus is the controlling law. All of the modern legislations admit this principle as well as the decisions of the courts. Only in the United States there is some uncertainty regarding the application of the above rule in view of the decision of the Supreme Court of the United States in *Hall v. Cordell,* but the weight of authority agrees with the general rule. The lex loci contractus is adopted also by the Institute of International Law[33] and by the Convention of the Hague.[34] The text writers also are of the unanimous opinion that the lex loci contractus should govern.[35] The rule laid down by the Supreme Court of the United States in the Scudder case may be regarded, therefore, as the governing law by almost universal assent.

There is no agreement, however, both in the positive law and among the jurists as to whether or not the lex loci contractus should be regarded as an exclusive rule.

This conflict of opinion has largely an historical foundation and is connected with the nature of the rule locus regit

33. Annuaire VIII, p. 121.

34. Art. 75, Uniform Law, Senate Document No. 162, Sixty-third Congress, First Session, p. 64.

35. Asser, p. 207; Audinet, p. 609; v. Bar, p. 671; Champcommunal, Annales de Droit Commercial, II, p. 142; Chrétien, Etude sur la Lettre de Change, p. 72; Conde y Luque, Derecho Internacional Privado, II, p. 297; Despagnet, p. 987; Diena, III, p. 28; Esperson, Diritto Cambiario Internazionale, p. 20; Field, Art. 614; Meili, II, p. 331; Lyon-Caen et Renault, IV, p. 545; Ottolenghi, p. 81; Valéry, p. 1279; Weiss, IV, p. 448.

Under the older continental theory, according to which the bill of exchange was looked upon literally as a mandate from the drawer to the drawee for the payment of funds belonging to the drawer, the contract was deemed made at the domicile of the drawee. The formal requirements were subjected, therefore, to the lex domicilii of the drawee. Voet, Commentaria ad Pandectas, Bk. XXII, Tit. II, Sec. 10. Dupuis de la Serra, L'Art des Lettres de Change, Ch. XV, No. 12, cited in Massé, Le Droit Commercial dans ses Rapports avec le Droit des Gens et le Droit Civil, I, No. 589; Pothier, du Contrat de Change, No. 155; Brocher, Cours de Droit International Privé, II, pp. 315-316.

actum in the Conflict of Laws. In Roman law and in the earliest period of the development of the rules of the Conflict of Laws in the Middle Ages, it seems that the validity of a legal transaction, so far as its formal execution is concerned, was determined by the same law that governed its validity or legality in general.[36] The difficulty of complying with the formal requirements of a foreign law and the injustice that might result therefrom led Bartolus and his successors to advocate that a will be deemed sufficiently executed if it complied with the law of the place of execution. Through the influence of Bartolus the rule locus regit actum, which was extended later to other transactions, became established. Being introduced on grounds of convenience the lex loci contractus did not supplant the original rule and so it came that the rule locus regit actum had at first only a permissive effect. A legal transaction was valid, therefore, as regards formal execution, if it satisfied the law of the place of execution or the law governing its validity or legality in other respects.[37] In the course of time the rule lost its original character in some countries so as to become imperative; in others it remained an alternative rule, except in certain classes of cases.[38] In England and the United States the rule locus regit actum was never accepted, except as to contracts, and with respect to them only in a mandatory form. In those countries which, in modern times, have pressed the claims of the national law, the rule is not infrequently stated as allowing a compliance with the lex loci contractus or the lex patriae which is common to the parties.[39]

In the law of bills and notes Italy has adopted squarely the rule locus regit actum in a permissive sense. Germany has accepted it to a limited degree, namely, when German subjects contract abroad. France, England and the United States, on the other hand, prescribe the lex loci contractus, upon principle, as an absolute rule.

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36. See Cod. VI. 23. 9, as to Roman law, and Lainé, II, pp. 333-357, concerning the later writers.

37. See Lainé, Introduction au Droit International Privé, II, pp. 395-413.

38. See Buzzati, L'Autorità delle Legge Straniere relative alla Forma degli Atti Civili, pp. 13-49, 170-184; Niemeyer, Vorschriften und Materialien, pp. 98-100.

