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SOME CONFLICT OF LAWS PROBLEMS PERTAINING TO BILLS AND NOTES

By C. SEVERIN BUSCHMANN*

LAW GOVERNING NEGOTIABILITY OF BILLS AND NOTES

Ordinarily the question of whether a promissory note or bill of exchange is negotiable is important only in connection with the solution of the question of whether or not a defense is available to a party.¹ Having determined that the instrument is negotiable, a further inquiry may be necessary to determine whether any defense is available against the holder, or whether it is eliminated by the fact that the one against whom the defense is sought to be asserted enjoys the immunities of a holder in due course.

The law of bills and notes is unique in that the class of instruments treated is subject to two kinds of defenses, namely, real and personal defenses. Real defenses are those available against any holder, regardless of considerations of negotiability or whether the holder took under such circumstances as would normally entitle him to the rights of a holder in due course. On the other hand, personal defenses, while available between the immediate parties and those who take otherwise than as holders in due course, ordinarily are lost (assuming the instrument is negotiable) once the instrument is held by a holder in due course, or one claiming through a holder in due course and not himself a party to any fraud.²

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¹ It has been stated that its negotiability or non-negotiability is important in view of the fact that certain incidents or qualities of the instrument are dependent upon its character in this respect. ² Wharton Conflict of Laws (3rd Ed.), 965.

² Section 57, Negotiable Instruments Law. For a discussion of real and personal defenses, see Norton on Bills and Notes (4th Ed.), 282.

It will thus be seen immediately that in case of the so-called real or absolute defenses, no consideration of negotiability or whether the holder is technically a holder in due course is necessary. The sole question is as to the law prescribing what are real defenses.

Many types of real defenses present no questions of conflicts of laws. For example, what constitutes a forgery of the name of a maker of a note is probably uniform in the various states. The usual kinds of real defenses arise with reference to capacity and certain kinds of illegality. The various states frequently have different rules governing the power of married women and infants to contract, or the act of a corporation may be *ultra vires* in one state but within the corporate powers elsewhere. Likewise, there is considerable conflict as to illegality, particularly with reference to gambling and usury. Moreover, different courts treat instruments as void or voidable, depending upon the statute applicable or the precedent it deems controlling. This often arises in case of instruments given for gambling transactions, instruments given on Sunday, instruments providing for confession of judgment, and, under some circumstances, those which provide for interest which is usurious.

Thus, it is apparent that consideration of the question of negotiability is only essential in case of personal defenses, at least as far as substantive rights are concerned, and in that particular with reference to the defenses available to (1) the primary parties to negotiable instruments, namely, the maker and acceptor, and (2) the secondary parties, namely, the drawer and indorser. In addition to determining the negotiable or non-negotiable character of the instrument from the standpoint of the substantive rights of the parties, it may be necessary to consider it as a preliminary question, as for example, the right of the holder to sue.³

As in the case of real defenses, there are many personal defenses as to which there exists no conflict in the various states. Some divergence of opinion appears as to necessity of diligence against a prior party and possibly in the case of illegality of certain kinds. But there is a considerable conflict as to what provisions will render instruments non-negotiable. Provisions

³ Wharton, *Op. Cit.*, 966.

⁴ Section 6 (5) of the Negotiable Instruments Law provides that the negotiable character of an instrument is not affected by the fact that it "designates a particular kind of current money in which payment is to be

for paying in current funds,⁴ for attorney's fees,⁵ for confession of judgment,⁶ (except where there has been subsequent legislation) and omission to make the instrument payable at a bank,⁷ have been rendered unimportant by the adoption of the Nego-

made." Illinois begins subsection 5 with the words "is payable in currency or current funds: or,"

That all conflict of authority upon the phrase "current funds" is not removed is indicated by an article by J. D. Brannan "Some necessary Amendments of the Negotiable Instrument Law," in 26 Har. L. R. 493 (1913). For cases involving this provision, see *Kreig v. Palmer National Bank* (1912), 51 Ind. App. 34, 95 N. E. 613.

See, generally, 37 Yale L. J. 803 (1928), note 2, for variations in enactment in the Negotiable Instruments Law in various jurisdictions.

⁵ Some states formerly held that a provision for attorney's fees rendered the instrument non-negotiable on the ground that the sum payable was not a sum certain. But by section 2 of the Negotiable Instruments Law the sum payable is a sum certain although it is to be paid with costs of collection or an attorney's fee.

For cases involving the question, see *Clark v. Porter* (1901), 90 Mo. App. 143; *Creston National Bank v. Salmonn* (1906), 117 Mo. App. 506; *Security Trust Co. v. Gleichmann* (1915), 50 Okla. 441, 150 Pac. 908.

In South Dakota a provision for attorney's fees is unenforceable by statute. See *Sharpe v. Schoenberger* (1921), 44 S. D. 402, 184 N. W. 209.

The same was true with reference to a provision for exchange. Such a provision formerly rendered the instrument non-negotiable. *Windsor Sav. Bank v. McMahon* (1889), 38 Fed. 283. By section 2 of the Negotiable Instrument Law, however, this no longer affects negotiability.

