CONFLICT OF LAWS RELATING TO BILLS AND NOTES.

II.

§ 3. Interpretation and Effect of Drawing, Acceptance and Endorsement.

The Bills of Exchange Act, 1882, provides:

72. (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.[1]

Whereas s. 72 (1) is comparatively free from ambiguity and is in substantial agreement with the ordinary rules of conflict of laws relating to contract in general, s. 72 (2) is more open to criticism, partly on account of its own ambiguity, partly because it is not so obviously in accord with the ordinary rules of conflict of laws. The second point of criticism is, however, complicated, and perhaps mitigated, by the fact that whereas there is a clear consensus of opinion that, as a general rule, the formalities of a contract are governed by the *lex loci celebrationis*, there is not so clear a consensus of opinion as to the law which should govern the effect or obligation of a contract, or, even if there is a substantial consensus of opinion, the result is obscured by the great diversity which manifests itself in the various attempts that have been made to formulate the rules as to the governing law.

With regard to s. 72 (2) itself, it is doubtful whether it is intended to deal at all with the effect or obligation of a contract on a bill or is confined to "interpretation" in the narrow sense. If the latter construction is correct, the statute does not deal at all with the transfer of a bill except as to the form and interpretation, in the narrow sense, of an endorsement, and the effect of an alleged transfer of a bill must be left to the ordinary rules of conflict of laws. In view of this ambiguity (which alone, it may be suggested in passing, would seem to be sufficient ground for a reconsideration

[1] In Canada, 53 V. c. 33, s. 71(2), re-enacted as R.S.C. 1906, c. 119, s. 161, and R.S.C. 1927, c. 16, s. 161,—"Canada" being substituted for "the United Kingdom."

of the statute by the legislature), it is proposed to discuss the transfer of a bill separately and subsequently, and to limit the discussion for the moment to other phases of the subject of interpretation and effect.

As to interpretation, in the narrow sense, that is, as to the meaning of the words which the parties have used, there seems to be no reason for denying that the proper law of the contract is whatever law the parties intend to make applicable, and that only if the intention of the parties is not expressed or cannot be inferred from the terms and circumstances of the contract, resort can be had to any presumption in favour of the *lex loci celebrationis* or the *lex loci solutionis*.

In the case of bills and notes it would, however, be undesirable from the point of view of subsequent holders that the question of the proper law should be a matter of conjecture, and an arbitrary statutory rule is preferable, unless indeed the proper law is designated on the face of the bill. The Bills of Exchange Act has made applicable to each contract on a bill the law of the place of making of the contract. Whether the Act ought to have made applicable the *lex loci solutionis* is another question.

When we leave the question of interpretation in the narrow sense, and come to discuss that of the essential validity, or obligation of a contract, we reach one of the most confused topics of conflict of laws, but part of the difficulty can be at least temporarily avoided by reserving for separate consideration cases of alleged illegality.[2]

If the question of alleged illegality is reserved, there is a substantial consensus of opinion that, as regards the effect or obligation of a contract, the proper law is usually, but not necessarily, the same as the conventional law, that is, the law contemplated and selected or intended by the parties as the law which is to govern their contract, and that if the intention of the parties is not expressed, the proper law must usually be conjectured by reference to the presumed intention of the parties.[3]

[2] Foote discusses separately the legality and the essentials of a contract: Private International Law, 5th ed. 1925, pp. 397 ff. But Dicey, who includes legality in "essential validity," as distinguished from the effect of the terms of a contract, points out that it is difficult to separate questions as to the one from questions as to the other: Conflict of Laws, 4th ed. 1927, p. 914.

[3] It seems preferable to use the term "proper law" in its natural sense as meaning the law which for any reason is entitled to govern the contract (Salmond & Winfield on Contract, p. 530), rather than to define it, as Dicey (Conflict of Laws, rule 155) does, as the law (or laws) by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed.

