THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES.

III. INTERPRETATION AND OBLIGATION.

A. THE GOVERNING LAW.

1. IN GENERAL.

a. English Law: Section 72, (2) of the Bills of Exchange Act provides as follows:

"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."

Chalmers gives the following explanation of the above provision:

"The term 'interpretation', in this subsection, it is submitted, clearly includes the obligations of the parties as deduced from such interpretation.

"Story, §154, points out the reasons of the rule adopted in this subsection. 'It has sometimes been suggested', he says, '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 with that rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its 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 where they respectively entered into the contract.'

"The case of a bill accepted in one country but payable in another gives rise to difficulty. Suppose a bill is accepted in France, payable in England. Perhaps the maxim, Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit, would apply. 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."

Dicey makes the following comment:

1. P. 244.
"It is therefore doubtful whether, when a bill is accepted in one country, e.g., England, and made payable in another, e.g., France, the obligations of the acceptor are governed, as the words of the section strictly taken imply, by the law of the country where the bill is accepted (lex loci contractus), or, as they ought to be on principle, by the law of the country where the bill is made payable (lex loci solutionis).

"The probable explanation of this difficulty is curious. Story's expressions have apparently suggested the terms of subsection 2. Story's language may be read, and probably was read by the persons engaged in considering the bill, as meaning that the obligations of the parties to a bill are governed by the law of the place where each party contracts. But this is not his real meaning; he clearly intends to lay down, though in a very roundabout way, that each contract embodied in a bill is to be interpreted by the law of the country where it is to be performed (lex loci solutionis). Unfortunately the language of subsect. (2) reproduces the words rather than the meaning of Story. The result is, that if the terms of the subsection be strictly interpreted, the obligations of an acceptor are to be governed, not, as Story intended, by the lex loci solutionis, but by the lex loci contractus. Mr. Chalmers' suggestion to a certain extent meets the objections to this result, but it may be doubted whether his suggestion is not in conformity rather with the doctrine of Story, when properly understood, than with the language of the Bills of Exchange Act, 1882, s. 72, subs. (2)."

b. **American Law**: The great weight of American authority is to the effect that the liability of the parties and the defences available to them, are governed by the law of the place where the bill or note is payable, and not by the law of the place of issue.³ A few courts apply the lex loci contractus.⁴

c. **French Law**: The intention of the parties governs. Where the intention is not expressed the law presumes that the parties contracted with reference to the lex loci contractus.⁵


⁵ Cass. Feb. 6, 1990 (S. 1900, L. 161, and note). Many of the text writers hold that where the parties have the same nationality they will be presumed to have contracted with reference to their national law.
d. *German Law*: The intention of the parties is the controlling law. In the absence of evidence of such an intention the parties will be deemed to have contracted with reference to the law of the place of performance.6

e. *Italian Law*: Article 58 of the Commercial Code provides as follows:

("The form and essential requisites of commercial obligations, the form of the acts necessary for the exercise and preservation of the rights derived therefrom and for their execution, and the effect of the acts themselves, are regulated, respectively, by the laws and usages of the place where the obligations are created and where said acts are done or performed, save in every case the exception laid down by Article 9 of the Preliminary Dispositions of the Civil Code for those subject to the same nationality."

Article 9 of the Preliminary Dispositions of the Civil Code has the following wording:

("The substance and effect of obligations are deemed to be regulated by the law of the place in which they were done, and, if the contracting parties are foreigners and belong to the same nationality, by their national law. The showing of a different intent is reserved in each case."

Article 58 of the Commercial Code has given rise to much controversy with reference to the present question. Does it intend to lay down the lex loci contractus as a rule of law, except where the parties have the same nationality, or is it intended merely as an expression of the presumptive intention of the parties in the absence of other evidence? The majority and better view appears to be that the Italian legislator did not intend to exclude the principle of the autonomy of the will in the law of obligations. The intention of the parties is to be regarded, therefore, as the law governing the obligations of the parties. Where the parties are of the same nationality they will be deemed to have contracted with reference to their national law. Where they are of different nationality, they will be presumed, in the absence of evidence showing a contrary intention, to have had in mind the law of the place of execution.7

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6. 6 RG 24 (Jan. 17, 1882).
7. Diena, Trattato, I, pp. 73-79; Ottolenghi, pp. 131-38.
Which of these rules should be adopted in a Uniform Law for the United States?

