CHAPTER 61

Circulation

I. THE CHAIN OF HOLDERS

WE shall consider here the position of the payee and subsequent indorsees. Under the universal approach, the sequence of holders is disintegrated or dissected into as many links subjected to different laws as there are jurisdictions containing places of contracting. The law of the place where an indorsement occurs governs the transfer of the rights included in the bill.[1] Such division, in addition to the various other connecting factors used in the conflicts law of bills, is bound to raise problems of classification. They have been regarded under three aspects:

The rights inherent in the possession of the bill;

The rights acquired by the formal succession against third persons;

And the relationship between a single indorsement and the basic bill.

1. The Effect of Possession: "legitimation"

While little Anglo-American authority seems available,[2]

[1] England: BEA sec. 72 (2) according to the prevailing meaning of "interpretation."
United States: LORENZEN 139.
France: WEISS, 4 Traité 443.
Germany: 2 BAR § 306.
Italy: DIENA, 3 Tratt. 94 § 222.
Geneva Rules, art. 4, par. 2, speaking of "the effects of the obligations produced by the signatures . . .;" Treaty of Montevideo, Com. L., art. 29; Cód. Bustamante, art. 226.

[2] Note, 95 A.L.R. (1935) 658.

it is agreed on the Continent that an indorsement has a threefold function:

(a) The possessor of the bill who is either named or covered by a blank indorsement has the ostensible power of indorsing the bill in the eyes of the indorsees;

(b) The indorsee possessing the bill has the power to present the bill to the drawer or acceptor;

(c) Under the same circumstances, the drawee is entitled to pay to the indorsee with liberating effect.

In conflicts law, these problems are generally included in the broader questions concerning the rights of the holder. According to the principle of independence, the individual legal systems prescribe the particulars. Thus, the law of each place of indorsement determines whether an indorser is a reliable transferor, while in the relation between indorsee and drawee the unsettled rivalry of the place of indorsement with the place of payment persists.

2. Translative Function of Indorsement

Again, the Continental doctrine distinguishes three effects of indorsement:[3]

(a) Indorsement transfers the right flowing from the bill against acceptor or maker;

(b) It procures the indorsee the position as holder "in due course" or "in good faith" respectively;

(c) It makes the indorser liable for warranty.

Moreover, however, indorsement completed by delivery transfers "title," meaning ownership in the paper of the instrument. (The expression should not be used otherwise, and notably should not include the debt.)

Taken as an isolated act of transferring tangible property, this conveyance is naturally subject to the law of the

[3] LUIZ M. RAMIREZ B., "Capacity under the Negotiable Instruments Laws of the Americas," 43 Mich. L. Rev. (1944) 559 ff.; JACOBI, Wertpapiere 249 ff.; STAUB-STRANZ, 56 n. 19; RILK (1933) 2; 11 ROHGZ. 250.

place where the instrument is situated. Anglo-American law, however, consistently connects both title and obligation; they are transferred by the same act of delivery. Correctly, therefore, English decisions in modern times have determined the entire translative effect of indorsement as a unit, although sometimes, with undue emphasis on the property aspect, speaking only of the *lex situs* for chattels.[4]

Elsewhere, the same approach is adopted for bills payable to bearer [5] or issued or indorsed in blank. But in bills to order, Continental doctrine holds it possible that at the place of signature an indorsement may create effective creditor rights, although at the place of delivery property in the bill is not effectively acquired.[6]

In fact, the divorce of obligation and title is old in German legislation and now also persists on the basis of the Geneva Convention, which treats merely the obligation and not the title. On the one hand, the particular rules on bills develop the doctrine of the holder in good faith; on the other hand, the laws of property provide for the protection of a purchaser in good faith of movables. It is characteristic that not even the concept of good faith is the same; in German law ignorance of a defect by gross negligence counts as bad faith in acquiring title to a chattel, but as good faith in acquiring rights against acceptor and indorsees.[7] Hence, opinions are divided in cases where title and obligation seem to part ways. In the prevail-

[4] Alcock v. Smith [1892] 1 Ch. 238; Embiricos v. Anglo-Austrian Bank [1904] 2 K.B. 870; [1905] 1 K.B. 677; Koechlin v. Kestenbaum [1927] 1 K.B. 616, 889; Guaranty Trust Co. of New York v. Hannay [1918] 1 K.B. 43; [1918] 2 K.B. 623. On the problems of title see BRITTON, Bills and Notes (1943) 734 ff.