Obviously s. 72 (2) of the Bills of Exchange Act, if it is meant to cover the effect or obligation of a contract, ignores the prevailing doctrine as to the proper law of a contract, and arbitrarily and, subject to one proviso, absolutely, constitutes the *lex loci celebrationis* the proper law of each of the contracts on a bill. This departure from the general rule as to contract is justified, it is submitted, only if the statutory provision itself is unambiguous and satisfactory.

It is true that in the case of an ambulatory instrument such as a bill of exchange it is important and, from a practical point of view, almost necessary, that a subsequent taker should be entitled to rely upon some simple rule for ascertaining the proper law. He cannot always know where the contract of each prior party was made, but he can usually conjecture or ascertain the place of making more easily than he can inform himself of the intention of a prior party. But for this purpose it would be as convenient a rule, and one perhaps more nearly in accord with the ordinary rule of conflict of laws as to the intention of the parties, to say that the *lex loci solutionis* should govern, in a case where a contract is made in one country to be performed in another.

If, for example, a bill is accepted in one country and made payable in another, there is a substantial consensus of opinion that the obligation of the acceptor ought on principle to be governed by the *lex loci solutionis* rather than by the *lex loci celebrationis*,[4] and the impression given by some authorities that the *lex loci celebrationis* is the governing law seems to be due to the fact that usually the place of acceptance is the same as the place of payment.

At this point we are on the threshold of a maze of ambiguities, the contributing elements of which may be summarily stated as follows:

(a) Story was of opinion that the *lex loci solutionis* should govern the effect or obligation, as well as the interpretation, of a contract.

(b) His language is nevertheless supposed to have suggested the language of the statute which provides that the *lex loci celebrationis* shall govern "interpretation."

[4] Cf. Dicey, 4th ed. 1927, p. 663, citing *Rouquette* v. *Overman*, 1875, L.R. 10 Q.B. 525; Westlake, § 229; but see Foote, Private International Law, 5th ed. 1925, pp. 458 ff., 464, distinguishing between the acceptor's "abstract liability to pay at all under his contract on the one hand, and the incidents, mode, and conditions of payment on the other."

(c) Strongly expressed *obiter dicta,* approved by the draftsman of the statute, are in favour of the view that "interpretation" includes effect or obligation.

(d) The draftsman of the statute suggests that the statute may mean that the governing law is the *lex loci solutionis.*

The net result seems to be that the statute is to be construed as including something which in its natural sense it does not include, and, as this brings the statute into flagrant conflict with principle, it is then suggested that the statute should be brought into accord with principle by its being read as saying something quite contrary to its natural meaning. Incidentally, as we shall see, Story is charged with ambiguity by way of explanation of the wording of the statute, and his language is also used to support the suggestion that the statute may be construed in accordance with principle. The whole matter deserves some further examination, because it involves the question whether the statute in its present form serves any useful purpose.

The relevant passages from Story on Conflict of Laws[5] are as follows:

§ 280. The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice; and the Roman law has adopted it as a maxim: 'Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.'[6] . . . .[7]

§ 281. Paul Voet has laid down the same rule. . . . Everhardus adopts the same doctrine. . . . Huberus adopts the same exposition. . . . Indeed, it has the general consent of foreign jurists; although to this, as to most other doctrines, there are to be found exceptions in the opinions of some distinguished names. . . . The general rule has however been adopted both in England and America. In one of the earliest cases Lord Mansfield stated the doctrine with his usual clearness. "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed."[8] And this has uniformly been recognized as the correct exposition in the common law.

[5] 8th ed. by Melville M. Bigelow, Boston, 1883.

[6] Dig. 44, 7, 21.

[7] Except for the first sentence, the paragraph is reprinted in Story on Bills of Exchange, § 147.

[8] *Robinson* v. *Bland* (1760), 2 Burr. 1077, 1078.

