CHAPTER 59

Formal Requirements

I. FORM AND SUBSTANCE

1. Essential Requirements

The traditional Continental doctrine is so accustomed to distinguish between formal and intrinsic requirements of acts and between validity and effects of obligations, that the writers unhesitatingly extend these notions to the law of bills and notes. In this spirit the Geneva conflicts rules establish different rules for "form" (article 3) and "effects" (article 4), although they entirely fail to mention the material requirements.

English and American authors reject any distinction between formal and material validity,[1] although it is controversial whether the English statutory rule on validity and "interpretation" includes "effects."

At the same time, Anglo-American law generally is less rigorous in establishing invalidity of obligations for lack of written expression. They do not require, for instance, the indication of the paper as bill of exchange, of the date or place of the issue;[2] in the United States, however, the order clause is essential,[3] unless the paper is payable to bearer.

The true situation has been explained by a number of

[1] LORENZEN 99 f. and in 30 Yale L. J. 565; BEALE, 23 Harv. L. Rev. 1; GUTTERIDGE, 16 (Ser. 3) J. Comp. L. 62-66.

[2] BEA s. 3; NIL s. 1 and 6 against Gen. Conv. art. 1 and 2.

[3] NIL sec. 1 (4) against BEA art. 8 (4); Gen. Conv. art. 11. For other points of comparison see WIGNY, Revue Dr. Int. (Bruxelles) 1931 at 805.

authors.[4] All essential formal requirements involve the necessity of a written word or clause in the bill and at the same time are an integral part and condition of the content of the contract. The statutes enumerate them exhaustively. A more appropriate category than form is that of "extrinsic" requirements, contrasted with "intrinsic" conditions, such as cause or consideration and consent.[5]

"Form," thus, is not a satisfactory category of conflicts rules on negotiable instruments. The rules using this term are extended by interpretation to broader concepts. But the only adequate and also the widest concept is that used by the American courts: *validity* of the contract, which includes "form and substance."

Yet, such outstanding statutes as the British Act and the Geneva Rules employ narrower language and provoke doubtful interpretations.

2. Narrow Enactments

Sections 72(1) and (2) BEA subject both "form" and "interpretation" of drawing, indorsing, etc., to "the law of the place where such contract is made." An active controversy whether "interpretation" includes validity on material grounds is still going on.[6] Chalmers advocated broad construction.[7] Recently, however, new doubts have arisen from the desire to apply the law of the place of payment to the bill in general.[8] On the platform of the dominant doctrine, Chalmers' construction is certainly right.

[4] DESPAGNET 988; OTTOLENGHI 81; LORENZEN 100; 2 FRANKENSTEIN 422; VEITH, 4 Rechtsvergleichendes Handwörterbuch 493.

[5] G. ARANGIO-RUIZ 183 ff.

[6] BEALE, 23 Harv. L. Rev. 1; NIBOYET, Manuel 657 n. 4; GUTTERIDGE 16 (Ser. 3) J. Comp. L. 62.

[7] CHALMERS (ed. 11) 236.

[8] FALCONBRIDGE, Conflict 283; DICEY (ed. 6) 691, advocating the law of the place of payment.

Article 3, paragraph 1 of the Geneva Rules runs as follows:

"The form of any contract arising out of a bill of exchange or promissory note is regulated by the laws of the territory in which the contract has been signed."

Article 2 deals with capacity and article 4 with effects; both apply, in principle, the same *lex loci actus*. Nothing is said about other requirements of validity. This defect must be, and commonly is, cured by extensive construction as in the British Act. Since the law of the place of signature governs "form," capacity, and "effects," intrinsic validity cannot escape the same law. This result creates a partial uniformity with American practice and lessens considerably the importance of the concept of form.

Nevertheless, the following survey is forced by the existing legal situation to proceed from "form" to "material validity" to "effects." Not only are the obligations of an acceptor and a maker governed by special laws under various rules, but the enacted laws have piled up distinctions and exceptions just in regard to formalities.

