PART TWELVE

BILLS AND NOTES

CHAPTER 58

Principles

I. SOURCES

THE law of bills and notes has developed in the law merchant through many centuries. Although it has not everywhere been so responsive to mercantile habits and conceptions in such relatively [1] high degree as in the English courts, after they absorbed cases involving negotiable instruments from the merchant courts, the special requirements of commercial needs are observed in all jurisdictions.[2] Most important of all, formal, simple, and reliable documentation of obligations is the primary characteristic. And, of course, as one of the oldest means of international commerce, bills and notes should satisfy this requirement also during their travels through several countries. Unfortunately, usage and legislation, producing different rules, have impeded the unity of purpose. Conflicts law, at least, could have been expected to provide a clear and easy co-ordination of the national differences. The unification of conflicts law, however, that was obtained in Geneva, after long and intensive labor at the most successful of all international commercial conferences, is limited as respects both territorial domain and material problems.

[1] Even the English courts, as is well known, submitted the merchant practice respecting bills of exchange to such common-law doctrines as that of consideration.

[2] Argentina: C.Com. art. 738 expressly mentions in connection with the laws also the commercial usages of the place where the instrument is executed.

1. The Written Laws

(a) *Communities.* The Montevideo Treaty of International Private Law of 1889 established a series of conflicts rules relating to negotiable instruments,[3] which were substantially reproduced in the Código Bustamante.[4]

The Hague Uniform Regulation of 1910-1912, predecessor of the Hague Convention of 1930, was adopted as law in Yugoslavia, Turkey, Ecuador, Guatemala, Nicaragua, and Venezuela.

The uniform conflicts rules stipulated in Geneva in 1930 for bills of exchange and promissory notes—cited hereafter as *Geneva Rules* [5]—and in 1931 for checks have been ratified by eighteen states, including Soviet Russia and Japan, but no American country.[6] The core of this legal community consists of the two groups developed either on the French system or on the German *Wechselordnung* of 1848. The influence of the latter enactment, one of the most outstanding legislative works of all times, has been fortified by the German and Italian literature. German and Italian doctrine, in fact, is the natural counterpart of the common-law decisions in this matter,

The Anglo-American group, although without an international agreement, is fairly united by the substantive rules of the British Bills of Exchange Act, 1882,[7] and the Uni-

[3] Argentina and four other states: See Vol. I, p. 29.

[4] Fifteen Latin-American states, see Vol. I, p. 32 ff., but without much visible effect on the practice. A comprehensive comment is offered by José Antonio Cordido Freytes, Les conflits en matière de lettre de change dans la Convention de La Havane (thèse Paris 1954).

[5] The substantive Geneva treaty on bills of exchange and promissory notes will be cited as *Geneva Convention.*

[6] Austria (1932), Belgium (1932), Denmark (1932), Danzig (1935), Finland (1932), France (1936), Germany (1933), Greece (1931), Italy (1932), Japan (1932), Monaco (1934), Netherlands (1932), Norway (1932), Poland (1936), Portugal (1934), Sweden (1932), Switzerland (1932), U.S.S.R. (1936).

[7] The Bills of Exchange Act, 1882, 45 and 46 Vict. Ch. 61.

form Negotiable Instrument Act, in which all states of the United States, Alaska, Hawaii, Puerto Rico, Colombia, Panama, and the Philippines participate. The conflicts rules, however, contained in the British Act (section 72), unhappily drafted, were omitted in the American Act and are replaced in this country by a confusing set of largely uncertain maxims.

If, hence, the two groups of the common-law and the Geneva Rules have to be in the forefront of our discussion, nevertheless the fragmentary character of these principal materials must be kept in mind. Even the Geneva Rules, though more complete than the provisions on conflict of laws in the Hague Uniform Law of 1912,[8] are greatly disappointing because of their restricted scope. The Convention on the substantive law itself is incomplete. The Conflicts Rules have more omissions. Particularly, there is no provision on the essential requirements of validity of the contracts involved; on negotiability of the instruments; on the transfer of obligations by indorsement; on identification of a person as holder. Neither do they determine the law governing the duties of the holder; the procedures of enforcement and of annulling titles lost or destroyed; the conflicts respecting "provision" (cover); accommodation bills; or the effect of limitation of action or preclusion impairing the rights of the holder.

The effects of the obligations are more fully treated in the English Act and the Latin-American treaties, which, however, in other respects are even more fragmentary.

(b) *Isolated laws.* Outside the conventions, some countries of the former French-Latin group have remained isolated, such as Albania, Dominican Republic, Honduras,

[8] They were restricted to form and capacity; on similar laws see 1 MEYER 643; TRUMPLER 154.

Mexico,[9] Spain, and of the former German group Bulgaria, Hungary, Rumania, and Czechoslovakia. The impact of the present Soviet law is unknown to the writer.

(c) *Scope.* The scope of the special conflicts matter seems to coincide with the extent of the law of negotiable instruments. The Anglo-American acts include "bills of exchange, cheques and promissory notes." The comparable older Continental laws were merely concerned with drafts *(lettre de change, cambiale, gezogener Wechsel)* and notes *(billet à ordre, vaglia* or *pagheró, eigener Wechsel).* More recently, separate enactments codified the rules on checks.