It has been questioned whether the rule stated by Story was really adopted by Roman law or had "the general consent of foreign jurists," and whether there was good authority for Lord Mansfield's dictum or for the cases in which that dictum had been followed in the United States when Story wrote his treatise in 1834,[9] but we are concerned for the moment only with Story's expression of his opinion, not with its correctness.

The alleged ambiguity in Story's language begins only, if at all, when he discusses what he calls "cases of a mixed nature." Beginning with §282 he reaffirms the general rule that the *lex loci solutionis* governs, if the specified place of payment is different from the place of contracting, but he discusses the difficulties in the application of the general rule in various cases. He begins §291 with a reaffirmation of the general rule, as applied to the rate of interest, and then proceeds to a long discussion of cases of interest, damages or exchange, reaffirming the general rule in §§296, 309 and 310, and at last arrives at the subject of the rate of interest payable on a bill by parties who have become parties to it in different countries. His language on this subject is as follows:

§ 314. Negotiable instruments often present questions of a mixed nature. Thus suppose a negotiable bill of exchange is drawn in Massachusetts on England, and is endorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored; what damages will the holder be entitled to? The law as to damages in these States is different. In Massachusetts it is ten per cent., in New York and Pennsylvania twenty per cent., and in Maryland fifteen per cent. What rule then is to govern? The answer is that, in each case, the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn; and the successive indorsers are liable on the bill according to the law of the place of their indorsement, every indorsement being treated as a new and substantive contract. The consequence is, that the indorser may render himself liable, upon a dishonor of the bill, for a much higher rate of damages than he can recover from the drawer. But this results from his own voluntary contract; and not from any collision of rights arising from the nature of the original contract.[10]

§ 315. It has sometimes been suggested that this doctrine is a departure from the rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity to the rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is

[9] See Lorenzen, Conflict of Laws relating to Bills and Notes, 1919, pp. 109 ff. For the sake of brevity I have omitted Story's footnotes, with some exceptions. It is said that the tendency of the decisions in the United States is towards the adoption of the law intended by the parties. Goodrich, Conflict of Laws, 1927, p. 237.

[10] Story, Conflict of Laws, reprinted as § 153 in Story, Bills of Exchange.

drawn; but only to guarantee the acceptance and payment in that place by the drawee; and in default of such payment they agree upon due notice to reimburse the holder in principal and damages, at the place where they respectively entered into the contract.[11]

This explanation seems clear enough. As expressed in a recent case in the Supreme Court of Canada,[12] relating to the measure of damages for breach of a contract for the sale of goods:

The relevant decisions are nearly all concerned with bills of exchange and, as regards these, the effect of the decisions prior to the Bills of Exchange Act appears to be that, by the law of England, interest by way of damages will be given according to the law of the place where the party charged has contracted to pay the bill; that is to say, according to the proper law of his contract.[13] As a rule the place of payment under each of the contracts embodied in the bill will be the place where the contracting party has become a party to the bill; and this accounts for the fact that the rule is sometimes stated as if the governing law, as regards interest, were the *lex loci contractus*.[14]

It is fairly plain from all Story's discussion that when the place of payment differs from the place of contracting, he thinks that as a general rule the former furnishes the proper law, in accordance with the presumed intention of the parties, and that it is only when the place of payment is the same as the place of contracting, or when there appears to be no conflict between the laws of these places respectively, that he sometimes speaks of the *lex loci celebrationis* or *lex loci contractus* as being the governing law.[15]

Dicey says[16] in explanation of the discrepancy between the statute and principle, that Story's expressions have apparently suggested the terms of s. 72(2) — the statute reproducing the words rather than the meaning of Story. But, strange to say, Chalmers does not suggest that there has been any misunderstanding of Story

[11] Story, Conflict of Laws, reprinted as §154 in Story, Bills of Exchange.

[12] *Livesley* v. *Horst Co.*, [1924] S.C.R. 605, Duff, J., at p. 609.

