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Commercial Paper and the Conflict of Laws

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COMMERCIAL PAPER AND THE CONFLICT OF LAWS

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Certificates of stock, bonds and other negotiable paper are apt to be regarded by business men as the equivalents of tangibles and, so, are normally dealt with by them as such. Nevertheless, stock certificates and negotiable paper represent intangibles. A stock certificate, for example, represents a share in the corporation. The owner of the share has a number of inchoate claims which are not always susceptible of exact delineation. Theoretically the owner is entitled to his proper share of the balance remaining on hand after discharge of obligations upon the dissolution of the corporation. He is also entitled to dividends, if earned, and may, depending on the character of his stock, participate in the selection of corporate directors. Bonds and other negotiable paper are likewise evidence of intangibles, namely, the primary or secondary obligations of those whose names are attached to the paper to pay the amounts designated therein. Even a bill of lading or a warehouse receipt is not a full substitute for the tangible which it represents. It merely creates a duty on the part of a carrier or warehouseman to deliver on presentment of the paper. If the paper is negotiable or semi-negotiable the person to whom it has been issued may transfer to another by some designated manner a similar right to delivery. However, whatever wishful thinking there may be, the paper never becomes the full equivalent of the goods deposited or shipped. At most it creates a limited right to delivery. Its negotiability creates a power to destroy by negotiation the claims of certain individuals to delivery and to convey to another the right to possession. In the field of Conflict of Laws courts have tended, on the whole, to emphasize the thesis that stock certificates and negotiable paper constitute no more than evidence of intangibles and so have tended to deal with problems concerning them as problems concerning the intangibles which they represent. Except, perhaps, where the question has been one of an alleged transfer of the obligations represented by the paper, the language used by the courts has been similar to that employed by them when dealing with ordinary contract problems. The differences of opinion as to the proper law to govern the rights and duties of the parties have been much the same.

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SHARES OF STOCK

It is generally agreed that the rights of shareholders, insofar as claims against the corporation are concerned, are controlled by the law of the place of incorporation.[1] Also, prior to the widespread enactment in the United States of the Uniform Stock Transfer Act, a majority of the American courts took the position that the effect of a transfer of a certificate of stock, to the extent that it affects ownership of the share, is controlled by the same law.[2] The theory was that the laws of the place of incorporation ultimately determine who is entitled to be recognized as the owner of the share. In *Masury v. Arkansas National Bank*,[3] for example, a judicial seizure of the share in Arkansas, the state of incorporation, took precedence over a prior pledge of the certificates, the pledge not having been registered on the books of the corporation or recorded in the Arkansas county where the corporation did business. Again, in *United Cigarette Machine Co. v. Canadian Pacific R.R.*,[4] Canadian law was held to control the right of a transferee of a certificate to be recognized as owner of a share in a Canadian corporation although the transfer took place in a jurisdiction where it was valid. While there were decisions to the contrary, the prevailing thesis was that just mentioned, that ownership of a share of stock depends ultimately on the laws in force at the place of incorporation. In addition, statutes in the various states provided for the garnishment of shares of stock at the place of incorporation.[5]

The Uniform Stock Transfer Act[6] was designed to bring about two changes in the pre-existing order, (1) transfer of the share by transfer of the certificate in the designated manner, and (2) attachment or seizure of the certificate through judicial process in order to reach the holder's interest in the share rather than by resort to garnishment of the share at the place of incorporation. Upon first thought it might seem that the effect of the Act is to bring about a merger of the share with the certificate so that the certificate becomes the *res* in jurisdictions which have adopted the uniform legislation. This has not, however, been the position of the courts. A transfer of the certificate in a

1. Cf. Rogers v. Guaranty Trust Co. of New York, 288 U.S. 123, 53 Sup. Ct. 295, 77 L. Ed. 652 (1933). See also Koster v. Lumbermens' Mutual Casualty Co., 330 U.S. 518, 67 Sup. Ct. 828, 91 L. Ed. 1067 (1947).

2. See Note, 131 A.L.R. 192 (1941).

3. 87 Fed. 381 (E.D. Ark. 1898).

4. 12 F.2d 634 (2d Cir. 1926). During World Wars I and II, seizure of stock owned by enemy aliens was upheld when the corporation was incorporated in the United States. In addition, seizure of the certificate, as seizure of the share, was upheld. Cf. Direction der Disconto-Geselschaft v. United States Steel Corp., 267 U.S. 22, 45 Sup. Ct. 207, 69 L. Ed. 495 (1925).

5. See Notes, 87 A.L.R. 485 (1933), 122 A.L.R. 338 (1939).

6. For a general discussion of this Act, see Hine, *Situs of Shares Issued under the Uniform Stock Transfer Act*, 87 U. OF PA. L. REV. 799 (1939); Pomerance, *The "Situs" of Stock*, 17 CORNELL L.Q. 43 (1931); Seymour, *The Proposed Uniform Stock Transfer Act*, 9 CALIF. L. REV. 186 (1921); 22 MARQ. L. REV. 209 (1938).

jurisdiction which has adopted the uniform legislation. This has not, however, been the position of the courts. A transfer of the certificate in a jurisdiction which has adopted the Uniform Act undoubtedly comes within it if the state of incorporation has also adopted the act. Here, there is no difficulty since the law at the place of incorporation authorizes transfer of the share through transfer of the certificate, hence, no barrier is raised under the law where the certificate is located and where its transfer takes place. However, if the jurisdiction where the corporate charter was granted has not adopted the Act, the effect of a transfer of the certificate has been held not to be controlled by the law of the place where it takes place even though the Uniform Act has been adopted there.[7]