[5] See authors cited by 2 FRANKENSTEIN 110; RAISER 102 ff.

[6] ULMER, Festgabe für Heck (133 Arch. Civ. Prax.) 192; DUDEN, Eigentumserwerb 68; WOLFF, Priv. Int. L. (ed. 2) 551; German W.O. (1908) art. 74, 82; Geneva Convention, art. 16, 17.

[7] German W.O. (1908) art. 74, 82; Geneva Conv. art. 16, 17; German BGB. § 932.

ing view, the right accruing from the bill follows the right in the bill, which agrees with the true content of the common-law principle. Minority opinions, however, hold that the title passes by the indorsement itself.[8]

There can be no doubt that the commercial view represented in the Anglo-American rules excels by its unity and simplicity. All translative effects of the transaction are simultaneously derived from the law of the place where the instrument is situated at the time of delivery.

3. The Doubtful Scope of the Principle of Independence

There does not exist a visible guiding idea for defining classification of problems that fall under the scope of the individual law of the place of an endorsement, rather than under some other conflicts rule respecting particular incidents of the bill of exchange. Even worse, no general agreement exists about the relative weight to give the law under which the obligation of a signer *(A)* is entered into and the law under which a subsequent signature *(of B)* confers rights *(to C)* against the precedent obligor *(A)*.

Our main materials consist in isolated groups of judicially treated topics and the respective comments or equally sporadic literary problems. Accordingly, we have to look for the desirable legal rules through the study of particular situations.

Only one general application of the several laws principle, although even this with qualifications, seems to be universally admitted, viz. the rule that the obligation of *warranty* is governed by the law of each indorsement.[9] This law determines the time, place, and currency of the

[8] RAISER 109 denies application of BGB. § 952 whereby an instrument follows the creditor's right. ULMER, *l.c.* 192 ff., would apply § 952 "to a certain degree."

[9] United States cases cited by LORENZEN 122 n. 232; RAISER 59; KESSLER 138.

warranty, as well as the requirements and extent of the liability. It includes the permissibility of conditional obligations (commonly ineffective)[10] and of partial indorsements (commonly void);[11] and the questions whether the indorser's liability is subsidiary to that of the drawer or *in solidum* for all warrantors,[12] whether the recourse must run through the entire chain or may jump to remote indorsers,[13] etc.

Where acceptance is refused, the law of the place of indorsement determines whether the holder may resort to the guarantors for payment [14] or security;[15] it decides also whether release of the principal debtor has effects on the secondary obligors.[16]

Hence, the law of the basic bill, though determining the primary obligations, does not affect the liabilities of recourse.

But that we have not reached a complete solution is shown by the next following doubt concerning classification.

II. Which Law of Indorsement Prevails in Determining the Rights of Holders?

This is a curious aspect of the principle of independence. Suppose *A* indorses to *B* in state *X*, and *B* indorses to *C*

[10] Permitted in BEA sec. 33; NIL sec. 39; prohibited in Geneva Convention, art. 12, par. 1.

[11] Not permitted by BEA sec. 32 (2); NIL sec. 32; Geneva Convention, art. 12, par. 2.

[12] Williams v. Wade (Mass. 1840) 1 Metcalf 82; Arangio-Ruiz 252 and cit. in n. 1.

[13] United States, whether previous suit against maker or acceptor is necessary: Williams v. Wade (Mass. 1840) 1 Metcalf 82; Trabue v. Short (1866) 18 La. Ann. 257; Weil v. Sturgis (Ky. 1901) 63 S.W. 602; 2 Wharton § 452 ff.

Diena, 3 Tratt. § 222.

[14] Geneva Convention, art. 43; BEA sec. 43; NIL sec. 151.

[15] Former German W.O. art. 25; French C. Com. (1807) art. 120; 1 Meyer 464; now Egypt: C. Com. mixte art. 125; C. indigène 119.