To use correct language, we are forced to restrict our principal survey to bills of exchange and notes, or even to bills alone, although on most subjects the rules are the same in the larger categories. Some special problems of checks will be examined thereafter.

2. Main Differences of Internal Law

Opposite principles remain between the Anglo-American laws and the Continental groups, which are principally represented by the Geneva Conventions. We find ourselves today in essentially the same situation as Lorenzen (p. 20 ff.) described in 1919, after the Hague but before the Geneva unification.[10] It is therefore appropriate to follow his lead in enumerating what now remain as major substantial differences.

[9] Mexico: General ley de títulos y operaciónes de crédito, 1932.

[10] See for full analysis HUDSON AND FELLER, 44 Harv. L. Rev. (1931) 333; WIGNY, Revue Dr. Int. (Bruxelles) 1931, 805; ASCARELLI, Actes Congr. Rome, 303-311.

Anglo-American Group	*Continental Laws*
Elasticity of form	Rigorous formalism
Promise of interest allowed	Geneva: only if the bill is after sight
England: bill cannot be in a certain foreign currency (*contra* United States)	Contra
Bill to bearer admitted	Not admitted
Consideration necessary	Contra
Conditional indorsement allowed	Contra
Indorsement after maturity equivalent to bill at sight	Merely an assignment
Reasonable time of presentation for acceptance	Fixed periods, Geneva art. 34: one year
Time for deliberation 24 hours	Geneva art. 24: the following day
Acceptance not dated in bills at sight may be completed by holder	Geneva art. 25 al. 2: the holder must make protest
Partial acceptance not allowed	Contra
Indorsements following a spurious signature invalid	Contra

3. Special and General Law

The special statutes on bills of exchange, etc., do not exhaust the requirements and effects of the obligations or "contracts" of which they speak. The uniform rules are supplemented by the national special rules on negotiable instruments called for by the broad reservations and gaps left by the Geneva Convention and to a much smaller ex-

tent by the Uniform Negotiable Instruments Law.[11] And there is a large domain, which varies and sometimes is very large, left to the general law of contract. Accordingly, we must evidently divorce the conflicts rules of the special matter from the general conflicts rules, so often applied by so many courts to "contracts" in general, although we also have to co-ordinate the two groups. In this respect, lack of thought is manifest in almost all systems.

Terminology. To obtain a clearer view of this subject, distinctive language will be indispensable. It does not exist in the common-law sphere, but it does in the Continental doctrines. German theory significantly speaks of *Wechselerklärung, Wechselrechtssatz,* and *Wechselanspruch,* contrasting these with the declarations, rules, and claims of the "general" or "common" law. Likewise, Italians and French lawyers use the adjectives *cambiario* and *cambial* respectively, in opposition to what is outside, *extracambiario.*[12]

It is proposed that the terms *cambial* and *extracambial* may be employed to indicate a necessary and greatly, though not entirely, neglected distinction also in American law.[13] The obligations created by the acts of issue, indorsement, acceptance, etc., are often governed by the special "cambial" law as far as its limits are defined by the special conflicts

[11] See, e.g., City of New Port Richey v. Fidelity & Deposit Co. (1939) 105 F. (2d) 348.

[12] See the elegant definition by ANGELONI, La Cambiale 38: These obligations are literal and complete in the sense that their content is exclusively determined on the basis of what results from the instrument which must suffice for itself. *Cf.,* the Mexican thesis by ALMANZA, *infra* n. 47, 18; and see now Mexico: S.C., Amparo, Julio 4, 1952, 2 Rev. Fac. Der. (1952) 254 no. 8, using Ley de Títulos y Operaciones de Crédito, art. 5, to distinguish the *relación subjacente* from the literal obligation.

[13] The effect of the distinction is well expressed, for instance, in Alcock v. Smith [1892] 1 Ch. 238 speaking of an obligation: "This is not a question arising on the bill as a piece of paper or chattel."

rules. If a relationship, however, is *"extracambial,"* as certainly should be recognized, e.g., in the case of the relationship underlying a writing on the bill, the special conflicts rules generally will not be competent, although there may be doubts and questions. (*Infra* II, 4).

Another concept, difficult to do without, is what the Italian writers understand by *"letteralità"* and the Germans have emphasized by their theory that the obligations flowing from the bill are essentially conditioned by their written form: *obligation by the writing,* "scriptural" obligation. Despite theoretical differences in the various systems, it is not true that Anglo-American law ignores the role of writing. This may most clearly be perceived when a bona fide holder for value is attributed just what the writing in the bill assures to him.

These two new terms, *cambial* and *written* obligation, may suffice to facilitate our language.[14]

II. The Role of Theory

1. Municipal Theories

Anglo-American writers seem commonly satisfied with the language of the Acts speaking of the "contracts" appearing on negotiable instruments. (BEA s. 27 (1); NIL s. 16), without analyzing the elements of these transactions. German and Italian literature, on the contrary, abounds in controversies and constructions respecting either the foundation or the nature of the special law on bills and notes.[15] So much industry and cleverness has been expended

[14] A further differentiation was made by older writers such as Grünhut, I 1; Karl Lehmann, Lehrbuch Hand. R. (ed. 2) 613, 646, calling cambial private law, *Wechselzivilrecht,* those parts of the general law to which the law of bills refers without incorporating them, e.g., capacity, form, effects of contract. However, no effect on the formation of conflicts rules has ever been suggested.