As to effect of discount provision permitting discharge of the instrument by payment of principal less a discount of 5% within thirty days, see *Waterhouse v. Chouinard* (1930), 128 Me. 505, 149 Atl. 21, 39 Yale L. J. 1205 (1930).

As to effect of reference on face of note to executory agreement, see *First Nat. Bank v. Morgan* (1930), 132 Ore. 515, 284 Pac. 582, 286 Pac. 558.

⁶ The Negotiable Instruments Law by section 5 (2) provides that negotiability is not affected by a provision authorizing a confession of judgment. This provision is omitted in Georgia and qualified in other states. In Indiana by subsequent legislation, Acts 1927, pages 174 and 656, the status of such notes is rendered rather precarious. They are clearly non-negotiable and perhaps wholly void. See 3 Ind. L. Journal 695 (1928), 5 Indiana L. Journal 93 (1930), *Egley v. Bennett* (1925), 196 Ind. 50, 145 N. E. 830.

⁷ Omission to make an instrument payable at a bank no longer affects negotiability. Negotiable Instruments Law, section 6. *Barger v. Farnham* (1902), 130 Mich. 487, 90 N. W. 281; *The Freeman's Bank v. Ruckman* (1886), 16 Grat. (Va.) 126; *Holmes v. Bank of Ft. Gaines* (1898), 120 Ala. 493, 24 So. 959; *Stix v. Matthews* (1881), 75 Mo. 96; *Traders' Nat. Bank v. Willson* (1913), 205 Fed. 266.

tible Instruments Law. Decisions of the various states are in some conflict, however, as to the effect upon negotiability of provisions for acceleration,⁸ provisions for extension of time,⁹ and certain other provisions.

Negotiability, as has been stated, is important only as it affects a defense available to a party. When an instrument is negotiable, it means that an indorsee for value without notice becomes the owner of the paper, unaffected by equities and defenses existing between the original parties.¹⁰

Desirable as it may seem to have the same law that determines whether the instrument is negotiable apply as to the defenses available, there seems to be no specific discussion in any reported case with reference to the same law governing both questions. Of course, in many instances there may be no conflict as to the defense but only on the negotiability or *vice versa*. With the exception of the case of *Barry v. Stover* (referred to in note 43 *infra*), no case has been found which applies one law to determine the question of negotiability and another law to determine the defense available.

⁸ In some states acceleration provisions have the effect of destroying negotiability. *Utah State Nat'l Bank v. Smith* (1919), 180 Cal. 1, 179 Pac. 160; *Richards v. Barlow* (1885), 140 Mass. 218, 6 N. E. 68; *United Bank and Trust Co. v. McCullough* (1927), 115 Neb. 327, 212 N. W. 762; *Kobey v. Hoffman* (1916), 229 Fed. 486. See, also, 1 Ind. L. Journal 206 (1926), for a discussion of effect upon Negotiability of provisions for Acceleration or Extension of Time in Bills and Notes. 8 Corpus Juris 140; 24 Mich. L. Rev. 64 (1926); L. R. A. 1916D 1280, note.

In the recent case of *Paepcke v. Paine* (1931), 253 Mich. 636, 235 N. W. 871, a bond contained both an acceleration provision and a reference to a trust agreement for the rights and obligations of the trustee and holders of the bonds, as to both of which there were conflicting decisions as to effect upon negotiability.

⁹ Renewal or Extension provisions affect negotiability according to some decisions. *Hakes v. National Bank of Terre Haute* (1895), 61 Ill. App. 501; *Sioux National Bank v. Lundberg* (1929), 54 S. D. 581, 223 N. W. 826; *Sykes v. Citizens Nat'l Bank* (1908), 78 Kan. 688, 98 Pac. 206, 19 L. R. A. (N. S.) 665; *Smith v. Zabel* (1927), 86 Ind. App. 310, 157 N. E. 551, 3 Ind. L. Journal 397 (1928).

See, also, 1 Ind. L. Journal 206 (1926), 24 Mich. L. Rev. 64 (1926); 8 Corpus Juris 140; L. R. A. 1916D 1280, note. In the *Sykes v. Citizens National Bank case* (*supra*) the provision rendering the instrument non-negotiable read in part as follows:

"Makers and indorsers . . . agree to all extensions and partial payments before or after maturity without prejudice to the holder."

¹⁰ *Bank of Hatcher* (1909), 151 N. C. 359, 66 S. E. 308, 310.

Where the question of negotiability must be answered for the purpose of determining substantive rights, for example the defenses available to the maker or acceptor, the great weight of authorities is to the effect that the law of the place of payment of the instrument governs.¹¹

The reasons for applying the law of the place of payment are often stated in the general language of the court in the case of *Midland Steel Co. v. Citizens National Bank*,¹²

