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

A STUDY IN COMPARATIVE LAW

Much uncertainty exists in this country concerning the rules of the Conflict of Laws applicable to Bills and Notes. In England the law on the subject was codified by the Bills of Exchange Act. The Negotiable Instruments Law fails to lay down rules for the Conflict of Laws and thus leaves the matter as it was before. Through the unification of the law of Bills and Notes, which has resulted from the adoption of the Negotiable Instruments Law by practically all of the states of this country, the conflicts that will arise with respect to such instruments in the future will result, in the main, where the rules of the Negotiable Instruments Law of this country come into collision with those of a foreign nation. Though there are some important differences between the Negotiable Instruments Law and the English Bills of Exchange Act it may be said that there exists, on the whole, quasi-uniformity in the law of Bills and Notes of the English speaking countries. Wide divergencies continue to exist, however, between the Anglo-American system and that of other countries, which is embodied now in the Convention of the Hague, of June, 1912. As the prospect that these differences will disappear in the course of the next half century is quite remote, a study of the rules of Private International Law which should govern where the rules of the Anglo-American system come into conflict with those of the Convention of the Hague is not without practical interest. In view of the many uncertainties in our law a codification of the rules of the Conflict of Laws on the subject would be highly desirable so that a greater uniformity of decision might be obtained in this regard. Such a codification should be undertaken, if possible, with a full knowledge of the best thought on the subject in other countries. It is the object of the present article to make such a preliminary investigation in the hope that it may throw some light upon the actual problems which will demand solution in any attempted codification of the Conflict of Laws relating to Bills and Notes. The ends of
this article will be subserved best if the comparative study be limited to those continental countries which have given, on the whole, most thought to the study of the subject under consideration. These are, beyond question, France, Germany, and Italy. The discussion of the law of other foreign countries, excepting that of England, would tend to obscure the main issues without adding anything especially new or helpful.

I. Capacity

Neither the Negotiable Instruments Law, nor the Bills of Exchange Act, nor the Hague Convention has attempted to lay down a uniform municipal rule governing capacity. In England and the United States the ordinary rules relating to capacity apply also to bills and notes. On the continent there were formerly many special restrictions affecting the capacity of parties to obligate themselves by means of bills and notes, and in a few countries some of these restrictions still subsist. The principal conflicts that may arise will relate to the capacity of married women and infants. What should be the rule in the Conflict of Laws governing their capacity to bind themselves by bill or note?

1. English law: The Bills of Exchange Act does not answer the above question. The general rule governing commercial contracts therefore applies. What the English law on the subject is cannot be stated with certainty. There appears to be only a single case throwing direct light upon the subject, that of Male v. Roberts. In that case an action was brought in England to recover a sum of money advanced in Scotland to an infant who appears to have been domiciled in England. Lord Eldon, at nisi prius, held that the defense of infancy depended upon the lex loci contractus, the law of Scotland. At the time the decision was rendered, the English law seemingly favored the view, both with respect to ordinary commercial contracts and contracts of

1. For a comparative statement of the municipal law relating to capacity, see Weiss, Traité de Droit International Privé, 2nd ed., IV., pp. 439-440; Ottolenghi, La Cambiale nel Diritto Internazionale, pp. 43-44; Diena, Trattato di Diritto Commerciale Internazionale, III, pp. 42-44.
2. So, for example, officers in the active army in Austria. See, Jettel, Handbuch des internationalen Privat-und Strafrechts, p. 117.
3. Section 72 (2) lays down the rule that 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. But this term is not comprehensive enough to include "capacity." See, Lefleur, The Conflict of Laws in the Province of Quebec, p. 184.
4. (1800) 3 Esp. 163.
marriage, that the law of the place where a contract was entered into determined the capacity of the parties.\(^5\) A noticeable change in the English cases appears during the latter half of the nineteenth century, indicating a decided tendency to adopt the continental view, which regards the question of capacity as belonging to the personal law and as subject, therefore, to the lex domicili or the lex patriae.\(^6\) In the case of *Sottomayor v. De Barros*\(^7\) the Court of Appeal per Cotton, J. says: "As in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile." And this rule is said to be "a well recognized principle." In *Cooper v. Cooper*\(^8\) the Lord Chancellor, Lord Halsbury, makes the categorical statement that "The capacity to contract is regulated by the law of domicile." These statements were mere dicta, as both cases related to marriage. Foote\(^9\) feels, nevertheless, that the dictum of the Court of Appeal in *Sottomayor v. De Barros* "has unsettled the whole subject, if, indeed, it has not gone further, and established the right of the lex domicili to decide all questions of capacity for every purpose."