[15] For a complete though short review see Mossa, Cambiale 27-125.

in this field that a reaction was due. The draftsmen of the Geneva Convention on the substantive law were very anxious not to be influenced by any theory, and insisted on being motivated exclusively by reasons of expediency.[16] Some commentators, therefore, declare it unnecessary to continue the old disputes.[17] Other scholars, however, investigate the Convention in search of its theoretical basis, yet the variety of their conclusions somewhat defies their efforts.

Whatever the truth of this matter may be, our study of the *conflicts* rules ought to start from a twofold statement.

On the one hand, not only the Geneva product but virtually all present statutes do not purport to express any theoretical foundation. Their history in the law merchant is too old to depend on modern dogmatism. What supports them is mercantile convenience, mixed with lawyers' techniques, and, in the conflicts sphere, guided or misguided by the well-known mechanical rules.

On the other hand, contempt of theories is to be avoided, insofar as they explain legislative half-thought by discovering the rational underground. It would be difficult, indeed, to determine the most decisive local connections, established by an international bill of exchange, if we lacked clarity about the nature of the acts composing such a bill. This will appear conducive to a study of the different connecting factors such as delivery in common law and signature in civil law, the nature and extent of defenses, limitation of action, relationship between principal and guaranteeing debtors, etc.

Theories were wrong in claiming that they explain the

[16] Conventions on bills, annex II art. 16; on checks, annex II art. 19.

[17] For information, see especially CAMILLO TROJANI, Teorie Cambiarie e legge uniforme (Roma 1936); HEINZ WIERS, Wechselannahme und Theorien im neuen Wechselgesetz, Kölner Rechtswiss. Abh. N.F. Heft 19 (Mannheim-Berlin-Leipzig 1935).

entire peculiarity of negotiable instruments, covering the relationships of drawer, acceptor, indorsers, and indorsees. We must recognize likewise that the legal ideas behind the particular, municipal or conflicts, rules are not mysterious theories of the kind of the popular doctrine discovering behind the favor granted to the good faith of a holder an effect of the appearance that his endorser was the right creditor (theory of apparent right, *Rechtsscheintheorie*). But every single rule has a purpose that must be clarified and justified by a legal idea, as part of a system. This is theory enough. In this connection three problems may be considered in the first instance.

2. The Cambial Contracts

The original concept of a contract based on a bill was coined by the old lawyers in view of the function served by bills of exchange at the time. The contract between the issuer and the recipient of the order to pay was a written delegation of a debt, saving the effective transportation of a sum of money, to be paid at a distant place. The French Ordinance of 1673 was accordingly interpreted by Pothier,[18] who was followed by more recent authors. This contract included both the delegation or assignment of a debt agreed upon against consideration *(valuta)* and the delivery of the instrument as performance of the issue. Yet it was also possible to distinguish these two elements as *pactum de cambiando* and issue against *valuta,* a distinction often made in former German works. The French rule that the cover, the debt of the drawer against the drawee, is assigned by the bill is another derivative of the delegation.

In the common law, the contracts written in the bill are

[18] POTHIER, Traité du contrat de change, Oeuvres de Pothier (1847) vol. 4, p. 473 ff.

cornerstones of the legal system of bills. But what do they mean? Lorenzen [19] regretfully defines this contract as the ordinary concept expressed by this word, without regard to the important fact that the obligation arises from the form of the bill rather than from mere agreement; this contract should not be burdened at all by the requirement of consideration.

Our question is this: Does the "contract" as the word is used in the acts still mean the ancient contract of delegation? If I am not mistaken, the answer should be negative, and what is meant is the pre-existent agreement presupposed before any formal contract is executed. It is the agreement between the immediate parties that the bill should be delivered with the signature of one party; hence, delivery of the bill, in correspondence with, "in order to give effect" to,[20] that agreement completes the transaction. This, of course, is simple language, neutral in itself to more searching analysis. But it does not justify the common notion of a "contract" including the entire legal transaction between the parties in question. Hence, the constantly urged opposition between the common-law emphasis on delivery as last act of the "contract" and the civil-law stress on the signature does not appear a priori quite convincing.

On the Continent, quite a number of theories underlie a "contract" to assume cambial obligations. This is a different concept. What the parties agree upon by this contract has primarily nothing to do with their basic relationship such as sale, payment, or gift, but is limited either to unilateral issue of the bill or to issue plus delivery. Be-

[19] LORENZEN 29.

