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CAPACITY UNDER THE NEGOTIABLE INSTRUMENTS
LAWS OF THE AMERICAS: A COMPARATIVE STUDY *

Luis M. Ramírez B.†

CLOSELY related to the legal rules that regulate the different aspects and effects of endorsement is the question of capacity to endorse bills of exchange. This forms part of negotiatory capacity in general, which, in a broad sense, may be defined as the faculty of a person to acquire rights and to assume obligations on negotiable instruments.

1. *The Problems of Legal Capacity*

The several aspects or phases of negotiatory capacity, which may be considered in the present connection, can be stated as follows: (1) what laws are to control in determining capacity and incapacity; (2) what persons have capacity to contract negotiatory obligations; (3) what are the effects of the obligations (e.g., endorsements) of persons without capacity, as respects (a) the obligations contracted by incompetents and (b) the other obligations that appear on the bill.

Although these three aspects are of interest for the unification of legislation and have significance in the law of negotiable instruments, they are not of equal importance. It is possible to attain a uniform law on bills of exchange without having uniformity in these three respects. It is clear that the ideal would be to unify the applicable rules, but, for the time being, this seems difficult to accomplish. It must be recalled that the laws on bills of exchange are not isolated legal institutions which have complete life in themselves, but that each is intimately related to a functioning legal system, be it called common law (and law merchant), or code of commerce and civil code.

Legislative uniformity, as stated, is attainable without having uniformity in the three respects indicated, two methods being available to resolve the problems involved. These methods are: (1) unification of the effects of obligations contracted on bills by persons without capacity, for example, by endorsement, particularly with respect to other obligations appearing thereon; and (2) through that harmony in the selection

* This article is part of a monograph entitled "Negotiation of Bills of Exchange" prepared by the author in connection with the Research in Inter-American law described by Professor Yntema at page 549 *supra*. The editors plan to publish parts of other similar monographs in future issues of the REVIEW.—*Ed.*

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of the applicable rules, which should characterize the determination of capacity. In this manner, it may be brought about that bills of exchange circulate freely and with certainty.

This is the method followed in the Uniform Regulation of The Hague Convention and in the Uniform Law of the Geneva Convention. Thus, articles 7 and 7, respectively, regulate the effects of the signatures of persons without capacity, while article 74 of The Hague Uniform Regulation and article 2 of the Geneva Convention on Conflicts of Laws provide the applicable norms for determination of negotiatory capacity. Once the applicable law is determined, this "national" law¹ will determine who have capacity. Mossa states that the questions of capacity, representation, cancellation, protest, etc., do not directly concern the Uniform Law.²

In accordance with the purpose of this work, the following aspects of the subject will be examined below: (1) what persons have capacity to endorse bills of exchange; and (2) what are the effects of endorsement by a person without capacity upon other obligations appearing on a bill of exchange. The determination of the applicable law and the effects of endorsement by a person without capacity, as concerns his own obligation, are aspects that fall without the scope of this study.

2. *Negotiatory Capacity*

In negotiatory capacity, according to Mossa, a distinction should be made between active and passive capacity. Active capacity is the power of a person to acquire a negotiatory right. Passive capacity is the power of a person to assume negotiatory obligations. Both may refer to the creation of a bill or to other acts constituting negotiatory obligations, such as endorsement.

Active negotiatory capacity is identified with capacity in general (in law and in fact). Any person, whether natural or legal, has capacity in the active sense, conformably to the ordinary rules respecting such persons, and thus may acquire the right incorporated in a document or instrument. Passive negotiatory capacity, on the other hand, is more restricted and principally refers not to capacity in law, but to capacity in fact or to act, with which, as a general rule, it coincides.³ Consequently, passive negotiatory capacity or, in other words, to ascertain when a

¹ The word "national" is used to designate the law that governs in each country, in contrast to the Uniform Law.

² Mossa, "Legge uniforme e nuova letteratura cambiaria" (1936) 34 Riv. D. Com. (It.) 128.

³ Cf. I MOSSA, LA CAMBIALE SECONDO LA NUOVA LEGGE 241 (Milano, 1937).

natural or legal person can contract a negotiatory obligation,⁴ is the more interesting. And it is to this that the statutory provisions usually refer.

Capacity to endorse bills of exchange is determined, generally, by the capacity to contract negotiatory obligations, and, in turn, capacity to contract negotiatory obligations, in general, is governed by ordinary capacity to contract.

Article 1 of the Budapest Rules relating to Bills of Exchange prescribed that capacity to contract by means of a bill of exchange shall be determined by the general capacity to contract.⁵ This rule is well founded, since:

The subject of capacity derives from the common law (*direito comum*), and, such being the case, the legal capacity of an individual to carry on trade is proportionate to his civil capacity; one is measured by the other. It follows therefrom that, in reference to capacity, the only regulation possible is that of the civil law, and, consequently, whenever the civil law modifies, by broadening or restricting, in a general way, the capacity of the citizen, this modification prevails over any other disposition of an equally general character.⁶

The Swiss Federal Code of Obligations, in the first part of article 720, contains a provision similar to that of the Budapest Rules.⁷

⁴ Section 47 of the Canadian Bills of Exchange Act would seem to be a good illustration of the distinction between the two types of negotiatory capacity and of the importance of passive capacity. It provides that:

"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract: Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or endorser, of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation."

This provision refers only to passive capacity, it seeming to follow therefrom that any corporation, even without authority in its charter, can acquire a right under a negotiable instrument.

⁵ International Law Association, Budapest, 1908, Report 592.

⁶ "A materia de capacidade é de direito comum e, assim sendo, a capacidade jurídica para o individuo comerciar está na mesma proporção de sua capacidade civil; uma se afere pela outra. Segue-se daí que, em materia de capacidade, a regulamentação unica possível é a do direito civil e consequentemente todas as vezes que la lei civil modificar, ampliando o restringindo, de um modo geral a capacidade do cidadão, esta modificação prevalece sobre qualquer dispositivo de carater egualmente geral." Paulino Neto, "Dois ensaios de direito commercial" (1935) 3 REV. JUR. (Rio) 160 et seq.

⁷ "Toute personne capable de s'obliger par contrat peut s'obliger par lettre de change."

3. *American Legislations*

The countries of America treat negotiatory capacity in different ways, both in the mode of defining it and in the determination of the persons affected. There follows a review of the provisions of each country, classified in three groups.

(1) The Argentine, Paraguayan, and Uruguayan Codes of Commerce, in the general provisions on bills of exchange, contain no disposition on the capacity of persons, but only particular rules on endorsement and *aval*.

The general basis for negotiatory capacity is to be found in the common rule which provides that persons who have attained majority and have free administration of their property, and such persons as acquire capacity to assume obligations before majority, can contract.⁸ Therefore, in order to know who have capacity to assume negotiatory obligations, including endorsement, it is necessary to resort to the provisions which determine who have capacity to contract.

The codes under consideration contain, in addition, special rules enabling legal representatives to endorse.⁹ It is provided that:

Those who succeed to the rights of an insolvent holder and the executors or legal representatives of a deceased creditor, have authority to endorse.¹⁰

Two criticisms may be made of this provision: (a) the situations contemplated do not properly pertain to the law of negotiability;¹¹ they are subjects that should be regulated in the parts relating to bank-

⁸ The general principle is based on articles 52, 53, 128, and 129 of the Argentine and Paraguayan Civil Code, and on article 9, and in general Chapter II of Title I of Book I, of the Argentine and Paraguayan Code of Commerce. Cf. C. A. Córdoba, 20.III.1918, 1 JURIS. ARG. 323: only persons having capacity to execute mercantile acts can incur obligations by bills of exchange. For Uruguay, see articles 1278 to 1281 of the Uruguayan Civil Code, and article 8, and in general Chapter II, Title I, of Book I, of the Uruguayan Code of Commerce.

⁹ Articles 630, 631, and 632 of the Argentine and Paraguayan Code of Commerce and articles 826, 827, and 828 of the Uruguayan Code of Commerce. Articles 630 and 826 will be dealt with in considering the capacity of married women.

¹⁰ "Los que suceden en los derechos de un portador insolvente y los albaceas o representantes legales de un acreedor muerto, tienen autorización para hacer los endosos." Arg.—C. Com., art. 631; Parag.—C. Com., art. 631; Urug.—C. Com., art. 827.

¹¹ Cf. 4 MALAGARRIGA, CÓDIGO DE COMERCIO COMENTADO SEGÚN LA DOCTRINA Y LA JURISPRUDENCIA, 3d ed., 160 (Buenos Aires, 1928).

ruptcy and to the law of succession; (b) while the Argentine, Paraguayan, and Uruguayan laws consider endorsement a true draft.¹²

It is not a right applicable exclusively to endorsement, justifying such particularity in the law.¹³

The other special provision on the power of representatives to endorse is the following:

If a bill is payable to a business house composed of various partners, endorsement by only one of the partners, whose name appears in the firm name or who is entitled to use the signature, is considered the act of the company.¹⁴

This provision is merely a repetition of the principles set forth in the codes of commerce in the part referring to partnerships.¹⁵

¹² Arg.—C. Com., art. 625; Parag.—C. Com., art. 625; Urug.—C. Com., art. 822.

¹³ "No es un derecho aplicable exclusivamente al endoso para que la ley se particularice en esa forma." I WILLIAMS, *LA LETRA DE CAMBIO EN LA DOCTRINA, LEGISLACIÓN Y JURISPRUDENCIA* 234 (Buenos Aires, 1930).

These articles refer to an "insolvent" holder. According to 2 SEGOVIA, *EXPLICACIÓN Y CRÍTICA DEL NUEVO CÓDIGO DE COMERCIO DE LA REPÚBLICA ARGENTINA* 126, n. 2131 (Buenos Aires, 1933), "En la palabra insolvente se ha querido comprender al fallido." Those who succeed to the rights of an insolvent holder are creditors of the estate, who will be represented either by the trustee or the liquidator, or by whoever may be the referee. Cf. RÉBORA, *LETRAS DE CAMBIO*, 3d ed., 195 (Paris, 1928). These are subjects directly related to the law of bankruptcy, examination of which does not concern this work.

The second part of the provisions under consideration deals with the executors and legal representatives of a deceased creditor. This provision is subject to similar criticisms. The subject is directly related to the law of succession; moreover, there is no reason to make a particular provision for endorsements.

¹⁴ "Si la letra es pagadera a una casa de comercio compuesta de varios socios, el endoso de uno solo de los socios, cuyo nombre figura en la razón social o que tenga el uso de la firma, se considera como acto de la sociedad." Arg.—C. Com., art. 632; Parag.—C. Com., art. 632; Urug.—C. Com., art. 828.