39. Audinet, p. 270; Despagnet, p. 665; Fiore, I, pp. 250-253; Pillet, Principes, p. 486; Surville et Arthuys, p. 267; Weiss, III, p. 120.

As for the text writers, those regarding the rule locus regit actum in the Conflict of Laws as mandatory reject, of course, any alternative rule in the matter of the formal execution of negotiable instruments.[40] Those contending that the rule has retained its original permissive character are divided in opinion upon the question whether an alternative provision is permissible in the law of bills and notes. Of those giving an affirmative answer some apply as the alternative rule the common national law of the immediate parties.[41] Others regard the various contracts as unilateral obligations and allow, therefore, a compliance with the national law of the debtor.[42] Others still would allow the lex patriae as the alternative rule only when it coincides with the lex loci solutionis.[43] Many feel, on the other hand, that the formal character of the instrument and the security of transactions involving bills and notes do not admit of an alternative rule in the law of bills and notes.[44] Jitta proposes again the law of the fiduciary place of issue, that is, the law of the place from which the instrument or the particular contract is dated, and, in the absence of such an indication, the lex domicilii or when the party in question is engaged in business or exercises a profession, the law of the state in which he has his place of business or office.[45]

Is there a sufficient reason for the adoption of an alternative rule as regards formality in a Uniform Law for the United States?

If an alternative rule is to be adopted, it cannot assume the form given to it by the German and Italian law. The German law is inacceptable because of its discrimination between citizens and foreigners. The alternative rule adopted by the Italian law—the law of nationality common to the parties,—cannot be approved, even if the lex domicilii be substituted for that of the lex patriae, for the reasons advanced in the

40. Asser, p. 66; Buzzati, pp. 152-154; Demangeat, in Foelix's Traité du Droit International Privé, (4th ed.) p. 184, note; Field, Art. 614; Laurent, Le Droit Civil International, II, p. 445.

41. Audinet, p. 610; Chrétien, pp. 84, 88; Surville et Arthuys, p. 672; Weiss, IV, p. 449.

42. Von Bar, p. 671; Champcommunal, Annales de Droit Commercial, 1894, II, pp. 145-146; Chrétien, pp. 882-89; Esperson, pp. 27-28.

43. Massé, I, p. 508.

44. Diena, III, p. 28; Lyon-Caen et Renault, IV, pp. 545, 549; Meili, II, p. 331; Ottolenghi, p. 81; Valéry, p. 1279.

45. II, p. 46.

discussion of alternative rules in connection with capacity. The only alternative rule which could reasonably be considered from the standpoint of American law is the lex loci solutionis, which has been actually proposed by Professor Despagnet,[46] of the University of Bordeaux. Is it advisable to adopt this rule in the Uniform law? Whatever doubts may have existed concerning the expediency of an alternative rule as regards capacity, there can be none so far as it affects the formal validity of bills and notes, for there are special objections which prohibit its adoption, even though it be sanctioned with respect to capacity and with respect to the formal validity of contracts in general.

In another place[47] the author has expressed his opinion that an alternative rule which would allow a contract to be valid, if it satisfied the requirements of the lex loci contractus for the law governing its validity in other respects, might be proper in jurisdictions where the lex loci contractus does not control the validity of contracts. But the following reservation was made which covers the exact subject now under consideration. "An exception should be made," it is there stated, "with respect to commercial paper. The nature of the instrument is here essentially dependent upon its form. Absolute certainty in regard to its character is of the utmost importance. A fixed rule must therefore apply which, in the nature of things, is the law of the place of issue."

That there is a valid distinction between ordinary contracts and bills and notes appears most clearly from the German law. Article 11 of the Law of Introduction to the Civil Code sustains a contract, so far as its formal validity is concerned, if it complies with the law of the place of making or with the law governing its validity or obligation in other respects, which, according to the prevailing rule, is the law of the place of performance. In the interest of security of dealings in commercial paper, this alternative provision does not extend to bills and notes, which are governed, upon principle, by the lex loci contractus.[48] The exceptional importance attached to the form of bills and notes is seen also in the attitude taken on the question of alternative rules by the Institute of Inter-

46. p. 988.