Concept of Form. In this matter, the contention, maintained by this writer, is commonly accepted that conflicts law must have an autonomous concept of form, viz., the external expression of a transaction.[9] To the same effect, the English leading case, *Guaranty Trust* v. *Hannay,* has subordinated to the rule on "form" the question whether a chain of indorsements is interrupted by an agent signing for the payee or an indorsee, without indicating that he is an agent.[10]

[9] *Supra* Vol. II, p. 497.

[10] Guaranty Trust Co. of New York v. Hannay [1918] 1 K.B. 43, [1918] 2 K.B. 623. *Cf.,* Koechlin et Cie. v. Kestenbaum [1927] 1 K.B. 616, 897, per Bankes, L.J., 899 per Sargant, L.J., and comment by the editors of DICEY (ed. 6) 685.

3. Scope of Form

Although a sound construction of the statutory and conventional provisions may be satisfied with certain analogies to the rules on "form," their direct application goes rather far into the province of the substantive function of essential form requirements. The rule, referring formalities to the law of the place of acting, has been applied, e.g., to the questions:

Whether the instrument is complete in form [11]

Whether a contract in a bill is unconditional [12]

Whether a clause indicating the consideration ("Valuta clause") is essential,[13] or

Whether an indorsement in blank is admitted,[14] and

Whether acceptance may be declared orally, according to one decision of the United States Supreme Court,[15] which is contradicted by another decision [16]—

What law determines the treatment of an incomplete declaration, which, however, complies with the formal essential of the law of the issue? [17] For instance, a bill is issued in the United States and sent to France to be filled in when an indorser is found. In one view, American law should prescribe how the instrument should be completed, because no new contract is made by the agent in France.[18]

[11] Editors of DICEY (ed. 6) 685 n. 77 find this "illogic but convenient," but I do not see why it is not a necessary incident of the *lex loci*.

[12] Guaranty Trust Co. of New York v. Hannay, *supra* n. 8, found no conflict because the bill was not conditional under both laws; Koechlin v. Kestenbaum, *supra* n. 8.

[13] NORBERTO PIÑERO, La Letra de Cambio (Buenos Aires 1932) 193.

[14] Admitted in the common law and Argentina, prohibited in the Geneva Convention and most civil-law jurisdictions.

[15] Scudder v. The Union National Bank of Chicago (1875) 91 U.S. 406.

[16] Hall v. Cordell (1891) 142 U.S. 116. Both decisions use fictitious assumptions of party intention.

[17] See the exhaustive comment by LORENZEN 88-90. American courts have dealt with very few problems concerning pure form. See 2 BEALE 1185 § 336.1.

[18] Thus, applying art. 3 of the Geneva Rules, ARMINJON, DIP. Com. 301 § 152.

Under another view, French law decides, since the local law is better suited to regulate the formal requirements.[19] But since a bill carrying a blank permissible under the law of the issue is a valid instrument, the first view is correct. Only where the bill is deemed to be issued in the second country should it be considered subject to the place where it is completed.

Likewise, the law of the issue determines whether undesirable additions to the normal initial context of a bill should be taken as not written or make the bill void.[20]

II. Locus Regit Actum

In a notable unanimity of principles, *all laws* agree that the "form" of an act contained in a bill or note is subject to the law of the place where this act is done.

1. Imperative Function

In this matter, *lex loci actus* has commonly preserved its imperative force.[21] But, curiously, French courts, from the beginning of this century, developed the tendency to convert the principle to its general modern role as merely permissive, creating an option between *lex loci* and the national law of the parties.[22] Under the Geneva Rules, now in force, there can scarcely be a doubt, also in France, that the parties may not choose their national law. Only the provisions reserving the application of the national law to the states have the power of derogating from the law of the place of the act. The domiciliary law is entirely excluded.

[19] *Cf.*, Arminjon et Carry 472, and Gen. Conv. art. 13 par. 2.

[20] On the difference, Swiss BG. (Feb. 28, 1930) 65 BGE. II 66; *cf.*, 74 RGZ. 339; RG. Jur. Woch. 1935, 1778 against the case of 21 ROHGE. 169.

[21] Diena, 3 Tratt. 22 §§ 209-212.