¹¹ *Lockwood v. Lindsey* (1895), 6 App. D. C. 396; *McCormick v. Tolmie* (1928), 46 Ida. 544, 269 Pac. 96; *Midland Steel Co. v. Citizens Nat'l Bank* (1904), 34 Ind. App. 107, 72 N. E. 290; *Bombolaski v. First National Bank* (1913), 55 Ind. App. 172, 101 N. E. 837; *Gates v. Fauvre* (1918), 74 Ind. App. 382, 119 N. E. 155; *Fordyce v. Nelson* (1883), 91 Ind. 447; *Sykes v. Citizens Nat'l Bank* (1908), 78 Kan. 688, 98 Pac. 206, 19 L. R. A. (N. S.) 665, L. R. A. 915F 1203; *Stevens v. Gregg* (1889), 89 Ky. 461, 12 S. W. 775; *Price v. Gatliff's Ex'rs* (1908), 33 Ky. L. R. 324, 110 S. W. 332; *Strawberry Point Bank v. Lee* (1898), 117 Mich. 122, 75 N. W. 444; *Barger v. Farnham* (1902), 130 Mich. 487, 90 N. W. 281; *Emanuel v. White* (1875), 34 Miss. 56; *Lienkauf Banking Co. v. Haney* (1908), 93 Miss. 613, 46 So. 626; *Law v. Crawford* (1896), 67 Mo. App. 150; *Clark v. Porter* (1901), 90 Mo. App. 143 (dictum only, because law of place of making, namely, Indiana Territory, was governed by same law as place of payment, the case is conclusive authority only for proposition that law of forum has no application); *Johnson v. Noble Machine Co.* (1910), 144 Mo. App. 436, 129 S. W. 271; *United Bank and Trust Co. v. McCullough* (1927), 115 Nebr. 327, 212 N. W. 762; *Security Trust Co. v. Gleichmann* (1915), 50 Okla. 441, 150 Pac. 908; *Chandler v. Kennedy* (1895), 8 S. D. 56, 65 N. W. 439; *Barry v. Stover* (1906), 20 S. D. 459, 107 N. W. 672; *Sioux Nat'l Bank v. Lundberg* (1929), 54 S. D. 581, 223 N. W. 826; *Freeman's Bank v. Ruckman* (1860), 16 Grat. (Va.) 126; *Corbin v. Planter's National Bank* (1891), 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673 (place of execution and performance coincided); 8 Corpus Juris 97, and note 56.

¹² 34 Ind. App. 107, 72 N. E. 290 (1904). A similar statement is contained in the cases of *Fordyce v. Nelson* (1883), 91 Ind. 447. This language represents the adoption of a statement of Story on Conflict of Laws (8th Ed.), 280, as follows:

“But where the contract is either expressly or tacitly to be performed in any other place there the general rule is, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance.”

This historical development of the statement is traced by Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 1 (1910), and Lorenzen, *Validity and Effects of Contracts*, 30 Yale L. Jour. 565 (1921). The latter article discusses thoroughly and extensively the Continental law and certain codes, as well as the origin and development of the intention theory in England and the United States. For a splendid discussion of the various rules, see 30 Yale L. Jour. 655 (1921), and 31 Yale L. Jour. 53 (1922).

"as the note was made in Indiana and payable in Pennsylvania, appellant, the maker, is liable according to the law of Pennsylvania. He is presumed to have contracted with reference to the law of that state."

The rule of applying the place of performance is inapplicable where the parties specifically provide that the law of another state shall govern. In this there is nothing illogical since their presumed intent to have the law of the place of payment govern is expressly rebutted by a provision in the instrument. In the case of *Bell v. Riggs*,¹³ the court, in speaking of the law governing the negotiability of the note sued on said,

"The contract of the parties as contained in the mortgage, provided that both note and mortgage should be governed by the laws of Oklahoma Territory. A contract of this sort is valid and will be enforced in the courts unless to give it effect would violate the public policy of the state of the forum with reference to the matter contracted about."

The decisions holding that the law of the place of performance governs are unobjectionable from a logical standpoint. Certainly where the question of negotiability goes to the substantive question of what defenses are available to the maker or acceptor and against whom the defenses may be asserted, it would seem reasonable to decide such questions by the law of the place where the maker or acceptor expects to perform by payment. Having agreed to perform in a certain state, the privilege of asserting defenses should not be enlarged or curtailed by the fact that the instrument is negotiated in some other jurisdiction.

It has been asserted that if the instrument is originally negotiable, that negotiability is inherent in the instrument so as to make it negotiable everywhere. In the case of *Reddick v. Jones*,¹⁴ a note was executed in North Carolina, not payable at any particular place, and indorsed in Virginia. It was nego-

¹³ (1912), 34 Okla. 834, 127 Pac. 427, 41 L. R. A. (N. S.) 1111. Where there was a mortgage on land in Oklahoma, for which a note made in that state but payable in Kansas was given which provided that both notes and mortgage should be governed and construed according to the laws of Oklahoma Territory, the court held the negotiability of the note would be determined by the same rule as if it had been both executed and made payable in Oklahoma Territory under which rule an acceleration provision rendered the note non-negotiable. To the same effect in *Goss v. Sorrell* (1912), 33 Okla. 586, 127 Pac. 435.

¹⁴ (1845), 28 N. C. (6 Ired.) 107, 44 Am. Dec. 68. But see, *Nichols v. Porter* (1867), 2 W. Va. 13, 94 Am. Dec. 501, where the defendant was held not liable as an indorser of negotiable paper because although negotiable where made and payable, it was not negotiable where he indorsed it.

liable under the law of North Carolina. In holding that the indorsee could sue the maker and indorser in North Carolina and would be protected as a holder in due course, unaffected by any equities, the court said,

"that property, it would seem, became inherent in it as a part of its nature, so as, perhaps, to make it negotiable everywhere. But, if that be not so, it is at all events, negotiable in every country whose laws do not forbid it."