The recent cases of *Ogden v. Ogden*\(^10\) and *Chetti v. Chetti*\(^11\) seem to support the lex loci contractus, but these cases, likewise, involve capacity for marriage and it is not clear that the statements were intended to apply to ordinary mercantile contracts.

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5. Lord Stowell expressed this view forcibly in *Dalrymple v. Dalrymple*, (1811) 2 Hagg. Cons. 54, a case involving capacity for marriage, in the following words: "It is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation which the law would impose upon him by virtue of that engagement."

8. In another case (Ruding v. Smith, 1821, 2 Hagg. Cons. 371) Lord Stowell expressly guarded himself as being understood as favoring the lex domicili. "I do not mean to say," he says, "that Huber is correct in laying down as universally true, that 'personales qualitates, alieni in certo loco jure impressas, ubique circumferri, et personam comitari,' that a man, being of age in his own country, is of age in every other country, be the law of majority in that country what it may."

6. In 1860 Sir Creswell still laid down the old rule regarding capacity for marriage, stating in general terms that the capacity to contract is subject to the lex loci contractus. *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; 29 L. J. Mat. 97; 6 Jur. (N. S.) 561; 2 L. T. 327.

7. (1877) 3 P. D. (C. A.) 1, at p. 5; 44 L. J. P. 23; 3 P. D. 1; 37 L. T. 415; 26 W. R. 455.


10. (1908) P. (C. A.) 46; 77 L. J. P. 34; 97 L. T. 827; 24 T. L. R. 94.

The absence of recent decisions on the question of commercial capacity and the uncertain pronouncements on the subject by the English courts in connection with marriage contracts make it impossible to state what the English law actually is. Westlake\textsuperscript{12} is of the opinion that the net result of the English decisions supports the view that the law of domicile governs the capacity to contract, except that in marriage contracts, the lex loci celebrationis must also be satisfied. Dicey\textsuperscript{13} concludes, on the other hand, that the rule laid down by Lord Eldon in \textit{Male v. Roberts} remains unaffected by the later English cases, and that the capacity to enter commercial contracts is probably to be determined by the law of the country where the contract was made.

2. \textit{American Law:} The American law is in a somewhat less uncertain state than the English. As the commercial life of the nation grew, the lex domicilii was found inconvenient, and was discarded as inconsistent with our conditions, at least as regards married women.\textsuperscript{14} The prevailing rule thus became the lex loci contractus.\textsuperscript{15} A remnant of the lex domicilii is found in those decisions which hold that the courts of the domicile of an infant\textsuperscript{16}

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  \item [13.] Conflict of Laws, 2nd ed., Rule 149, exception 1, p. 538.
  \item [14.] "We do not think the continental rule applicable to our situation and condition. A state has the undoubted right to define the capacity or incapacity of its inhabitants, be they residents or temporary visitors; and in this country where travel is so common, and business has so little regard for state lines, it is more just, as well as more convenient, to have regard to the laws of the state of contract as a uniform rule operating on all contracts, and which the contracting parties may be presumed to have had in contemplation when making their contracts than to require them, at their peril, to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all." Deemer, J., in Nichols & Shepard Co. v. Marshall, (1899) 108 Iowa, 518, 79 N. W. 282.
  \item [16.] Story preferred already the lex loci contractus in his famous work on the Conflict of Laws and contributed largely to the adoption of the rule in this country. In Section 102 of his treatise he says, "Secondly: As to acts done, and rights acquired and contracts made in other countries (than the place of domicile), touching property therein the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons."
  \item [16.] International Text Book Co. v. Connelly, (1912) 206 N. Y. 188; 99 N. E. 722. The court in this case, per Vann, J., said, "We think that the
or a married woman\textsuperscript{17} may decline to enforce their contracts entered into in a foreign state and valid under the law of such state, when their enforcement would contravene the established policy of the forum having for its object the protection of infants and married women.