As the question before us relates to the interpretation and obligation of the contract and not to its validity, the governing principle, recognized in all countries, is that the intention of the parties is, in the last analysis, the controlling factor. In the law of bills and notes, however, such an intention is rarely, if ever, directly expressed and cannot ordinarily be gathered with sufficient definiteness from the surrounding circumstances. In the interest of certainty and the security of commercial dealings involving negotiable paper it is necessary, therefore, for the courts or legislatures to lay down certain presumptions which shall fill in the gap. These presumptions, except in so far as they must yield to considerations of policy, should represent the law which the parties, acting as reasonable men, would probably have chosen as the governing law had their attention been directed to the matter.

On behalf of the lex patriae it is said that the contracting parties are generally familiar with their national law, while they are ordinarily ignorant of the law of the place where they may happen to make the contract. Where they have a common nationality it is deemed fair to presume, therefore, that they had the lex patriae in mind. Against this presumption it may be urged, even from a continental viewpoint, that the law of obligations, unlike the family law, does not express national peculiarities based upon racial characteristics or local, physical conditions. Having to do with business the parties would naturally be more apt to know the law of their domicile than their lex patriae.

Some authors, Pillet, for example, have realized the force of the above objection against the lex patriae and contend that the lex domicilii, if common to both parties, best expresses their presumptive intention. This presumption may best express the probable intention of the parties in the older countries, but it cannot be adopted in a country like the United States, where the population is very migratory. The criterion of domicile under the conditions prevailing in this country would present too many difficult issues of fact to make it a

practical standard for the defining of legal rights, particularly in the law of negotiable paper, where certainty is a paramount consideration. This objection applies equally to von Bar's\(^10\) theory, which supports the lex domicilii of the debtor.

There remain the lex loci contractus and the lex loci solutionis. Which of these rules should determine the obligation of the parties to a bill or note?

Our comparative study fails to give us a convincing answer. We have seen that the great weight of authority in this country and the German courts apply the law of the place of performance; while the Bills of Exchange Act, the Italian Code and the French courts lay down the law of the place where the contract is made. It seems, however, that the provisions of the English act resulted from a misunderstanding of Story's view which clearly supports the lex loci solutionis.\(^11\) In view of this conflict in the positive law, it will be necessary to look into the theory upon which the conflicting views rest.

The chief supporters of the lex loci solutionis are Story and Savigny. Savigny's argument in favor of the law of the place of performance is put by him in the following form:\(^12\)

"In every obligation, then, we find principally and uniformly two visible phenomena, which we might take as our guides. Every obligation arises out of visible facts; every obligation is also fulfilled by visible facts: both of these must happen at some place or another. We can, therefore, select either the place where the obligation has originated, or the place where it is fulfilled, as determining its seat and its forum,—either the beginning or the end of the obligation. To which of the two points shall we give the preference upon general principles?"

"Not to the origin. This is in itself accidental, transitory, foreign to the substance of the obligation and to its further development and efficacy. If in the eyes of the parties a permanent influence reaching into the future were to be ascribed to the place where the obligation arose, this certainly could not

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The most recent Norwegian authors appear to have adopted the same view. Synnestvedt, Le Droit International Privé de la Scandinavie, p. 261.

While it is impossible to accept von Bar's reasoning in general, it must be admitted that there is a scientific basis for the adoption of the lex domicilii of the debtor with respect to unilateral obligations. From a theoretical standpoint, therefore, this rule might be applied to bills and notes in jurisdictions where the contracts of the different parties are regarded as creating unilateral obligations.

11. See Dicey, pp. 593-94.

flow from the mere constituent act, but only from the connection of that act, with extrinsic circumstances, by which a definite expectation of the parties was directed to that place.