[22] Diena *ib.* p. 33. *Cf.*, *supra* Ch. 55 and Ch. 58, III.

2. Where is the act done?

The problem is old. The statutists usually discussed the case where a bill of exchange signed by the drawer or indorser in one place is sent to the payee or indorsee staying in another place. Jan Voet solved it as follows:

"Quia vero, in quibusdam circa cambiorum jura variant leges et consuetudines variarum regionum, notandum est, in decidendis circa haec controversiis spectandas esse leges loci illius, ad quem litterae cambii destinatae, et in quo vel acceptatae, sunt, vel acceptari debuerunt, non item loci unde missae; cum illic contractus intelligatur celebratus, ubi implementum eius destinatum est." [23]

This doctrine was fully adopted in England. Sending and receiving the document completing the act constitute the test of the applicable law. On the Continent, the contrary doctrine prevailed. The signer assumes his obligation by the signature itself, which in some systems may also dispossess him of the title.[24] These antagonistic theories have been perpetuated with certain modifications.

(a) *The Common-Law Doctrine.* According to the British Act [25] and established American practice,[26] the applicable law is determined by the place where a bill is delivered by the drawer, or indorser, with his signature.

Delivery is legally defined as

"transfer of possession, actual or constructive, from one person to another." [27]

Leaving out, for the moment, the acceptor, who is treated differently, what reason is given for this important rule?

The statutes themselves seem clearly to indicate that delivery is essential inasmuch as it "completes" the act.[28]

[23] Comm. ad Pand. L. XXIII, tit. II § 10.
[24] DIENA, 3 Tratt. 25 n. 1.
[25] BEA sec. 21; NIL s. 16. Canada: BEA ss. 2, 31, 32, 39, 40, 41, 178.
[26] Ludlow v. Bingham (1799) 4 Dal. 47; Restatement § 312.
[27] BEA s. 2; NIL s. 191.
[28] BEA s. 21; NIL s. 16: completions to the act.

The latter proposition is literally true; if a bill is signed on a Sunday and delivered on Monday, it is not deemed to fall under the Sunday statutes.[29] Hence, the theory that the place of the final act in the course of concluding a contract determines the law applicable to the contract, has been applied here—this is Beale's teaching.[30]

Not believing in the soundness of this theory, I think that it does not even do justice to the common-law doctrine.[31] However, at this juncture, it is important to note the large qualifications of the principle.

Where the signer is authorized to send the bill by mail, it is remembered that the English postal regulations prevent the sender from reclaiming a posted bill; therefore, the place where the signer mails the letter is deemed to be the place of delivery.[32] (This theory is not readily applicable to foreign mail in case the sender of a letter may retrieve it from the post.)[33] In the absence of authorization and of estoppel, the decisive place would be where the postman hands out the paper.[34] But this case is quite rare. In domestic business, it may be taken as the rule that the "contract" is completed by a unilateral act quite as ordinary

[29] In re Estate of Martens (1939) 226 Iowa 162, 223 N.W. 885.

[30] The definition by 2 BEALE 1047 f. of delivery as the final act making the contract binding is corrected by FALCONBRIDGE 276 f.: the issue is completed by the delivery, but the binding force depends upon the applicable law. However, our problem is why common law has derived this rule from the binding force of delivery.

[31] *Infra* Ch. 61.

[32] England: Ex p. Cote In re Deveze (1873) L.R., 9 Ch. App. 27, 31 f., per Mellish, L.J.; Kleinworth v. Comptoir National d'Escompte [1894] 2 Q.B. 157; Thairlwall v. Great Northern Railway [1910] 2 K.B. 509 CHALMERS (ed. 12) 52 n. 1.

United States: Trego v. Cunningham's Est. (1915) 267 Ill. 367, 108 N.E. 350. Restatement § 314.

[33] In re Deveze (1873) L.R. Ch. App. 27, 31 f.; C.A. in Chancery, per Mellish, L.J.