[16] Spies v. National City Bank (1903) 174 N.Y. 222, 66 N.E. 736, 61 L.R.A. 193 a.o.

in state *Y*. The two laws define differently the position of indorsees, for instance, as to protection of good faith against defenses of duress, fraud, mistakes, lack of consideration, lack of delivery. *A* seems to obligate himself just to what the law of the first indorsement compels him, no less and no more. However, *C* acquires rights under the law of the second indorsement, rights that may be larger or narrower than what *B* acquired. The analogous question arises if *A* is the drawer and *B*, the payee, indorses to *C* in another jurisdiction. In other words: is the obligation of *A* definitively fixed by the law of *X* or is it subsequently modified by the law of *Y*?

This problem has been discussed incompletely in several applications, two of which follow:

1. Defenses of Warrantor

Continental writers have believed that the American courts in the matter of defenses almost always look to the law of the particular obligor.[17] But in the United States no substantial authority exists on the question, since almost[18] all decisions to which we may resort concern the obligation of primary obligors upon promissory notes. Yet we may submit that American courts are prepared to go along with the English comments on the Bill of Exchange Act, Section 72(2), and the prevailing Continental opinion. According to these, in any case, it is the law of the place of the indorsement by which the individual holder *acquires*

[17] See HUPKA 264.

[18] LORENZEN 134 n. 264 cites Ory v. Winter (La. 1826) 4 Mart. N.S. 277, for the proposition that when a party contracts under the law allowing him a certain defense, he is protected against a holder who is a holder in due course under the law of his contract. But the reasoning of LORENZEN 141 ff. seems to evaluate grounds pro and contra and to arrive at a contrary result. The majority of the cases, increased by Stout v. American Natl. Bank and Trust Co. (Miss. 1942) 7 So. (2d) 824, apply *lex loci contractus* and seem to think of the place where the holder purchased the bill.

his position that decides on the admissibility of defenses against him.[19]

This law, thus, on the one hand determines what requirements the holder in due course (or bona fide holder) must fulfill, e.g., whether bad faith requires positive knowledge of a defect of title [20] or also includes "dishonesty," [21] lack of "honest, credible confidence," [22] or requires "knowingly acting to the detriment of the debtor." [23] The latter formula has been understood as excluding any consideration of negligence; the holder is protected except when he acts with direct or indirect intention.[24] Also the burden of proof is subject to this law.[25]

On the other hand, all defenses that law *X* may concede to *A* are cut off against a holder privileged under the law of his own acquisition.[26] This very remarkable result is justified in the Continental literature by the necessity to protect the holder in the interest of undisturbed circulation. The indiscriminate language of the Geneva Rules, article 4, paragraph 2, in stating the principle of independence certainly encourages a corresponding solution.[27]

That American practice favors the same view may be inferred from one decision holding "that a transfer of personal property which is valid by the law of the place where such transfer is made is insufficient to pass a valid title to

[19] RAISER 91; HUPKA 263 ff.; QUASSOWSKI ALBRECHT 94; ULMER, Wertpapiere 287. The wording of Unif. Com. Code, s. 3-305, seems to confirm the same view with respect to the numerous differences of American statutes.

[20] NIL sec. 56; *cf.*, BEA sec. 2.

[21] NIL sec. 59; BEA sec. 90.

[22] Hurst v. Lee (1911) 143 App. Div. 614, 127 N.Y.S. 1040; "Good faith means honesty in fact in the conduct or transaction concerned," Unif. Com. Code, s. 1-201 Nr. 19.

[23] Geneva Conv. art. 17.

[24] Comptes rendus 133, 291 ff.; HUPKA 52 n. 2.

[25] Compare BEA sec. 30, par. 2; NIL sec. 59, sent. 1, with Geneva Conv. art. 17 (the debtor must prove the dishonesty of the holder).

[26] BEA sec. 30, par. 2; NIL sec. 59.

[27] RAISER 104; ARMINJON ET CARRY 478 § 422.

it," so as to protect a holder in due course of a note against the defense of the maker based on fraud.[28] With greater clarity the same conclusion seems to follow from the leading American decision on forged indorsements, to be discussed presently.