¹⁵ See articles 305 of the Code of Commerce of Argentina and Paraguay and 457 of the Code of Commerce of Uruguay. The provision under consideration refers to partnerships, since it speaks of a commercial house composed of various partners and of the firm name, things which corporations do not have. See articles 310, 313, and 314 of the Argentine and Paraguayan Code of Commerce and 453, 403, and 404 of the Uruguayan Code of Commerce.

Two principles appear in the articles under consideration:

(a) Endorsement by one of the partners whose name appears in the firm name is considered as the act of the partnership. And, "with respect to third parties" may be added, since liability among the partners is always possible. Articles 305 of the Argentine and Paraguayan Code of Commerce and 457 of the Uruguayan Code of Commerce provide that:

"Los socios que por cláusula expresa del contrato social estén excluidos de contratar a

(2) Among the countries which have a general provision on capacity to assume negotiatory obligations, Bolivia, in article 367 of the Mercantile Code, provides that, with respect to the drawer or acceptor of a bill of exchange who is not a merchant, the bill has no effect other than that of a simple promissory note under the common civil jurisdiction, except for the right of the holder to demand its value from anyone who may have intervened. This means, then, that, in order to draw or accept a bill, it is necessary to be a merchant. This is the general principle, but this provision will not apply, when a non-merchant has drawn or accepted a bill by reason of some mercantile operation in which he was engaged. The principle followed by this code, that the use or employment of bills of exchange is limited to merchants or to cases involving mercantile transactions, today is definitely abandoned.

With respect to endorsements, the same code, in article 368, enacts that endorsements on bills of exchange shall give rise to all their effects against whoever have made them, saving the law (*fuero*) applicable to an endorser who does not engage in commerce. It seems to follow from this provision that any person with capacity to contract can endorse a bill of exchange, but without prejudice to the application of the civil law, if he does not engage in commerce.

In the other countries, capacity to contract governs negotiatory capacity, and the latter governs capacity to endorse bills of exchange. Brazil¹⁶ and Mexico¹⁷ enact the general principle without addition. It

nombre de la sociedad, y de usar de su firma, no la obligarán con sus actos particulares, aunque tomen para hacerlo el nombre de la compañía.

"Sin embargo, si los nombres de esos socios estuviesen incluidos en la razón social, soportará la sociedad la resulta de estos actos, salvo su derecho de indemnización contra los bienes particulares del socio que hubiese obrado sin autorización."

(b) Endorsement by a person entitled to use the signature of the firm is considered the act of the partnership. This is an application of a provision in another part of the Code, that:

"La razón social equivale plenamente a la firma de cada uno de los socios. Los obliga a todos, como si todos hubieran efectivamente firmado. . . ." Arg.—C. Com., art. 303; Parag.—C. Com., art. 303; Urug.—C. Com., art. 455.

An exception is made of the case where the firm name is used in transactions manifestly foreign to the transactions defined in the partnership contracts. Arg.—C. Com., art. 320, párr. 2; Parag.—C. Com., art. 320, párr. 2; Urug.—C. Com., art. 454, párr. 2.

¹⁶ Bra.—Dec. 2044, art. 42:

"Póde obligar-se, por letra de cambio, quem tem a capacidade civil ou commercial . . ."

¹⁷ Mex.—Ley General de Títulos y Operaciones de Crédito, art. 3:

"Todos los que tengan capacidad legal para contratar, conforme a las leyes que menciona el artículo anterior, podrán efectuar las operaciones a que se refieren esta Ley, salvo aquellas que requieran concesión o autorización especial."

follows from these provisions that to undertake a negotiatory obligation it is not necessary to be a merchant and that one prohibited to engage in commerce nevertheless can contract negotiatory obligations.¹⁸ Canada¹⁹ has the same rule, that general capacity to contract governs capacity to assume obligations by bills of exchange, with the addition that the laws or special regulations of a corporation govern in determining whether it is capable of contracting negotiatory obligations.

“Some corporations are given special authority to become parties to notes and bills by their charters, or by the general laws by which they are governed. In the case of others it is implied from the nature of their objects. In the case of a company having capacity to become party to bills and notes, it will be presumed that it has officers that can endorse; for it is only through officers or agents that it can exercise this function.”²⁰

Chile, Colombia,²¹ and Guatemala²² have similar provisions, which refer to the general rules on capacity to define negotiatory capacity. But the article in the Chilean Code speaks of “persons who are prohibited from engaging in commerce by reason of age,” a clause not in the Guatemalan provision. This phrase seems to imply a confusion of concepts, and it is difficult to correlate it with other provisions of the Code. Prohibition and incapacity are two distinct things. Prohibitions are made in the public interest, as, for example, when brokers²³ or members of a partnership²⁴ or a *commandite*,²⁵ are prohibited from engaging in com-

¹⁸ 5 CARVALHO DE MENDONÇA, TRATADO DE DIREITO COMMERCIAL BRASILEIRO, pt. 2, 216 (Rio de Janeiro, 1938).

¹⁹ “Capacity to incur liability as a party to a bill is co-extensive with capacity to contract: Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or endorser, of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation.” Can.—Bills of Exchange Act, § 47.

²⁰ MACLAREN, BILLS, NOTES AND CHEQUES, 6th ed. by Frederick Read, 141 (Toronto, 1940).

²¹ “Las personas que pueden obligarse pueden celebrar el contrato de cambio por su propia cuenta o por la de un tercero que las haya autorizado especialmente al efecto.

“Las personas a quienes está prohibido comerciar por razón de la edad, la naturaleza de su profesión, dignidad o estado, pueden celebrar el contrato de cambio, y girar, endosar, aceptar, pagar o cobrar una letra, siempre que lo hagan accidentalmente, sin ánimo de especular y violar la prohibición.” Chile—C. Com., art. 622 (similarly, Col.—C. Com., art. 748).

²² Guat.—C. Com., art. 598 (identical with the above provision, omitting the clause “por razón de la edad”).

²³ Chile—C. Com., art. 57.

²⁴ Chile—C. Com., art. 404, inc. 4.

²⁵ Chile—C. Com., art. 474.

merce. Incapacities are established to protect persons, as in the case of minors.

(3) The countries that have enacted no special provision on capacity in the special laws or the corresponding part of the codes, and for which, to resolve the question, reference must be made to the underlying legislation, comprise: Costa Rica,²⁶ Cuba,²⁷ Ecuador,²⁸ El Salvador,²⁹ the United States,³⁰ Haiti,³¹ Honduras,³² Nicaragua,³³ Panama,³⁴ Peru,³⁵ the Dominican Republic,³⁶ and Venezuela.³⁷

Thus, by three different methods the countries of America arrive at a common solution, namely, that negotiatory capacity should be governed by the norms of capacity to assume obligations and to contract.

The writer is in accord with the second method of stating this principle. Although it is not a necessary and indispensable provision, it is desirable, in the interest of clarity, to insert it in the laws on bills of exchange or the relevant part of the commercial codes.

This is a subject outside the proper orbit of a uniform law on bills of exchange, since it should be governed by internal or national laws.

²⁶ Article 3 of the Code of Commerce of Costa Rica refers to the common civil legislation.

²⁷ Article 2 of the Code of Commerce of Cuba indirectly refers to the common civil legislation. Moreover, for issue or endorsement of an occasional bill of exchange, legal capacity to contract will govern. Cf. I GARRIGUES, *CURSO DE DERECHO MERCANTIL* 584 (Madrid, 1936).

²⁸ Articles 6 and 8 of the Code of Commerce of Ecuador refer to the general rules of the Civil Code.

²⁹ Articles 4 and 5 of the Code of Commerce of El Salvador indirectly refer to the Civil Code. Cf. also article 114 of the Code of Commerce, invalidating signatures by non-merchant minors.

³⁰ The Negotiable Instruments Law does not contain a provision, as does the Canadian law, which refers capacity to the underlying law. It may be asserted that:

"In general, all persons who can make a legal contract can become parties to commercial paper . . . the questions of *capacity* and *authority* of parties to make, accept, and transfer negotiable paper are governed by substantially the same rules of law that control other contracts." I RANDOLPH, *A TREATISE OF THE LAW OF COMMERCIAL PAPER*, 2d ed., 432 et seq., § 244 (1899).

³¹ Reference should be made indirectly to the Civil Code of Haiti in those parts of the Code of Commerce which are not explicit. Cf. also article 112 of the Code of Commerce, invalidating signatures by non-merchant minors.

³² Article 5 of the Code of Commerce of Honduras sets forth special rules on capacity of persons, which are supplemented by the Civil Code, particularly article 1555.

³³ In Nicaragua, article 2 of the Code of Commerce refers to the Civil Code.

³⁴ Article 12 of the Panama Code of Commerce refers indirectly to the Civil Code.

³⁵ In Peru, articles 1 and 2 of the Code of Commerce refer to the Civil Code.

³⁶ Reference should be made indirectly to the civil legislation in the Dominican Republic.

³⁷ Article 10 of the Venezuelan Code of Commerce refers to the Civil Code.

But there should be uniformity in the rules determining the applicable national law, in order to avoid:

A large number of conflicts that arise from the diversity of legislations relating to civil and commercial obligations in general, and which are naturally produced when there is a question of commercial paper.³⁸

4. *Position of Minors*

It has seemed interesting to the writer to outline the position of minors and married women in the American legislations, as indicating or giving an idea of the so-called underlying laws.³⁹

The transition from incapacity or minority to capacity or majority is fixed by statute. In America, the various legislations have fixed three different ages:

(1) Majority is acquired at the age of twenty-one in Bolivia,⁴⁰ Brazil,⁴¹ Canada,⁴² Chile,⁴³ Colombia,⁴⁴ Costa Rica,⁴⁵ Cuba,⁴⁶ Ecu-

³⁸ "Une grande nombre de conflits qui naissent de la diversité des législations relatives aux obligations civiles et commerciales en général, et qui se produisent naturellement lorsqu'il s'agit d'effets de commerce." Kuhn, "Principaux problèmes soulevés dans le commerce international par les conflits de lois relatifs aux effets de commerce," 8 *Recueil des cours* 1925, III, 139 at 144.

³⁹ Gutteridge states in this respect that the question of capacity:

"From a business point of view . . . is the least important of the questions which fall to be discussed. Infants, lunatics and married women are not often in the habit of affixing their signatures to bills of exchange, and it can only happen very exceptionally that litigation connected with commercial paper circulating internationally will turn upon the capacity of a defendant to bind himself by his signature." "The Unification of the Rules of Conflict Relating to Negotiable Instruments," 16 *J. COMP. LEG.*, ser. 3, 59 (1934).

Nevertheless, Lorenzen states:

"The principal conflicts that may arise will relate to the capacity of married women and infants." "The Rules of the Conflict of Laws Applicable to Bills and Notes," 1 *MINN. L. REV.* 11 (1917).

⁴⁰ Bol.—C. Civ., arts. 195 and 256.