[13] *Cooper* v. *Earl of Waldegrave* (1840), 2 Beav. 282; *Allen* v. *Kemble* (1848), 6 Moo. P.C. 314; *Gibbs* v. *Fremont* (1853), 9 Exch. 25; *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522; *The Queen* v. *Grand Trunk Ry. Co.* (1890), 2 Can. Ex. R. 132; *Fergusson* v. *Fyffe* (1840), 8 Cl. & F. 121.

[14] As, for example in *Gibbs* v. *Fremont*, and *In re Commercial Bank of South Australia*.

[15] These remarks apply also to later paragraphs in Story; for example, Conflict of Laws, §§316[a], 316[b] (Bills of Exchange, §§156, 157). The case of a bill not being stamped in accordance with the *lex loci celebrationis* is distinguished as involving formalities: Conflict of Laws, §318 (Bills of Exchange, §159). The question whether an acceptance is general or qualified (Conflict of Laws, §333: Bills of Exchange, §164) would appear to be a question of interpretation in the narrow sense.

[16] Conflict of Laws, 4th ed. 1927, pp. 663-4.

in the drawing of the statute. On the contrary, he quotes Story as pointing out the reasons of the rule adopted in the statute.[17] This is a matter of some moment, because the commentary of the learned draftsman of the statute is apt to be regarded as having a quasi-authoritative character[18] (although doubtless he would have been the first to deprecate this), and his explanation is calculated to lead to confusion in the construction of the statute. His quotation from Story, in explanation of the statute is merely §315 (§154), above quoted. But Story in this paragraph was merely explaining §314 (§153), which in turn related, not to the case of a contract made in one country and payable in another, but to the measure of damages applicable to parties contracting in different countries, the place of payment of each contract being assumed to be the same as the place of making. And on the next following page of his commentary, Chalmers says that "it may be questioned whether the measure of damages comes within the meaning of the word 'interpretation' in its present context in the act," and then proceeds to quote with approval a passage from Mayne on Damages, and to cite again §315 (§154) of Story for the proposition that the rule with respect to damages appears to be that "the place at which each party to a bill or note undertakes that *he himself* will pay it, determines with regard to him the *lex loci contractus* according to which his liability is governed."

Unless I have wholly misunderstood the learned commentator on the Bills of Exchange Act, he seems to quote Story to explain a statute which says something quite different from what Story says, and, shortly afterwards, seems to say that the passage quoted from Story is irrelevant to the provision of the statute in question. But that is not all that, with respect, one feels bound to find fault with. Why, in order to say that the *lex loci solutionis* governs the measure of damages, choose for quotation a passage which artificially calls such law the *lex loci contractus*?—unless it is to give some additional countenance to the suggestion which is made by Chalmers in a passage intervening between the two references to Story, namely, that when the statute refers to "the law of the place where such contract is made" it means the law of the place where such contract is payable.

This is the Chalmers' language[19]:

[17] Chalmers, Bills of Exchange, 9th ed. 1927, p. 282.

[18] "Almost authoritative" is Dicey's expression: op. cit., p. 655, note (y).

[19] Chalmers, Bills of Exchange, 9th ed. 1927, pp. 282-3.

The case of a bill accepted in one country but payable in another gives rise to a difficulty. Suppose a bill is accepted in France, payable in England. Probably the maxim, *Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit*, would apply.[20] But if not, then comes the question, what is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the *lex loci solutionis* would be regarded: cf. Nouguier, § 1419.

The suggestion made in the first part of the passage quoted is startling. It would seem to be contrary to the rule for the construction of a code stated in *Bank of England* v. *Vagliano*,[21] and, if accepted, would seem to deprive the provision in question of its utility. A statute which has to be explained as meaning what it does not say is not of much use as a guide. The only authorities cited by Chalmers are a Latin phrase quoted by Story from the Digest, and two cases relating to intrinsic validity or legality—a subject which is apparently not governed at all by s. 72 (2).