47. 20 Yale Law Journal, pp. 457-458.

48. Staub, Art. 85; Planck, Bürgerliches Gesetzbuch, Art. 11 Law of Introduction.

national Law[49] and the Convention of the Hague.[50] Both allow such an alternative rule as regards capacity but deny it in the matter of the formal execution of bills and notes.

Whatever the merits of an alternative rule may be in general, for the reasons above suggested it cannot be adopted with respect to the formal requirements of bills and notes. In this branch of the law at least the rule locus regit actum must have an imperative character.

Because of the special objections in the law of bills and notes to the adoption of an alternative rule, as regards formalities, which are based upon the negotiable character of such instruments and the consequent requirements of certainty, there is no need of considering the provisions of the English Wills Act or the statutory provisions existing in many states of this country which have introduced, in the matter of wills and deeds, the continental rule of locus regit actum in a permissive sense.

The foregoing discussion relates to the essential as well as to the formal requirement of bills and notes, for no clear line of demarcation between the two can be drawn. This is most apparent in countries belonging to the German group which have adopted the formal exchange law, according to which the rights of the parties are derived solely from the form of the instrument.[51] "The bill of exchange," says a noted Italian writer,[52] "being a literal[53] contract, its form no doubt influences the substance of the obligation." Article 85 of the German Exchange Law speaks accordingly only of the law governing the essential validity of the contract, the term including all formal requirements. In the other countries that have not adopted the formal system of bills and notes after the German type, for example, France, the impossibility of clearly distinguishing between form and substance is likewise admitted. Says Des-

49. Annuaire VIII, p. 121.

50. Art. 75, Uniform Law, Senate Document No. 162, Sixty-third Congress, First Session, p. 64.

51. See Grünhut, Wechselrecht, II, p. 572.

52. Diena, III, p. 28.

53. "The literal contract of Roman Law", says Professor Sohm, "was a fictitious loan, which operated by virtue of the 'literae'—i. e. by virtue of the writing in the codex as such, irrespectively altogether of the facts actually underlying the relations between the parties—to impose on the debtor an abstract liability to pay a fixed sum of money." Institutes, Ledlie's translation, 2nd ed. p. 413.

pagnet:[54] "Without doubt certain of these requisites may refer to matters of substance, as the 'remise de place en place' and the indication of 'value received'. But they constitute all parts of the context of the bill of exchange and by virtue of that fact become matters of form." Other writers of authority call attention to the same fact.[55] Section 72, subdivision 1, of the Bills of Exchange Act uses the expression "requisites of form", but these words are to be understood no doubt as including all essential requirements, excepting those of capacity and consideration. In the Negotiable Instruments Law the essential requirements for the validity of a bill or note, apart from capacity and consideration, are found in the chapter entitled "Form and Interpretation". The word "form" includes therefore the essential requirements. The American cases dealing with the question from the standpoint of the Conflict of Laws appear to have assumed, however, that a distinction might be drawn between the formal and essential requisites, and that they might be subjected properly to different laws. While the requirement of a written form or of a stamp has been considered a matter of formal execution, which is determined by the lex loci contractus, the statutory provision that a negotiable note must be payable at a bank[56] and the prohibition of a stipulation for attorneys' fees[57] have been classified as matters of substance and subjected to the law of the place of payment. In none of the cases was there any discussion of the problem involved. It is submitted that all of the conditions prescribed by law for the creation of a bill or note should be governed by one law—the lex loci contractus —and that the American decisions last referred to should be disapproved.

What has been said under Capacity concerning the meaning of the lex loci contractus and the importance of the place from which the original instrument or a supervening contract is dated holds true also of the present subject.

Should any exceptions to the lex loci contractus like those found in the Bills of Exchange Act or the German Exchange Law be recognized?