[34] Lysaght v. Bryan (1850) 9 C.B. 46, 137 E.R. 808.

contracts are concluded by mailing acceptance,[35] and this also in the United States, despite modified postal rules.[36] This act, theoretically, is independent of the transfer of ownership; but again, the transfer of title will usually coincide with acceptance according to the intention of the parties. As delivery may be constructive, it can be effected by what is called in civil law *constitutum possessorium*.[37]

Since signing and sending, thus, occur at the same place, the result approaches closely the Continental legal situation. Yet, this is not all. According to the statutes, a valid and intentional delivery is presumed when a signer is no longer in possession of the bill;[38] and the same is "conclusively presumed" in favor of a holder in due course.[39] A holder in due course is not required to deliver the original bill to the payee in order to exercise his indorsement rights.[40] "Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement." [41] Finally, an indorsement is presumed to be made at the place where the instrument is dated.[42] Although the last provision no longer fits the circumstances, the other rules are of high practical value, notably the non-

[35] It may also be recalled that an insurance policy indicating that it is signed, sealed, and delivered may be kept by the insurance company for the disposition of the insured and is then deemed to have been delivered. Xenos v. Wickham (1867) L.R. 2 H.L. at 312. This has been generalized for deeds.

[36] Dick v. U.S. (1949) 82 F. Supp. 326, for this reason rebelled against the mailbox theory, but see Note, 34 Minn. L. Rev. 140-142.

[37] Pennington v. Crossley & Sons (1897) 13 T.L.R. 513.

United States: 6 C.J.S. 513 n. 63, cited with approval by Seawell, J., in Everett v. Carolina Mortg. Co. (1939) 214 N.C. 778, 1 S.E. (2d) 109, 113.

[38] NIL s. 16 i.f. BEA s. 21 (3).

[39] NIL s. 16 sent. 3; BEA s. 21 (2) i.f.

[40] City of New Port Richey v. Fidelity and Deposit Co. of Md. (Fla. 1939) 105 F. (2d) 348, 350.

[41] NIL s. 11; BEA s. 13(1).

[42] NIL s. 46. See also Chemical Nat. Bank of N.Y. v. Kellogg (1905) 183 N.Y. 92, 75 N.E. 1103.

rebuttable presumption in favor of the bona fide holder. American courts also have held that the place at which an instrument is dated is deemed prima facie to be the place of delivery [43] and that this presumption is conclusive for the benefit of a holder in due course.[44]

(b) *The Civil-Law Doctrine.* The place where the signature is written has been selected on the Continent because it is said to be easily identified either by the writing or by other evidence. This practical motive inspired the draftsmen of the Geneva Rules, who definitely were unwilling to subscribe to any theory of unilateral creation of obligations. But, again, is this reason convincing? The answer largely depends on the solution of the question: whether the "place of the signature" means the true place where it has been executed or the place where the instrument says that the signature was made.

Locus verus or locus scriptus? This is an old and unfortunately still controversial problem. Pothier wrote that the absence of a date or an error in it cannot be held against the drawer or the acceptor, no more than the omission of the place where the bill is written.[45] Yet modern prevailing opinion clings to the place of signature in its true form and denies that ignorance of a holder should be protected when he believes in a falsely alleged place.[46] To be sure,

[43] LORENZEN 84 citing Lennig v. Ralston (1854) 23 Pa. Sta. 137; Second National Bank v. Smoot (D.C. 1876) 2 MACARTHUR 371; Parks v. Evans (Del. 1879) 5 Houst. 576.

[44] Towne v. Rice (1877) 122 Mass. 67; LORENZEN 85 n. 95.

[45] POTHIER, Contrat d'échange (4 BUGNET 486) § 36.

[46] Austria: OGH. (Oct. 6, 1905) 19 Z. int. R. 285; BETTELHEIM 109.

France: App. Colmar (March 11, 1933) Rev. Crit. 1934, 138; and Note NIBOYET.

Germany: (formerly) OLG. Nürnberg (May 6, 1925) JW. 1926 384; check issued in Germany, dated at New York; the presumption that the issue was in New York is adopted but held rebutted by the fact that the check, as early as four days after issue, was negotiated in Germany. BAR, Int. Hand. R. 384; M. WOLFF, Festgabe für Wieland (1934) 457; STAUB-STRANZ 85 n. 3, 91 n. 15.