"The case is quite different with respect to the fulfillment, which is indeed the very essence of the obligation. For the obligation consists just in this, that something which was previously in the free choice of a person, is now changed into something necessary, —that which was hitherto uncertain, into a certainty; and when this necessary and certain thing has come to pass, that is just the fulfillment. To this, therefore, the whole expectation of the parties is directed; and it is therefore part of the essence of the obligation that the place of fulfillment is conceived as the seat of the obligation, that the special forum of the obligation is fixed at this place by voluntary submission."

The above view has found many adherents, particularly in Germany, where it has been adopted by the Reichsoberhandelsgericht and the Reichsgericht and was approved at the twenty-fourth session of the German Juristentag, in 1897.

Notwithstanding Savigny's eminence the arguments used by him in support of the law of the place of performance fail to carry conviction. Von Bar advances the following argument against the position taken by Savigny:

"In support of this view, it is pleaded that performance is the end and object of the obligation to which the whole view of the parties is directed. This does not by itself, however, justify the subjection of the obligation exclusively to the law recognized at the place of performance. All that one can infer is, that in points depending upon the agreement of parties there is foundation for inferring a voluntary subjection to the law of the place of performance, by virtue of that expectation of parties which is directed to that end; while the law of obligations consists to a large extent, although not exclusively, of rules which may be avoided at the pleasure of parties. But even with this limitation, it is impossible, without a revolt against the general logical rules for interpreting the intention of parties, to carry out the theory of the rule of the place of performance in regard to obligations. For even if we leave out of account that, as the parties often know nothing of the law of the place of performance, and as it is often very difficult to say what is the place of performance in this sense, we
cannot assume any voluntary subjection of the parties to the law of that place, an alteration in the place of performance made subsequently to the conclusion of the contract must alter the contract in each and every point, if the law of the new place of performance differs from that of the old; and if there are several places of fulfillment, we are at a loss for any rule of interpretation."

The above quotation summarizes briefly the arguments against the lex loci solutionis. From the mere fact that the debtor may have to be sued at his residence, the courts of which have jurisdiction in the premises, certainly no deduction regarding the presumptive intention of the parties can be made. Great difficulties might arise in ordinary contracts in the determination of the place of performance when the parties have not indicated the same. In the words of Professor Niemeyer, the rule proposed by Savigny would introduce "a complicated legal concept, the criteria of which pre-suppose again a definite law". In bilateral contracts obligations may arise on both sides, the place of performance of which may be indifferent jurisdictions. In these cases we might have the strange spectacle of having the mutual obligations arising out of one and the same contract controlled by conflicting laws. How are we to look at the obligation of one of the parties separately from that of the other when the one obligation constitutes the condition of the other? And yet, this is the precise thing that the German courts have been forced to do in following Savigny’s theory in the above class of cases.

Story considers the application of the lex loci solutionis as "the result of natural justice". In support of this conclusion he relies upon two passages from the Roman law, upon

17. See Story, Secs. 282 et seq.; Wharton, pp. 867-71, 877-83; Minor, pp. 377-82, 388-400. "But although the general rule is so well established", says Story, "the application of it in many cases is not unattended with difficulties; for it is often a matter of serious question, in cases of a mixed nature, which rule ought to prevail, the law of the place where the contract is made, or that of the place where it is to be performed. In general it may be said that if no place of performance is stated, or the contract may indifferently be performed anywhere, it ought to be referred to the lex loci contractus. But there are many cases where this rule will not be a sufficient guide." Sec. 282.
19. 34 RG 191 (October 13, 1894); 46 RG 193 (April 28, 1900); 51 RG 218 (April 21, 1902); 55 RG 105 (June 16, 1903); RG April 26, 1907 (18 Niemeyer 177).
20. P. 389.
statements of some of the older authors, and the decisions of English and American courts. Let us inquire into these authorities in order to discover to what weight they are entitled.

Story asserts, first of all, that the Roman law adopted the lex loci solutionis as a maxim, quoting the two passages from the Digest of the Corpus Juris Civilis which follow:21 "Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit", and "Contractum autem non utique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia."