⁴¹ Bra.—C. Civ., art. 9.

⁴² By the common law, and by articles 246 and 324 of the Civil Code of Quebec. With respect to the underlying legislation, Canada is particularly interesting on account of the fact that two systems govern, the Anglo-American, which is the Common Law, and the Continental, which is the Civil Code of the Province of Quebec, based on the Code Napoléon.

⁴³ Ley 7612, of October 11, 1943, published in the *DIARIO OFICIAL OF CHILE* on October 21 of the same year, fixed the age of majority at twenty-one years (arts. 1 and 4), thus amending the Civil Code and Code of Commerce.

⁴⁴ Col.—C. Civ., art. 34.

⁴⁵ C. R.—C. Civ., art. 22.

⁴⁶ Cuba—L. de 19.V.1916, amending article 320 of the Civil Code. 52 *Col. Leg.* 51.

dor,⁴⁷ El Salvador,⁴⁸ the United States,⁴⁹ Haiti⁵⁰ Honduras,⁵¹ Mexico,⁵² Nicaragua,⁵³ Panama,⁵⁴ Peru,⁵⁵ the Dominican Republic,⁵⁶ Uruguay,⁵⁷ and Venezuela.⁵⁸

(2) The age of twenty-two is prescribed in Argentina⁵⁹ and Paraguay.⁶⁰

(3) And majority commences at eighteen years in Guatemala.⁶¹

The powers of minors vary in the different legislations of America. And especially, they vary within each legislation, depending on the object of the legal act. Thus, within the same legislation a minor will be able to accomplish a particular act, if it be done for a specified purpose, and not, if for other purposes. Such variations also occur among the obligations on a bill of exchange, as from endorsement.

The enactments follow different systems in empowering minors to contract, dependent on whether they engage in commerce, whether they possess separate property, on their civil status, or on judicial decree.

The following countries permit minors to engage in commerce upon the fulfillment of certain requirements:⁶² Argentina, Brazil,

⁴⁷ Ec.—C. Civ., arts. 21 and 235.

⁴⁸ El Sal.—C. Civ., art. 26.

⁴⁹ In the United States, the age of twenty-one years has been prescribed by the Common Law for centuries as the beginning of majority, for both men and women. Cf. I WILLISTON, TREATISE ON THE LAW OF CONTRACTS, 2d ed., p. 671, § 224 (1936). But in certain states, this rule has been modified by statutes or laws with respect to women, who are considered to have attained majority at the age of eighteen years in Arkansas, Idaho, Illinois, Maryland, Minnesota, Montana, Nevada, Oregon, South Dakota, North Dakota, and Utah. Id. 622, n. 4.

⁵⁰ Haiti—C. Civ., arts. 329 and 398.

⁵¹ Hon.—C. Civ., art. 269.

⁵² Mex.—C. Civ., art. 646.

⁵³ Nic.—C. Civ., art. 278. The Civil Code of Nicaragua contains a provision that differentiates it from the other codes, article 280. Although a person has not completed twenty-one years, he may be declared of age when it benefits him. A male who has attained fifteen years or a female of fourteen can invoke this provision. See also, article 1612 of the Code of Civil Procedure.

⁵⁴ Pan.—C. Civ., art. 34.

⁵⁵ Peru—C. Civ., art. 8.

⁵⁶ Dom.—C. Civ., arts. 388 and 488.

⁵⁷ Urug.—C. Civ., art. 280.

⁵⁸ Ven.—C. Civ., arts. 327 and 419.

⁵⁹ Arg.—C. Civ., art. 126.

⁶⁰ Parag.—C. Civ., art. 126.

⁶¹ Guat.—C. Civ., art. 6.

⁶² These requirements are not common to all the countries. In Argentina and Paraguay, any person over eighteen years of age is permitted to engage in commerce, provided he proves that he is legally emancipated or authorized (C. Civ., art. 10).

Canada (Province of Quebec), Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela. On

There must be an express authority of the father or the mother, registered and published in the commercial court. The minor will thereby be considered of age for all commercial acts and obligations (C. Civ., arts. 11-19).

In Brazil, lawfully emancipated minors and children over eighteen years of age subject to parental authority, with the consent of their parents, can engage in commerce (C. Civ., art 1). Under this provision, to be able to engage in commerce, the minor must be over eighteen years of age, and the provision of article 9 of the Civil Code does not revoke this requirement. Article 9, parágrafo único, inciso 5, prescribes that the incapacity of minors ceases when they have a civil or commercial establishment, independently maintained. The Sixth Court of Appeals, on December 11, 1931, held that:

"Para que cesse a incapacidade do menor por efeito de estabelecimento commercial com economia propria, é necessario que já tenha atingido á idade de 18 annos, exigida para a habilitação a commerciante, pelo Codigo Commercial, artículo 1 numeros 2 e 3." 104 Rev. D. 398.

In Colombia, it is provided by article 15 of the Code of Commerce, that minors and children subject to parental authority can engage in commerce in those cases where, conformably to the Civil Code, they are exempted from guardianship, or are emancipated and are granted free administration of their property.

Costa Rica permits a person over twenty years of age to engage in commerce, provided he has been emancipated (C. Com., art. 4).

In Chile, two cases are possible: (a) minors who administer their separate property (*peculio profesional*) and engage in acts of commerce, are liable to the amount of the property; (b) minors, thus contracting, can acquire the status of merchants, provided such acts are repeated and they make commerce their regular profession (C. Com., arts. 7 and 10). Cf. I PALMA, DERECHO COMERCIAL 164 (Santiago de Chile, 1940).

In Ecuador, an emancipated minor can engage in commerce, provided he has been so authorized by his curator and enrolled in the registry office. Moreover, this authority is presumed, when the minor publicly engages in commerce and the curator does not protest (C. Com., art. 9). Such persons are regarded as of age for all acts of commerce. Minors who have separate property (*peculio profesional*) and administer it, if they engage in acts of commerce, are liable to the amount of such property.

El Salvador admits by implication that minors declared of age can be merchants (C. Com., art. 6) but does not prescribe the requirements therefor. Likewise, it stipulates that minors who have and administer property of their own, are subject to liability to the amount of the property, if they engage in some act of commerce.

In Guatemala, the Commercial Code of 1942, in article 6, prescribes a general rule, stating:

"Todas las personas que según las leyes comunes son hábiles para contratar y obligarse y a quienes las mismas leyes no prohiban expresamente la profesión del comercio, tienen capacidad legal para ejercerlo."

In Haiti, emancipated minors over eighteen years of age are permitted to engage in commerce (C. Civ., art. 397), if it is authorized in advance by their parents or guardians and registered in the commercial court at the domicile of the minor (C. Com., art. 2).

In Mexico, those under twenty-one years of age and over eighteen are allowed to engage in commerce, after emancipation, declaration of age, or authorization by their guardians. The minor then does not enjoy the benefits of minority (C. Com., art. 6)

the other hand, Bolivia, Cuba, and Honduras⁶³ do not permit minors to be merchants. All the countries enumerated distinguish between merchants and non-merchants, between commercial codes and civil codes. In the countries that derive their legislation from the Anglo-Saxon system, these distinctions do not exist, and the general or ordinary capacity to assume obligations or to contract under the ordinary law controls.⁶⁴

In addition to the powers granted to minors by the commercial laws, the civil legislation also takes into consideration the development of discernment in minors, granting them greater powers until they become complete at majority. On this point the legislations vary, in extent as much as in method and terminology.⁶⁵ For this reason, in case a minor,

and is considered to be of age, notwithstanding the provisions of the common civil law (C. Com., art. 7).

Nicaragua prescribes in the Code of Commerce (art. 7) that when, having acquired means, minors dedicate themselves to commerce, they are liable to the amount thereof.

In Panama, minors who are emancipated or declared of age are allowed to engage in commerce, as if they had attained majority (C. Com., art. 13).

In Peru, it is provided that legally emancipated minors who have free administration of their property, can engage in commerce (C. Com., art. 4; C. Civ., art. 514).

The Dominican Republic has a provision similar to that of Haiti (C. Com., arts. 2 and 3).

In Uruguay, any person over eighteen years of age can engage in commerce, if he is legally emancipated, has capital of his own, and, in the case of orphans, is declared competent to administer his property (C. Com., art. 9). Emancipation for commerce consists in authorization to engage in commerce by the father, mother, or guardian, or judicially decreed, which authorization is to be registered in the commercial court. The minor is then considered of age for the purpose of all commercial acts and obligations, and will not enjoy the benefit of restitution (C. Com., art. 10).

In Venezuela, emancipated minors can engage in commerce and accordingly in acts of commerce, if they are authorized by their father or mother or with judicial approval when the curator is not a parent. The authorization is registered in the registry office of the register of commerce. Thereafter, they are considered of age in person and property (C. Com., art. 12).

⁶³ Bolivia (C. Merc., art. 2) prohibits the exercise of commerce by minors. Cuba and Honduras do so by implication, since both require the attainment of twenty-one years (C. Com., arts. 4 and 5, respectively), except in case the minors continue transactions of their predecessors by means of guardians (C. Com., arts. 5 and 6, respectively).

⁶⁴ In Canada, the duality of the Common Law and the Civil Law exists. The same occurs in the United States, but it is not so marked and typical.

⁶⁵ Marriage alone emancipates in Argentina (C. Civ., art. 131) and Paraguay (C. Civ., art. 131) irrespective of any form, and whatever be the age of the contracting parties. It is irrevocable, even though the marriage be dissolved by the death of one of the spouses. But those emancipated are subject to a series of restrictions, some absolute and others relative, which require judicial authorization for the execution of acts.

Other countries provide that emancipation may be acquired by marriage or judicial declaration, and others by marriage or authorization of the father or mother. In Costa Rica, emancipation may be accomplished by marriage (C. Civ., art. 152), and by the

with limited capacity, contracts a negotiatory obligation, its enforceability against him will depend on all these circumstances.

father or mother who has parental authority, when the minor is over eighteen. It must be executed by public instrument and recorded in the register of civil status. It is irrevocable (C. Civ., art. 154), and the minor can dispose of his person and property, as if he were of age (C. Civ., art. 155).

In Cuba, emancipation takes place by marriage of the minor, and by concession of the father or mother exercising parental authority, when the minor is of eighteen years and gives his consent thereto (C. Civ., arts. 314-318). Article 314 of the Civil Code also cites as a form of emancipation attainment of majority, but majority properly speaking is not emancipation but complete capacity in fact of the individual. The legal concept of emancipation is:

“A aquisição da capacidade civil antes de idade legal.” 1 BEVILAQUA, CÓDIGO CIVIL DOS ESTADOS UNIDOS DO BRASIL COMENTADO, 6th ed., 198 (Rio de Janeiro, 1940).

It confers capacity on the emancipated minor, but it carries restrictions on alienation (C. Civ., art. 317).