[20] National Exchange Bank v. Rock Granite Co. (1911) 155 N.C. 43, 70 S.E. 1002: In view of the rule that a contract is executed where "the same becomes a binding agreement," the courts hold that the liability of an indorser is controlled by the laws of the state in which the note is indorsed and delivered.

tween these two variants there was much controversy; recently, however, the theory, once proposed by Einert, regarding the unilateral "creation" of the instrument by the drawer as the source of the obligation has lost most of its following. There is a marked tendency among leading writers toward a combination of the written declaration by drawer or indorser, with a contract between him and the payee or indorsee, respectively, concluded by the delivery of the bill (German *Begebungsvertrag*). The German Reichsgericht has adopted this theory with respect to issuance and indorsement, though not acceptance.[21] It has been contended that this is also the best foundation for the rules of the Geneva Convention.[22] But even if this is correct, which must not be examined here, it should not imply in any case that all states, members of the Convention, have agreed on the high degree of abstractness ascribed to the German obligation written in a bill of exchange. This leads us to a problem not yet considered in the conflicts literature.

3. Influence of Underlying Relationships

To define the problem, a few facts of the municipal systems ought to be borne in mind.

The problem scarcely regards the provisions of all legal systems whereby either "a bona fide holder," or "a holder in due course for value" is protected against the defenses that his debtor may draw from his underlying relationship with another cambial debtor. The position of this privileged holder is independent of the ground on which prior holders acquired their own positions. This phenomenon

[21] RG. JW. 1928, 231; 134 RGZ. 33; formerly this theory was also applied to the obligation of the acceptor, 24 RGZ. 87; but this was abandoned, delivery not being required. 74 RGZ. 353, *cf.*, 134 *id.* 34.

[22] Hence, the German Reichsgericht maintains its twofold theory, s. last note; 162 RGZ. 338; PRIESE-REBENTROST 4, 7.

is analogous to many other situations where a bona fide purchaser is protected. Particulars of requirements vary, but no fundamental divergence of views is in issue.

If, however, we set aside this case, most important in practice but exceptional in the organization of the law of bills, there is a basic difference of degree in which the bill is detached from the underlying relation. The German law of negotiable instruments has elaborated a rigorous separation of the obligation flowing from the writing on the bill and the "cause" or legal ground of the undertaking. The debt arises from the signature and is enforceable even though fraud, error, duress, or dissent mar the underlying agreement,[23] as is apparent when the holder sues his own indorser who fails to appear in court. The defect must be alleged and proved by the defendant. This is essentially the reborn classical Roman law of *stipulatio* and *exceptio doli* or *exceptio pacti.* In the French system, the writing produces but a presumption of the validity of the written obligation. Common law does not even recognize this much, although it is very difficult to ascertain its exact conception. Without doubt, basically the efficacy of every obligation in the bill presupposes the fulfillment of all requirements for validity and enforceability of contracts.

This conceptional divergence has its principal importance in procedural situations such as nonappearance of the defendant, summary procedure on instruments or privileges of enforcement, traditional in civil-law countries, but is not devoid of substantive effects.

What, then, ought to be our approach to the following simple cases?

[23] The Reichsgericht (March 20, 1941) 166 RGZ. 306, overruling its own former practice, stated that the debtor cannot oppose defenses of his indorser to a bona fide holder even though the latter is also creditor of the underlying debt.

In a lawsuit in Germany, the holder—for some reason not a holder in due course—sues on a bill issued in Chicago and indorsed to him in Frankfurt, Germany. The defendant drawer, an American in Chicago, pleads usury in the contract between him and the payee. Or the signature of a French drawer, defendant against a subsequent indorsee, upon an indorsement made in Germany, is attacked in a German court under evidence of fraud. Are these defenses to be construed under German *lex fori?* Under this law, this would mean the existence of a full right arising from the writing and of a mere defense based on unjust enrichment or on the tort of a collusive conspiration. Under Illinois law, there would be no obligation, nor under French law, after rebuttal of the presumption. Is the German conception even applicable in all countries, because the rights of the holder are acquired under German law *ex scriptura?*

No! Such approach would be detrimental to international circulation by exaggerating the power of local laws at the cost of the law under which the issue occurred. In other words, the law of Illinois or France, governing the validity and effect of the drawer's obligation, also determines what influence its own general law of contracts should have on the cambial obligation. Merely in favor of a privileged bona fide holder, a very large exception frees him from restrictions of prior holders, and, as we shall see, even models for him a new law of acquisition.

A similar case occurs when an English drawer proves that no valuable consideration has been given either between drawer and drawee or between indorser and the present holder. The holder has no right at common law. In the exaggerated German system, he has a claim which must be repelled by a defense strongly controversial in the literature.[24]

[24] ULMER, Festgabe für Heck (133 Arch. Civ. Prax 1931) 213-215.

Generally, it may be submitted that the influence of the underlying transaction on the obligation based on the bill is governed by the same law governing this obligation. This trivial result points to an important method. The special conflicts rules are deemed to refer to so much of the ordinary law of obligations of the decisive place as the domestic law of this place prescribes. This principle will help answer our next question.

4. Scope of the Cambial Rights

"Extracambial" (general law) obligations are naturally controlled by their own laws rather than by the law of the place of issue or indorsement or payment, the preferred contacts of cambial conflicts rules. A sale of goods produces obligations governed, e.g., by the law of the seller's domicil. If the buyer accepts a trade bill of exchange, he enters into an obligation under the law of the place where he has to pay, which is normally his own domicil. The seller may transfer both his debts to the same person, e.g., his discount bank, and the causes may be joined in a law suit. But the causes of action remain different.