Is the same true of non-negotiability? If it is once impressed upon the instrument, does that character remain throughout? In the case of *Popp v. Exchange Bank*,¹⁵ bonds issued in New York in 1912 were sent to a guardian of minors in California, who pledged the bonds with a bank for his own purposes and then brought an action to recover them. The bonds were negotiable under New York law but counsel omitted to offer proof thereof, and while the bonds were also negotiable in California at the time of the transfer, it was by force of a statute changing the prior law. The assumed law of New York was therefore the same as California law prior to the amendment, and the real question was whether the original (assumed) non-negotiability of the bonds was permanently impressed upon them regardless of a subsequent transfer. The court held that the law of the place of execution of the contract determined its character and effect, that the bank had no title and the plaintiff could recover. While there is no clear language so stating in the opinion, the effect of the decision is to treat the original non-negotiability as being unaffected by a subsequent transfer in a jurisdiction where negotiable.¹⁶ The cases holding that the character of the instrument as negotiable remains throughout the existence of the instrument seem to have support only from the cases on the Continent.¹⁷ The attitude of American courts in determining negotiability according to the party before the court is not

¹⁵ 189 Cal. 296, 208 Pac. 113 (1922). See, also, 11 Cal. L. Rev. 114 (1923).

¹⁶ In the case of *Mackintosh v. Gibbs* (1909), 79 N. J. L. 40, 74 Atl. 708, an indorser was held liable as indorser of a negotiable instrument, where the instrument was negotiable where indorsed but non-negotiable where made and payable.

¹⁷ Lorenzen, Conflict of Laws relating to Bills and Notes, 131. The author says:

"On the continent it is generally assumed that the law of the place of issue must fix the character of the instrument throughout its life, and that all parties in the absence of

only confusing, but may have disastrous consequences in so far as recourse against a prior party is concerned.

As far as each party to the instrument is concerned, it is well settled that the negotiable or non-negotiable character of the instrument is not affected by the transfer of the instrument in another jurisdiction.¹⁸ In *Krieg v. Palmer National Bank*,¹⁹ a bank issued a certificate of deposit to a payee in Indiana where the instrument was payable. There was a subsequent indorsement to plaintiff in Illinois. Under Indiana law the instrument was rendered non-negotiable by reason of a provision for payment in current funds. In a suit by plaintiff against the maker and the Indiana indorser, the court held the negotiability of the instrument was governed by Indiana law. The court said by way of dictum that the Illinois indorser who was not a party to the suit was the only one governed by that law; that the liability of the indorser was governed by the law of the place of indorsement.

In a few jurisdictions the rule is laid down that the law of the place of contracting determines whether a mercantile instrument is negotiable. In spite of the indication of intention by the maker by making the instrument payable elsewhere, to subordinate the law of the place of execution to that of the place of performance, nevertheless a few courts apply the law of the place of contracting. The reasons assigned are that negotiability goes to the character of the instrument issued, which is associated with its validity, which in turn is determinable by that law.²⁰ The law of the place where made means the place where

express declaration to the contrary, become bound upon that basis."

The author there suggests that the place of issue should determine its negotiability, with the extension in favor of negotiability that if negotiable in the place where indorsed the indorser should be held liable as an endorser of negotiable paper.

¹⁸ *Krieg v. Palmer* (1911), 51 Ind. App. 34, 95 N. E. 613; *Dow v. Rowell* (1841), 12 N. H. 49; *Reddick v. Jones* (1845), 28 N. C. (6 Ired.) 107; *First Nat'l Bank v. Dean* (1891), 16 N. Y. S. 107, 17 N. Y. S. 375; Lorenzen, *Op. Cit.*, 135.

¹⁹ 51 Ind. App. 34, 95 N. E. 613 (1911).

²⁰ *Howenstein v. Barnes* (1879), 5 Dill. 482, Fed. Cas. No. 6786. In that case the instrument was executed in Kansas, payable in Missouri. By the law of the latter state it was non-negotiable.

In a suit by the receiver of an assignee against the makers the court held that the law of the place of making governed, by which law the instrument was negotiable. But the court adds that the case rests upon

the instrument was delivered, and not where signed. In the case of *Navajo County Bank v. Dolson*,²¹ plaintiff brought suit against the maker and three indorsers of a note signed by the maker in Arizona, indorsed by the defendant indorsers in California and mailed back to the maker in Kentucky and remailed by the maker to Arizona, which was the place of payment. It was contended that the note was non-negotiable by reason of a waiver of exemption provision and provision for attorney's fees, and the indorsers contended that on a negotiable note notice of dishonor and non-payment was essential to their liability. The court found the place of making was where the note was delivered as consummating the bargain, that the law of the place of making controlled the negotiability, and therefore being negotiable under Arizona law, the indorsers were released. The court said,

"Whether or not the note involved here was a negotiable instrument must be determined by the law of the place where the contract between the parties was made. 1 Daniel on Negotiable Instr., Sec. 367. Ordinarily the place where a contract is made depends, not upon the place where it is written, signed or dated, but upon the place where it is delivered as consummating the bargain."²²

the general commercial law of the country. *Navajo County Bank v. Dolson* (1912), 163 Calif. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787. (Here the place of execution and payment coincided but the court states that the place of contracting is controlling.)