54. p. 988.
55. Brocher, Cours, II, p. 318; Ottolenghi, p. 81; Weiss, IV, p. 451.
56. Barger v. Farnham, (1902) 130 Mich. 487, 90 N. W. 281; Freeman's Bank v. Ruckman, (1860) 16 Gratt, (Va.) 126.
57. Strawberry Point Bank v. Lee, (1898) 117 Mich. 122, 75 N. W. 444.

Assuming that the original bill or note is void for want of compliance with the formal or essential requirements prescribed by the law of the place of issue and that such a bill or note is later accepted or indorsed in another country under the law of which the original bill or note would have been valid, should such acceptor or indorser be held? The English Bills of Exchange Act and the German Exchange Law give an affirmative answer to the question. Much controversy has arisen on the continent as to whether the result of the German and English acts can be reached without the aid of positive legislation. On the one hand it is argued that inasmuch as the different contracts on a bill or note are independent of each other, each indorser occupying, as it were, the position of a new drawer and the acceptor, that of the maker of a note, they should be held if the original instrument satisfied the requirements of the law of the place where such acceptance or indorsement occurred.[58] The weakness of this argument from the standpoint of continental law lies in the fact that in the law of bills and notes of many of the continental countries neither the acceptor nor the indorser of a bill or note which is void for non-compliance with the essential requisites prescribed by law, can be held as such.[59] If such an acceptor or indorser is not liable under the municipal law for the reason that an "acceptance" or an "indorsement" implies the existence of a valid original bill or note, it is difficult upon theory to hold him, from an international viewpoint, in the case now under consideration.

Von Bar's argument is not convincing. He says:[60] "But again, on the other hand, the acceptance or the indorsement of a bill made in this country is valid, so far as form is concerned, although the bill itself does not satisfy the forms required by the law of the place of issue, if only it does satisfy the conditions required by the law of this country. For the acceptor binds himself unconditionally for payment of the sum in the bill, and the indorser binds himself in the event of the accept-

58. Von Bar, p. 673; Beauchet, Du Droit Allemand sur les Conflits de Lois en Matière de Lettrés de Change, Annales de Droit Commercial, 1888, II, pp. 29-30; Champcommunal Annales de Droit Commercial, 1894, II, p. 147; Chrétien, pp. 101-102; Esperson, pp. 31-33; Lyon-Caen et Renault, IV, p. 550.

59. Art. 7, German General Exchange Act; Article 725, Swiss Law of Obligations; Art. 254, Italian Commercial Code.

60. p. 673.

or's failure to pay: that being so, we cannot, on the other hand, take into account the fact that the debtor may or may not have a right of recourse or of indemnity, nor can we take into account the reason why the prior obligant does not pay, and that reason may be that the principal debtor in the bill has not validly bound himself." The simple answer to v. Bar is that in a country under the law of which neither the acceptor nor the indorser warrants the validity of the instrument, there is no justification for implying such a warranty when the original instrument is issued abroad.

The solution is somewhat different under Anglo-American law. An indorser warrants that at the time of indorsement the instrument is a valid or subsisting bill or note.[61] This warranty would cover the invalidity of the original instrument as a bill or note under the lex loci contractus because of non-compliance with the formal requirements of such law.

An acceptor admits only the signature of the drawer and not the validity of the instrument in other respects.[62] Anglo-American law goes upon the theory that an acceptor has no better means than the holder or indorser to ascertain the genuineness of the body of the instrument, and that there is no reason, therefore, why the risk of alteration or forgery should not be thrown upon the person presenting the instrument for acceptance or payment. The same reasoning applies upon principle where the invalidity results from a non-compliance with the law of the place of issue. Notwithstanding the fact that an acceptor cannot be held in the above case upon the ordinary principles of American law relating to negotiable paper, and, according to the German law of bills and notes, neither an indorser nor an acceptor can be so held, the English and German acts impose liability upon both of these parties. The English act provides:[63] "Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom." This provision relates only to the original contract, since it speaks of bills, *issued* out of the United Kingdom, but there is no reason why it should not apply equally