The questions whether the drawer has to furnish the funds to the drawee,[25] and whether the drawee is bound to honor the bill by acceptance and payment, depend merely on the underlying relationship between drawer and drawee, such as bank account, letter of credit, confirmed documentary credit, or other credit arrangement. Most

[25] ARMINJON ET CARRY § 453; ARMINJON, DIP. Com. 339 § 178; G. ARANGIO-RUIZ § 85 against the older opinion of French Cass. civ. (Feb. 6, 1900) Clunet 1900, 605; DIENA, 3 Tratt. § 217; OTTOLENGHI § 55; PILLET, 2 Traité 845; CAVAGLIERI, Dir. Int. Com. 373; WEISS, 4 Traité 460.

On the question whether the provision is transferred and by which act, see Geneva Rules art. 6, vol. 3, p. 442; *cf.*, ARMINJON, DIP. Com. 341 § 180; otherwise DICEY (ed. 6) 683. And see on various connected problems HUPKA, Wechselr. 272.

authors apply the law of the drawee's domicil.[26] More correctly, Arminjon invokes the law of the contract existing between drawer and drawee.[27] That holders do not know whether there is a duty to accept, is certainly a disadvantage, but not one caused by conflicts law.

Illustrations. (i) A bill issued in Germany, payable in Switzerland, was attacked by the acceptor on the ground of immoral consideration. German law governed the cambial requirements, but Swiss law was applied to determine whether good morals were offended.[28]

(ii) A bill of exchange was issued and accepted in the state of Monaco and payable in Rouen, France; the defense of the acceptors against the action of the holder was that the bill was given for payment of a sales price higher than the amount of the bill, to evade the tax laws, and that the debt depended on a certain condition. The Tribunal of Rouen allowed the action under the alleged law of Monaco. In correct application of the Geneva Rules, not the law of Monaco, but French law as *lex loci solutionis* governed, under which only a rebuttable presumption obtains for the existence of cover and the French provision avoiding a debt for fiscal fraud was inapplicable to a Monaco transaction. The alleged unfulfilled condition belonged to the extracambial relationship, effective between the original parties, though not against a holder in good faith.[29]

(iii) A buyer paid a part of the price by indorsing a promissory note of a third person which was not honored. The court in Puerto Rico denied recourse of the seller against the buyer (C.C. 1170, derived from Spanish C.C. art. 1170) on the theory that NIL abolished such claim. In reality, recourse in the underlying relationship is not affected by the cambial law.[30]

[26] 4 LYON-CAEN ET RENAULT § 646; DIENA, 3 Tratt. 118 ff. § 227.

[27] ARMINJON ET CARRY § 438, p. 498 n. 1, 2; ARMINJON, DIP. Com. 326 § 171; against other opinions, *cf.*, LORENZEN 148 n. 313—law of the place of presentment; DICEY (ed. 6) 683.

[28] App. Zürich (Sept. 17, 1929) 29 Bl. Zü. R. 298 No. 123.

[29] Trib. com. Rouen (June 17, 1949), Roganne v. Quevillon, S.1950.2.41, Clunet 1950, 554, with critical notes.

[30] Paris v. Canely (1952) 73 D.P.R. 403; Note, 22 Rev. Jur. Un. P.R. (1953) 43.

Two doubtful cases have been dealt with by the Geneva Conflicts Rules. One regards the so-called claim for unjust enrichment recognized by law where an extinguished bill is excluded as a cause of action. This claim is construed in Germany as a residue of the "cambial" claim.[31] The other case is that of a French bill dishonored and lacking cover, so that the holder has no extracambial hold on the drawee, but under French law still enjoys a claim on the ground of the bill against the drawer, even though he lost his recourse through negligence.[32]

The Geneva treaty leaves both these cases to be determined by the law of the place of issue, although merely with force within the territory of this law.[33] This is an arbitrary and unsatisfactory escape.[34]

Cover. The Hague and Geneva Conferences proved unable to unify the conspicuous diversity of the laws concerning the assignment of cover ("provision").[35] By express statement, it was left to the national laws to decide whether the drawer has to provide cover at maturity and whether the holder has "special rights" in the cover.[36] Conflicts rule 6 adds the provision that:

"The question whether there has been an assignment

[31] See STAUB-STRANZ, art. 89 n. 2, and other comments to the *Wechselordnung*. See also ARMINJON, DIP. Com. 380 § 209.

[32] France: C. Com. art. 116, par. 6.

[33] Hague Convention, art. 6; Geneva Convention, annex II art. 15.

[34] For other subjects on the fringe of the law of bills see MONACO 17.

[35] *Supra* Vol. III, p. 415 f., 441 ff. The particular laws are described by JOAQUIN VIJIL TARDON, La provision de la lettre de change (Paris/Lausanne 1939) and the problems surveyed by ERNST E. HIRSCH, Der Rechtsbegriff Provision—im französischen und internationalen Wechselrecht (Marburg 1930).