In Haiti and the Dominican Republic, emancipation by operation of law (*de pleno derecho*) takes place on marriage (C. Civ., arts. 386 and 476, respectively). It may be granted by declaration of the father or mother when the minor is fifteen (C. Civ., arts. 387 and 477, respectively). Orphans of eighteen years may be emancipated with the approval of the family council. Emancipated minors have only administration of their property, there being restrictions on alienation (C. Civ., arts. 391 *et seq.*, and 484 *et seq.*, respectively). Emancipation is revocable (C. Civ., arts. 396 and 487, respectively).

In Mexico, marriage results in emancipation (C. Civ., art. 461). Minors over eighteen years can petition therefor, when they satisfy certain conditions of competence (C. Civ., art. 642). The minor has free administration of his property, but with restrictions on alienation (C. Civ., art. 643).

In Nicaragua, by virtue of article 280 of the Civil Code, a minor can be declared of age. Moreover, he can be emancipated by marriage and by authorization of the father or of the mother in his absence (C. Civ., art. 271). In the first case, he must be over eighteen years, and in the second, he must be over eighteen and the emancipation must be agreed to by the minor (C. Civ., arts. 273 and 274). Emancipation enables the minor to control his person and property as if he were of age (C. Civ., art. 272).

In Panama, emancipation may be effected by marriage or declared judicially (C. Civ., arts. 205 and 206); in the latter case, the minor must be over eighteen years of age. He can control his person and his property as if he were of age. When the minor is an orphan, having neither father nor mother, he can be declared of age at eighteen by the competent tribunal (C. Civ., arts. 209 and 210), subject to restrictions (C. Civ., art. 13).

In Uruguay, it is provided that the methods of terminating parental authority include lawful marriage (C. Civ., art. 280, inc. 3) and emancipation granted by parents to children over eighteen years of age (C. Civ., art. 280, inc. 4), which must be effected by public instrument, with the consent of the minor (C. Civ., art. 281) and authorized by the proper judge. It is irrevocable. The restrictions to which those declared of age are subject, apply (C. Civ., art. 283). Orphans over eighteen years of age, without father or mother, who have the necessary aptitude, may be judicially declared of age (C. Civ., art. 302). It is irrevocable (C. Civ., art. 304) and carries restrictions (C. Civ., arts. 308, *et seq.*).

In Venezuela, emancipation may be by marriage (C. Civ., art. 382) or by court

5. *Married Women*

In this connection, only the position of married women will be treated, since single women are governed by the same regime as men, according as they are adults or minors. In some legislations, they have

proceeding when the minor is over eighteen years (C. Civ., art. 383). It confers capacity to perform acts of administration only (C. Civ., art. 388).

Other countries prescribe three grounds or sources of emancipation, namely, judicial, voluntary, and statutory. Thus, in Bolivia, a minor is emancipated when he marries (C. Civ., art. 248), and may be emancipated by his father when he has reached the age of fifteen years, this being effected by declaration of the father before the court (C. Civ., art. 249). A minor who has been orphaned can be judicially emancipated when he has reached eighteen years (C. Civ., art. 250). Emancipation is revocable for just cause (C. Civ., art. 253).

In Ecuador, the three types of emancipation likewise apply, but it is irrevocable (C. Civ., arts. 261, et seq.).

Other countries, Colombia, El Salvador, and Honduras, have two complementary institutions. They recognize voluntary, statutory, or judicial emancipation, which puts an end to parental authority and is irrevocable (C. Civ., arts. 294, 258, and 248, respectively). In addition provision is made for *habilitación de edad*, a privilege granted to a minor to enable him to execute all acts and contract all obligations of which those of age are capable, with certain restrictions, particularly respecting alienation of property. In Colombia, El Salvador, and Honduras, married persons over eighteen are so habilitated by force of law (C. Civ., arts. 340, 297, and 270 respectively). In other cases, it is necessary to be emancipated and to have attained eighteen years.

In Chile, parental authority over the minor can be terminated by means of emancipation, which may be voluntary, statutory, or judicial (C. Civ., art. 264).

Other countries provide various grounds for emancipation. Thus, in Brazil, under article 9 of the Civil Code, these may be: consent of the parents when the minor is eighteen, judicial decree (if the minor, being eighteen, is under guardianship), marriage, exercise of public office, the conferring of a scientific degree by an institution of higher education, independent maintenance of a civil or commercial establishment. The law provides that emancipation terminates incapacity, and therefore full civil capacity is acquired. Cf. I BEVILAQUA, CÓDIGO CIVIL DOS ESTADOS UNIDOS DO BRASIL COMENTADO, 6th ed., 198 (Rio de Janeiro, 1940). It is irrevocable.

In Peru, the Civil Code contains provisions similar to the Civil Code of Brazil. It provides:

"La incapacidad de las personas mayores de 18 años cesa por emancipación, por matrimonio y por obtener título oficial que autorice ejercer una profesión u oficio." (C. Civ., art. 11). Emancipation is effected by a judicial proceeding with the consent of the minor (C. Proc. Civ., arts. 1039 and 1047). It is irrevocable and confers full capacity.

Guatemala, as we have observed, provides that majority is attained at the age of eighteen years. It also enables minors to execute civil acts; for example, they are considered to have attained majority for the purpose of administering property acquired by their own industry or profession (C. Civ., art. 192).

In the United States and Canada, countries where the Common Law predominates, especially in the former, emancipation is recognized, but it has a much more limited meaning than that attributed to it, as stated above, in the various civil codes. Reference is made principally to the services that a minor can render, employment, and the earnings he acquires thereby. Emancipation may be effected by express agreement and also

certain incapacities in law, which it is not pertinent to consider in this work, not having direct connection with bills of exchange. Perhaps the unique case of restriction imposed on women as women is that of Haiti, which provides that the signatures of women, not merchants, on bills of exchange are invalid with respect to them, being but simple promises.⁶⁶

The situation of married women varies under the legislations of the countries of America. Some deem the married woman to have capacity; others, to have capacity with the imposition of certain restrictions; and others consider her to be relatively incompetent in fact.⁶⁷ The question of the married woman's capacity or incapacity is intimately related to the matrimonial regime,⁶⁸ namely, the rules regulating the property

by the special circumstances surrounding a case, when the parents refuse necessary support for the minor's sustenance, except where the minor refuses to accept support in the parental household. Cf. I WILLISTON, NEGOTIABLE INSTRUMENTS, p. 624, § 225 (1931). Emancipation gives minors power to use the earnings which they obtain for their services, as well as power to contract therefor. Emancipation may be partial and revocable, except when it is given with sufficient consideration or is under seal. In certain states, the Common Law has been modified by statutes, whereby a female minor contracting marriage, is considered of age with full contractual capacity (thus in Alabama, California, Maryland, Nebraska, Oregon, Texas, and Washington; cited in I WILLISTON, NEGOTIABLE INSTRUMENTS 622, n. 7 (1931), and, in certain other states, a man or woman, by contracting marriage, becomes of age (thus in Iowa, Kansas, Louisiana, Washington, and Utah; cited, *id.*, n. 8).

For a full discussion of emancipation in the United States, both at Common Law and under the statutes of the various states, see 5 VERNIER, AMERICAN FAMILY LAWS 240 et seq., § 282 (London, 1931-1938).

According to the Civil Code of Lower Canada, a minor can be emancipated by marriage (by operation of law, C. Civ., art. 314), judicially (C. Civ., art. 315), and extra-judicially, subject to review by the courts (C. Civ., art. 316). The minor acquires capacity for certain purposes, including administration of his property (C. Civ., art. 319). But there are restrictions, and the obligations that the minor contracts are subject to review by the court or tribunal (C. Civ., art. 322, par. 2).

⁶⁶ Haiti—C. Com., art. 111.

⁶⁷ The present writer submits that the incapacity of the married woman is factual and relative (*de hecho y relativa*), because it does not depend on her sex, namely, her being a woman, but on the fact of contracting marriage, it being possible for her to execute acts by representation or with authorization. As 2 CLARO SOLAR, EXPLICACIONES DE DERECHO CIVIL CHILENO 76 (Santiago de Chile, 1937) states:

"La incapacidad de la mujer casada consiste, esencialmente en que la mujer no puede en principio, ejecutar válidamente los diversos actos jurídicos sin autorización que por regla general debe emanar del marido."

⁶⁸ It seems appropriate to provide a summary of the principal matrimonial regimes, in the interest of clarity when reference is made to one of these. For full discussion of matrimonial regimes, see ALESSANDRI RODRIGUEZ, TRATADO PRÁCTICO DE LAS CAPITULACIONES MATRIMONIALES, DE LA SOCIEDAD CONYUGAL Y EL LOS BIENES RESERVADOS DE LA MUJER CASADA (Santiago de Chile, 1940). See also, as a comparative study, although at present there are modifications, De la Vega, "Capacité de la femme mariée dans le droit de l'Amérique latine," found in PUBLICATIONS DE L'INSTITUT DE DROIT COMPARÉ, DE

and the pecuniary interests of spouses between themselves and in their relationships with third persons. The views of the respective countries differ on whether married women should be competent or relatively incompetent, but it may be said that there is a tendency to regard the married woman as having capacity, as evidenced by the various laws modifying the civil codes.⁶⁹

L'UNIVERSITÉ DE PARIS, ser. I (Paris, 1933), and ROGUIN, TRAITÉ DE DROIT CIVIL COMPARÉ, LE RÉGIME MATRIMONIALE (Paris, 1905). The principal systems are community property, separation of property, participation of gains, without community, and dotal.

(1) *Community of property*. The property of husband and wife, whether contributed to the marriage or acquired during it, constitutes an aggregate or common fund, which belongs to the conjugal partnership and which is divided when the community is dissolved. The property is generally managed by the husband, and the woman is incompetent to perform legal acts without the husband's consent or supplementary permission.

This community regime may be complete or partial. When the community is complete, all property of the spouses is included, whether contributed to or acquired during the marriage. Partial community, as its name indicates, does not include all the properties of the spouses, certain properties being reserved. Two types of partial community may exist: (a) community of moveables and gains, under which all moveables and gains acquired during the marriage are included in the common fund, immoveables remaining as reserved property, and (b) community of gains, which is characterized by inclusion in the common fund of moveables and immoveables acquired during the marriage for value (*a titulo oneroso*), individual property of all kinds being reserved.

(2) *Regime of separation of property*, in which there is no pecuniary community or association. Each spouse retains the assets that he contributed to the marriage, as well as those he acquires during its duration, administering them independently. This also may be partial or complete, according as all or certain property is affected.

(3) *Regime of participation of gains*, a regime combining the two preceding. It consists in the retention by each spouse of the administration and ownership of property contributed to as well as acquired during the marriage, but, upon its dissolution, in the inclusion of the property derived from gains of both spouses in a common fund, for the sole purpose of liquidation and participation.