Italy: DIENA, 3 Tratt. 26.

there is a rebuttable presumption that the place written is the true place.[47]

A contrary opinion which originated in Germany maintains, however, that the written place enjoys preference, whenever its law subjects the debtor to a stronger liability.[48] Certain authors of this group restrict this view to the protection and choice of bona fide holders. A justification has often been sought in the general freedom of the parties to select the applicable law by choosing an appropriate place and indicating it as the place of signature.

At present, on the ground of the Geneva Rules, the dominant opinion follows the impressive majority of the commission drafting the Geneva Rules who gave unmistakable approval to the strict requirement of the real place.[49] Diena was particularly eager in advocating this rigor. Although the presumption in favor of the written place is conceded,[50] no holder enjoys a defense against the proof that the signature was affixed at a place not visible on the bill.[51] Where the fictitious character of the indication is evident on the face of the instrument, the court

[47] 23 RGZ. 500. It is presumed that a merchant signs a bill at his business place, a private person at his domicil.

[48] Germany: ROHG. (May 11, 1872) 6 ROHGE. 125; RG. (Jan. 15, 1894) 32 RGZ. 115, 117; 91 *id.* 130 (with respect to bills issued "abroad"); KG. (May 22, 1916) 35 ROLG. 2; and constant practice of the 13th division. IPRspr. 1931 96; 1932 95 and 101; 1933 46; JW. 1932 754, and see *supra* n. 8. 2 BAR 182; 2 GRÜNHUT 579 n. 35; 1 MEYER 651; 2 *id.* 368; 2 FRANKENSTEIN 426; NUSSBAUM 319; ULMER, Wertpapiere 286.

Italy: MOSSA IX 3 Annuario Dir. Comp. 367 ff.; MONACO 109.

Switzerland: BG. (April 6, 1900) 26 BGE. II 258; (April 3, 1912) 33 BGE. II 135; (July 7, 1914) 40 BGE. II 407.

[49] A German proposal in favor of the written place was rejected, Comptes rendus 352, 430.

[50] PRIESE-REBENTROST, Art. 92 n. 2. MONACO 108: the literal wording has preference over the not mentioned reality.

[51] ARMINJON ET CARRY 474; G. ARANGIO-RUIZ 149 ff.

has to note it ex officio.[52] However, not everyone shares this view.[53]

In case a written place or date is missing, some laws, such as the Geneva Convention (article 1) with respect to the drawer's or acceptor's signature, declare the obligation inexistent. Where this is not the law,[54] it is commonly assumed [55] that the place of the signing may be proved by means of evidence allowed at the forum. If no evidence is presented, much favor is shown for the law of the domicil of the obligor,[56] because this place is usually known to the parties or is easily ascertainable. It is also normally just the place where the signature is expected to happen.

Delivery in municipal civil law. Our comparison would be entirely defective, if we were not to appreciate the forceful European debates about the role that delivery, that is transfer of the title in the paper, exercises in the law of negotiable instruments. Without accepting every shade of any of the various doctrines, it seems, indeed, almost obvious that a normal creation or transfer of a bill is composed of three acts: agreement, signature, and delivery, of which the first in the Germany theory is extracambial. Some authorities lay all the weight on the contract of delivery *(Begebungsvertrag)*. But even theories starting from the idea that the main part of the entire transaction is the unilateral act of signing, at present consider delivery among the essential elements. Thus, in the view of a

[52] App. Colmar (May 11, 1933) Rev. Crit. 1934, 138.

[53] See *infra* n. 61. The Kammergericht upheld its practice, *supra* n. 41; (Nov. 4, 1935) JW. 1936, 2102, *contra:* RILK, *ibid.;* KNUR UND HAMMERSCHLAG, Kommentar zum Wechselgesetz (1949) art. 92 n. 1. See HUPKA 253, RAISER 57; ULMER, Wertpapiere 285 agrees in principle but gives the holder a choice to qualify his claim in accordance with the real place of signature, apparently the result of GRÜNHUT, *supra* n. 41.

[54] BEA s. 4, 12; NIL s. 129, 13; Portuguese C. Com. art. 282.