A doubt, however, is revealed precisely by a case discussed in the United States. Payee *A*, taking with notice of fraud committed against the maker, negotiates the note to *B* who is immune against the defense of fraud, but afterwards *A* reacquires the instrument. American courts and now the Draft of a Commercial Code hold *A* subject to the defense.[29] If *A* takes in the United States without knowledge but without due inquiry into a suspicious situation and negotiates the note in Germany, where negligence is no bar to the protection of the holder, no American court, evidently, will admit his claim. It might be argued even under the Geneva Convention that if *A* has acted "sciemment au détriment du débiteur," his claim should be dismissed, whatever his credentials may be. The case recalls the model case of collusion used in Geneva.

Results, hence, seem identical all around. American courts would not need resort to public policy to obviate undesirable situations.

A special instance of such effort to promote smooth circulation has developed in the case of forged signatures.

2. Spurious Signatures

Under the Anglo-American acts, signatures forged or attached in the name of a person without his authorization

[28] Brook v. Vannest (1895) 58 N.J.L. 162, 33 Atl. 382; LORENZEN 140; RAISER adds Fogarty v. Neal (1923) 201 Ky. 85, 255 S.W. 1049 in referring to the special case of spouses between themselves.

[29] Berenson v. Conant (1913) 214 Mass. 127, 101 N.E. 60; CHAFEE, "The Reacquisition of a Negotiable Instrument by a Prior Party," 21 Col. L. Rev. (1921) 538, 542; Uniform Com. Code, 3-201(1).

are inoperative. No right can be acquired "through or under that signature." [30] The law recognizes exceptions in the case of estoppel and ratification by the person whose signature is not genuine or unauthorized. Other rules mitigate the result, such as the English statute allowing bankers to pay in good faith drafts without verifying the indorsements,[31] and the judicial practice shifting the damage from a paying bank upon the true owner.[32]

In the civil-law countries, on the contrary, a bona fide holder may base his claim on any genuine signature, for using part of a merely formally uninterrupted chain of indorsements. According to article 16, paragraph 2, of the Geneva Convention:

"Where a person has been dispossessed of a bill of exchange by any event whatever, the holder, justifying his claim (by an uninterrupted sequence of endorsements), is not liable to surrender the bill, unless he has acquired it in bad faith or has committed a gross fault in acquiring it."

This contrast of legislation much debated in the fruitless efforts for a universal bills of exchange law and, in fact, of doubtful solution,[33] could also have disturbed conflicts law. It is gratifying to see how the courts, though reasoning on various formal principles, yet have bridged the gap, distinctly favoring easy circulation and protection of discounting banks.

[30] England: BEA s. 24; Canada: BEA s. 49; U.S.: NIL s. 23.

[31] BEA s. 60.

[32] NIL s. 15; Uniform Comm. C., s. 3-115 and 3-406; to obviate City Nat. Bank of Galveston v. American Express Co. (Tex. 1929) 16 S.W. (2d) 278, *cf.*, Palmer, 48 Mich. L. Rev. 266. On the thoughtful American practice concerning the question who should bear the damages, the bank or the owner, see BRITTON §§ 142, 146. In a recent decision, in Strickland Transportation Co. v. First State Bank of Memphis (Tex. Sup. 1948) 214 S.W. (2d) 934, ann. 27 Tex. L. Rev. (1949) 713, the court by majority vote assumed that the damage caused by the faithlessness of the forging agent should fall on the person who employed him.

[33] *Cf.*, HUDSON AND FELLER, 44 Harv. L. Rev. (1931) at 354.

The English Court of Appeal, in *Embiricos* v. *Anglo-Austrian Bank* [34] argued on the basis of the principle of independence, although this also could have been used for an opposite decision. However, it recognized the civil-law rule with respect to a check payable in England.

The clerk of the payee *A* stole a check on a London bank, already indorsed to *B,* forged *B*'s indorsement, and discounted the check with a Viennese bank. The bank, again, indorsed the check to London and received payment. When the payee sued the London bank for a second payment his action was dismissed. The bank in Vienna was authorized by the Austrian law to discount the apparently regular instrument in good faith.