The theory has sometimes been that the power to transfer ownership of the share through transfer of the certificate is ultimately controlled by the law of the place of incorporation. Unless that law grants the power, there can be no transfer of the share through transfer of the certificate. At the same time it has been held that the power created at the place of incorporation is operative abroad, where the certificate is located, even though the law there has not been satisfied. In *Morson v. Second National Bank of Boston*,[8] for example, certificates of stock of a Massachusetts corporation had been given the claimant in Italy. The gift was consummated by endorsement and delivery but formalities required by Italian law to transfer by gift had not been complied with. Nevertheless, the Supreme Judicial Court of Massachusetts upheld the gift on the ground that it was effective to transfer ownership of the share under the Uniform Stock Transfer Act which had been adopted in Massachusetts. Because of the universal adoption of the Act in the United States, the matter is no longer important insofar as it involves transfer in America of shares in corporations incorporated in this country. The same is true of judicial seizure of the certificate, as well as seizure of the share at the instance of a creditor. It is, however, important in connection with certificates which are located in this country but which represent shares in corporations incorporated abroad. Upon the theory that control of ownership of the share rests finally with the country of incorporation, transfer of the certificate as transfer of the share would logically, if the doctrine of the *Morson* case is accepted, have to conform to the foreign law, the law of the place of

7. Presumably because of the universal adoption in the United States of the Uniform Act, the problems from an interstate point of view are no longer important except insofar as the earlier cases may have a bearing upon the effect of transfer abroad of shares in American corporations or upon the effect of a transfer in the United States of a share in a foreign corporation. See Note, 131 A.L.R. 192, 197 (1941). For a particular case, see Penington v. Commonwealth Hotel Construction Corp., 18 Del. Ch. 170, 156 Atl. 259 (1931), where the transfer was one of a certificate representing a share of stock in a corporation incorporated in a state which had not adopted the Uniform Act.

8. 306 Mass. 588, 29 N.E.2d 19 (1940).

incorporation. Likewise, it would seem that the efficacy of attachment or of levy upon the certificate as the equivalent of seizure of the share would also depend on the law of the place of incorporation. Only if that law authorizes transfer of the share or its seizure through transfer or seizure of the certificate, would the transfer or seizure of the certificate affect title to the share. Instead of adopting the mercantile point of view that the certificate is the *res*, the courts, perhaps logically enough, have construed the Uniform Act as creating a power — one which owes its existence to the law at the place of incorporation — to transfer the share through transfer of the certificate in the manner permitted in the Act irrespective of where the certificate may be located. Seemingly, if the Act or something similar to it has not been adopted at the place of incorporation the transfer must comply with the law there. But even though the position of the courts may be logical enough, it would seem that better results might be attained, where the matter is one of material effect on business transactions, through consideration of business convenience rather than through some judicial hypothesis.

BILLS AND NOTES

Prior to the adoption of the Negotiable Instrument Law the American cases involving questions of conflict of laws with respect to negotiable paper were numerous insofar as interstate problems were concerned.[9] Naturally, because of the present degree of uniformity brought about by the Uniform Act they are now of relatively exceptional occurrence. Local variations of the Act, because of occasional local variations in wording or local interpretation, however, still give rise to occasional controversies. Also, paper of foreign origin or American paper which has circulated abroad gives rise to questions whose solution is frequently difficult. The problems are complicated by the fact that the number of names on the paper represent just so many different undertakings. Drawer, acceptor and endorser, in the case of bills of exchange, and maker and endorser, in the case of promissory notes, enter into distinct obligations. Also, each endorsement, if effective, gives to the endorsee the right to payment or, in the alternative, the power to transfer that right to his endorsee.

9. The Negotiable Instrument Law does not purport to deal with problems of conflict of laws. On the continent of Europe movements in the direction of uniformity resulted in the Geneva conventions in 1930, relating to bills of exchange, and 1931, relating to checks. These conventions have been widely adopted except by the Anglo-American countries. For general discussions see Balogh, *Critical Remarks on the Law of Bills of Exchange of the Geneva Convention*, 9 TULANE L. REV. 165 (1935), 10 TULANE L. REV. 36 (1935); Feller, *The International Unification of Laws Concerning Checks*, 45 HARV. L. REV. 668 (1932); Hudson and Feller, *The International Unification of Laws Concerning Bills of Exchange*, 44 HARV. L. REV. 333 (1931). For a critical survey, see also Gutteridge, *The Unification of the Rules Relating to Negotiable Instruments*, 16 J. COMP. LEG. & INT'L L. 53 (1934).