[55] See MONACO 111 f.

[56] SALPIUS, 19 Z. Handelsr. (1874) 11; 2 BAR 182; 2 MEYER 368; BETTELHEIM 110; RAISER 55.

leader of scholarly research, the unilateral act of signature creates the cambial obligation only under the legal condition that the contract of delivery of the instrument follows. The full legal effect is brought about by the two connected acts.[57] Of course, in the case of a bona fide holder, the contract of delivery is complemented by the protection of *bona fides*.

Rationale. The Anglo-American modifications of the axiomatic function of delivery obviate largely the disadvantages connected with the fact that the place of delivery is never visible on the bill. But the principle is defeated by the exceptions, and the reliance of conflicts rules on presumptions and fictions also is a sign of an unsound theory.

On the other hand, the German theory gives the signature exclusive importance, in contradiction to the necessity of delivering the bill for any normal purpose. Moreover, the insistence on the real place of signing, ultimately deriving from a credence in the magic power of *lex loci actus*, is palpably wrong, while granting a choice of position to a bona fide holder merely shows that the main rule is inept. It seems that the draftsmen of the Geneva Rules drew an exaggerated conclusion from what they thought might be a *fraude à la loi* in the case of a minor who fakes a place where he would be of full age; in the case of formalities, such fear of fraud in business matters is even more unrealistic than with respect to capacity.

The damage done thereby to international circulation of bills cannot possibly be repaired by excepting the case where the signer is supposed to have advisedly submitted to the

[57] ULMER, Wertpapiere 41 ff., 53. The impressive Italian literature reaches a similar conclusion. The act of creation, whether conceived as a factual act (MOSSA, CARNELUTTI, RAVA) or as a legal transaction (ASCARELLI), combines with the act of transfer or issue (emission), consisting of delivery and acceptance; see the summary by G. ARANGIO-RUIZ, 133 f.

law of the written place. Even if party autonomy were to be recognized in the law of negotiable instruments (which is a wrong theory) uncertainty of proof and arbitrariness of its judicial admission are unsound elements. Likewise the idea of estoppel, adduced in some American decisions against others,[58] is a precarious corrective. Whether the misled holder may sue the signer of an instrument with a false date by action in tort,[59] a poor substitute,[60] depends too much on the circumstances to be a real help. The only way out is the frank statement that, at least in the case of a bona fide holder, the written place alone is what counts; this has been judiciously advocated even under the equivocal text of the Geneva Rules, in defiance of the draftsmen, especially Diena.[61]

3. Conclusions

In a considered review of the Geneva debates, Gutteridge [62] connects the test of delivery with the commercial requirement that the paper should be in the hands of the payee or indorsee, and prefers it for instruments to bearer (where all systems agree), for giving a paper in escrow, and for documents in C.I.F. contracts and bankers commercial credit. With respect to the ordinary instruments to order, Gutteridge considers that the problem, restricted to the liabilities of drawer and indorser and to circulation outside territorial limits, could be solved in either way, especially because usages may be changed to increase the cases where signature and delivery coincide.

[58] Watson v. Boston Woven Cordage Co. (1894) 26 N.Y.S. 1101; Chemical Natl. Bank v. Kellogg (1905) 183 N.Y. 92, 75 N.E. 1103; *Contra:* Basilea v. Spagnuolo (N.J. 1910) 77 Atl. 531.

[59] M. WOLFF, Festgabe für Wieland (1934) 459 ff.

[60] MONACO 102.

[61] WIGNY, Rev. Dr. Int. (Bruxelles) 1931, 804: Quod non est in cambio, non est in mundo; HUPKA 250; RAISER 57 ff.; VEITH, 4 Rechtsvergleichendes Handwörterbuch 509; MONACO 105 ff. § 30.

[62] GUTTERIDGE 16 (ser. 3) J. Comp. L. at 71. M. WOLFF, Priv. Int. L. § 464 goes over to the delivery test. See also DICEY (ed. 6) 688 n. 4.