²¹ (1912), 163 Calif. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787.

²² To the effect that a bill or note is deemed executed at the place of delivery, see *Tilden v. Blair* (1874), 21 Wall. (U. S.) 241, 22 L. Ed. 632; *Briggs v. Latham* (1887), 36 Kan. 255, 13 Pac. 393; *Greenbaum Sons' Bank and Trust Co. v. Porth* (1924), 116 Kan. 310, 226 Pac. 747; *Hart v. Wills* (1879), 52 Iowa 56, 2 N. W. 619; *Wells, Fargo & Co. v. Vansickle* (1894), 64 Fed. 944. The place of receipt governs where sent by mail. *McGarry v. Nicklin* (1895), 110 Ala. 559, 17 So. 726; *Phipps v. Harding* (1895), 70 Fed. 648; *Nashue Sav. Bank v. Sayles* (1904), 184 Mass. 520, 69 N. E. 309. Except where payee or other party has agreed in advance to the terms thereof in which event the place of delivery will be the place where the instrument is mailed. *Barrett v. Dodge* (1890), 16 R. I. 740, 19 Atl. 530; *Garrigue v. Keller* (1905), 164 Ind. 676, 74 N. E. 523; 8 Corpus Juris 90.

Accommodation paper is regarded as executed in place where it is first negotiated for value. *Tilden v. Blair* (1874), 21 Wall. (U. S.) 241, 22 L. Ed. 632; *Gay v. Rainey* (1878), 89 Ill. 221; *Young v. Harris* (1854), 14 B. Mon. (Ky.) 556. See note 71, Lorenzen's Cases Conflict of Laws (2nd Ed.), p. 391.

The same rule with reference to contracts generally is set out in the case of *Millikan v. Pratt* (1878), 125 Mass. 374, Lorenzen's Cases (2nd Ed.) 283. See, also, Wharton, *Op. Cit.*, 888.

The statement has been made by one authority that the law of the place of making should determine whether or not a mercantile instrument is negotiable, but if the arrangement of the supporting authority and those opposed is for the purpose of indicating that the weight of judicial opinion approves of the statement, then the proposition is inaccurate and quite misleading.²³ The same objections to having the *lex loci contractus* determine negotiability exist as in the case of validity, with possibly less reason for strict adherence to the law of the place of contracting in case of negotiability,²⁴ since a desire to have the instrument have that quality or characteristic would not require any investigation as to good faith of the parties, a frequent objection to the application of the law of the place of performance in contract cases. Moreover, the performance consists either in one payment or a series of payments, practically always performable in one jurisdiction and the objections asserted to exist from that standpoint in the contract cases are obviated. To have negotiability governed by the law of the state in which the parties performed the last act necessary to complete the contract, no matter how casual, accidental or unrelated to the transaction, is illogical, especially where place of performance is named. If the parties wish negotiability with its accompanying privileges and disabilities to be determined by the law of a particular state, why should it be necessary either to go to that state to contract, or arrange to have the final act completing

²³ The American Law Institute, Conflict of Laws, Restatement No. 4, and Commentaries, section 360. Of the six cases cited as supporting the view that the law of the place of contracting determines whether the mercantile instrument is negotiable, the case of *Howenstein v. Barnes* (1879), 5 Dill. 482, by a dictum supports the proposition. The case of *Stevens v. Gregg* (1889), 89 Ky. 461, 12 S. W. 775, definitely selects the law of the place of payment in preference to the law of the place of contracting. *Ory v. Winter* (1826), 4 Mart. N. S. (La.) 277, fails to reveal the place where the note was payable and the court by no means commits itself to an adoption of the law of the place of contracting without regard to the place of payment. In the remaining authorities it appears that the place of making and payment coincide, namely, *Stix v. Matthews* (1881), 63 Mo. 371; *Warren v. Copelin* (1842), 4 Met. (Mass.) 594; *Dow v. Rowell* (1841), 12 N. H. 49.

²⁴ The merits and demerits of the rules applying intention of parties, place of performance and place of contracting so far as determining the validity of contracts are discussed in 23 Harv. L. Rev. 260 (1910); 30 Yale L. J. 565, 655 (1921); and 31 Yale L. J. 53 (1922).

the contract occur in that state when a place of payment can so easily be provided for in the instrument?

It has already been pointed out that the contract of each party to a negotiable instrument is separate and independent. With reference to the drawer in the case of *Amsinck v. Rogers*,²⁵ the Court of Appeals of New York said,

"It is familiar law that the contracts of the different parties to a bill of exchange are independent and carry different obligations. 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, and agrees, in default of such payment, upon due notice, to reimburse the holder in principal and damages at the place where he entered into the contract."