61. N. I. L., Sec. 66; B. E. A., Sec. 55 (2).
62. N. I. L., Sec. 62; B. E. A., Sec. 54 (2) (a).
63. B. E. A., Sec. 72 (1) (b).

to the supervening contracts. The German act, which embraces clearly all contracts upon a bill or note issued abroad, is worded as follows:[64] "If, however, the statements inserted abroad on the bill satisfy the requirements of the inland law, no objection can be taken against the legal liability incurred by statements subsequently made within the Empire (Inland) on the ground that statements made abroad do not satisfy the foreign laws."

Undoubtedly the above qualification of the ordinary rules of commercial paper was adopted in the interest of a local policy, the purpose of which is the better protection of "inland" dealings in bills and notes. Such legislation, while arbitrary in the sense that it does not harmonize with the municipal law relating to bills and notes, may be justified however, if sound policy so demands. The writer is of the opinion that inasmuch as the security of domestic dealings affecting such foreign bills and notes is thereby promoted, the exception under discussion might be adopted with advantage even in a country like Germany where neither the acceptor nor the indorser warrants the validity of the instrument. He would recommend, therefore, for adoption in the Uniform Law for the United States, Section 72 subdivision (1) (b) of the English Bills of Exchange Act with a change in the phraseology, which would show clearly that it applies to the supervening contracts as well as to the original instrument.

As for the second exception to the lex loci contractus contained in the English Bills of Exchange Act, a different conclusion must be reached. Section 72, 1 (a) provides that: "Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue." Some of the American cases,[65] as we have seen, support the above provision on the ground that foreign revenue laws are not entitled to recognition. The better opinion, both in England and in this country, would give effect to such laws, however, provided their violation results in the invalidity of the contract and not merely in its unenforceability until full compliance with the stamp require-

64. Arts. 85, 98.

65. Ludlow v. Van Rensselaer, (1806) 1 Johns. 93; Skinner v. Tinker, (1861) 34 Barb. 333.

ment.[66] The cases holding that the foreign stamp laws are local or intraterritorial because fiscal in their nature, and not entitled therefore to extraterritorial recognition, have been condemned by practically all of the text writers both continental and Anglo-American.[67]

No reasons of a practical nature are evident why this view should not be adopted by the Uniform Law in the United States.[68] In our relation with continental countries it would be of no importance whether the above rule or that of the Bills of Exchange Act were adopted, for the Hague Convention prohibits the contracting states to make the validity of a bill or note or any contract thereon depend upon compliance with the stamp laws, and as for bills issued in England for circulation and payment in this country, the exception to the rule of the lex loci contractus previously discussed, corresponding with Section 72, 1 (b) of the Bills of Exchange Act, would afford a sufficient protection to those becoming parties thereto or holders thereof in the United States.

(To be continued.)

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66. Bristow v. Sequeville, (1850) 5 Ex. 275; Alves v. Hodgson, (1797) 7 T. R. 241; Clegg v. Levy, (1812) 3 Camp. 166; Fant v. Miller, (1866) 17 Gratt. (Va.) 47; Satterthwaite v. Doughty, (1853) 34 N. C. 314.

67. Von Bar, p. 672; Diena, III, p. 14; Despagnet, pp. 1000-1001; Grünhut, II, p. 571, note 12; Schaeffner, Entwicklung des Internationalen Privatrechts, p. 120; Jitta, II, p. 49; Champcommunal, Annales de Droit Commercial, 1894, II, p. 202; Lyon-Caen et Renault, IV, p. 552; Ottolenghi, p. 100; Surville & Arthuys, p. 696.

Chalmers, Bills & Notes, 6th ed., p. 242; Daniel, Negotiable Instruments, 6th ed., Sec. 914; Story, Conflict of Laws, 8th ed., p. 346.

68. But for the fact that the English Stamp Act requires bills issued abroad to be stamped in England and makes no allowance for any foreign stamp, the above view would probably have been followed also by the Bills of Exchange Act.