(4) and (5) The *regime without community* and the *dotal regime* are the least frequently used. The former involves division of the property of the woman into property contributed and personal. The former is administered by the husband; the personal property pertains to her. In the dotal regime, there is also a division of the property of the woman into dotal and paraphernal property. The dotal property is the aggregate of property that the woman delivers to the husband for him to administer, covering part of the domestic expenses, and paraphernal property is that of which the woman has the management and disposition. The *dor*, generally, must be returned at the dissolution of the conjugal partnership, for which there exists a statutory mortgage on the property of the husband.

⁶⁹ It is pertinent to cite the modifications with respect to married women that have been introduced in the French Civil Code, since this code has been one of the most important sources of all the civil codes of the countries of America. By law of February 18, 1938, 38 Collection des lois n.s., 156, Book I, Title V, Chapter VI of the Civil Code was amended by the grant of civil capacity to married women. The most important modification is stated in the new article 215, by which the married woman is given full capacity, subject to limitation only by law or by the matrimonial regime

Argentina, Canada, Colombia, Costa Rica, Cuba, El Salvador, Honduras, Mexico, Nicaragua, Panama, and the Dominican Republic,⁷⁰

adopted. For full discussion, see L. Juillot de la Morandière, 15 DALLOZ, RECUEIL HEBDOMADAIRE (1938) 25 et seq. Also Herchenroder, "The Capacity of Married Women in French Law," 20 J. COMP. LEG., ser. 3, p. 196 (1938).

⁷⁰ *Argentina.* Ley 11357 of 1926 on the civil rights of women, has amended the provisions of the Civil and Commercial Codes with respect to married women. A married woman may, without marital or judicial authorization, engage in a lawful profession, office, employment, or business, administering and freely disposing of the products of such occupations (art. 3, inc. 2, let. a). This provision, therefore, amends articles 13, 14, 15, 16, and 17 of the Code of Commerce. Moreover, and most important from the point of view of this work, it amends article 630 of the Code of Commerce, which stated that "El derecho de endosar una letra firmada o endosada a favor de una mujer no casada que posteriormente contrae matrimonio, pertenece al marido," since now this right to endorse a bill does not enure to the husband. But, by virtue of article 3, inciso 2, letra c, of the law cited, the husband can endorse when he administers the property. Thus, it should be considered that the:

"Derecho de endosar una letra firmada o endosada a favor de una mujer que luego se casa corresponde a ella, y no al marido, a no ser que éste, por no haber hecho la esposa la manifestación de voluntad . . . conserve la administración." 4 MALAGARRIGA, CÓDIGO DE COMERCIO COMENTADO, SEGÚN LA DOCTRINA Y LA JURISPRUDENCIA, 3d ed., 160 (Buenos Aires, 1928).

The endorsement of the husband, when he has administration of the property, would be perfectly valid. The matrimonial regime, although it has suffered slight modifications in extent, continues to be that of community of gains.

Canada. On this subject, the legislations of the provinces vary among themselves, particularly that of Quebec. In the majority of the provinces, the original law was that of the Common Law, under which the married woman is relatively without capacity, and therefore incompetent to contract obligations by bills of exchange on her own account. But the English Married Women's Property Act, 1882, 45 & 46 Vict., c. 75, provides that a married woman who has separate property, actual or anticipated, can contract obligations as if she were *feme sole*. This act governs in the provinces in which it has been adopted. Thus, there has resulted the matrimonial regime of complete separation.

Colombia. According to Ley 28 of 1932, on patrimonial regime in marriage, married women have free administration and disposition of property that belonged to them at the moment of contracting marriage or that they contributed, as well as of other property that they had acquired or may acquire (art. 1); for this, authorization by the husband or supplementary license by the court is not required (art. 5). The Colombian regime in marriage is that of participation of gains.

Costa Rica. The civil legislation imposes no incapacity on married women, who require neither authorization by the husband nor by the court to contract (C. Civ., art. 78). One distinction only is to be made: if the marriage was celebrated with a marriage settlement, including a stipulation on administration of property, this will be governed accordingly. Without a marriage settlement, each spouse retains control and free disposition of his property, both that which he had upon contracting marriage or that which he acquires in any manner during the marriage. Moreover, contracts between the spouses are permitted (C. Civ., art. 76).

Cuba. Article 43, párrafo 4, of the Constitution of Cuba (1940) provides that:

"La mujer casada disfruta de la plenitud de la capacidad civil, sin que necesite licencia o autorización marital para regir sus bienes, ejercer libremente el comercio, la industria, profesión, oficio, o arte, y disponer libremente del producto de su trabajo."

married women are considered to have capacity. The same is true in the

And article 20 of the same constitution declares illegal and punishable any discrimination on account of sex. These constitutional provisions have broadened even more those of the law of July 18, 1917, on the capacity of the married woman. The first part of article 43, párrafo 4, speaks of "controlling her property" (*regir sus bienes*), and it seems to follow therefrom that she can perform all the acts necessary for the management, alienation, or disposition of her property, thus confirming article 4 of the law of 1917 cited. The matrimonial regime continues to be that of community of gains.

El Salvador. According to the Civil Code, married women have full civil capacity. Article 189 provides that:

"Los cónyuges podrán contratar entre sí, y la mujer no necesita autorización del marido ni del juez para celebrar toda clase de contratos ni para comparecer en juicio." The regime of complete separation of property governs.

United States of America. The general principle respecting married women may be stated, adopting the words of Page, as follows:

"At Common Law, subject to certain exceptions, it was well settled that an executory contract entered into by a married woman was void, and even now no contract is enforceable against her unless under the provisions of some statute." 2 PAGE, *THE LAW OF CONTRACTS* 1427 (1905).

See also: 1 RANDOLPH, *A TREATISE OF THE LAW OF COMMERCIAL PAPER*, 2d ed., 475 et seq. (1899); 1 DANIEL, *A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS*, 7th ed., 346 et seq. (1933); EATON AND GILBERT, *A TREATISE ON COMMERCIAL PAPER AND THE NEGOTIABLE INSTRUMENTS LAW* 62 et seq. (1903); STORY, *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE*, 3d ed., 112 et seq. (1853). But the rules of the Common Law, under which married women are incompetent to contract on their own account, are modified by statutes or laws in almost all the states of the United States, and very little remains of the Common Law rules. To the present day, so far as the rules of the Common Law prevail, a married woman is incompetent to contract an obligation, whether as drawer, endorser, or acceptor of a bill of exchange, since she is considered *feme covert*. The states have the power to legislate on this subject and have done so, the pertinent provisions varying from one state to another. The majority of the states recognize by statute the regime of complete separation of property and the capacity of married women. For the different relationships between husband and wife with respect to property and acts, see 3 VERNIER, *AMERICAN FAMILY LAW* (London, 1931-1938).

Honduras. The principle is that married women have full capacity. Article 173 of the Civil Code permits contracts between the spouses, and the wife does not need authorization by the husband nor by the court in order to contract obligations. The matrimonial regime may be that of separation of property or marriage settlement (C. Civ., art. 169).

Mexico. The Civil Code provides in article 2 equality of legal capacity for men and women. Therefore, women are not subject, by reason of sex, to any restriction on the acquisition and exercise of civil rights. Implementing this general provision, article 172 of the Civil Code states:

"El marido y la mujer, mayores de edad, tienen capacidad para administrar, contratar, o disponer de sus bienes propios, y ejercitar las acciones u oponer las excepciones que a ellos corresponden, sin que para tal objeto necesite el esposo del consentimiento de la esposa, ni ésta de la autorización de aquél; salvo lo que se estipule en las capitulaciones matrimoniales sobre administración de los bienes."

Moreover, article 169 of the Civil Code enables women to fill an office, engage in a profession, industry, or in commerce, when such does not interfere with woman's mis-

United States.⁷¹ Other countries, such as Bolivia, Guatemala, and Peru,⁷² consider the married woman to have capacity, but with certain restrictions. Others continue to consider the married woman relatively

sion. The husband can object on serious and just grounds, when he provides for all household expenses, and, in case of disagreement, decision rests with the court (C. Civ., art. 171). The matrimonial regime may be that of a marriage settlement, in which the administrator of the community is to be designated (C. Civ., art. 189) or, when there has been no agreement, that of separation of property.

Nicaragua. Married women have full capacity, according to article 157 of the Civil Code, contracts being permitted between spouses and authorization by husband or judge not being necessary for women to contract or to appear in court. The regime is that of complete separation of property.

Panama. Similar to the preceding as regards capacity and with respect to the matrimonial regime (C. Civ., arts. 1163 and 1167).

Dominican Republic. Ley 390, of December 18, 1940, which grants full capacity of civil rights to the Dominican woman (1 Col. Leyes 1940, 439), has fundamentally changed the concepts of the Civil and Commercial Codes on this subject. According to article 1 of the law referred to, a woman who has attained majority, whether single or married, has full capacity for the exercise of all civil rights and functions, under the same conditions as a man. The restrictions on the civil capacity of women, which may result from the fact of marriage, will derive only from provisions that the law may expressly enact in certain cases. By virtue of said article 1, and articles 215 and 216 of the Civil Code, as amended by this law, it is understood that article 113 of the Commercial Code, which provides that signatures of non-merchant women on bills of exchange are valid only as mere promissory notes, is amended. At present, a woman can exercise freely any office or industry, and, if the husband opposes, the judge decides. According to article 5 of the law of 1940, a woman, under whatever matrimonial regime, enjoys the administration and disposition of property resulting from her labor, as well as of her own or reserved property. It thus appears from the context of the law, that there exists the regime of community of gains (art. 8) and, in certain cases, of separation.

⁷¹ For a summary of the state statutes respecting married women, see CREDIT MANUAL OF COMMERCIAL LAW 264 *et seq.* (1943). See also the preceding note.

⁷² *Bolivia.* The law of October 21, 1936, 2 Anuario Administrativo de 1936, p. 2199, and CARLOS WÁLTER URQUIDI, LEGISLACIÓN VIGENTE DESDE EL 17 DE MAYO DE 1936, p. 296 (Cochabamba, 1936) on the civil rights of women, and the legal and economic regime of the conjugal partnership, has modified the provisions of the Civil Code and the Code of Commerce. These, however, do not give wide latitude to the capacity of married women. In 2 Anuario Administrativo de 1936, 2199, joined to the heading of the decree, appears between parentheses a statement to the effect that "This decree has not been applied." It has not been possible for the writer to determine what is meant by this statement: whether the decree has not entered into force, or has been repealed, or merely has not been applied in practice. If any of these possibilities has occurred, what law governs this subject? Without stating an opinion, the writer has followed this decree, since article 102 thereof states that all provisions which may conflict with this *decreto-ley* are repealed.