The contract of the indorser is set out in the following language by the Supreme Court of New York in the case of *Aymar v. Sheldon*,²⁶ as follows:

"No principle, however, seems more fully settled, or better understood in the commercial law, than that the contract of the endorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by endorsement is equivalent in effect to the drawing of a bill, the endorser being in almost every respect considered as a new drawer. . . . That the nature and extent of the liabilities of the drawer or endorser are to be determined according to the law of the place where the bill is drawn or endorsement made, has been adjudged both here and in England."²⁷

Ordinarily, therefore, where the question of negotiability arises between indorser and indorsee, where something other than the right to sue is involved, the law of the place of indorsement governs; that is, the place of the indorser's contract.²⁸

It is unfortunate that adherence to the above rules, results in having to determine the negotiable character of an instrument

²⁵ 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875 (1907). To the same effect, see *Farmers Nat. Bk. v. Sutton Mfg. Co.* (1892), 52 Fed. 191; *Crawford v. Mobile Branch Bank* (1844), 6 Ala. 12; *Hunt v. Standard* (1860), 15 Ind. 33; *Thorp v. Craig* (1860), 10 Ia. 461; *Woods v. Gibbs* (1858), 35 Miss. 559; *Freese v. Brownell* (1871), 35 N. J. L. 285; *Aymar v. Sheldon* (1834), 12 Wend. 439. See, also, 8 Corpus Juris 98, note 68.

²⁶ 12 Wend. 439, 27 Am. Dec. 137 (1834).

²⁷ Some cases hold that the place of payment of the party primarily liable governs. *Dunn v. Welsh* (1879), 62 Ga. 241; *Hibernian National Bank v. Lacombe* (1881), 84 N. Y. 367; *Peck v. Mayo* (1842), 14 Vt. 33. Lorenzen, *Op. Cit.*, 122 note 233.

²⁸ *Hyatt v. The Bank of Kentucky* (1871), 8 Bush 193.

de novo with respect to the drawer and each indorser. A protest against this result has frequently been voiced, and it has been urged that in the interest of negotiability, a person should be held as an indorser of a negotiable instrument where it is negotiable either where issued or where indorsed.²⁹ However, the author of the suggestion realizes that there is no support for the above proposition, and that the result is our courts will determine negotiability by different laws, thus producing considerable confusion.³⁰

In the case of *Hyatt v. Bank of Kentucky*,³¹ an indorser of note was sued by the indorsee. The instrument was negotiable in Louisiana, where made and payable, and non-negotiable in Kentucky where indorsed. In holding that the quality of the instrument as commercial paper should be determined, as far as the Kentucky indorser was concerned, by the law of that state the court said,

"It is to the interest of trade and commerce that there should be some fixed and permanent rule governing contracts of this character; and, with this rule established, no mere circumstances or presumptions should be permitted to fix a liability upon such paper other than the liability imposed by the law of the place where the contract is made."

The converse of the situation in the *Hyatt v. Bank of Ken-*

²⁹ Lorenzen, *op. cit.* 129.

³⁰ Lorenzen, *op. cit.* 132, says: "The American Courts determine the negotiability of bills and notes, now by one law, now by another, according to the nature of the particular question before them. Their attitude is responsible for much of the confusion to be found in the law of bills and notes, and it cannot be too severely condemned."

³¹ (1871), 8 Bush. 193, Lorenzen's Cases (2nd ed.) 392. While the court did not talk about negotiability it held in effect that the law of the place of indorsement determined the character of the instrument as a note or a bill of exchange.

To the effect that as between indorser and indorsee the law of the place where the indorsement was made determines negotiability, see *Nichols v. Porter* (1868), 2 W. Va. 13. There the instrument was negotiable where made and payable but not where indorsed, and as to the indorser the instrument was held non-negotiable in a suit by the indorsee.

Contra and to the effect that the law governing the contract of the primary obligor rather than the law of the place of negotiation controls, *Popp v. Exchange Bank* (1922), 189 Cal. 296, 208 Pac. 113. 11 Cal. L. R. 114 (1923). See 8 Corpus Juris 97 and note 60.

To the effect that negotiability as to the drawer is governed by the law of the place of execution of the check, *Hennenlotter v. De Orvananos* (1921), 114 Misc. Rep. 333, 186 N. Y. S. 488.

tucky case existed in the case of *Mackintosh v. Gibbs*.³² There the note was non-negotiable where made and payable, but negotiable where indorsed, and the indorser was held as an indorser of negotiable paper.

However desirable it might be to have negotiability always determined by the same law, the doctrine of independence of contracts has become so thoroughly fixed in our law that no hope can be had for such a result.

It has been asserted that the negotiability of an instrument as affecting the respective rights of one who has been fraudulently deprived of it and one who has obtained the same from or through a third person who had no authority to transfer it, depends upon the law of the place where the transfer to the present holder took place and not necessarily upon the substantive law of the original contract.³³ Whatever may have been the reasons leading to the adoption of the rule in England, there seems no reason for such exception here, and the authorities do not support the statement. Particularly the more recent cases apply the place of making or if the place of payment is different, then the latter, in determining the question of negotiability.³⁴

On the question of negotiability there seems to be some indication that in the Federal Courts it is governed by general commercial law of the country, following the rule established in the case of *Swift v. Tyson*.³⁵

³² (1909), 79 N. J. Law 40, 74 Atl. 708 *aff.* (1911), 81 N. J. Law 577, 8 Atl. 554.