It may also be questioned whether the suggestion made in the second part of the passage quoted from Chalmers is justified, namely, that when the statute refers to the law of the place where the contract is made, it means the rule of conflict of laws prevailing in that place and not the local law applicable to local transactions. The suggestion is tempting, because it seems to afford another way of construing the *lex loci celebrationis* as meaning, by virtue of the doctrine of the *renvoi*, the *lex loci solutionis*. But the efficacy of this solution of the problem depends in each case upon the particular view of the doctrine of the *renvoi* adopted by the law of the place of contracting as interpreted by the court of the forum,[22] and it is submitted that a statute which is supposed to furnish a guide as to the appropriate law in various kinds of cases of conflict of laws relating to bills and notes should be construed as referring to the specific local law applicable according to its terms, and not as merely referring to the law which is to furnish the appropriate rule of conflict of laws.

Chalmers strongly approves[23] the view, expressed in some judicial dicta, that "interpretation" includes the obligations of the parties as deduced from such interpretation, or the "legal effect" of

[20] *Robinson* v. *Bland* (1760), 6 Burr. 1077 (bill accepted in France payable in England); cf. *Moulis* v. *Owen*, [1907] 1 K.B. at pp. 754, 755 (cheque drawn in France on bank in London).

[21] [1891] A.C. 107.

[22] See *In re Annesley, Davidson* v. *Annesley*, [1926] Ch. 692: cf. note in 5 Canadian Bar Review (June 1927), p. 389, questioning whether this case furnishes a satisfactory solution of the problem of the *renvoi*.

[23] Bills of Exchange, 9th ed. 1927, p. 282.

the contract.[24] It is, however, this view which is chiefly responsible for the difficulty of reconciling s. 72 (2) with principle, and which creates the temptation to construe the statute contrary to its natural meaning, and it is submitted that it would be simpler and more satisfactory to construe the statute as referring to "interpretation" in the narrow sense, but as meaning what it says as regards interpretation in that sense. The statute would not then be so bad as far as it goes. The effect or obligation of each contract, including the transfer of a bill and, apparently, the measure of damages on dishonour, as well as questions of legality or illegality, would all be left to be governed, independently of the statute, by the proper law of each contract, that is, usually by the *lex loci solutionis* of each contract.

Two Canadian cases decided under the provision of the Canadian Act corresponding with s. 72 (2) are in point. In the Nova Scotia case of *Sanders* v. *St. Helens Smelting Co.*[25] a bill dated and drawn at Halifax, Nova Scotia, was addressed to a company at Manchester, England, and there accepted payable at a banker's in London. It was held that the interpretation of the acceptance was governed by English law, and that as so interpreted the acceptance was not qualified, but general. The decision seems to be right, the question being one of interpretation in the narrow sense. The Quebec case of *London and Brazilian Bank* v. *Maguire*[26] was decided, however, on the ground that "interpretation" in s. 72 (2) includes "legal effect." A bill was dated and drawn at Buenos Ayres; the drawer being the master of a bark, registered in New York and then bound from an Argentine port to New York, and the bill being given for an advance made by the plaintiff bank to enable the bark to proceed on her voyage; the bill being addressed to a firm in New York and being for "$1865, U.S. gold;" the payee being domiciled in Quebec, but the endorsement by him to the plaintiff bank being made in the Argentine Republic. In an action by the bank against the endorser, the plaintiff demurred to the defendant's plea. The plea in substance alleged that the defendant was mortgagee of the bark and, to the knowledge of the plaintiff, an accommodation endorser of the bill; and that under the law of the Argentine Republic the holder of the bill had a lien on the hull, freight and cargo of the bark

[24] E.g., *Alcock* v. *Smith*, [1892] 1 Ch. 238, at p. 256; cf. *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K.B. 677, at pp. 683, 686; *Koechlin* v. *Kestenbaum*, [1927] 1 K.B. 889.

[25] (1906) 39 N.S.R. 370.