In regard to these quotations it may be said that they do not establish the proposition in support of which they are cited. In the first place, there are other passages in the Corpus Juris, equally explicit, which appear to support the lex loci contractus. For example: "Si fundus venierit ex consuetudine ejus regionis in qua negotium gestum est pro evictione caveri oportet";21a and "Uniuscujusque enim contractus initium spectandum et causam."21b

Fiore22 attempts to reconcile the four passages from the Roman law above mentioned by suggesting that the last two refer to the vinculum juris of the contract while the former two, that is, those which were cited by Story, govern merely the mode of performance.

In the second place, it is very doubtful whether the passages quoted by Story have any bearing whatever upon the question before us, for they may refer merely to the forum, that is, to the place where suit may be brought, and not to the law governing the contract itself.

Says von Bar:23

"An appeal is made to the fact that by Roman law the forum contractus was set up in the place where the obligation was to be performed, and Savigny especially tries to make out that the local jurisdiction, as well as the local law of the obligation, depends upon a voluntary submission of the parties, and therefore that the rules which regulate the former are to be applied also to the latter. But, in the first place, the Romans, "in determining the jurisdiction, had no intention of laying down what the law of the obligation was to be. Fur-

21a. Dig. XXI, 2, 6.
21b. Dig. XVII, 1, 8, pr.
23. P. 543.
ther, by Roman law the forum contractus was not exclusive, but concurrent with the forum domicilii of the debtor. This could not be the case if the Roman law had conceived the place of performance to be the seat of the obligation. In the third place, it is at variance with the general principles adopted by Savigny himself, and by far the greater number of authorities, to conclude from the competency of a court that the law recognized at its seat is uniformly applicable. By a similar deduction, we should hold that the law recognized at the seat of the court which had to decide any case must rule the case in all its bearings. Lastly, we shall show (see our discussion of jurisdiction) that it is not by any means the case that the Roman law unconditionally set up the forum contractus in the place where the obligation was to be performed."

Wächter, one of the leading authorities on Roman law, expresses himself more fully in regard to the passages from the Roman law cited by Savigny.

"It is certain," he says, "that in so far as a legal transaction is subject to the will of the parties, it must be assumed in case of doubt that they wish the law of the place where the transaction took place to be applied, quo actum est, quo negotium gestum est. In the matters which are subject to the control of the parties, the rule locus regit actum governs therefore in case of doubt. However, a meaning is ordinarily given to this principle of the Roman law which does not appear to be the correct one.

"It is commonly asserted, at least by the more recent (German) writers, that in case the parties have agreed upon a place of payment, the law of such place should control, as that place constitutes, under these circumstances, in effect the locus contractus. They cite in support, D. XLIV. 7 de O et A. 1. 21, XLII 5. de reb. auct. jud. 1, 3. These passages say, it is true, that the place of payment agreed upon is deemed legally the locus contractus. But they say this solely with respect to the creation of the forum contractus, in regard to which the agreement is naturally of importance, and by no means as regards the interpretation of the will of the parties and the supplementing of what the parties left uncertain. Indeed on this very point a contrast is made with the place of payment. The will of the parties shall be supplemented by the law of the place in which the negotium gestum est; but as regards the forum contractus the locus contractus shall be deemed not the place quo negotium gestum est, sed quo solvenda pecunia est."

Many other writers agree with von Bar and Wächter and hold that Savigny and Story have given too broad a meaning to the Latin texts quoted.

In the light of the above considerations, Story's assertion that the law of the place of performance is supported by the Roman law must be said to rest upon a questionable foundation.

Story next relies upon the ancient authors, quoting from Paul Voet, Huber and Everhardus, though he admits that John à Sande maintained that the law of the place where the contract was made should govern. He says:

"Paul Voet has laid down the same rule. 'Hinc, ratione effectus et complimenti ipsius contractus, spectatur ille locus, in quem destinata est solutio: id, quod ad modum, mensuram, usuras, etc., negligentiam, et moram post contractum initum accedentem referendum est.' He puts the question: 'Quid si in specie, de nummorum aut reditum solutione difficilas incidat, si forte valor sit immutatus, an spectabitur loci valor, ubi contractus erat celebratus, an loci, in quem destinata erat solutio. Respondeo; ex generali regula, spectandum esse loci statutum, in quem destinata erat solutio'. So that, according to him, if a contract is for money or goods, the value is to be ascertained at the place of performance, and not at the place where the contract is made. And the same rule applies to the weight or measure of things, if there be a diversity in different places. Everhardus accepts the same doctrine. "'Quod, aestimatio rei debitaee consideratur secundum locum ubi destinata est solutio, seu deliberatio, non obstante quod contractus alibi sit celebratus. Ut videlicet inspiciatur valor monetae, qui est in loco destinatae solutionis.' Huberus adopts the same exposition. 'Verum tamen non ita praeceis respiciendus est locus, in quo contractus est initus, ut si partes alium in contrahendo locum resesperint, ille non potius sit considerandus.' 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."

Is Story correct in saying that the lex loci solutionis "has the general consent of foreign jurists"?

It is noteworthy, in the first place, that Story has quoted only from Dutch authors. No reference is made to Italian writers. Of the many French writers on the subject of the Conflict of Laws, Boullenois alone is cited in a note, and of the German writers, only Hertius.

The Italian school of jurists following Bartolus, the founder of the science of the Conflict of Laws, regarded the law of the place of making as the law governing the obligation of contracts. In his two volume classic work Introduction au

Droit International Privé published in 1888 and 1892, Professor Lainé makes the following statement concerning Bartolus' view on the subject.26

"As far as the substance itself of the litigation is concerned (ipsius litis decisio), a distinction must be made. The point in question may relate either to the natural consequences of the contract, to the consequences which inhere in the contract from its inception (aut quae ex his quae oriuntur secundum ipsius contractus naturam tempore contractus); in this case the lex loci contractus governs, and by the lex loci contractus must be understood the place where the contract is formed and not the place where it is to be performed. Or the question relates to the consequences which arise subsequent to the formation of the contract as the result of negligence or default (aut de his quae oriuntur ex postfacto propter negligentiam aut moram), in which event the law of the place indicated for the performance of the contract must govern, or, if nothing has been specified in this regard, the law of the forum; for it is there that the negligence or default has occurred."

Bartolus' view appears to have prevailed until Domoulin advanced his theory that the express or tacit intention of the parties was the governing law. Contrasting this view with that of Bartolus, Lainé states the following:27

"The contracts are . . . the object of two entirely different systems, that of Bartolus and that of Dumoulin. Bartolus submits the contract to the law of the place where it is executed, at least as to its direct effects, to the consequences which inhere in it from the beginning, and the majority of authors after him regard the contract as formed in the place where it is made, and not where it is to be performed. Bartolus admits, moreover, that as regards the indirect and accidental effects, that is, the consequences which have happened through the negligence or default of the party obligated, the applicatory law is that of the place designated for the performance of the contract, or (in the absence of such an indication) that of the forum . . . Dumoulin, starting from the idea that in the matter of contracts the will of the parties governs, lays down the principle that if the intention of the parties has not been expressed it must be derived from the circumstances under which the contract has been executed. In his opinion the lex loci contractus is only one of the attendant circumstances. . . . Moreover, he does not distinguish between the direct effects and indirect consequences of a contract."

27. I, pp. 255-56.
In his discussion of the French, Dutch and German schools of jurists, Lainé unfortunately does not deal specifically with the question now under consideration. He mentions the fact that various authors28 of the French school applied the lex loci contractus, without stating whether it would govern where the place of performance and the place of execution do not coincide. There is no reason to assume, however, that a radical change with respect to this point had taken place since Bartolus and because of this fact, no doubt, Lainé fails to refer to the matter. The fact that in modern times the French jurists almost without exception support the lex loci contractus as against the lex loci solutionis would tend to show also that this has been the traditional rule in France.

Owing to the uncertainty of the Roman texts, dissenting voices from the doctrine that the lex loci contractus controls the obligation of contracts, have existed at all times, and Boullenois, whom Story cites in support of his statement,29 seems to have belonged to this class.