³³ Wharton, *op. cit.*, 966; 61 L. R. A. 205, 206; quoted and discussed, Lorenzen, *op. cit.*, 131.

³⁴ *Savings Bank v. National Bank of Commerce* (1889), 38 Fed. 800; *McCormick & Co. v. Tolmie Bros.* (1928), 46 Ida. 544, 269 Pac. 96; *Fidelity & Deposit Co. v. Andrews* (1928), 244 Mich. 159, 221 N. W. 114 (involving stolen trust certificates); *Paepcke v. Paine* (1931), 253 Mich. 636, 235 N. W. 871 (stolen bonds); *Sioux Nat. Bank v. Lundberg* (1929), 54 S. D. 581, 223 N. W. 326. See *Baker Co. v. Brown* (1913), 214 Mass. 196, 100 N. E. 1025 (bills of lading case). *Wylie v. Speyer* (1881), 62 How. Pr. 107, applies law of the forum.

³⁵ (1842), 16 Pet. 1, holding that upon questions of general commercial law the federal courts are not bound by decisions of the local tribunals. In the case of *Howenstein v. Barnes* (1879), 5 Dill. 482, the court said: "But it seems to me the case rests upon the general commercial law of the country, and this court is not bound to speculate upon the effect of these conflicting decisions of Kansas and Missouri." And in the case of *Farmers Nat. Bank v. Sutton Mfg. Co.* (1892), 52 Fed. 191, it was stated that "except so far as the rights of the parties are affected by statute the question is one of general commercial law but it is the general commercial law

NEGOTIABILITY AS AFFECTING RIGHT TO SUE

Desirable as it is to have all questions relating to negotiability governed by one law, the state of the law is such that little hope can be held out for uniformity. The question of negotiability with reference to the right of an indorsee to maintain the action does not arise as frequently as formerly, since most states permit an indorsee or assignee to bring suit in his own name, regardless of negotiability, provided the indorsement is legally sufficient to pass to the holder the rights of the indorser or assignor. Where the question is pertinent, however, the rule is settled that the right of a holder to maintain an action in his own name is governed by the *lex fori*.³⁶ If, for example, the law of the forum provides that a holder of a non-negotiable instrument cannot sue in his own name, such a person could not sue, regardless of the fact that the law of the place of making, payment or indorsement might have permitted an assignee of a non-negotiable instrument to sue.³⁷ So likewise, in determining what law governs the negotiability of the instrument for the

of the State of Indiana. Upon such questions courts of the United States, in exercising a jurisdiction concurrent with that of the state courts, have always asserted an independence of judgment as to the state law, even if they differ with the state supreme court. But where the question is a new one with the federal courts it is their rule, and it is their duty, to give weight of the decisions of the courts of the state whose laws they are administering." See *Kobey v. Hoffman* (1916), 229 Fed. 486. Compare *Traders' Nat. Bank v. Willson* (1913), 205 Fed. 266.

³⁶ Wharton, *op. cit.*, 999 and note 1, 61 L. R. A. 222; *Foss v. Nutting* (1860), 14 Gray 484; *Lodge v. Phelps* (1799), 1 John. Cas. 139; *Cope v. Daniel* (1840), Ky. 9 Dana 415; *Jordan v. Thornton* (1846), 7 Ark. (2 Eng.) 224; *Warren v. Copelin* (1842), 45 Mass. 594; *Logue v. Smith* (1831), Wright (Ohio) 10; *Woods v. Ridley* (1850), 11 Humph. 194; *Hakes v. Nat'l. Bank of Terre Haute* (1895), 61 Ill. App. 501; *Hardy v. Lamb* (1913) (Tex. Civ. App.), 152 S. W. 650.

In *Richards v. Barlow* (1885), 140 Mass. 218, 6 N. E. 68, where suit was brought in Massachusetts to enforce a judgment taken in Illinois on a note made and payable there and negotiable under Illinois laws the court treats the note as non-negotiable under Massachusetts laws and enforces judgment on the ground that they must respect the judgment. But the court points out that Illinois may have had a statute permitting the assignee of a non-negotiable chose in action to recover. By treating it as non-negotiable the court appears to adopt the law of the forum. For a similar case likewise involving a confession of judgment note, see *Egley v. Bennett* (1924), 196 Ind. 50.

³⁷ Wharton, *op. cit.*, 999. *Contra*, *Richards v. Barlow* (1885), 140 Mass. 218, 6 N. E. 68 (*dictum*).

purpose of right to sue, some cases hold that this question is likewise determined by the law of the forum.³⁸ But where the right to sue depends upon the character of the instrument and the nature of the substantive rights acquired, it would seem that, for the purposes of applying the remedial law of the forum, the character of the instrument as negotiable should be determined by the law of the place of performance, and a number of cases so hold.³⁹ As to the right of an indorsee to sue an indorser, negotiability is ordinarily determined by the law of the place of indorsement in accordance with the doctrine of the independence of the various contracts.⁴⁰

HOLDERS IN DUE COURSE

After an instrument is determined to be negotiable, in order to escape personal defenses the holder must qualify as a holder in due course. There is a conflict as to whether the law of the place of payment of the instrument,⁴¹ or the law of the place of indorsement governs.⁴² In the interest of uniformity in the

³⁸ *Clark v. Farmers Woolen Mfg. Co.* (1836), 15 Wend. 256.