The same rule applies where the contract is made by correspondence.\textsuperscript{18} The law of the place of payment, or the law of the state with reference to which the parties may have intended to contract, is of no consequence.\textsuperscript{19}

Whether the above rules apply to infants’ contracts can not be stated definitely. \textit{Thompson v. Ketcham}\textsuperscript{20} appears to be the only case involving the question. This case was decided, however, upon its second appeal to the Supreme Court of New York, on a question of evidence. On the first appeal the plea of infancy was held to be controlled by the law of the place of performance, and it seems that Chancellor Kent, who wrote the

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facts stated show that the contract wherever made was to be performed by both parties substantially in this state and that it should be governed by its laws. Our courts will not enforce the contract of an infant against him, even if technically it was completed by acceptance in another state, when his promise was not only made here but entire performance by one party and substantial performance by the other was to be made here. Otherwise it would be easy to deprive an infant of the protection which our law affords him on grounds of public policy.\textsuperscript{17} First National Bank v. Shaw, (1902) 109 Tenn. 237; 70 S. W. 807; 59 L. R. A. 498; 97 Am. St. Rep. 840; Armstrong v. Best, (1893) 112 N. C. 59; 17 S. E. 14; 25 L. R. A. 188; 34 Am. St. Rep. 473.


20. (1809) 4 Johns. 285; (1811) 8 Johns. 189.

In this case suit was brought in New York upon a note executed in Jamaica, the defense being infancy. The judge charged the jury that as the contract was made in Jamaica, it must be governed by the laws of that island, and as there was no proof that the laws of Jamaica protect infants against such contracts, the plaintiff was entitled to recover. The jury accordingly found a verdict for the plaintiff. The Supreme Court reversed the judgment on the ground that the testimony in the case showed the note to be payable in New York on the arrival of the parties there, so that the law of New York would govern. “For, it is a well settled rule,” said the learned Court, “that where a contract is made in reference to another country in which it is to be executed, it must be governed by the laws of the place where it is to have its effect.” (4 Johns, at p. 268). When the case came again before the Supreme Court the parol testimony that the payment of the note was to be made in New York was held inadmissible. The defendant not having proved the law of Jamaica, judgment was rendered in favor of the plaintiff.
opinion of the court, when the case came before it the second
time, concurred in that view.21

The suggestion has been made that, inasmuch as infants' con-
tracts are not void, but voidable only, the defense of infancy be-
ing in the nature of a privilege granted to the infant, these cases
do not involve a question of capacity in any true sense, but the
*obligation* of the contract, which, in accordance with the general
weight of authority in this country, is controlled by the law of
the place of performance.22 There is no decision, however,
which sanctions such a distinction. The question is actually re-
garded by the English and American courts as one relating to
capacity.

Where the question concerns not so much the consequences
of infancy as the fact of infancy itself, the *lex domicilii* enters
as a third factor to complicate the problem. Assuming that the
*lex loci contractus* governs the consequences of the plea of in-
fancy, does the same law decide also whether or not a person
is of age? Where a party has reached the age of majority under
the local law, the defense that he is still a minor under the *lex
domicilii* would probably be denied. It is more doubtful whether,
in the converse case, that is, where the party is a major under
the law of his domicile, but is still a minor under the *lex
place of contracting, the defense of infancy could be set up.
There are dicta, but no square decisions, to the effect that the
law of the place where the contract was entered into should con-
trol.23

3. *French Law:*24 The capacity of French subjects is deter-
mimed by French law irrespective of the place where the bill or

21. "The *lex loci* is to govern, unless the parties had in view a different
place, by the terms of the contract. *Si partes alium in contrahendo locum
respererint.* This is the language of Huber. Lord Mansfield, in Rob-
inson v. Bland, (2 Burr. 1077) says, '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, and that was the case with the contract in that
cause.' Kent. Ch. J., 8 Johns., at p. 193.

911; also in note 26 L. R. A. (N. S.), at page 769. But see Minor, Conflict
of Laws, p. 149, note.

Life Ins. Co. v. Simons, 52 Mo. App. 357; Huey's Appeal, (1854) 1
Grant's Cas. 51. See also Wharton, 3d ed., pp. 264-265.

A number of cases which rejected the *lex domicilii* as determining
the status of a party as a major involved the question of the party's capacity
to sue (Gilbreath v. Bunce, (1877) 65 Mo. 349) or to control a judgment
(Harris v. Berry, (1884) 82 Ky. 137) and not ordinary commercial
capacity.