To this extent, in the relationship between a holder and the drawee, it is universally settled that the law of the place where an indorsement is made—as in the *Embiricos* case, the Austrian law—determines the justification of the indorsee's title and, hence,[35] of the drawee's right to pay to him.

There arose grave doubt, however, about the recourse against precedent indorsers and the drawer. Could the Viennese bank, or its indorsee who cashed the check, in the absence of payment, recover from the payee or the drawer? In his opinion, Vaughan Williams, L.J., by an obiter dictum, held it "convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument." He considered that otherwise, even though the indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign law, yet he would be guilty of a conversion if he obtained payment from an original party to the negotiable instrument from which he could not have

[34] [1905] 1 K.B. 677.

[35] That is, under the law of the place of payment (*infra,* Ch. 62 n. 30), referring to the law of the indorsement.

recovered by process of law.[36] An analogous decision has been rendered in New York.[37]

A corresponding general rule to bind American parties issuing, accepting, or indorsing a bill has been proposed by Lorenzen.[38] The Supreme Court of the United States took a broad view, but on technically different grounds. This time, the *lex situs* was invoked as the chief basis of the decision.

The Supreme Court held, indeed, that the right of a holder against the drawer as well as the drawee is governed by the law of the place where the indorsed bill is delivered to the holder.

A check was drawn by the United States Veterans Bureau to the Federal Reserve Bank of New York on the Treasury of the U.S. The check was payable to L. Makanja in Yugoslavia and mailed to him, but failed to reach him. Somebody forged his signature and an attestation by the city and sold it to the Merkur Bank in Zagreb (Croatia), whence it came to the Guaranty Trust Company to which it was paid by the Federal Reserve Bank of New York as fiscal agent of the U.S.[39]

The decision is squarely built on the conflicts rule for transfer of chattels. The bank in Yugoslavia acquired the title under its last situs, by the effect of good faith. The court, in this view, was influenced by the consideration that the owner of the paper, the Government, by mailing the check consented to negotiation in Yugoslavia. From these antecedents, the trust company acquired the check and the right to enforce the obligation it represents, as an incident of the transfer of a chattel.

[36] *Ibid.* at 684.

[37] Casper v. Kühne (1913) 159 App. Div. 389, 144 N.Y.S. 502; payment in good faith by the drawee bank in Vienna.

[38] LORENZEN 139.

[39] United States v. Guaranty Trust Co. of New York (1934) 293 U.S. 340, 95 A.L.R. 651; STEFFEN, Cases 390.

It is very difficult to follow this sequence of ideas, since a check to order is not an ordinary chattel. The result in the instant case was right, but the reasoning expressed a not quite satisfactory theory.

Mr. Justice Brandeis, speaking for the court and intent on combating the theory of the defendant government, explained that the holder in the case had, indeed, more than a title in a valueless paper, derived from the local *lex situs;* the situation was likened to that of a transferee without indorsement or an indorsee after maturity, that is, the holder was not owner of "the debt," but he had the right to collect the proceeds such as the payee would have. This construction unnecessarily separates title and debt. Why was the holder not also the owner of the debt as well as of the paper? If the Yugoslavian law was seriously applied, the discount bank did acquire "the debt," not meaning of course the underlying relationship between the payee and the drawer, or that between the drawer and the drawee, but "the debt" flowing from the instrument, the scriptural rights. It is illogical and unsound to convert this effect into a conception that neither corresponds to Yugoslavian nor to American law. For assuming that the foreign bank became a regular holder in good faith, so as to cut off the objection of previous forged signatures, his successors in due course enjoyed his privileges and were not in a hybrid and possibly precarious position.

It is an important requirement that title and cambial debt both be considered in full, and at the same time kept together as often as possible.

In France the principle of independence was understood to require that English parties should not be made liable contrary to their own law (of contracting), except on the ground that the latter contravenes public policy.[40] Yet the

[40] ARMINJON ET CARRY 507 § 448.

only English and American opinions rendered so far approve such liability even in their own courts. The same view has been taken by the German writers, because the recourse must be continued to reach the original parties. They contend that the drawer has no interest in the person who avails himself of the recourse.[41] In any case, the courts do feel the necessity of bridging the gaps threatening the value of international bills of exchange.