[26] (1895) Q.R. 8 S.C. 358.

prior to all claims except seamen's wages, and its failure diligently to collect the amount out of the hull, freight and cargo had the effect of depriving the defendant of any recourse against the bark and consequently discharged the defendant from liability, on the bill. It was held that the liability of the endorser was governed by the law of the place where the endorsement took place, that is, by the law of the Argentine Republic, and not by the law of the place of payment or by the law of the endorser's domicile. The plaintiff's demurrer to the defendant's plea was therefore dismissed. The case might, however, have been decided in the same way, independently of the statute, on the ground that the proper law of the endorser's contract was that of the place where he undertook that he himself would pay, not that of the place where the acceptor undertook to pay,[27] or, alternatively, on the ground that it was a question of discharge of contract, rather than one of the obligation of the contract itself.

The preceding discussion takes it for granted that in accordance with prevailing doctrine the different contracts on a bill are regarded for the purposes so far discussed as independent contracts, each governed by its own proper law, whether that law be, as a general rule, the *lex loci solutionis* or, as s. 72(2) provides so far as it is applicable at all, the *lex loci celebrationis*. In some respects, the opposing doctrine, namely that the whole bill, including all the supervening contracts, should be governed by a single law, is attractive and has obvious advantages.[28]

All authorities supporting the doctrine of the independence of the different contracts on a bill are forced to admit that there are some necessary limitations to the application of the doctrine.[29] There is general agreement that the date of maturity of a bill should be determined by the *lex loci solutionis* and so s. 72(5) of the Bills of Exchange Act provides. There is not the same measure of agreement in different countries as to the law which should govern presentment for acceptance, presentment for payment, and the requisite proceedings on dishonour, but the Bills of Exchange Act, s. 72(3), provides that the duties of the holder are determined by the law of the place where the act is done [is to be done?] or the bill is dishonoured. Westlake, indeed, goes a long way in the direction of

[27] Cf. Story, Conflict of Laws, §315 (Bills of Exchange, §154), already quoted.

[28] For a discussion of both doctrines, with a summary of the laws of various countries, see Lorenzen, Conflict of Laws relating to Bills and Notes, 1919, pp. 121 ff.

[29] Lorenzen, op. cit., pp. 128 ff.

approving the doctrine that the whole bill should be governed by a single law when he states in §230 that "since the drawer or indorser of a bill . . . are sureties for the due performance of the obligation incurred by accepting . . . it, the law of the place where the bill . . . is payable according to the terms in which it is drawn . . ., as regulating such due performance, indirectly affects their obligation by affecting that of the maker. . ." Whether he is right in adding that his proposition is probably not set aside by s. 72(2) may be questionable as applied to the proposition in its broadest sense.

On the other hand the proviso to s. 72(2)—"Provided that, where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom"—seems to suggest the theory that an inland bill should be governed to a certain extent by a single law, while it leaves foreign bills to be governed by the several laws proper to the respective contracts on the bill.

Concluding Note.

The subject of the conflict of laws relating to bills and notes might be further pursued in accordance with my general plan[30] under the following additional headings:

§4. Transfer of a bill.
§5. Intrinsic validity, or legality, of a bill.
§6. Presentment, protest and notice of dishonour.
§7. Sum payable expressed in foreign currency: rate of exchange.
§8. Due date of a bill.
§9. Capacity of parties.
§10. Discharge of obligation and limitation of action.

The topic of legality or intrinsic validity is sufficiently complicated in itself, but at least it would appear to be comparatively free from complications introduced by the Bills of Exchange Act.

The discussion of the transfer of a bill would involve some further reference to s. 72(1) and s. 72(2) of the Bills of Exchange Act and would furnish some additional arguments as to the desirability of a revision of the terms of the statute.

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[30] This article will, in substance, appear in its complete form in the forthcoming fourth edition of the author's book on Banking and Bills of Exchange.