As a result of Savigny's influence the prevailing view in Germany today holds that the parties must be deemed to have contracted with reference to the law of the place of perform-

28. E. g. Froland and Bouhier, Lainé II, pp. 37, 64-65.
29. The reference is to Boullenois, Vol. II, Title 4, Ch. 2, Observ. XLVI, pp. 475-76, 488, of his treatise on the Personnalité et de la Réalité des Loix, Coutumes, ou Statuts. On page 488 Boullenois says that where a place of payment is agreed upon the law of that state shall determine the time within which suit must be brought. On pages 475-76 Boullenois quotes from Colerus, de Process. execut. The first part of the quotation consists of a statement of the following general principles which Colerus deems applicable to a contract of sale: "Si agitur de subjiciendo contractum Legibus, aut Consuetudini aliqujus loci, tunc attenditur locus, aut Consuetudo fori, ubi verba obligatoria proferuntur, et contractus perfectur, non autem locus destinatae solutionis: Consuetudo si quidem loci ubi negotium geritur, ita subintrap ipsum contractum, ut secundum Leges loci intelligatur actus fuisse celebratus, quamvis ea de re nihil fuerit expressum." Then follows an application of these principles to the sale of a horse at Magdeburg, the purchase price being payable in Nuremberg. Colerus reaches the conclusion that the law of Magdeburg should control the implied warranties of the vendor. Boullenois remarks with reference to the above, "I agree with the decision of Colerus, but not with his preliminary principles. In my opinion the law of the place of contracting must be followed in this case because, inasmuch as movable property is involved, and a bargain, the making and performance of which take place on the spot, the intention of the parties cannot have been other than to conform to the law of the place where they contracted". Boullenois approved evidently the lex loci solutionis as the governing law but regarded the collateral contract of warranty as an executed transaction and not as a contract to be performed in the place where the contract of sale was performable; that is, where the purchase price was to be paid.
But this was not the view of the old German writers and Story is wrong when he cites Hertius as favoring the lex loci solutionis. Story relies upon Number 53 of that author's work De Collisione Legum. Hertius asks the following question:

"Praestanda sunt aliqua ex contractu, quae postea acciderunt v. g. propter culpam vel moram; quaeritur, si discrepent leges, utra utri praeponderet?

His answer is:

"Quidam ad locum iudicii respiciunt, quidam ad locum destinatae solutionis. Ut Bartolus, Barbosa, quos sequitur Brunnen. ad L. 6. de evict. n. 7. Christin, V. 1. D. 283. n. 12. seq. Ab utrisque recte dissentiit D. Cocceius Diss. de fundat. in territ iurisdict. tit. 6 § 7. quia obligationes culpae vel morae ex ipso contractu oriuntur, eiusque propriae praestationes sunt."

Hertius says that the obligations arising out of a breach of contract on account of negligence or default are governed, according to some, by the law of the forum, and, according to others, by the law of the place of performance, citing Bartolus and Barbosa, but he adds that Cocceius rightly dissents from either view. It would seem from this that Cocceius must have applied the law of the place of making and that Hertius agrees with this view. That such was the opinion of Hertius appears clearly from Number X of his treatise, where he lays down the following rule: "Si lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei sitae."

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The naturalia of a contract are determined, therefore, according to Hertius, by the lex loci contractus and not by the lex loci solutionis. As the meaning of Hertius is very plain, and the conclusion above stated, so far as the author is aware, is not challenged by anybody, Story's reference to Hertius in support of the lex loci solutionis must be due to either accident or mistake.

Instead of having the "general assent of foreign jurists", as Story maintains, our investigation up to this point has shown that the lex loci solutionis was rejected by the Italian, the French and the older German school of jurists.

The only jurists left to lend any real support to Story's statement are the Dutch writers, and it is from these that all of Story's quotations are taken. Story admits, moreover, in the later editions of his work, that the Dutch writers themselves were divided upon the subject, mentioning John à Sande as favoring the lex loci contractus. Story quotes only from Paul Voet, Huber, and Everhardus, but there is reason to doubt that Paul Voet would subscribe to the lex loci solutionis as governing the obligation of contracts in all respects. The first passage from Paul Voet quoted by Story is preceded in the original text by the following:

"Quod si de ipso contractu quaeratur, seu de natura ipsius contractus, seu iis quae ex natura contractus veniunt, puta fidejussione, etc., etiam spectandum est loci statutum, ubi contractus celebratur . . . : quod ei contrahentes semet accommodare praesumptur."