Article 8, inciso 2, and article 44, provide that the husband has the administration of the earned and patrimonial property of the woman but requires authorization for certain acts. When the woman is engaged in a profession, she can effect all the acts that such profession demands (art. 20). Two matrimonial regimes may exist: that of com-

without capacity; these are Brazil, Chile, Ecuador, Haiti, Paraguay, Uruguay, and Zenezuela.⁷³

6. *Effects of Endorsement by Incompetent*

What effects are produced by the endorsement of a person without capacity as respects other obligations appearing in the bill of exchange, is a question the solution of which will depend on the conception of the

munity of gains and that of separation of property. In this latter case, each of the spouses has free administration and disposition of the paraphernal property (art. 55).

Guatemala. In general principle, married women are not incompetent. Two matrimonial regimes may exist during marriage: (1) that of marriage settlement (C. Civ., art. 100), in which settlement, the contracting parties must state whether separation of property or community of gains is adopted; (2) if there is no marriage settlement, each contracting party remains owner and disposes freely of the property that he had upon contracting marriage and may acquire during the same (C. Civ., art. 104), a supplementary form being that of community for designated property. In the community regime, the husband is administrator of the property (art. 106), but the woman does not need authorization by the husband nor by the judge to contract when there is property of her own (C. Civ., art. 108). The Code of Commerce supplements the provisions of the Civil Code. According to article 7, a married woman who has attained majority can engage in commerce, if she has entered into a marriage settlement and adopted the regime of separation of property. And if the woman publicly engages in commerce without having concluded a marriage settlement or if, having done so, she did not adopt the regime of separation of property, the consent of the husband is presumed for all acts related to the profession (C. Com., art. 8).

Peru. The new Civil Code of Peru, of 1936, prescribes an intermediate system for the capacity of married women. The matrimonial regime is that of community of gains (C. Civ., art. 176), and each spouse retains administration of his own property (art. 178), the husband being administrator of the common property (C. Civ., art. 188). The woman can contract and dispose of her property without other limitations than those derived from the legal regime (C. Civ., art. 172). Women can engage in any profession, but for this the husband's consent or supplementary permission by the court is necessary (C. Civ., art. 173). The regime of separation of property may also exist.

⁷³ *Brazil.* The general rule concerning married women is given by article 6, No. II, of the Civil Code, prescribing that married women are relatively without capacity for certain acts or with respect to the mode of their execution, while the conjugal society subsists. The husband is the head of the family and of the conjugal society and manages the property (C. Civ., art. 233), but the husband is subject to restrictions and in many cases must have the authorization of the woman (C. Civ., art. 235). The woman requires the husband's consent for many acts (C. Civ., art. 242), among them to engage in a profession (No. VIII). Once authorized, she can perform all the acts inherent in her profession (C. Civ., art. 246). The normal matrimonial regime is that of community of gains, but the systems of *dos* and separation of property may exist, according to the stipulations and circumstances. Likewise, the Code of Commerce enables a married woman to engage in commerce, when she is authorized to do so (C. Com., art. 1, No. IV).

Chile. (According to the amendments to the Civil Code and the Code of Commerce made by Ley 5521, of December 19, 1934). The present article 11 of the

bill of exchange that is entertained. The theory or principles incorporated in the law governing bills of exchange, indicates the pattern for the relations between the different negotiatory obligations.

Code of Commerce refers to article 150 of the Civil Code for women who engage in commerce. The general principle, established by article 137 of the Civil Code, is that a married woman cannot, without her husband's consent, conclude any contract nor incur obligations. This rule is subject to important modifications when the woman engages in a profession or industry (C. Civ., art. 149, inc. 1), in which case article 150 of the Civil Code takes effect. A married woman can nevertheless freely dedicate herself to the exercise of an employment, industry, commerce, etc., except when the court, in a summary proceeding, prohibits her from doing so. The normal regime is that of community of gains, but separation of property can also exist. Article 150, párrafo 3, of the Civil Code, contains the following provision, which modifies the matrimonial regime:

"La mujer casada, de cualquier edad, que desempeñe algún empleo o que ejerza una profesión, oficio, o industria, separados de los de su marido, se considerará separada de bienes respecto del ejercicio de ese empleo, oficio o industria y de lo que en ellos obtenga, no obstante cualquiera estipulación en contrario; . . ."

Consequently, a woman is considered without capacity, while she has no occupation, and to undertake one the husband's consent is not necessary. Thus, it may be said that only a vestige of incapacity remains.

Ecuador. According to article 131 of the Civil Code, a woman cannot, without the husband's consent, conclude any contract nor incur obligations, except by judicial authorization (C. Civ., art. 137). A woman can execute all acts inherent in her profession. When a married woman is a merchant, articles 12 and 13 of the Code of Commerce govern. The regime is that of community of gains, but there can be separation of property.

Haiti. The system that the Code of Commerce, in conformity with the Civil Code, enacts, is exceedingly strict in reference to bills of exchange. It includes not only married, but also single women, except merchants of both classes. Signature by a woman is valid only as a simple promise (C. Com., art. 111). A female merchant can, of course, contract by bills of exchange. But in order to be such, as well as to engage in an isolated act of commerce, the husband's consent is necessary (C. Com., art. 4). The matrimonial regime is that of community of gains.

Paraguay and Uruguay. The Civil Code of Paraguay, in article 55, provides that married women are without capacity with respect to certain acts or the mode of their execution (inc. 2). Article 1280 of the Uruguayan Civil Code provides that married women are without capacity. A woman must have her husband's permission to contract (arts. 189 and 131, respectively), and the husband is administrator of all the property (C. Civ., art. 186 and 130, respectively). The matrimonial regime is that of community of gains, separation of property being possible in certain cases.

The Codes of Commerce of Paraguay and Uruguay (arts. 630 and 826) state:

"El derecho de endosar una letra firmada o endosada a favor de una mujer casada que posteriormente contrae matrimonio, pertenece al marido."

This provision applies to non-merchant women. It must not be taken to include a married woman who is a merchant, since articles 13 and 15, respectively, stipulate that the marriage of a woman merchant does not alter her rights and obligations, and she is presumed to be authorized to engage in commerce while her husband does not manifest the contrary. An endorsement will be deemed the husband's in case a woman merchant marries, provided the husband does not give formal notice to the contrary. A married woman, satisfying the statutory requirements, can be a merchant with her husband's

One of the principles that has been established by legal theory and modern legislations is that of the autonomy of the obligations appearing in a bill of exchange. The principle of autonomy may refer to two classes of relations: (a) the relation of the instrument or bill of exchange to the underlying transaction, and (b) the relation of one obligation to the others appearing in the bill. It is to the latter that the principle of autonomy is properly applied. For the former, the word "abstraction" is employed.

Vivante presents the concept of autonomy as follows:

The right is autonomous, because the holder in good faith exercises an original right which cannot be limited or destroyed by virtue of the relations existing between the preceding holders and the debtor.⁷⁴

The principle of autonomy has its principal and most important application in the exclusion of defenses; i.e., there cannot be alleged against a subsequent holder exceptions that might have been maintained against his transferor, nor do defects in the right of the one who transfers a bill affect the holder's position, if not apparent on its face.

To be valid, autonomy requires another element, that of good faith. Without good faith on the part of the acquirer, he loses the benefits of autonomy. Thus Tena states:

There cannot be opposed against a party who acquires an in-

consent, but she cannot be judicially authorized contrary to the husband's will. Once they are merchants, married women can execute all the acts necessary for their trade.

In Paraguay, according to the Constitution of 1940, rights of women, which are to be regulated by law, are recognized. Article 23 provides:

"Los derechos civiles de la mujer serán regulados en la ley, atendiendo la unidad de la familia, la igualdad de la mujer y el hombre y la diversidad de sus respectivos funciones en la sociedad."

Venezuela. In marriage, if there is no express agreement, the regime of community of property exists (C. Civ., art. 148), but, at the same time, a distinction is made between separate property of the spouses and common property. Each spouse has free disposition of his own property, but cannot dispose of it by gift (C. Civ., art. 154); the husband manages the common property, and the wife that which has been acquired by her labor (C. Civ., art. 186). The matrimonial regime is that of community of gains. A married woman, satisfying the established requirements, may engage in commerce (C. Com., arts. 14, 15, 16, 17, and 18), and in such case execute all the acts necessary for its exercise.

⁷⁴ "El derecho *es autónomo*, porque el poseedor de buena fe ejercita un derecho propio que no puede ser restringido o destruído en virtud de las relaciones existentes entre los anteriores poseedores y el deudor." 3 VIVANTE, *TRATADO DE DERECHO MERCANTIL*, translation by Ricardo Espejo de Hinojosa, 136, n. 953 (Madrid, 1932-1936).

strument of credit in good faith, the personal exceptions that perhaps might have been opposed against his transferor.⁷⁵

The transferor might not have had the right to transfer the bill, whether because his right had been extinguished, or because he had never had it, or, as in the case that concerns us, because he did not have capacity to transfer the instrument, yet the transfer to the third party holder in good faith will not be less valid on this account.

By virtue of autonomy, the obligations become independent of each other, and the right of a holder in good faith is independent of the right of his transferor. The Roman principle, *nemo plus juris in alium transferre potest quam ipse habet*, is not pertinent in the modern law of negotiability. Security of transactions and the protection of good faith in credit relationships require that the Roman principle be excluded.

These premises established, let us examine the effects of the signature of a person without capacity.

It may be observed that the signature of a negotiatory obligation has a double function, formal and substantive. By formal function of the signature, it is understood that the signature performs the purposes for which it was affixed, in relation to the other obligors or transferees, serving to legitimate the acquirer's title and to transfer the instrument. By substantive function are meant the effects that the signature produces as respects the signer and his obligation on or right to the instrument. This relation may involve the power to demand performance of the obligation or inability to do so.

Nullity of the signature of a person without capacity relates to this latter function, i.e., performance cannot be required of him. *Vivante* states:

Incapacity of the obligor does not deprive the signature of its formal function; if it appears as the signature of the drawer or issuer, it does not rob the bill of its ability to accept other negotiatory obligations, of acceptors, *avalistes*, or endorsers, which will produce all negotiatory effects. If it appears as the signature of an endorser, it will serve to perfect the series of endorsements.⁷⁶

⁷⁵ "A quien adquiere de buena fe un título de crédito, no pueden oponérsele las excepciones personales que tal vez pudieron oponerse a su causante." 2 TENA, DERECHO MERCANTIL MEXICANO, 2d ed., 53 (Mexico, 1938).