Liability of Agent. According to the English and American Acts,[42] an agent "signing for or on behalf of a principal or in representative capacity" is not liable on the instrument "if he was duly authorized." Otherwise, he is personally liable. The same is stated in the Geneva Convention, article 8. Are these incidents of the signature?

Arminjon proposed first to consult the *lex fori* on the "preliminary question" whether the relationship is to be characterized as *"cambiaire"* or not;[43] in the affirmative, the agent would have to use the forms of the *lex loci contractus,* and his own obligation would be determined by the bill of exchange law. The detour seems unnecessary. The laws of bills of exchange expressly incorporate the liability of unauthorized agents, correctly so, since his relationship to third parties is governed by the law of the contract that he concludes (Vol. III, p. 141). Indeed, by reimbursing the holder he enters into the cambial rights quite as the principal would.[44]

[41] STAUB-STRANZ 744 n. 24; KESSLER 152 n. 36; RAISER 105.

[42] *Supra* n. 28.

[43] ARMINJON ET CARRY 491 § 433 with some distinctions; ARMINJON, DIP. Com. 320 § 165.

[44] Whether there should be an analogy in the case where an authorized agent signed with the name of his principal without his own name and finally pays the bill, is questioned by ULMER, Wertpapiere 179.

III. *"Lex Loci Contractus"* of the Single Obligation or Law of the Original Contract?

1. Negotiability

The ability of a paper to be transferred by indorsement or delivery depends on compliance with formal requirements. It might simply be regarded as an incident of form. But American courts distinguish negotiability from form, and various considerations have been introduced into the problem.

(a) *In English and Continental laws,*[45] it is plainly recognized that the law of the place of issue governs the *original contract* also with regard to the questions whether the payee may transfer the instrument to order, in blank, or to bearer. A bill of exchange drawn and delivered in England and payable in Paris was negotiable and indorsable anywhere without the clause "or order" as former French law required, and is endorsable now although not named "bill of exchange," as the Geneva law adopted in France requires. Conversely, a bill issued in a country of the Geneva Convention is negotiable everywhere, if designated as bill of exchange (article 1), though clauses required elsewhere are lacking.

It is furthermore settled that *accessory contracts,* such as indorsements or *avals,* enjoy the negotiability of the original bill. An indorser therefore cannot restrict his signature by prohibiting subsequent indorsements (Gen. Conv., art. 15, par. 2).

But where the drawer himself uses the clause "not to order," [46] or for that matter when the law of the first is-

[45] 2 Diena, Principi 312; 3 Trattato 95 § 222; Ottolenghi 211 § 84; Raiser 99; Hupka 265.

[46] Generally allowed, see Diena, 3 Tratt. 94 n. 1; Geneva Conv. art. 11, par. 2.

sue excludes negotiability in the absence of a clause "to order," [47] the municipal enactments and doctrines are divided. Among them, the view that non-negotiability extends to all further contracts [48] has been adopted in the British Act, section 8(1) and the Geneva Convention, article 11, paragraph 2:

> If the drawer has inserted in the bill the words 'not to order' or an equivalent clause, the bill can only be transferred in the form and with the effects of an ordinary assignment.

Other laws, however, pursuing the principle of independence as conceived in municipal law, restrict the effect of the clause to its signer, even though he is the drawer; the bill, hence, reacquires its full force in the hands of any holder.[49]

The conflicts problem appears where, under the first group of laws, now under the Geneva Convention, the drawer, according to his law, excludes subsequent negotiations, which nevertheless occur in a country denying the absolute effect of the clause. The municipal doctrines have influenced the decisions. Leading writers belonging to the jurisdictions of the second group extending their municipal conception to the conflicts rule have invoked the independence of subsequent indorsements as governed by their own laws of contracting.[50] Against this view, a scholarly

[47] Egypt, Code Com. mixte art. 110; Code C. Com. indigène art. 105 (following a former provision of the French (Com.).

[48] France: Cass. (Dec. 11, 1849) S. 1850.1.121, D. 1850.1.47;
Germany: former Wechselordnung art. 9, 15;
Scandinavia: Bills of Exchange Act (1880) art. 9, 15; Swiss C. Obl. art. 727, 733;
Hungary: Bills of Exchange Law (1876) art. 8, 13.