In my opinion, both systems suffer from theoretical prejudices and should make place for a more earthy conception. Delivery, taken as the "final act," and signature, taken as the exclusive creative force of the obligations, are both incompetent to govern. To restrict their pretended scopes, rebuttable and unrebuttable presumptions are inadequate.

In the case of a place written in the bill, a bill intended to circulate—and there is really no limit to the territory where a negotiable instrument may circulate—it is difficult to understand why this date should not indicate the place of contracting in the meaning of conflicts rules. The true main ground on which the contracts arise and the basis for the peculiar working of a bill, is the writing. It is definitely the only practical answer to the much ventilated problem of *locus verus* v. *locus scriptus,* that whenever a place is indicated on the bill, this place determines the applicable law. That immediate parties are always subject to the defenses inherent in their underlying relationships and third persons may be liable for tort are self-evident counter-instances rather than the basic rule in the matter.

In the absence of a writing in the bill indicating the place to which the conflicts rule looks, the common-law approach is superior for a very conclusive reason. As will be noted more explicitly, when the transfer of cambial rights is to be examined, the mechanism of negotiable instruments at common law has preserved a similar structure for title and obligation, appealing to business men. In contrast to the German and Geneva systems, the incidents of obligation and property in the life of a bill of exchange are intimately connected. One act, delivery of the instrument, transfers obligatory rights as well as title. There is no difference between them as respects, for instance, good

faith. There need not be any subtle difference where a bill is mailed to the cambial successor. Thus, not as the "last act" in creating the *obligation* but as the act effectuating the domination of the bill by the grantee in respect of both obligation and title, delivery is naturally the right contact for choice of law. Since the transfer of title depends on the *lex situs,* Anglo-American courts sometimes have naively but with adequate results submitted also the obligation to the law of the situation of the paper.[63]

The difficulties of evidence, conspicuous in the learned discussions, are minimized by this approach. Where the paper actually was at the moment of a contested transfer, rather than where the signature was made, is not so hard to discover. To ascertain the situs of a tangible thing at a given date, usually causes so little concern that we scarcely hear of it in international property law.

Of course, the acts transferring title are different in the various systems. This difficulty would be removed if the Romanistic doctrine requiring *traditio* for the transfer of tangible things were abandoned in this application. Not only would international harmony be achieved, but within the Central European systems themselves obligation and title would no longer be governed by incongruous rules.

Interpersonal law. A check was issued by an Englishman in Shanghai upon a local branch of an American bank corporation, at a time when Great Britain and the United States enjoyed extraterritorial jurisdiction through their own courts in Shanghai.[64] Should the law of the place of payment be identified with the Chinese Law of Bills of Exchange and Checks? It seemed evident that it was the Negotiable Instruments Act of the American state in which the bank was incorporated, that governed.

[63] See for more detail, *infra* Ch. 61.
[64] See my report and opinion, 6 Z. ausl. PR. 336-341.

III. Exceptions to the Principle

1. British Law

By proviso in Section 72 (1) (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."

This proviso is intended to make negotiability in England independent of defects attached by the foreign law of its origin. The parties must have negotiated in England and the lawsuits occur in England, and probably the action must be for payment. Favor is not granted to inland transactions as such but only to those from which an actual recourse between domiciliaries arises. These two features approach the provision to two exceptional Continental rules presently to be quoted.

2. Geneva Rules

(a) *Article 3, paragraph 2,* inspired by the German legislation of 1848, after stating the law of the place of signature, continues:

"Nevertheless, where the obligations subscribed in a bill of exchange or a promissory note are invalid according to the provisions of the preceding paragraph but conform to the law where a subsequent obligation is subscribed, the irregularity of the first obligations does not affect the validity of the subsequent obligation."

The 1940 draft of the Montevideo Commercial Treaty, article 26, follows this example.

Thus, the original bill may be void under the basic law, or an indorsement invalid under the law of its place of

signature, but subsequent contracts are valid, if they comply with the formal requirements of the place where they are written, and this validity is recognized in all member states, inclusive of the country of issue. Such contracts may be acceptance, indorsements, aval, or intervention for honor, all regularly presupposing a valid basic bill.