A preliminary question may be the nature of the paper. Is it negotiable? If the view in the *Restatement of Conflict of Laws*[10] is accepted and strictly applied the negotiable character of the paper as to the drawer, acceptor or maker, as the case may be, would be determined by the law of the place where the contract of each was technically made since theoretically, and according to the *Restatement*, it is the law of that place which determines the nature and validity of a contract. Yet there are a large number of cases in which it has been held that the law of the place of payment controls. In *Sykes v. Citizens National Bank*,[11] for example, a note had been executed in Kansas but was payable in Missouri. Prior to maturity it was transferred to the plaintiff. The maker, having no notice of the transfer, paid the original payee. He contended that the note was not negotiable; therefore, since he had no notice of the assignment there was no obligation to pay the plaintiff. The trial court found that according to Missouri law the note was a negotiable instrument and gave judgment for the plaintiff. Its holding was affirmed. By way of contrast a different result was reached in *Swift & Co. v. Bankers Trust Co.*[12] by the New York Court of Appeals. There a check was drawn at the instance of a dishonest clerk in Illinois on a New York bank in favor of a nonexistent of fictitious payee. The New York bank honored the check. The drawer contended that the New York bank had made an unauthorized payment since under New York law the check was one without a payee and so created no obligation to anyone. However, it was held that the "validity of a check, the scope of the order to pay and the person authorized by the drawer to receive payment are fixed at the inception of the instrument and by the law of the place where the instrument had inception." Since under Illinois law a check payable to a fictitious payee is payable to bearer, the bank was absolved.

The position has also been taken that the character of paper as to the endorser[13] is controlled by the law of the place of endorsement rather than by the law of the place where the instrument was originally executed and presumably was payable. The explanation here may be an assumption that the endorser's undertaking is to pay, if the principal obligor does not, at the place where the endorsement was executed. As to him, under this assumption, the place of execution and place of payment are theoretically identical. But an endorsement does more than create obligations. If effective, it gives the endorsee the right to payment.

In some continental countries the law differs radically from American law with respect to the ability of a thief to transfer, on a forged

10. See RESTATEMENT, CONFLICT OF LAWS §§ 312-316, 320, 336 (1934).
11. 78 Kan. 688, 98 Pac. 206 (1908).
12. 280 N.Y. 135, 19 N.E.2d 992 (1939).
13. Hyatt v. Bank of Kentucky, 71 Ky. 193 (1871).

endorsement, title or right to payment. The matter has been litigated from the point of view of conflict of laws in a number of English and American cases. In the case of *United States v. Guaranty Trust Company of New York*,[14] for example, the United States Veterans' Bureau drew a check on the Treasurer of the United States to the order of a resident of Yugoslavia. The check never reached the payee but it was paid by a bank in Zagreb to which it had been transferred under a forged endorsement. The check was sent to a New York bank which received payment from the United States. Having learned of the forgery, the Treasurer of the United States later sued to recover the proceeds of the check. The position of the Supreme Court was that since the United States sent the check to Yugoslavia, it intended that the check should be negotiated there, according to the law of that country. Since the transfer there gave title to the Yugoslavian bank, even though the endorsement was forged, the United States failed to recover. By way of contrast in the case of *Everett v. Vendryes*[15] the law of the place where the alleged transfer was made was held not to be controlling. There a bill had been drawn in New Granada upon a drawee in New York. It was endorsed to the plaintiff in New Granada. Under the law there the endorsement, because of failure to observe certain formalities, did not give the endorsee good title. Under New York law, however, the endorsement transferred title. The paper was dishonored by the drawee. Suit was against the drawer in New York. The court assumed that the drawer's contract was to be performed in New York (where the drawee was to accept) and applied the law of that state. Again, in the case of *Badger Machinery Co. v. United States Bank and Trust Co.*[16] the matter of innocent purchaser for value was referred to the law of the place of execution which was also the place of payment.

In England a distinction has been made between a foreign and an inland bill.[17] The effectiveness of a transfer of the first is controlled by the law of the place where it takes place but a transfer of an inland bill is governed by English internal law. A further distinction has been made by the New York Court of Appeals between an endorsement to a bank for purposes of collection and one made for purposes of transfer of title.[18] In the particular case a corporation had received a check from the Treasury Department of the United States as payment for a tax refund. The president of the corporation endorsed the check to a Belgian bank. The amount of the check was collected through a New

14. 293 U.S. 340, 55 Sup. Ct. 221, 79 L. Ed. 415 (1934). See also Embiricos v. Anglo-Austrian Bank, [1905] 1 K.B. 677; Koechlin v. Kestenbaum Bros., [1927] 1 K.B. 889.
15. 19 N.Y. 436 (1859).
16. 166 Wis. 18, 163 N.W. 188 (1917).
17. See The English Bills of Exchange Act, 1882, 45 & 46 VICT. c. 61, § 72(2).
18. Weissman v. Banque de Bruxelles, 254 N.Y. 488, 173 N.E. 835 (1930).

York bank and deposited to the personal account of the president who withdrew the proceeds for his personal use. Under the law of Belgium no liability by the bank to the corporation was created by the transaction. The law of New York and presumably that of the District of Columbia imposed responsibility since the bank should have been put on notice of the president's lack of authority. The court stated that if the endorsement had transferred title to the Belgian bank, the law of Belgium would have controlled. However, the position was that the endorsement was for purposes of collection. Since the collection was to be made in the United States the law here controlled as the law of the place of performance.

While an endorsement normally amounts to a purported transfer of a right to enforce the claim against the principal obligor for the amount allegedly due, it also creates new obligations since the endorser impliedly agrees that if the principal obligor does not fulfil his obligations the endorser will. Internal laws vary somewhat as to the steps which must be taken by the holder in order to impose liability on the endorser.