[49] Italy: former law: VIVANTE, 4 Trattato Dir. Com. § 1617; actual Bills of Exchange Law, 1933, art. 15, 19.

[50] Italy: DIENA, 3 Trattato 97 § 222; BONELLI 230; OTTOLENGHI § 84 (but see § 57); G. ARANGIO-RUIZ 254 § 98;
France: ARMINJON ET CARRY 507 § 449.
Germany: STAUB-STRANZ 739-740 n. 16.

opinion considers the drawer's declaration to be an integral or at least prominent part of the original contract, binding on all participant parties, throughout the circulation of the bill.[51]

But the defenders of the independence principle [52] again may point to its adoption, without an exception for the clause "not to order," in the Geneva Rules (article 4, paragraph 2). Also certain of the draftsmen have denied that a bill could be made non-negotiable from birth forever.[53]

On the other hand, it is clear that accessory parties may end initial negotiability by appropriately restricting their signatures.[54]

(b) *United States.* Also in the United States it is controversial what law governs negotiability. Lorenzen [55] and the Restatement (§ 336) have well perceived that in principle negotiability is an incident of the basic contract, governed by the law of the place of the first issue. Only a small minority of the decisions, however, follow this course.[56] Beale says that most decisions contain "as usual no square holding." [57] Wharton thought that the courts decided according to individual incidents rather than principles.[58] Favor for one party has certainly influenced some

[51] 2 BAR 166 n. 143; RAISER 99; HIRSCH, JW. 1932, 709; HUPKA 265; KESSLER 138.
France: VALÉRY § 923; ARMINJON, DIP. Com. 336 § 177.
[52] STAUB-STRANZ, art. 93, n. 16; HUPKA 26 (5).
[53] RAISER 111.
[54] RAISER 101 consistently denies this possibility as excluded by the original contract.
[55] LORENZEN 129 ff.; Popp v. Exchange Bank, noted 11 Calif. L. Rev. 114 (1923).
[56] Carnegie v. Morrison (Mass. 1841) 2 Metcalf 381; Swift & Co. v. Bankers Trust Co. (1939) 280 N.Y. 135, 19 N.E. (2d) 992.
[57] 2 BEALE 1186 § 336.1; *cf.*, Notes, 61 L.R.A. 193, 205; 19 L.R.A. (N.S.) 665; See also BEUTEL-BRENNAN 971 § 66 with comment on Mackintosh v. Gibbs (1909) 79 N.J.L. 40, 74 Atl. 708; add (1911) 81 N.J.L. 577, 80 Atl. 554.
[58] 2 WHARTON 966, *cf.*, LORENZEN 130.

holdings.[59] According to Stumberg's analysis, in the case of a maker or an acceptor, the weight of authority favors the law of the place of payment, although for secondary obligations the decided tendency goes toward the separate laws of the places of drawing or indorsing. But authority exists for the proposition that if a check is drawn in Mexico and payable in New York, its negotiability depends on the law of Mexico, because the check is a bill of exchange.[60]

Application of the independent laws is often advocated by the usual formalistic arguments. The law of the place of payment is not explained at all. But, as the next topic will show, it is regarded as the alternative to plurality of laws which is not attractive in itself with respect to the primary obligation.

(c) *Conclusion.* If we want a simple and coherent law we cannot disregard the initial role of a bill if issued as a negotiable instrument. Any indorser may eliminate its effect for himself by an express clause. But he should not be able to restrict the characteristic quality of the paper with respect to subsequent parties who sign without restriction. This quality is an immediate effect of compliance with the formal requirements of the original contract.[61]

Where, however, an instrument is non-negotiable under its original law, it accords with the modern compromises respecting form and capacity to allow subsequent additions altering the nature of the instrument as respects the parties involved thereafter.[62]

2. Indorsement after Maturity

Indorsement after maturity has "a most diversified effect in the different countries." [63] This is also true of indorse-

[59] See, e.g., Nicholas v. Porter (1867) 2 W. Va. 13, 94 Am. Dec. 501.