[36] Annexe II to the Geneva Convention, art. 16. The legislators, thus, though inserting the assignments into the formal cambial law, separated them from the Convention. In this spirit, Italy used separate legislation to introduce transfer of the underlying debt of the drawee in special cases, although requiring a formal clause on the instrument. See MOSSA, Cambiale 179 § 51; ANGELONI, Cambiale 765; R.D. Sept. 21, 1933 Nr. 1345, L. Jan. 15, 1934 n. 48, art. 1 on bills secured through assignment of debts derived from supply of merchandise.

to the holder of the debt which has given rise to the issue of the instrument, is determined by the law of the place where the instrument was issued."

The complex of problems thus excluded from the uniform set of rules, once prevailingly considered as of cambial nature, is of uncertain delimitation as respects the general, "civil," law.[37] It would seem settled, however, that *lex loci contractus* governs the conditions of the transfer (e.g., whether there is an assignable debt or what is "cover"), the form of the transfer (by a written clause or by the force of law, that is, the fact of the issue), and at what time the assignment occurs (at issue, or at the time of the drawer's bankruptcy or at maturity).[38] It results also from the long debates that the relationship between the holder and the drawee as well as the holder's preference over the creditors of the drawer depends on the law of the place of the issue.[39] However, the rights and duties existing between the drawer and the drawee remain in the sphere mentioned above governed by the law of their contract.

The draftsmen chose the law of the issue against the strongly advocated minority view that the law of the place of payment is most directly concerned.[40] In the law of checks, in fact, the latter contact was adopted. This controversy and the further question whether the effect of the issue of a bill on the assignment of cover is really a cambial matter (as we think is the case), may explain a curious proposition by the editors of Dicey.[41] They char-

[37] *Cf., supra* n. 25 and see the recent writings: ARMINJON ET CARRY § 453; ARMINJON, DIP. Com. §§ 178-180; G. ARANGIO-RUIZ § 85 where the partly different views of older writers are cited.

[38] HUPKA 273; ARMINJON, DIP. Com. 339 § 178.

[39] STAUB-STRANZ, art. 95 n. 5 and cited German writers.

[40] This was still the proposal of PERCEROU in the Conference, Comptes rendus 364.

[41] DICEY (ed. 6) 683 *in fine.*

acterize this problem as one not pertaining to the bill but to assignment and conclude that "a cheque drawn and issued in Scotland" (where cover is deemed to be assigned) on a London bank should not operate as an assignment of the drawer's balance in England. This solution is inacceptable in the member states of the Geneva Convention as well as in the United States. Speaking of checks, the *lex loci solutionis* would be quite reasonable, but only with respect to cambial effects. As the English Act now stands, it presumably prescribes the *lex loci contractus;*[42] and an assignment of a simple debt ought to be governed by the law of the place of transfer rather than by the law of the debtor.[43]

Again, if in the absence of any assignment by cambial law, the parties to the issue of a bill make an accessory special contract of equitable assignment, this, of course, reenters into the noncambial sphere; and this is true notwithstanding the duty of diligence, which the payee or holder must observe where the bill is not paid.[44]

Enforcement Privileges. The old *instrumenta guarantigiata* permitted the creditor immediate enforcement without preceding law suit for judicial ascertainment and condemnation. Such privileges still exist, particularly for enforcing a claim upon bills of exchange. In German law, there is no doubt about the procedural nature of this faculty of the creditor.[45] In Italy, however, the decisions were divided on the characterization of the effects of a bill en-

[42] BEA sec. 72 (2); the second paragraph on inland bills in this case is not applicable because of sec. 53.

[43] *Supra* Vol. III, p. 433 f., 415 f.

[44] England: Banner v. Johnston (1871) L.R. 5 H.L. 157; Ex parte Dever *in re* Suse (1884) 13 Q.B.D. 766.

United States: 6 C.J.S., Assignments § 60, esp. p. 1112 relating to checks.

[45] RG. 9 RGZ. 430 and JW. 1906, 716, n. 15. Once, it is true, SALPIUS, 19 Z. Handelsr. (1874) 1, 64, had to refute a theory connecting the law of protest and notification with the executive force of bills.

abling the holder to enforce without judgment. The majority considered the executive effect of the bill as a material quality of the obligation, controlled by the law of the place of the issue, hence accessible also to foreign bills.[46] Learned opinion,[47] sanctioned by the Supreme Court, correctly emphasized the procedural nature of the problem, calling for the law of the forum.[48] Hence, foreign bills sufficient as such under their law of issue should have enjoyed the privilege. The legislation of 1933, however, has restricted this consequence to bills so enforceable under their law of issue.[49]

In the United States, clauses permitting the creditor to confess for the debtor, in order to reach at once a confession judgment, are prohibited in most, but not all, jurisdictions. An unsettled controversy has brought up the most diverse answers to the question which law applies.[50]

III. Private Autonomy

Prevailing judicial authority in the United States [51] as well as in Europe [52] has taken it for granted that the free-

[46] App. Venezia (Feb. 23, 1928) Rivista 1929, 273; (May 16, 1930) *id.* 1931, 544; Cass. Ital. (Nov. 23, 1934) Foro Ital. 1935 I 17; App. Napoli (Dec. 8, 1935) Rivista 1938, 185; *cf.*, De Nova, Revue Crit. 1950, 362, n. 16.