⁷⁶ "La incapacidad del obligado no priva a la firma de su función formal; si figura como firma del librador o del emisor, no despoja a la letra de cambio de su aptitud para recoger otras obligaciones cambiarias, de aceptantes, avalistas o endosantes, que producirán todos los efectos cambiarios. Si figura como firma de endosante servirá

The formal significance of the signature is that, although intrinsically invalid, extrinsically it retains its entire force and does not affect the other obligations.⁷⁷

Now, the two functions of the signature, formal and substantive, apply to endorsement and produce consequences in its effects. Endorsement has two principal effects, the first translative of title to the bill and the second constitutive, that of guarantee. By the first, the endorser transfers to the endorsee all the rights inherent in the bill, and, by the second, he makes himself responsible on the bill, in favor of the endorsee and subsequent transferees, for acceptance and payment. Applying the above to the signature of a person without capacity, the translative effect of the endorsement will be produced by the formal function of the signature, and, in the absence of the substantive function, the constitutive effects of the endorsement will fail to be produced.

It must be kept in mind that the personal right of the endorser does not pass to the endorsee. In this respect endorsement differs from assignment. What is transferred is the right existing or incorporated in the instrument.

Angeloni explains⁷⁸ that endorsement requires capacity on the part of the endorser to assume negotiatory obligations at the moment of the transfer of the instrument. The endorser's incapacity makes the constitutive effect of the endorsement disappear, so that an endorser without capacity, by alleging his incapacity, can free himself of liability for acceptance and payment of the bill, to any holder who prosecutes an action on the bill (*acción cambiaria*) against him. On the other hand, this does not impair the translative effect, not even as against the endorsee, although he knew or should have known of the endorser's disability, since the formal existence of the endorsement is sufficient to legitimate the negotiation of the bill with respect to all subsequent holders.

para integrar la serie de los endosos." 3 VIVANTE, TRATADO DE DERECHO MERCANTIL, translated by Ricardo Espejo de Hinojosa, 225, n. 1035 (Madrid, 1932-1936).

⁷⁷ 2 TENA, DERECHO MERCANTIL MEXICANO, 2d ed., 214 (Mexico, 1938) says with outstanding clarity:

"Ni la incapacidad de alguna de los signatorios del título, ni la falsedad de alguna de las firmas que contiene, ni la nulidad, en una palabra, que por cualquier motivo pueda afectar cualquiera de las obligaciones, ejercen la menor influencia sobre la validez del título con respecto a los demás obligados. Así lo preceptúa el artículo 12. De donde se sigue que la falta de validez de referencia es exclusivamente *material*, como dice Bonelli. Formalmente, las firmas sin valor lo conservan íntegro, en el sentido de que dejan inatacables las obligaciones de los demás signatorios, aun de los sucesivos al signatorio incapaz."

⁷⁸ ANGELONI, LA CAMBIALE E IL VAGLIA CAMBIARIO SECONDO LA LEGGE UNIFORME DI GINEVRA 136 (Roma, 1936).

7. *International Conventions*

Article 13 of the draft uniform law on bills of exchange, presented by Germany at The Hague Conference of 1910, provided that, if a bill carries forged signatures or those of persons without capacity to bind themselves by bills of exchange, these should not influence the validity of the other obligations. The *Avant-Projet d'une Loi Uniforme sur la Lettre de Change et le Billet à Ordre* provided the same, referring in article 8 only to the signature of persons without capacity.

At The Hague Conference of 1912, the article of the *Avant-Project* was reproduced in article 7 of the Uniform Regulation, which states:

If a bill of exchange bears the signature of parties not having capacity to contract, the liabilities of other signers shall be nonetheless valid.⁷⁹

In the Geneva Uniform Law, the same principle is enunciated in article 7, but broadened, as in the draft presented by Germany in 1910. In addition to the signatures of persons without capacity, forged signatures or those of fictitious persons, or those that for any other reason do not bind the persons who affixed them or in whose name they were signed, do not affect the remaining obligations.⁸⁰

This solution, with which the present writer agrees, is a broad approval of the principle of autonomy, applying to all cases in which one obligation is invalid, while the others do not therefore cease to be valid.

8. *American Legislation on Autonomy*

In the positive legislation of all the countries of America, the conclusion may be reached that nullity of the obligation, in a bill of exchange, of a person without capacity, does not affect nor invalidate the other negotiatory obligations.

To reach this conclusion, the various legal systems have followed two paths: (1) through express provision in the law on negotiability or the relevant part of the code of commerce treating bills of exchange, establishing the validity of the other obligations on the bill; and (2) through supplementary provisions in the commercial or civil codes, con-

⁷⁹ "Si une lettre de change porte la signature de personnes incapables de s'obliger, les obligations des autres signataires n'en sont pas moins valables." La Haye, 1912, I Actes 245.

⁸⁰ In this conference the opinion was unanimous that the principle of independence of negotiatory obligation should be adopted. See the discussion of article 7 in Geneva, 1930, Records 189 *et seq.*

firming the principles adopted in the laws on negotiability or referring to parties who can allege incapacity.

In the first group are Brazil, Canada, Costa Rica, Ecuador, El Salvador, the United States, Guatemala, Mexico, Nicaragua, Panama, Peru, and Venezuela. In the second are Argentina, Bolivia, Chile, Colombia, Cuba, Haiti, Honduras, Paraguay, the Dominican Republic, and Uruguay.

The provisions of Brazil, El Salvador, Mexico, and Peru are quite similar. The Brazilian law⁸¹ provides that negotiatory obligations are autonomous and independent of each other, and that the signer of an obligation continues to be liable even when there exists forgery, falsification, or nullity of any other signature. Incapacity comes under the provision respecting "nullity of any other signature."⁸²

The Code of Commerce of El Salvador⁸³ recognizes negotiatory autonomy by prescribing that each signature placed on a bill of exchange subjects the signer to the obligation implied thereby, notwithstanding the nullity of any other obligation or the falsity of any of the signatures.

In Mexico, the *Ley General de Títulos y Operaciones de Crédito*⁸⁴ enacts the independence of the obligations on a bill, in a detailed and comprehensive provision that the incapacity of any one of the signers does not invalidate the other obligations.

The Code of Commerce of Peru⁸⁵ prescribes that bills bearing the signatures of persons without capacity shall be valid with respect to persons having capacity who subscribe.

The legislations of Ecuador,⁸⁶ Guatemala,⁸⁷ Nicaragua,⁸⁸ and Venezuela,⁸⁹ which follow or have adopted the Hague Uniform Regulation, provide that, if a bill bears the signature of persons without capacity to assume obligations, this shall not affect the validity of the obligations contracted by the other signers.

The *Ley de Cambio of Costa Rica*⁹⁰ envisages this subject from another point of view; it gives the holder in good faith the right to demand payment from any other party, when the bill is drawn or

⁸¹ Bra.—Dec. 2044, art. 43.

⁸² Cf. 5 CARVALHO DE MENDONÇA, TRATADO DE DIREITO COMMERCIAL BRASILEIRO, 3d ed., pt. 2, 221 (Rio de Janeiro, 1938) and Bra.—Dec. 2044, art. 153.

⁸³ El Sal.—C. Com., art. 453.

⁸⁴ Mex.—Ley General de Títulos y Operaciones de Crédito, art. 12. See Tribunal Supremo de Justicia, Dist. y Terr. Fed. 30.IX.1938, 23 AN. J. 259.

⁸⁵ Peru.—C. Com., art. 512.

⁸⁸ Nic.—C. Com., art. 606.

⁸⁶ Ec.—L. de 5.XII.1925, art. 7.

⁸⁹ Ven.—C. Com., art. 396.

⁸⁷ Guat.—C. Com., art. 612.

⁹⁰ C.R.—L. Cam., art. 19.

endorsed by a person without capacity. The result is the same, but this introduces a new element, the good faith of the holder.

The four American countries that follow Common Law conceptions with reference to bills of exchange are, as is well known, the United States, Canada, Colombia, and Panama. The Colombian law did not incorporate section 22 of the Negotiable Instruments Law, so that the solution on this point has been supplied by other provisions. The United States and Panama have a common provision, which reads:

“The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.”⁹¹

It is pertinent to note that this provision refers only to endorsement or assignment. The Canadian law, on the other hand, refers to issue or endorsement.⁹²

If the theory is accepted that a signature on a bill of exchange may have two functions, substantive and formal, the first referring to the obligation of the signer and the second to performance of the purposes for which it was affixed, it will be easy to understand the provision mentioned above. As for the substantive purposes of the signature, a minor or a corporation cannot be bound if without capacity for such act. But, the signature is sufficient to have formal effect, i.e., to give external validity to the bill, and for this reason the signature of such parties transfers title to the bill.

When the substantive function or purpose of the signature is non-existent, the constitutive effect of an endorsement is suspended, i.e., it does not guarantee acceptance or payment of the bill, but, by virtue of its formal function, the effect of transferring title to the bill containing the endorsement remains intact.

Contracts of minors with other parties,⁹³ i.e., when persons without

⁹¹ U.S.—N.I.L., § 22; Pan.—L. 52 de 1917, art. 22.

⁹² Can.—Bills of Exchange Act, § 48.

⁹³ It may be said that the contract of a minor is generally voidable, and that only he or his representatives can allege its invalidity, while he or his representatives can demand performance of the contract. Moreover, the contract can be ratified. Cf. BIGELOW, *THE LAW OF BILLS, NOTES AND CHECKS*, 3d ed., 177 (1928); I RANDOLPH, *A TREATISE ON THE LAW OF COMMERCIAL PAPER*, 2d ed., 463 (1899); I DANIEL, *A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS*, 7th ed., 335 (1933). He would be liable on a contract for “necessaries,” and

“By necessities are meant those things which are needed by the infant, and are suited to his means and rank in life.” I DANIEL, *A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS*, 7th ed., 336 (1933).

capacity are bound, are not considered in this study. But it is of direct concern whether a person without capacity, having transferred an instrument and having rescinded his contract, can demand restitution of the bill.

"The statute changes the law"⁹⁴ on this point. Although a person without capacity can rescind the contract of endorsement and demand compensation or damages, as may be indicated, he cannot demand restitution of the bill itself. Title once transferred, the bill continues in circulation. The relations between the incompetent and the party with whom he contracted, cannot modify the title already transferred. This is the writer's interpretation.⁹⁵

Bigelow⁹⁶ maintains the contrary, that the minor can "recover the instrument or its proceeds." This is based on the view that section 22 "seems merely declaratory of the unwritten rule."⁹⁷ The existing situation is set forth with great clarity by the American Institute of Banking, when it states:

"The courts have held that the infants can disaffirm the passage of title and recover the instrument from the indorsee. The question must be deemed unsettled, for it would seem better to regard the effect of the indorsement as irrevocably vesting the title to the instrument in the indorsee though not creating liability against the infant."⁹⁸

The provision commented upon refers only to corporations and to minors, but by analogy it should apply to any other class of persons without capacity.⁹⁹

Rescission of the endorsement of a person without capacity, therefore, does not affect the other obligors on the bill, and the holders can demand performance from any of the remaining parties. This conclusion is reached by applying principles expressed in other legal provisions,¹⁰⁰ according to which the drawer guarantees the capacity of the payee to endorse the bill, the acceptor guarantees the capacity of the drawee, every qualified endorser, negotiating the instrument, guaran-

⁹⁴ CRAWFORD, *THE NEGOTIABLE INSTRUMENTS LAW*, 4th ed., 55 (1918).