[60] Hennelotter v. De Orvananos (1921) 114 Misc. 333, 186 N.Y.S. 488 and *supra* n. 50.

[61] Everything on this point has been said by LORENZEN 100.

[62] LORENZEN 132 seemed to be of the same opinion.

[63] LORENZEN 32.

ments after protest or after the time for protest has elapsed. However, the great tendency has been in all these cases to treat the indorsee as an ordinary assignee.[64] Conflicts do arise where duly protested bills give rise to this situation, as formerly in Germany,[65] or conversely these events do not impair the indorsement, as formerly in France.[66]

The reason for the infirmity of the indorsee's position is not a defect of title, but the end of the normal life of the instrument. This gives no reason to exclude the individual laws in just this case.[67]

IV. Single Law of Indorsement or Law of the Place of Payment?

1. Amount of Damages in Recourse

In this matter there has been no doubt respecting the substantive nature of the extent of recovery due in case of recourse on a dishonored bill.[68] In England formerly, the "several laws" doctrine applied to the rate of interest,[69] and related questions,[70] but the Bills of Exchange Act, section 57(2), states that in the case of a bill dishonored abroad, the last holder or a warrantor may choose between the English measure of damages and the amount of re-exchange with interest. A decision has given the same right to a foreign drawer against an English acceptor.[71] Otherwise, foreign parties seem to be restricted to the Eng-

[64] BEA sec. 10 (2); NIL sec. 7, par. 3.
Geneva Conv., art. 20.
[65] Former Germon W.O. art. 16.
[66] Former French doctrine, 4 Lyon-Caen et Renault § 135.
[67] See Raiser 107.
[68] In re Gillespie, ex p. Robarts (1886) 18 Q.B. 286; Re Commercial Bank of S. Australia (1887) 36 Ch. D. 522; Dicey (ed. 6) 702 n. 84.
[69] Gibbs v. Freemont (1853) 9 Exch. 25.
[70] Cooper v. Earl of Waldegrave (1840) 2 Beav. 282; Chalmers 238.
[71] In re Gillespie, *supra* n. 62.

lish provisions in an English court.[72] Hence, apart from re-exchange, which has little importance at present, the acknowledgment of the substantive character of damages does not help much.

American courts, speaking of *lex loci contractus* [73] or of *lex loci* of "performance," [74] have applied the law of each single contract; the maker of a note and the acceptor, of course, remaining subject to the law of the place of the payment of the instrument.[75] The German law and discussions preceding the uniform Geneva Convention were dominated by the idea that in the event of recourse the amount of the bill and the original addition of interest and costs ought to be successively increased by new interest and costs.[76] This system of "plural return costs" is mitigated by a right of every party liable to offer payment and require that the bill shall be given up to him.[77] With this system of substantive law, accentuating by itself the independence of the single laws with international effect, it is only a step to the similar conflicts system, accounting for the additional costs according to the single laws.

It would seem, indeed, that, once the single law doctrine obtains at all, it has the relatively best case in this very question which is really such as would be contemplated by a bank discounting a payee's check.[78]

2. Defenses of Acceptor or Maker

The analogous rivalry of conflicts rules involving the position of the primary obligors belongs to the next chapter.

[72] DICEY (ed. 6) 703; LORENZEN 168.

[73] Slacum v. Pomery (U.S. 1810) 6 Cranch 221, 3 L. Ed. 205; Bank of Illinois v. Brady (1843) 3 McLean 268, Fed. Cas. no. 888.

[74] Peck v. Mayo (1842) 14 Vt. 33, 39 Am. Dec. 205, and cases cited by LORENZEN 169 n. 401-403. But see Mullen v. Morris (1845) 2 Pa. St. 85: place of payment of the bill, i.e., New York, for indorser of Pennsylvania *(semble)*.

[75] Scofield v. Day (N.Y. 1822) 20 Johns. 102: English law for a note payable in England.

[76] Geneva Conv., art. 48, 49; *cf.*, former German W.O. art. 50, 51.

[77] Geneva Conv., art. 50; W.O. art. 48.

[78] See LORENZEN's conclusion 173; RAISER 65 ff.