As has already been stated the position has been taken that with respect to the endorser the character of the paper as negotiable is determined by reference to the law of the place of endorsement. Also, the vast majority of Anglo-American courts have held that the steps to be taken, such as notice, protest, and so forth, by the holder upon default by the primary obligor are controlled by the law of the place of endorsement.[19] The theory here sometimes is that the undertaking of the endorser is to perform his secondary obligation at the place of endorsement. So, place of performance and place of contracting are theoretically the same. A similar position has been taken with respect to the drawer of a bill.[20] At the same time there seems to be substantial agreement that it suffices if the form of the notice or protest conforms to the law of the place where default by the principal obligor occurred.[21] And, in a Missouri case, *Belestin v. First National Bank*,[22] the

19. See Amsinck v. Rogers, 189 N.Y. 252, 82 N.E. 134 (1907); Aymar v. Sheldon, 12 Wend. 439 (N.Y. 1834); Montana Coal and Coke Co. v. Cincinnati Coal and Coke Co., 69 Ohio St. 351, 69 N.E. 613 (1904). As to necessity of previous suit against the maker or acceptor, see Rose v. Park Bank, 20 Ind. 94 (1863); Hunt v. Standart, 15 Ind. 33 (1860); Williams v. Wade, 42 Mass. (1 Metc.) 82 (1840). Or, as to the question of consideration, see Wood v. Gibbs, 35 Miss. 559 (1858). The amount of recovery as against the drawer or indorser has been determined by the law applicable to their respective contracts. Slacum v. Pomery, 6 Cranch 221 (U.S. 1810); Gibbs v. Fremont, 9 Exch. 25. *Contra:* Bank of Illinois v. Brady, 3 McLean 268, 2 Fed. Cas. 649, No. 888 (N.D. Ill. 1843); Mullen v. Morris, 2 Pa. 85 (1845); Peck v. Mayo, 14 Vt. 33 (1842).

20. *Cf.* Amsinck v. Rogers, 189 N.Y. 252, 82 N.E. 134 (1907).

21. Pierce v. Indseth, 106 U.S. 546, 1 Sup. Ct. 418, 7 L. Ed. 254 (1883); Commercial Bank of Kentucky v. Barksdale, 36 Mo. 563 (1865); Sylvester v. Crohan, 138 N.Y. 494, 34 N.E. 273 (1893); Douglas v. Bank of Commerce, 97 Tenn. 133, 36 S.W. 874 (1896); Carter v. Union Bank, 26 Tenn. 548 (1847). *Contra:* Musson v. Lake, 4 How. 262, 11 L. Ed. 262 (U.S. 1846).

22. 177 Mo. App. 300, 164 S.W. 160 (1914).

matter of adequacy of ultimate performance as to the drawer was held to be controlled by the law of the place on which the paper was drawn. There the plaintiff, in Missouri, bought a bill on a London bank from the defendant bank. The bill was stolen but was paid in good faith by the London bank although the endorsement had been forged. In absolving the defendant the Supreme Court of Missouri concluded that the defendant's undertaking was that the bill would be paid according to the law of the place of payment and, since under English law the London bank was absolved, so would be the defendant Missouri bank.

It has been suggested that the actual decisions, when stripped of the stated reasons through which their results were reached indicate a strong overall tendency on the part of the courts to protect the holder of paper.[23] In so doing, so it has been said, they promote negotiability as a mercantile device for the free exchange of credit. Actual results reached in situations involving a contention of invalidity because of usury undoubtedly support the suggestion since here the vast majority of the courts have taken the position that the paper is nonusurious if it can be upheld by reference to the law of either the place of making or that of the place of payment. In some instances courts have even gone so far as to uphold the validity of the paper if the interest was nonusurious under the law of any place with which it had a substantial connection.[24] The reasons usually given in the usury cases are that the parties are presumed to have intended a valid transaction. If that intention were not given effect the security of commercial transactions would be undermined. In addition, two apparently conflicting decisions by the Supreme Court of the United States might be offered as evidence to support the suggested tendency.[25] In one an oral promise to accept a bill was upheld because it was valid under the law of the place where the promise was made; and in the other, involving the conflicting internal laws of the same two states it was upheld because it was enforceable under the law of the place where the bill was to be accepted. Again, some of the decisions involving the incapacity of a married woman under her domiciliary law to become surety for her husband's obligations as, for example, where she is an endorser of his paper, may indicate further an over-all desire to protect the holder[26] since here incapacity under the domiciliary law has usually been disregarded and at times the wife has been held responsible upon a theory of a presumed intent to make a legally enforceable promise. Also it so

23. See Note, 55 HARV. L. REV. 1181 (1942).

24. See Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 Sup. Ct. 626, 71 L. Ed. 1123 (1927); Arnold v. Potter, 22 Iowa 194 (1867); Scott v. Perlee, 39 Ohio St. 63 (1883); Dugan v. Lewis, 79 Tex. 246, 14 S.W. 1024 (1891).

25. See Hall v. Cordell, 142 U.S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956 (1891); Scudder v. Union National Bank of Chicago, 91 U.S. 406, 23 L. Ed. 245 (1875).

26. Cf. Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930). See also Poole v. Perkins, 126 Va. 331, 101 S.E. 240 (1919).

happens that in the cases in which endorsements abroad have been held to be governed by foreign law as transfers of title, the results have been protection of the holder.[27] However, in these cases the courts have tended to treat the paper as tangible property and as such subject to the same rules of conflict of laws which control transfers of movables in general.