⁹⁵ Cf. BRANNAN, *NEGOTIABLE INSTRUMENTS LAW ANNOTATED*, 6th ed., 318 (1938).

⁹⁶ BIGELOW, *THE LAW OF BILLS, NOTES AND CHECKS*, 3d ed., 318 (1928).

⁹⁷ *Id.*

⁹⁸ *NEGOTIABLE INSTRUMENTS*, publication of the American Institute of Banking, 64 (1941).

⁹⁹ Cf. BRANNAN, *NEGOTIABLE INSTRUMENTS LAW ANNOTATED*, 6th ed., 319 (1938).

¹⁰⁰ U.S.—N. I. L., §§ 61, 62, 65, 66; Pan.—L. 52 de 1917, arts. 61, 62, 65, 66.

tees that prior parties had capacity to contract, and every endorser without qualification guarantees the same.

In an indirect and confused way, the same result as autonomy of obligations is reached with reference to this problem.

In this subject, Canada more clearly establishes autonomy of obligations.¹⁰¹ It enables the holder to demand payment from any of the other parties, when the bill has been drawn or endorsed by a minor or a corporation.¹⁰² Although other incapacities are not cited, the writer believes that by analogy the same should apply to them. There is no reason of any kind to make distinction.

But if the analogy were not deemed acceptable, the same result could be reached by indirect methods; namely, that the acceptor, drawer, or endorser is prohibited from alleging the lack of capacity of the party to whom he is liable, according to sections 129, 130, and 133.

The Colombian law, a version of the Negotiable Instruments Law, does not contain section 22 of the latter. Nevertheless, it is possible to arrive at the same solution by means of the guarantees made by one who puts his signature on a bill. By articles 62 and 63, the issuer of an instrument or the drawer guarantees the existence of the payee and his capacity to endorse. By article 64, the acceptor guarantees the capacity of the drawer, and by articles 67 and 69, whoever negotiates the document by delivery, or by qualified endorsement or endorsement, guarantees the capacity of prior parties.

The Code of Commerce of Chile contains no express provision on this subject, but the context of the Chilean legislation, as illustrated by article 635, relating to falsification, adopts the doctrine of autonomy of negotiatory obligations. The fact that an endorsement is made by a person without capacity does not deprive of validity nor affect the other signatures appearing in the bill.¹⁰³

The Codes of Commerce of Haiti and the Dominican Republic provide¹⁰⁴ that bills signed by non-merchant minors are void with respect to them, without prejudice to the respective rights of other parties.¹⁰⁵

¹⁰¹ Can.—Bills of Exchange Act, § 48.

¹⁰² "It is not necessary to the validity of a bill that the drawer or endorser should be liable." MACLAREN, *BILLS, NOTES AND CHEQUES*, 6th ed., 146 (1940).

¹⁰³ Cf. I DAVIS, *LA LETRA DE CAMBIO 180* (Santiago de Chile, 1928), stating:

"Si la persona incapaz es un endosante, los endosatarios futuros tendrán acción contra los demás endosantes, el aceptante y el librador, puesto que la incapacidad del deudor carece de toda influencia en las obligaciones de las personas capaces que se han vinculado a la circulación del título."

¹⁰⁴ Arts. 112 and 114, respectively.

¹⁰⁵ This rule applies to issue, endorsement, acceptance, or *aval*. 4 LYON-CAEN and RENAULT, *MANUEL DE DROIT COMMERCIAL*, 14th ed., 421, § 483 *bis* (Paris, 1924).

These provisions refer to the position of the minor who has undertaken an obligation. These codes make no provision with respect to the other obligations in the bill, but the writer believes that such would be entirely valid. This interpretation is based on the fact that a party having capacity cannot set up the invalidity of the obligation of a person without capacity, as a defense.¹⁰⁶

Although it seems that the Bolivian provisions do not adopt the principle of autonomy,¹⁰⁷ one may reach the same conclusion as in all the other countries by applying article 716 of the Civil Code, which states:

Persons having capacity to contract cannot assert the incapacity of the person under disability, with whom they have contracted.¹⁰⁸

The Code of Commerce of Cuba, in the part referring to endorsements, incorporates the concept that an endorsement is an independent contract and may be regarded as equivalent to a new issue of the bill, subject to differences with respect to liability, which is more limited.¹⁰⁹ As a consequence, it may be said that:

By the endorsement of a bill and acquisition of the same by the transferee, . . . a legal relation is established, which in no way affects the other contracting parties.¹¹⁰

Thus, if there is an endorsement void as having been made by a person without capacity, it cannot prejudice the remaining obligors on the bill of exchange.¹¹¹

¹⁰⁶ The renowned commentators, Lyon-Caen and Renault, state:

"Plusieurs lois étrangères formulent expressément la règle incontestable, du reste, même dans les pays, comme la France, où elle n'est pas formulée par la loi, d'après laquelle, si une lettre de change porte la signature d'un ou plusieurs incapables, les autres signataires n'en sont pas moins obligés." *Id.* at p. 432, § 510.

Cf. BORNO, CODE DE COMMERCE HAITIEN MIS AU COURANT DE LA LÉGISLATION EN VIGEUR (Port-au-Prince, 1910).

¹⁰⁷ Bol.—C. Merc., arts. 367 and 368.

¹⁰⁸ "Las personas capaces de obligarse, no podrán reclamar la incapacidad del prohibido, con quien han contratado."

Cf. a *sentencia* of the Supreme Court on May 10, 1887, G.J. No. 566, No. 8, 8 at 9, in which it is asserted:

"La circunstancia de ser menor su hermano, no vicia ni inválida la obligación contraída por el ejecutado."

¹⁰⁹ *Cf.* MARTINEZ ESCOBAR, LETRAS DE CAMBIO, LIBRANZAS, CHEQUES, VALES Y PAGARÉS 282 (La Habana, 1929).

¹¹⁰ "Con el endoso de una cambial y adquisición de la misma por el cesionario, . . . se establece una relación jurídica, la cual no afecta para nada a los demás contratantes." PIÑOL AGULLÓ, COMENTARIOS 154.

¹¹¹ Piñol gives the interpretation that, although it be void, it does not prejudice subsequent endorsements, just as if it were valid. He relies for this interpretation on the

The codes of Argentina, Paraguay, Uruguay, and Honduras, which are similar in their treatment of this subject, contain no express provision on the effects of an endorsement by a person without capacity on the other obligations appearing in the bill. The writer believes that the solution lies in the context or theory followed by these codes. Thus, different provisions¹¹² adopt the principle of autonomy of obligations, by enacting that a bill of exchange constitutes a distinct and personal obligation relative to each one who signs it. One Argentine court¹¹³ has held that the incapacity of the drawer cannot be invoked against a second or later endorsee, provided he received it in good faith, and another has held that the grounds of invalidity based on article 1042 of the Civil Code were established for the exclusive benefit of parties contracting without capacity.¹¹⁴

It may be recalled that an endorsement made by a person without capacity is not a forged endorsement and cannot fall within the conception of forgery.¹¹⁵

8. Conclusions

From the preceding analysis various conclusions and principles can be deduced, which it seems desirable to accept:

Negotiatory capacity should be governed by the general rules on capacity to contract and to assume obligations.¹¹⁶

sentencia of the Supreme Court of Spain, of June 15, 1897, which deals with false endorsements. The difference between nullity on account of falsity and nullity for incapacity has been set forth above.

¹¹² Arg.—C. Com., arts. 625, 735, 736.

Parag.—C. Com., arts 625, 735, 736.

Urug.—C. Com., arts. 822, 928, 929.

Hon.—C. Com., art. 526.

This solution is confirmed by the Civil Codes; Arg.—C. Civ., art. 703, Parag.—C. Civ., art. 703, which provide:

“Aunque uno de los acreedores fuese incapaz de adquirir el derecho o contraer la obligación, ésta no dejará de ser solidaria para los otros. La incapacidad solo puede ser opuesta por el acreedor o deudor incapaz.” Cf. Urug.—C. Civ., art. 1567.

Confirmed in Honduras by article 1600 of the Civil Code.

Id., LUIS MORENO, PRÁCTICA DEL DERECHO CIVIL HONDUREÑO 269 (Tegucigalpa, 1934).

¹¹³ Cám. Civ. 2 de la Cap., 24.XII.1934, 48 JURIS. ARG. 875.

Cf. Yadarola, “La reforma de la legislación cambiaria argentina en base a la ley uniforme,” EL DERECHO CAMBIARIO ARGENTINO Y LEGISLACIÓN UNIFORME, PROYECTO DE REFORMA, Instituto argentino de estudios legislativos, publicación 6, p. 58 (Buenos Aires, 1940).

¹¹⁴ See 2 SEGOVIA, EXPLICACIÓN Y CRÍTICA DEL NUEVO CÓDIGO DE COMERCIO DE LA REPÚBLICA ARGENTINA 125, n. 2127 (Buenos Aires, 1933).

¹¹⁵ Cám. de Paz Letrada (Sala 1), 6.VII.1937, 7 La Ley 311.

¹¹⁶ Cf. CARLOS MALAGARRIGA, LA UNIFICACIÓN INTERNACIONAL DE LA LETRA

It is desirable to state this principle generally for all negotiatory obligations, in order to avoid confusion or the need to resort to interpretations, which are often dangerous.

The principle of the autonomy of obligations should be comprehensively accepted, and, as a corollary, the invalidity of a signature on a negotiable instrument on account of incapacity should not affect the remaining obligations appearing in the bill.

The defense of incapacity is available only to a party without capacity; it is provided for his exclusive benefit, and he can oppose it *erga omnes*. This is one of the points with respect to which the formal nature of the bill of exchange is dominated by the so-called underlying transaction. With much justice, Tena comments on this principle, to the effect:

- And we think it never will be otherwise, at least while it is believed that the norms established on the subject of capacity by our civil and commercial codes are norms of public order, non-abrogable by the will of individuals.¹¹⁷

DE CAMBIO 116 (Buenos Aires, 1916):

"Que la capacidad para obligarse por letra de cambio no debe ser otra que la capacidad general para contratar."

¹¹⁷ "Y nosotros pensamos que no lo tendrá nunca, al menos mientras se crea que las normas establecidas en punto a capacidad por nuestros códigos civil y comercial, son normas de orden público, inderrogables por la voluntad de los particulares." 2 TENA, DERECHO MERCANTIL MEXICANO, 2d ed., 213 (Mexico, 1938).