Both Fiore and Rivier, in his notes to Asser's Conflict of Laws, conclude that Paul Voet drew a distinction between the vinculum juris, i.e. the intrinsic validity, substance and extent of the obligation, in regard to which the lex loci contractus would govern, in accordance with the passage above.

33. See, for example, von Bar, p. 540, note; Wächter, Archiv für die civilistische Praxis, XXV, p. 43, note.
34. P. Voet, de Stat., Sec. 9, Ch. II, n. 10.
quoted, and the onus conventionis, i.e. the performance, in regard to which the law of the place of performance should control, as indicated in the quotation given by Story.

Whatever the majority view among the Dutch jurists may have been, they constitute but a small number of the writers of the various statutory schools of jurists, most of whom appear to have entertained the view that the law of the place of execution and not that of the place of performance should determine the obligation of contracts, at least in so far as the direct consequences are concerned. Story's assertion that the lex loci solutionis is supported by the general consent of foreign jurists is therefore utterly untrue.37

As for English and American authority, the first sanction of the theory that the lex loci solutionis should determine the obligation of contracts is a dictum by Lord Mansfield in Robinson v. Bland38 to the following effect:

37. See also Aubry, 23 Clunet, p. 465; Fiore I, p. 163; Foelix, I, p. 235. 38. (1760) 2 Burrow 1077.

"The action was an action upon the case upon several promises; and the declaration contained three counts. The first count was upon a bill of exchange, drawn at Paris, by the intestate Sir John Bland, on the thirty-first of August, 1755. and bearing that same date, on himself in England, for the sum of £672 sterling, payable to the order of the plaintiff, ten days after sight, value received and accepted by the said Sir John Bland.

"The first question is, whether the plaintiff is entitled to recover upon this bill of exchange, by force of the writing. . . .

"There are three reasons why the plaintiff cannot recover here upon this bill of exchange.

"First, the parties had a view to the laws of England. 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. Huberi Praelectiones, lib. 1, tit. 3, p. 34, is clear and distinct: 'Veruntamen, etc. locus in quo contractus, etc., potius considerand', etc., se obligavit.' Voet speaks to the same effect.

"Now here, the payment is to be in England; it is an English security, and so intended by the parties.

"Second reason: Mr. Coxe has argued very rightly, 'That Sir John Bland could never be called upon abroad for payment of this bill, till there had been a willful default of payment in England'. The bill was drawn by Sir John Bland on himself, in England, payable ten days after sight.

"In every disposition or contract where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here.

"Third reason: The case don't leave room for a question. For the law of both countries is the same. The consideration of a bill of exchange might, in an action upon it, be gone into there as well as here. And as to
"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."

When Story wrote his treatise on the Conflict of Laws Lord Mansfield's dictum had been followed by a number of courts in the United States. In none of these cases is there any discussion of the rule to be adopted. The authority of Lord Mansfield was sufficient to preclude the need of a consideration of the matter de novo. And what support did Lord Mansfield adduce for the rule laid down? None except the passage from Huber quoted by Story and the statement that Voet supported the same doctrine.

As neither Lord Mansfield nor Story nor any of the American cases have given any reasons why the law of the place of performance should govern the obligation of contracts, but have contented themselves with relying upon questionable passages from the Roman law and the writings from one or two of the ancient authors it may not be amiss to examine the matter briefly with special reference to the law of bills and notes.

The main objections raised against the lex loci contractus are: (1) that the place of contracting is often accidental and is chosen without reference to its effect upon the contract; the money won at play, it could not be recovered in any court of justice there, notwithstanding the bill of exchange.

"This writing is, as a security, void (being for a gaming debt), both in France and in England. We may therefore lay the bill of exchange out of the case: it is very clear the plaintiff cannot recover upon that count." Pp. 1077-79.