In the main, any one of three types of questions may be presented in cases involving negotiable paper: One, what are the obligations of the parties to the paper to an acknowledged holder? Two, what is the effect of an attempted transfer of the right to performance of the collective obligations? Three, what steps must be taken by the holder to impose liability upon the parties alleged to be responsible?

As to the first question, when the matter at hand has been one of validity or invalidity, as where it is contended that the paper is usurious, those courts which have given effect to the instrument if they could possibly do so have taken as their primary consideration security of commercial transactions, not some assumed underlying *a priori* hypothesis. By way of contrast, when the question has been one of the character or nature of the obligation supposedly created by the agreements of the parties, they have divided along the traditional lines to be found generally in the field of contracts and the conflict of laws. The area of debate has been place of performance as against place of making.

When the matter of negotiability is raised, it is normally assumed that an obligation of some kind was created as the result of the original transaction. The particular problem is the nature of the undertaking of the alleged obligor which came into being when he put his name on the paper. Is it the kind which is transferable by endorsement? Does a transfer to an innocent person destroy defenses which could have been set up against the payee? Does the transfer automatically impose upon the obligor an obligation to pay the transferee? These questions cannot be satisfactorily solved by *a priori* judicial assumptions or hypotheses. They can only be solved by an over-all consideration of business convenience. It may be that one who signs paper, as maker, acceptor, or indorser, has no cause to complain if foreign law is held to be controlling as to the nature of his undertaking, especially when he knows, or should have known, that ultimate payment is to take place abroad. To fix the character of the obligations of all the signers of the paper by reference to the law of the place of performance of the principal obligation would have the virtue of giving operative effect to a single rule of law. Nevertheless, the obligor is less likely to be familiar with the foreign rule than with his own. So, it seems somewhat unfair that his obligations be controlled by foreign law. It is be-

27. See note 14 *supra*.

lieved that general convenience would be best served by giving effect to the law of the place where the obligor assumes responsibility by putting his name on the paper. On the other hand, the majority Anglo-American decisions to the effect that necessity for protest and notice is governed as to each secondary obligor by the law of the place of his contract seem to place on the holder an undue burden since he must ascertain the requirements in this respect under the law governing the contract of any party to the paper he may wish to hold responsible for the default of the principal obligor. It is generally agreed that the form of the protest and notice in the case of a bill need only comply with the law of the place where it is to be accepted or having been accepted is to be paid. Ordinarily this would also be the place where default occurs. The reason here seems to be that the holder cannot conveniently make his protest in the form required under the law of the place of the contract of each person secondarily responsible. Similar general considerations of business convenience seem to call also for a rule by which necessity for protest and notice would be governed by the law of the place where the paper is to be accepted or is to be paid, which normally would be the place of default by the principal obligor. Courts which take the position that the effect of an alleged transfer of negotiable paper is governed by the law of the place where the transfer is made are merely giving effect to the expectations of those who engage in mercantile practices. Acceptance here of the business point of view without regard to the subtle refinements usually encountered in the field of conflict of laws seems highly desirable, particularly if one keeps in mind that interstate and international trade and commerce could not function efficiently without negotiable paper as a tool for extension and transfer of credit.

WAREHOUSE RECEIPTS AND BILLS OF LADING

The Uniform Warehouse Receipts Act, like the Uniform Stock Transfer Law, has been adopted throughout the United States. As enacted in most states it provides for negotiability of the receipt when to bearer or order. There are some slight differences in the wording, from state to state, of some of the provisions of the law but in the main the provisions as to negotiability and effect of negotiation are the same. Consequently, interstate questions of conflict of laws are not likely to arise. Also, ordinarily the receipt would be transferred in the jurisdiction where it was issued. In any event, the effectiveness of the law in that place in providing for transfer of the receipt as a transfer of the right to delivery of the goods would hardly be questioned. All of the points of contact are the same. However, whether there has been negotiation and, if so, its effect as between the holder and the transferee should, it is believed, be governed by the law of the place where the

holder of the receipt allegedly negotiated it.

Unlike the case with the Uniform Stock Transfer Law and the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act has not been widely adopted. However, since Congress has legislated with respect to bills of lading covering shipments from one state to another or from a state to a foreign country, local state law in this field is applicable only to intrastate shipment. Choice of law situations involving them are not likely to arise. As is the case with respect to warehouse receipts, all of the points of contact of the contract of carriage are in the same state. The agreement is made there, delivery of the goods to the carrier is to take place there, so that the agreement is to be wholly performed there. Under any of the conflicting theories of conflict of laws, negotiability of the bill of lading would be determined by reference to the law there. Furthermore, it is not likely that the bill of lading issued by the carrier will be transferred in a state other than the one where the carriage is to take place. The area where choice of law problems may arise as a practicable matter is that of bills of lading covering shipments in foreign commerce. Unfortunately, their solution is not simple, and the cases are relatively few.