[47] Chiovenda, Principii di diritto processuale civile (ed. 4, 1928) 130, 253; L. Mortara, Manuale della procedura civile (1926) vol. 2 § 790; D'Amelio, Scritti 271; Bosco, Rivista 1929, 278; Baldoni, *id.* 1931, 548; Monaco, 3 Giur. Comp. DIP. 44; Cavaglieri in Banco, Borsa e Titoli di Credito 1942 I 130 ff.

Mexico: C. Com. art. 1391, IV: H.R. Almanza, Los Conflictos internacionales de leyes en materia de Titulos de credito (Thesis, Mexico 1940) 23, criticizes the lack of reciprocity.

[48] Cass. Ital. (June 17, 1929) Foro Ital. 30 I 101; App. Milano (July 16, 1932) Foro Lomb. 1933, 464 cited by Cavaglieri, Dir. Int. Com. 400.

[49] Decree of Dec. 14, 1933, no. 1669 (Bills of Exchange Law) art. 63; Morelli, Dir. Proc. Civ. Int. 25 § 12.

[50] Beutel-Brannan (ed. 7) 290 ff., § 5 (2); Note, 13 A.L.R. (2d) 1312 (1950); Dean, Ann. Survey Am. L. (1950) 48.

[51] Story § 317; 2 Wharton §§ 447 ff.

[52] Surville § 484; 2 Frankenstein 426; Haudek 15, 43; Raiser 22 ff., 34 ff., 42; Kessler 141-143; Arminjon, DIP. Com. 297 § 150.

dom of the parties, in the limits as it exists in the various countries, extends to bills and notes. The American decisions, from early beginnings in Massachusetts, applied the intended law of the contract, although this law was variably identified. It has frequently been argued in this country and abroad that the law of the place of drawing or endorsing governs because intended by the parties to the issue or to an indorsement, or that the place of payment is decisive because it is contemplated when a note is made or acceptance is declared or even in other cases.[53] In an important practical application, an intentionally wrong indication of a place of issue in a bill of exchange has been recognized as valid for the reason that the parties may thus determine the applicable law. The Código Bustamante in its primary rule of the matter declares for the law intended by the parties.[54]

All these borrowings from freedom of contract are unnecessary. Hypothetic intention is now replaced by objective criteria;[55] a false date presents a problem of its own.[56] Assuredly, no positive law prohibits express agreements to select a law;[57] to have effect, however, within the cambial relation, the agreement would have to be written in the bill,[58] such as "Pay according to the law of Panama;" and such a clause seems to be extremely rare.

Without a clear direction by the instrument's wording, the nature of negotiable papers is repugnant to party agree-

[53] SALPIUS *op. cit.* n. 26, 17, taught that the place of payment is intended by the parties to govern the acts necessary for exercising and preserving recourse; RENAUD, Wechselrecht, followed this view, but changed it later (ed. 5, § 8).

[54] Cód. Bust. a. 264 ff. ("a falta de convenio"), criticized by CORDIDO FREYTES (*supra* n. 4) 40 f., 93, 96, 98.

[55] *Supra* Vol. II, 436 ff.

[56] *Infra* Ch. 61.

[57] France: Paris (Aug. 18, 1856) D. 1857.1.39; (June 17, 1899) S. 1900.1.225. Germany: RG. (Jan. 15, 1894) 32 RGZ. 115.

[58] See the excellent argument of RAISER 51 ff.

ments outside the writing. Clauses not visible on the face of the instrument can have no effect except between the parties to the agreement. To accord private autonomy where it does not belong compromises its necessary functions elsewhere.

The editors of Dicey's sixth edition to the same effect oppose the traditional doctrine of the proper law in matters of negotiable instruments.[59]

This is also the case of the times allowed by the laws for presentment, protest, and notice. Modifications of the periods of time or of the sanctions, allowed in certain limits, must be indicated in the bill to affect third parties.

Another matter is interpretation of the cambial declarations. As the Italian Supreme Court puts it, neither the principle of *letteralità* nor even that of formalism prevents an interpretation of the declarations according to their true meaning. Thus, which of several signatures was that of the drawer, should be ascertained from the instrument but with the aid of all circumstances.[60]

IV. The Bill and the Accessory Obligations

1. Principles.

(a) *The principle of the basic bill.* Section 3 (1) of the British Act defines the formal requirements of a bill. It must contain the person who shall pay, the payee, the sum to be paid, the time of maturity, and the place of payment. Observance of these requirements is a condition for the existence of any right to be based on the bill; they are the common basis of the obligations of drawer and

[59] Dicey (ed. 6) 681; M. Wolff, Priv. Int. Law § 468; Wigny, Revue Dr. Int. (Bruxelles) 1931, 811; Arminjon, DIP. Com. 298 § 150; 2 Percerou et Bouteron 179 § 210.