On the other hand, the exception is not limited to an instrument invalid on the ground of formalities. The issue or preceding indorsement may be invalid for any cause under its own law, although not under the law of the subsequent contract.

The provision also does not require that the holder should inquire into the foreign law and be in good faith about it. The purpose is to favor circulation in all cases.

This paragraph, therefore, disregards the principles of the convention in several respects. But were this exception the only one, it might possibly be defended as a forceful addition to the independence of indorsements and other accessory contracts in the interest of convenience. It is the same tendency that impells the American courts to establish each contract on its own conditions.

Unfortunately, paragraph 2 is accompanied by a second exception. Together they destroy whatever fabric the Rules may claim.

(b) *Geneva Rules, article 3, paragraph 3,* states under the influence of another old German rule, but by mistake even enlarging this questionable provision,[65]

[65] See HUPKA 246 ff. A German proposal intended only to reproduce art. 85 sent. 3 of the German Wechselordnung of 1908 (also Swiss C.O. of 1881 art. 823 par. 3, Austria W.O. of 1850 art. 85 par. 3) referring to engagements entered by a national (German) toward a national (German) abroad. This is a (misplaced) application of the *lex patriae communis.* But in Asser's formulation adopted in the Rules, the national may transact with any national or foreigner, only the enforcement being restricted to nationals. However, Germany, Switzerland, and Austria have used the reservation to its full extent.

"Every contracting State has the faculty to prescribe that the obligations assumed in bills of exchange and promissory notes by one of its subjects abroad shall be valid with respect to another of its subjects within its territory, provided that they are clothed in the form of the national law."

It is not required (as it was in article 85 of the German Act) that the subject of the enacting state should have transacted with another subject of the state. On the other hand, under the former German law, supervening contracts with a foreigner, or even between foreigners, were regarded as valid in Germany if they conformed to the law of the German place of contracting, whereas now in regard to a foreigner the law of the place of contracting operates with the ordinary restrictions.

This second exception comes near to the British special rule for foreign bills. Both are indefensible nationalistic residues.[66] Yet paragraph 3 has been welcomed as good law for emigrants.[67]

The practical significance of these rules may be illustrated:

(i) A bill of exchange drawn in England by *A* and delivered to *B*, payable to the bearer, is valid everywhere by the law of the place of contracting. If issued in Italy it would be void under the same principle; but *B* nevertheless would win his recourse against *A*, if he sues in England according to proviso (b), though not in the United States nor in any other country outside those following the Bills of Exchange Act.

Had *B* indorsed the bill issued in Italy to *C* in Italy, and *C* to *D* in England, mailing it from Italy, the case would

[66] DIENA, 3 Tratt. 78; e.g., protectionism not inspired by a neat, precise, well-determined principle. To the same effect GUTTERIDGE 16 (ser. 3) J. Comp. L. at 64, who, however, does not seem to include the English proviso in his regret; HIRSCH, JW. 1930, 1341; ARMINJON, DIP. Com. 292 § 147.

[67] *Cf.*, MONACO 132 and cited authors.

seem outside of proviso (b). Again, if *C* is an Italian national and indorses the bill to another Italian, effect is given in Italy under the Geneva Rule 3, paragraph 3, and the Italian Bills of Exchange Act.

(ii) A bill issued in Germany not containing the word "Wechsel" or a corresponding word in a foreign language used in the bill, was void under the old law and is so under the Geneva Rules (art. 1, no. 1). If it is indorsed in England to a firm carrying on business in England, the holder may sue in England under proviso (b), though the drawer could not.[68] Supposing the English indorsee indorses the bill to *D* in the United States, *D* cannot sue anywhere, unless the court were to change over to the law of the place of payment, as is, regrettably, possible in the United States.

In any case, the liability of the drawer or indorser depends on what the other party chooses to do.[69] And discriminations are made according to criteria not in conformity with the standards of equality of a freely circulating commercial paper. The worst consequence, of course, is that a debtor can be sued who has no recourse left against previous warrantors; but this happens also on the mere ground of the principle of independence.

[68] DICEY (ed. 6) 687, Ill. 4.
[69] GUTTERIDGE 16 (ser. 3) J. Comp. L. at 64.