The federal act does not apply to shipments from foreign countries but it does to shipments from the United States in foreign commerce, without regard to the flag of the carrier when the carriage is waterborne.[28] There would seem to be no objection to applying American

28. See Bank of New York & Trust Co. v. Atterbury Bros., 226 App. Div. 117, 234 N.Y. Supp. 442 (1st Dep't. 1929); Archibald & Lewis Co. v. Banque Internationale de Commerce, 216 App. Div. 322, 214 N.Y. Supp. 366 (1st Dep't 1926). *Cf.* Chesapeake & Ohio Ry. v. State National Bank, 280 Ky. 444, 133 S.W.2d 511 (1939). The liabilities and immunities of carriers by sea in foreign commerce are now governed by the Carriage of Goods by Sea Act of 1936, 49 STAT. 1207 (1936), 46 U.S.C.A. §§ 1300-1315 (1944). The statute is an implementation of the so-called Hague Rules of 1921. Insofar as carriage in foreign commerce is concerned it replaces almost entirely the Harter Act of 1893, 27 STAT. 445 (1893), 46 U.S.C.A. §§ 190-95 (1928). Insofar as carriage of goods by water in domestic commerce is concerned, the Harter Act still controls unless the Act of 1936 is incorporated into the bill of lading. The general scheme of the Act of 1936 is to exempt the carrier from liability for losses resulting even from negligence in management and navigation but to impose responsibility for losses resulting from negligence in loading, stowage, care and delivery of the cargo and for losses due to negligence in furnishing an unseaworthy vessel and in not properly equipping and manning her. Furthermore, while the carrier may by stipulation increase his responsibilities he may not diminish them. The Act of 1936 is the culmination of a long struggle between shippers and carriers who through stipulations in bills of lading attempted to throw the risks of loss almost entirely on the shipper. The Harter Act was designed to prohibit certain stipulations exempting carriers from liability. It applied to all shipments to or from American ports. The Act of 1936 was, in effect, the readoption by the United States of the general principles of the Harter Act as they had been accepted by the principal maritime nations at The Hague Conference in 1921. These two acts (The Harter Act and the Carriage of Goods by Sea Act) do not purport to regulate negotiability and negotiation of bills of lading. These matters are covered by the Act of August 29, 1916, 39 STAT. 538-45 (1916), 49 U.S.C.A. §§ 81-124 (1951). The general scope of the Act of 1916 is provided for in 39 STAT. 538 (1916), 49 U.S.C.A. § 81 (1951). As to its application to a bill of lading issued in the United States by a French carrier

law when the goods are received by a carrier and a bill of lading is issued in this country insofar as the legal relations of the carrier and the shipper are concerned. The points of contact are sufficiently numerous. If the thesis of the Massachusetts Supreme Judicial Court with respect to the effect of the Stock Transfer Act is accepted,[29] namely that that act creates a power to transfer a right to be recognized as owner of the share through the designated manner for transfer of the certificate, logically the position could be with respect to bills of lading that the federal law designates the manner by which transfer of the bill of lading may operate as a transfer of the right to delivery of the goods. This would result, of course, in the application of American law without regard to the place of transfer of the bill.

The position might be taken in the alternative that transfer of a bill of lading, irrespective of the place where it is issued or delivered, is the exercise of a power relating to the transfer of an interest in a chattel.

Title interests in chattels are frequently said to be controlled by the law of the situs.[30] Therefore, it might be argued that the effectiveness of a transfer of the bill of lading as a transfer of an interest in the goods it covers should be controlled by the same law.[31] In the case of *Hallgarten v. Oldham*,[32] Mr. Justice Holmes, while on the Massachusetts bench took the position that the effect of a transfer in New York of a warehouse receipt, as to an attaching creditor, was controlled by the law of the situs of the goods, which was Massachusetts. However, the receipt was itself nonnegotiable. While an analogy to the situation where a chattel is transferred was drawn[33] the further position was that the same considerations might not be applied to an order receipt. Later, in 1913, in *Roland M. Baker Co. v. Brown*,[34] involving an order bill of lading situation, the Massachusetts court did, however, refer the matter of the effect of an indorsement of a foreign bill of lading to the law of the place where the bill was indorsed and delivered. The goods had been shipped from Russia on a British vessel to the defendant in Massachusetts. The defendant indorsed the bill to a hide company in

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see Johnston v. Compaignie Generale Transatlantique, 123 Misc. 806, 206 N.Y. Supp. 413 (Sup. Ct. 1924).

29. See Morson v. Second National Bank of Boston, 306 Mass. 588, 29 N.E.2d 19 (1940).

30. Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 23 L. Ed. 1003 (1876); Marvin Safe Co. v. Norton, 48 N.J.L. 410 (1886). See also Beale, *Jurisdiction over Title of Absent Owner in a Chattel*, 40 HARV. L. REV. 805 (1927); Carnahan, *Tangible Property and the Conflict of Laws*, 2 U. OF CHI. L. REV. 345 (1935); Stumberg, *Chattel Security Transactions and the Conflict of Laws*, 27 IOWA L. REV. 528 (1942).

31. See Hellendall, *The Res in Transitu and Similar Problems in the Conflict of Laws*, 17 CAN. B. REV. 7 & 105 (1939).

32. 135 Mass. 1 (1883).

33. Mr. Justice Holmes referred to and quoted from Olivier v. Townes, 2 Mart. (n.s.) 93 (La. 1824), and Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109 (U.S. 1868). See also note 30 *supra*.

34. 214 Mass. 196, 100 N.E. 1025 (1913).