24. Since the days of the statutists the view has generally prevailed on
note is executed or payable. The personal (national) law is applied also to foreigners. A party can not avail himself of his foreign personal law if he has fraudulently concealed the same, or if its application would contravene the public policy of France. The courts have tended to disregard the foreign personal law in favor of the lex loci contractus, also, when the interests of a Frenchman, who had exercised due care, would be prejudiced by its application.

4. German Law: The German law is found in Article 84 of the German Exchange Law of 1849, which reads as follows:

"The capacity of a foreigner to incur liabilities under exchange law is to be decided according to the law of the state to which he belongs. Nevertheless, a foreigner, incapable of contracting by exchange law according to the law of his own country, is liable within the Empire (Inland), if he incur such liabilities, in so far as he is so capable according to inland law."

This rule has now become the general rule governing the Conflict of Laws, for Article 7 of the Law of Introduction of the Civil Code provides:

the continent that the personal law, formerly the lex domicilii, to-day more commonly the law of nationality (lex patriae), should determine both the status and the contractual capacity of parties.


In the event of a change of domicile the more general opinion favored the law of the actual domicile at the time of contracting and not that of the domicile of origin. See Lainé, II, pp. 199-217. So also the modern authors. See Savigny, Private International Law, Guthrie's translation, p. 355; v. Bar's Private International Law, Gillespie's translation, pp. 317-318.

25. Code Civil, Art. 3.
28. The same provision is found in the Hungarian Law of 1876 (Art. 95); the Scandinavian Law of 1880 (Art. 84); the Swiss Law of Obligations of 1881 (Art. 822); the Commercial Code of Servia (Art. 168); the Russian Law on Bills and Notes (Art. 82), and the law of Brazil of 1908 (Art. 42). See, Weiss, IV, p. 443.

The exception to the application of the personal law was adopted in Germany only after a long debate at the Conference of Leipzig, on grounds of commercial convenience, by a vote of 10 to 9. It was aimed primarily at the special incapacities relating to bills and notes which existed in many of the continental states. The wording of the exception in favor of the lex loci contractus was couched, however, in such broad terms as to cover all kinds of incapacity, general or special. See, Staub, Kommentar zur allgemeinen deutschen Wechselordnung, 3d ed., Art. 84; Meili, Internationales Civil- und Handelsrecht, II, pp. 327-329.
"The business capacity of a person (Geschäftsfähigkeit) is adjudged according to the laws of the state to which he belongs.

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"If a foreigner enters into a legal transaction in this country as to which he is not competent, or is restricted in his capacity, he is as to such transactions to be regarded as competent in so far as he, under the German laws, would be competent to act. This provision does not apply to transactions relative to family rights and to rights of inheritance, as well as to transactions disposing of real estate in a foreign country." 29

The above concession in favor of the lex loci contractus is restricted to transactions entered into in Germany. 30 Whenever the contract is executed in a foreign country, the national law of the party in question will control without qualification. This is true though the law of such country should make a similar concession in favor of the lex loci contractus as the German law. 31 Where the national law has adopted the lex domicilii as the rule governing capacity, and the domicile of the party is in Germany, German law will be held to control. 32

5. Italian Law: According to Article 6 of the Preliminary Dispositions of the Civil Code, "The status and the capacity of persons and the family relations are regulated by the law of the state of which they are subjects."

Article 58 of the Commercial Code provides, however, that "The form and the essential requisites of commercial obligations are regulated respectively by the laws and usages of the place where the obligations are created."

An express reservation is made by Article 58 in favor of the application of Article 9 of the Preliminary Dispositions of the Civil Code, according to which the national law will govern when both parties have the same nationality.

The Italian authors are divided on the question whether the "essential requisites of commercial obligations" are to be under-

29. A similar provision exists in regard to capacity to sue or to be sued. Such capacity exists if it is conferred by the national law or by German law. Sec. 55, German Code of Civil Procedure; Barazetti, Das Internationale Privatrecht im bürgerlichen Gesetzbuche für das deutsche Reich, p. 43.
stood as including capacity.\textsuperscript{33} In the opinion of some,\textsuperscript{34} the article refers only to the general objective requirements for bills and notes specified in Article 251 of the Commercial Code, and not to capacity. "According to the opinion that has finally prevailed," says Diena,\textsuperscript{35} "the essential requisites of commercial obligations, to which Article 58 alludes, are all those contemplated by Article 1104 of the Civil Code, among which is included the capacity to contract." The lex loci contractus will determine not only the capacity of foreigners in Italy, but also that of Italian subjects in foreign countries.\textsuperscript{36}