40. "It is a principle too well known and established and founded upon reasons too obvious to require proof or illustration." Sedgwick, J., in Powers v. Lynch, supra.

"It seems to be an undisputed doctrine. . . . This is nothing more than common sense and sound justice." Parker, C. J., in Prentiss v. Savage, supra.

41. In the modern law of England the law intended by the parties is the law which governs the validity and obligation of the contract. "The essential validity of a contract," says Dicey, "is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law of the contract. Proper law of the contract means 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; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended, to submit themselves." Conflict of Laws, 2nd ed., pp. 545, 529.
(2) that when the contract is concluded by correspondence the lex loci contractus can be determined only by a fiction of the law. These objections do not exist if the lex loci solutionis is adopted as the governing law, but others arise, which, in the opinion of the writer of this article, are even more formidable in so far as the law of bills and notes is concerned. There is no reason, in the first place, to assume in the average case that the parties contracted with reference to the law of the place of performance rather than to the law of the place of execution. In the majority of cases the place of payment is inserted by the maker or acceptor, no doubt, as a mere matter of personal convenience, so that there is no reasonable basis for the assumption that the contracting parties would have chosen that law, had their attention been directed to the matter, as the law governing the obligation of their contract.  

In view of the fact that the law of the place of execution alone is directly ascertainable at the time of contracting and is accessible to both parties with equal facility it seems more rational to assume that they would have chosen that law as the governing law, rather than the law of the place of payment, to which neither of them had ready access and with which both were probably unfamiliar.  

The lex loci contractus, has, in the second place, the great advantage over the lex loci solutionis in its application to bills and notes in that it conduces towards greater certainty. It has been seen that the formal and essential validity of a bill or note is determined by the law of the place of execution. As the obligations of the parties to a bill or note depend for the most part upon provisions in the instrument which are formal or essential requisites, one rule should govern both matters. Otherwise we should have the unsatisfactory condition of having the necessity of a particular requirement controlled by one law, viz. the lex loci contractus, while its meaning would be determined by another law, viz. the lex loci solutionis. Logic as well as simplicity and certainty demand the application of a single rule, and that rule, in the nature of things, is the lex loci contractus, which controls both capacity and the formal and essential requirements.

On account of the foregoing advantages, the lex loci contractus is advocated as the law governing the obligation of

the contracts of the different parties to bills and notes by the
great majority of authors who have made a special study of
the problem. It is recommended also by the Institute of
International Law, and should be adopted as the governing
principle in a Uniform Law for the United States.

(To be continued.)

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44. Beauchet, Annales de Droit Commercial, 1888, II, p. 62; Beirao, Da
Letra de Cambio em Direito Internacional, p. 67; Champcommunal, An-
nales de Droit Commercial 1894, II, p. 150-200; Chrétien, p. 129; Des-
pagnet, p. 989; Diéna, III, p. 124; Diéna, Principes, II, p. 213; Esperson,
p. 37; Fiore, I, p. 164; Fiore, Elementi di Diritto Internazionale Privato,
p. 448; Grünhut, II, p. 579; Lyon-Caen et Renault, IV, No. 645; Otto-
lenghi, p. 186; Schäffner, p. 122; Valéry, p. 1280.

To the same effect, Asser, p. 209; Calvo, Dictionnaire de Droit Inter-
national, I, p. 438; Vincent et Penaud, p. 342.

Jitta applies again the law of the fiduciary place of issue, pp. 76, 95.

45. Annuaire, VIII, p. 121. At its session at Florence in 1908 the
Institute adopted a series of resolutions as regards the law governing the
obligation of contracts. According to these resolutions, if the parties
have not expressed a real intention, the determination of the law to be
applied shall be derived from the nature of the contract, from the relative
condition of the parties and from the situs of the property. In the matter
of bills and notes it is to be the law of the place where each contract is
entered into, or, if such place be not mentioned in the instrument, that of
the domicile of the obligor. Notwithstanding the above presumption, a
manifestation of the real will of the contracting parties, even though it
be tacit, shall prevail. Annuaire, XXII, pp. 289-92.