Boston to be held in trust for the defendant. The hide company in breach of trust delivered the bill for value to another concern which sold it to the plaintiff. Under Massachusetts law the bona fide purchaser of a negotiable bill took title. Under English law, which the bill of lading declared to be controlling as between owner and carrier, an endorsement for a special purpose did not authorize the endorsee to transfer title, or a right to delivery, to another. After declaring that in any event the stipulation in the bill of lading referred only to claims as between carrier and owner of the goods, the court decided that Massachusetts law controlled so that as between the defendant and the plaintiff the latter was entitled to delivery of the goods. It might be added here that transactions involving bills of lading are frequently accompanied by transactions involving letters of credit and drafts. As has been seen, the effect of a transfer of negotiable paper is usually held to be governed by the law of the place of negotiation. It would be highly inconvenient therefore if the effect of a transfer of a bill of lading were governed by a rule different from that applied to the transfer of an accompanying draft.

As has already been said,[35] the federal act does not apply to foreign bills of lading. A number of opposing ideas as to the proper law could be urged, each supported with equal logic. It might be argued, for example, that if the goods are consigned to a port in the United States, the law of the state of delivery should determine negotiability upon a theory that ultimate performance is to be consummated at the place of delivery.[36] The carrier promises to deliver to the person entitled to delivery there. The same position might be taken with respect to a purported right to delivery by an assignee or transferee of the bill. Again, the position might be that since the matter concerns transfer of a title interest in goods, the law of the situs at the time controls as to each transaction from the time of delivery by the shipper to the time of delivery at destination.[37] This latter position would be most inconvenient. Suppose, for example, that goods are delivered to an English carrier at LeHavre, France, for delivery in the United States. At this point not only the bill of lading as affecting the legal relations between the carrier and the person to whom it is made out would be controlled by French law but the same law would control the effect of a transfer of the bill as a transfer of the right to delivery. However, after the vessel reached the high seas, presumably English law would control any transfer which might then be made as the law of the flag. Then upon arrival in the United States the law of the state where the goods then are would control.

35. See note 28 *supra*.
36. For an analogy in connection with negotiable paper, see Sykes v. Citizens National Bank of Des Moines, 78 Kan. 688, 98 Pac. 206 (1908).
37. Hellendal, *The Res in Transitu and Similar Problems in the Conflict of Laws*, 17 CAN. B. REV. 7 & 105 (1939).

The *Restatement of Conflict of Laws* would resolve the matter by ascertaining, first, whether under the law of the situs at the time a document of title is issued the chattel becomes embodied in the document; then, if so, the law of the situs of the document would govern the effect of its transfer as a transfer of a right to the chattel.[38] It may seem picayunish to quarrel with this point of view. So-called documents of title involve a number of legal relations. In the case of a bill of lading and its transfer there is, first, the matter of the obligations of the carrier, and then, second, the matter of the intermediate rights and duties of the parties to the transfer and the rights as against the carrier. The power to transfer a right to delivery as against others through transfer of the bill is only one of the incidents of transactions with respect to bills of lading. These transactions are peculiarly transactions engaged in by business men. It is believed that their legal effect should be such as to fulfill the reasonable expectations of those who engage in them. It is further believed that these expectations can be best fulfilled in connection with interstate and international affairs by referring the matter of the over-all effect of each transaction to the law of the place where it occurred rather than by resort to fine technicalities as to where the transfer may have been consummated.[39] The

38. See RESTATEMENT, CONFLICT OF LAWS §§ 50, 261 (1934).

39. The courts in only a few of the cases involving foreign-issued bills of lading discuss the matter of the proper law to control negotiability and negotiation. In Olivier Straw Goods Corp. v. Osaka Shosen Kaisha, 27 F.2d 129 (2d Cir. 1928), *cert. denied*, 278 U.S. 618, 49 Sup. Ct. 22, 73 L. Ed. 540 (1928), for example, the bill of lading purportedly covered a shipment on a Japanese vessel from a Japanese port to an American port. The bill of lading with a draft attached was sent to an American bank which paid the draft. In fact, the goods had not been shipped. Suit was brought against the Japanese steamship line. In imposing liability, Judge Augustus Hand took the position that the bill of lading falsely represented the fact of shipment. No reference was made to Japanese law. The case was decided on general principles of Anglo-American maritime law. Perhaps the court assumed that the Japanese law was similar to Anglo-American law. *Cf.* Archibald & Lewis Co. v. Banque Internationale de Commerce, 215 App. Div. 562, 214 N.Y. Supp. 366 (1st Dep't 1926), in which a fraudulent bill of lading was apparently drawn in Bulgaria and sent to a Paris bank with a draft attached. The Paris bank sent the bill and the draft to New York for collection. The draft was paid. In a suit against the Paris bank, the argument was that the federal act does not apply to bills of lading issued abroad. The court then imposed liability upon the Paris bank on the theory of false representation as to the validity of the bill. A further position was that the indorsement of the bill of lading by the French bank was for purposes of collection of the proceeds of the accompanying draft. Since the indorsement was not a transfer of title, New York law, as the law of the place of performance of the collection agency, was held to control. In the case of Neumann v. Reiss, 138 Misc. 576, 245 N.Y. Supp. 464 (Sup. Ct. 1930), goods had been shipped from Hamburg to New York on a Japanese vessel. A German bank had sent the bill of lading with a draft attached to its corresponding New York bank for collection. This bank refused to accept the bill and draft. The shipment was discharged from the vessel by a stevedoring company. Subsequently the United States Collector of Customs took control. The plaintiff, a creditor of the shipper, attached the goods. It was contended that the attachment was invalid because of an outstanding bill of lading which had not been surrendered. The court's position was that the goods in the hands of Collector of Customs were no longer in the possession of the carrier. Therefore the attachment was upheld. It was stated,

result reached would usually be the same as that which would be reached under the *Restatement* but not always.