[60] Italy: Cass. (Jan. 15, 1940) Riv. Dir. Com. 1940 II 237, 8 Giur. Comp. D. Com. n. 31.

acceptor as well as of all indorsers and other obligors. The German name for this basis is *Grundwechsel.* Its substance is analyzed as a mandate by the drawer to the drawee to pay, or in a note, the promise of the maker to pay. English expressions are "the bill," "the instrument," "the order or promise to pay." In more pregnant language, Lorenzen speaks of the *original contract* in contrast to the *"acceding"* contracts. In conflicts law the basic bill is doubtless subject to one, "the single" law, whereas the supervenient writings produce obligations either submitted to several laws or forming the subject of profound doubts. Again, consciousness of these contrasting concepts saves notable error and confusion. How could one so ignore the fundamental concepts as to advocate the law of each indorsement for determining the maturity of the bill!

The American courts properly oppose the place of issue to that of payment, although all other contacts should not be excluded a priori.

> "The drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn but only guarantees its acceptance and payment in that place by the drawee . . . His contract is regarded as made at the place where the bill is drawn," with the conclusion that "the necessity of making a demand and protest and the circumstances under which the same may be required or dispensed with are incidents of the original contract which are governed by the law of the place where the bill is drawn rather than of the place where it is payable. They constitute implied conditions upon which the liability of the drawer is to attach according to the *lex loci contractus.*" [61]

(b) *The principle of independence.* The great majority of the courts in all countries have shown a remarkable unity

[61] Amsinck v. Rogers (1907) 189 N.Y. 252, 82 N.E. 134, 12 L.R.A. (N.S.) 875.

in establishing the leading idea that the various obligations arising from declarations on the bill are governed by several laws, each by its own independent law.[62] In the United States, this principle has been stressed from the beginning in early Massachusetts decisions [63] and carried out more consistently than in English law.[64] The statutes and conventions have all followed the same path, despite mounting opposition.

The reasons for this attitude are plain. Historically, the principle is connected with the rule, *locus regit actum,* working separately in every contract documented in the bill. It is argued, as usual, that a signer intends to be bound so far as the law of the place of contracting goes. "The law of the place of contracting and independence of contracts in a bill stay and fall together." [65] More impressive, a bank discounting a bill or a creditor taking it in lieu of payment does not want to inquire into foreign laws controlling anterior written obligations.[66] The courts seek to protect a resident of the forum as well as to avoid foreign laws.

2. Difficulties

The coexistence of the single law of the bill and the several independent laws of the accessory obligations is the most potent cause of disunity. In view of the disconcerting divisions that arose in American decisions, a unitary law once postulated by Pothier [67] has been sought with

[62] On this subject see in the first place LORENZEN'S book and RAISER 58 ff., both with comparative research.

[63] 2 WHARTON §§ 449 ff.; 1 DANIEL §§ 895 ff. The only clear deviation, in Shanklin v. Cooper (Ind. 1846) 8 Blackf. 41, was overruled in Hunt v. Standart (1860) 15 Ind. 33, 77 Am. Dec. 79.

[64] RAISER 41.

[65] GUTTERIDGE 16 (ser. 3) J. Comp. L. at 67.

[66] Both RAISER 59 and STUMBERG 255 ff. emphasize this point.

[67] See 1 DANIEL § 901; MINOR 396; Committee of Legal Experts of the League of Nations, Doc. prépar. 8.

particular energy in this country, aiming at "interdependence" rather than "independence." [68] But the law of the place of payment, most frequently resorted to in this effort, too evidently failed to help as a general criterion.

The Geneva Rules disregarded the countercurrents to the dominance of the two principles, and merely established certain exceptions in favor of a single law. Severe criticism attaches at least to one of these exceptions, while others have been missed.

The great problem remains almost as it was posited by Lorenzen in 1919: What questions are attributable to the law governing the bill as a whole and what questions ought to have their own law? This will be the subject of all following discussions. Clearly, the idea of independent obligations is naturally limited by the basic requirements for the validity of all obligations in the bill. We should not forget that the law thereby applicable includes construction and general rules.

Examples of settled solutions. (i) A bill is issued in France without indicating a time for payment and circulates in England. French law governing the original contract also determines the manner in which the day of payment should be filled in.[69]

(ii) Where the amount of the sum is written in figures and letters contradicting each other, the law of the issue determines which amount is decisive.[70]

(iii) If the bill is "payable to P," the law of the place of issue determines whether it is payable to order (BEA, s. 8, 34) or non-negotiable (NIL, s. 8).[71]

[68] POTHIER, Contrat de change § 155 (for protest); 2 BAR 169; 2 BROCHER 314; PILLET, 2 Traité 856 ff.
[69] *Infra* Ch. 61, IV.
[70] ARMINJON ET CARRY 489 § 432.
[71] FALCONBRIDGE, Conflict of Laws 283.

(iv) Whether a drawee may pay upon a forged indorsement and whether, therefore, the drawer is liberated, is determined by the law of the place of payment as that governing the position of the drawee.[72]

[72] Caras v. Thalmann (1910) 123 N.Y.S. 97, *infra* Ch. 62.