³⁹ *Bowne v. Olcott* (1796), 2 Root (Conn.) 353; *Lockwood v. Lindsey* (1895), 6 App. D. C. 396; *Law v. Crawford* (1896), 67 Mo. App. 150; *Reddick v. Jones* (1845), 28 N. C. (6 Ired.) 107; *Grace v. Hannah* (1858), 51 N. C. (6 Jones) 94; *Barry v. Stover* (1906), 20 S. D. 459, 107 N. W. 672; *Corbin v. Planters Nat'l Bank* (1891), 87 Va. 661, 13 S. E. 98; *Stix v. Matthews* (1881), 63 Mo. 371. See *Warren v. Copelin* (1842), 45 Mass. (4 Metc.) 594. It has been asserted, however, that the place of transfer governs where it differs from the place of payment, Wharton, *op. cit.*, 1000 note 4. *Weiseman v. Banque de Bruxelles* (1927), 224 N. Y. S. 555. In 37 Yale L. J. 803 (1928), at 811, the writer approves of the rule in the interest of free circulation.

⁴⁰ *Mendenhall v. Gately* (1862), 18 Ind. 149 (place of payment and indorsement coincided); *Everett v. Vendryes* (1859), 19 N. Y. 436 (*dictum*). See *Yeatman v. Cullen* (1839), 5 Blackf. 240. *Contra*, *Roads v. Webb Adm.* (1898), 91 Me. 406, 40 Atl. 128 (applying *lex fori*).

⁴¹ Wharton, *op. cit.*, 971; 8 Corpus Juris 104, 61 L. R. A. 202; 37 Yale L. J. 806 (1928); *Lorenzen, op. cit.*, 140; *Webster v. Home Mach. Co.* (1886), 54 Conn. 400, 8 Atl. 483; *Woodruff v. Hill* (1874), 116 Mass. 310; *Green v. Kennedy* (1879), 6 Mo. App. 577; *Allen v. Bratton* (1872), 47 Miss. 119; *Bright v. Judson* (1866), 47 Barb. 29; *First Nat. Bank v. Dean* (1891), 16 N. Y. S. 107; *Limerick Nat. Bank v. Howard* (1901), 71 N. H. 13, 15 Atl. 641. See *Emanuel v. White* (1857), 34 Miss. 56.

⁴² *Woodsen v. Owens* (1892), Miss., 12 So. 207 (not reported in state reports); *Brook v. Vannest* (1895), 58 N. J. L. 162, 33 Atl. 382; *King v. Doolittle* (1858), 1 Head 88, 38 Tenn. 77; *Holt v. McCann* (1897), Ct. of Civ. App. of Texas, 42 S. W. 310; *Russell v. Buck* (1842), 14 Vt. 147 (coincided).

application of law, it is desirable, of course, to have the law of the place of payment of the primary party govern. This could be accomplished on the theory that such party expects to be governed, as to defenses and negotiability, by the law of the place of payment, and he is presumed to know what constitutes a holder in due course under that law.⁴³ In the interest of free circulation of such instruments, it might be well to adopt a rule treating the holder as a holder in due course if he satisfies either with the law of the place of payment or the place of indorsement.⁴⁴ In the Federal courts the position is taken that in matters of general commercial law, they will determine the question for themselves.⁴⁵

Perhaps the only hope for uniformity can be by the insertion of provisions in the instrument as to what law is to govern the parties in the particulars herein discussed. Such provisions would be clearly valid and would eliminate situations where intervening parties are held without right of recourse, and similar situations.⁴⁶

⁴² Lorenzen, *op. cit.*, p. 142. The writer says: "To say that the *lex loci contractus* is the proper law to determine the nature of the defenses which a party may set up against a holder in due course and against a party who is not a holder in due course and yet to deny its competency to define what it understands by the term 'holder in due course' is inconsistent and irrational. Both questions in the very nature of things should be governed by the same law."

The writer is obviously (and no doubt inadvertently) using the term *lex loci contractus* in the broad sense to mean place of performance. This is apparent by reference to page 105 of the same treatise.

In the case of *Barry v. Stover* (1906), 20 S. D. 459, 107 N. W. 672, it appears that the court applied one law to determine defenses and another to define negotiability.

⁴⁴ Lorenzen, *op. cit.*, p. 142, where the writer says: "From the standpoint of legislative policy it might not be unwise, however, to adopt an alternative rule and give to the holder the right of a holder in due course when he is regarded as such by the law of the place of transfer. * * * As such an alternative provision would afford a more extensive protection to the purchaser of negotiable paper and would thus increase its power to circulate, its adoption by the uniform act would serve a desirable end."

⁴⁵ Lorenzen, *op. cit.*, 141 and note 284. *Baltimore & O. R. R. Co. v. Baugh* (1893), 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. See note 35, *supra*.

⁴⁶ In notes it has become almost the rule to insert provisions as to waiver of protest, notice of dishonor and non-payment. Many notes also provide that the drawer and indorsers consent to extensions thereof.