A few words concerning the provisions in the proposed Uniform Commercial Code concerning conflict of laws should be added.[40] One provision[41] permits the parties to agree that the law of a particular state or country shall govern their rights and duties if the transaction bears a reasonable relationship to that state or country. To permit the parties to select the governing law has met with considerable opposition in this country. When carriage of goods at sea was largely in foreign bottoms, particularly British, it was the usual practice to stipulate in the bill of lading that the law of the flag controlled. Insofar as the matter of restricting the obligations of the carrier were concerned, the Supreme Court of the United States under the federal admiralty and maritime jurisdiction disregarded these provisions, usually on grounds of public policy.[42] Selection by the parties of their own governing law runs counter to the spirit of the *Restatement of Conflict of Laws* as well as the results in a number of decided cases.[43] There should, however, be no objection. Normally the problems involved concern the nature of the paper or the effect of an alleged transfer of it. By designating in their instrument the governing law, the

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however, that goods in the hands of a stevedoring company employed by the ship owner are in the possession of the carrier. The intimation was that, had the Collector of Customs not taken possession, the ability of the general creditor to attach would have been controlled by local New York law rather than by the federal act.

The case of Roland M. Baker Co. v Brown, 214 Mass. 196, 100 N.E. 1025 (1913), is of course direct authority for the proposition that the effect of a transfer of a bill of lading as a transfer of a right to the delivery of the goods is controlled by the law of the place of transfer. Since the federal law does not apply to bills of lading issued abroad the effect of negotiation of a foreign-issued bill would seem to be controlled, when the transfer takes place in the United States, by the internal law of the appropriate state. It might be added here that Professor Williston has taken the position that the failure of Congress to extend the federal act to foreign bills of lading may have been due to the thesis that our law could not be made applicable to bills of lading issued abroad. See 4 WILLISTON, CONTRACTS § 1116 (Rev. ed. 1936). It is doubtful whether Congress felt any restraint on its power in this respect since formerly the Harter Act and now the Carriage of Goods by Sea Act, note 28 *supra*, apply to shipments in foreign commerce whether to or from the United States. It may be, however, that congressional self-denial may have been due to a thought that the character of foreign paper should not be controlled by the law of the United States.

40. See UNIFORM COMMERCIAL CODE § 1-105 (Official Draft 1952).

41. *Id.* § 1-105(6).

42. See Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788 (1889). See also Oceanic S. N. Co. v. Corcoran, 9 F.2d 724 (2d Cir. 1925).

43. See Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 Atl. 158 (1937); cf. Hal Roach Studios, Inc. v. Film Classics, Inc., 156 F.2d 596 (2d Cir. 1946). See also Note, *Commercial Security and Uniformity through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647 (1949). For the English point of view, see Vita Food Products, Inc. v. Unus Shipping Co., Ltd., [1939] A.C. 277 (P.C.). The general thesis of the *Restatement* is that parties may not choose the applicable law. Legal rules control without regard to the wishes of individuals.

parties give expression in advance to their expectations as to the effect, the general nature, of their transaction. However, the dispositions in the Code which would apply in the absence of express agreement run counter to general theories of conflict of laws and, in addition, would frequently result in the application of general provisions of the Code, where adopted, under circumstances that would not be within the reasonable expectations of the parties. Indeed the alternatives for the application of the locally adopted Code are such that it would be relatively rare that its provisions would not be applied at the forum. For example, the provisions with respect to documents of title (Article 7) apply when the contract is made, offered or accepted or the transaction occurs within the state; or, is to be performed or completed with the state, in whole or in part; or, relates to or involves goods which are to be or are in fact delivered, shipped or received in the state; or, involves a bill of lading, warehouse receipt or other document of title which is to be or is in fact issued, delivered, sent or received in the state. Provisions dealing with the applicability of other portions of the Code when a matter of conflict of laws is involved are equally or almost equally broad.[44] Those responsible for the conflict of laws provisions of the Code rely on *Seeman v. Philadelphia Warehouse Co.*,[45] a usury case, in which Mr. Justice Stone took the position that a contract will be upheld against a contention of usury if the rate of interest conforms to either the law of the place where the contract is made or is to be performed. As has been pointed out earlier in this article the matter of legality or validity of the instrument is not the same as that of its nature, as negotiable, for example, or of the transfer of the right to performance of the obligations it creates. In the event that the Code is universally adopted in the United States there will, of course, be few interstate problems of conflict of laws. However, it is most unlikely that it will ever be adopted abroad. The application of the Code to foreign transactions if any of the designated contacts exist seems to hark back to a time when one could suspect that courts were prone to apply, on whatever excuse might occur to them, their own local law because it, the local law, seemed to them necessarily to be superior. Of course, to pull within the scope of the Code by resort to ten-gauge-shot-gun blasts is likely to result in unexpected surprises to those who engage in commercial transactions on an interstate or international plane.

44. As to commercial paper see UNIFORM COMMERCIAL CODE § 1-105(3) (Official Draft 1952).
45. 274 U.S. 403, 47 Sup. Ct. 626, 71 L. Ed. 1123 (1927).