From the preceding comparative study it is seen that none of the countries, the law of which has been studied, applies, without qualification, the personal law of the parties (the lex domicilii or the lex patriae) in the determination of the capacity of parties to enter commercial contracts.\textsuperscript{37} This is most noteworthy in view of the strong stand by continental Europe in support of the doctrine that the personal law should govern the capacity of parties in general. Individual authors, in the theoretical atmosphere of their study, have expressed the view that the principle of the lex patriae should not yield in any respect, on grounds of expediency, to the lex loci contractus.\textsuperscript{38} But whenever they were confronted with the actual needs of business life, they have not hesitated to make such concessions. This appears most distinctly from the resolutions adopted by international associations, conferences, and congresses. The Association for the Reform and Codification of International Law, at its session at Antwerp in 1877,\textsuperscript{39} the Congress of Commercial Law held at Antwerp in

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\item \textsuperscript{33} The views of the different writers are stated by Diena, Trattato di Diritto Commerciale Internazionale, I, pp. 14-15, note; Ottolenghi, La Cambiale nel Diritto Internazionale, pp. 28-43.
\item \textsuperscript{34} See Ottolenghi, pp. 37-38.
\item \textsuperscript{35} I, p. 138.
\item \textsuperscript{36} Diena, III, p. 53.
\item \textsuperscript{37} Contra: Quebec, where the lex domicilii is applied, even though the party would have capacity under the law of Quebec, where the contract was entered into. Jones v. Dickinson, R. J. R., 7 Quebec S. C. 313; Lafleur, Conflict of Laws in the Province of Quebec, p. 147.
\item \textsuperscript{39} Revue de Droit International, 1877, p. 411.
\end{itemize}

The resolution adopted was as follows: "La capacité d'un étranger en matière de lettre de change est en général réglée d'après son statut personnel.

"Toutefois l'étranger, lorsqu'il contracte des engagements se rattachant
1885,\(^{40}\) and in Brussels in 1888,\(^{41}\) and the Institute of International Law at its session at Brussels in 1885,\(^{42}\) have all indorsed the lex loci contractus as an alternative rule to the law of nationality whenever a party, who is incompetent under his foreign personal law, has capacity to contract under the law of the state where the contract was made.

Article 74 of the Convention of the Hague for the Unification of Bills and Notes of 1912 expresses the same view. It provides:

"The capacity of a person to bind himself by a bill of exchange shall be determined by his national law. If such national law declares the law of another state to be applicable, such latter law shall be applied.

"A person who lacks capacity under the law indicated in the preceding paragraph, shall nevertheless be validly bound, if he has entered into the obligation within the territory of a state according to the law of which he would have been competent."\(^{43}\)

The Institute of International Law, at its session in Lausanne in 1888,\(^{44}\) recommended a somewhat narrower rule with regard to the application of the lex loci contractus, which would allow the lex loci to impose liability only in the event that the incompetent misled the other party or "grave circumstances" existed, the appreciation of which was to be left to the courts.

Several members of the Institute of International Law have suggested still other compromise systems. At the meeting of the Institute at Lausanne, Westlake\(^{45}\) proposed the lex loci contractus in substitution for the lex patriae when the party who was incompetent under his national law, was twenty-one years of age, and the other contracting party was ignorant of such incapacity. Von Bar\(^{46}\) was of the opinion that the lex loci contractus should take the place of the lex patriae when the person dealing with the party who is incompetent acted in good faith. In his text book on Private International Law, v. Bar expressed his view in the following form:

"It is immaterial whether or not a person has capacity to bind himself by bill, be that incapacity a result of a general incapacity aux lettres de change dans un pays autre que le sien, est régis par les lois de ce pays, sans pouvoir invoquer sa loi nationale."

\(^{40}\) Clunet, 1885, p. 629.
\(^{41}\) Weiss IV, p. 444.
\(^{42}\) Annuaire de l' Institut de Droit International Privé, VIII, p. 97.
\(^{43}\) See Senate Document No. 162, 63d Congress, 1st Session, p. 64.
\(^{44}\) Annuaire, X, pp. 103-104.
\(^{45}\) Annuaire, X, p. 102.
\(^{46}\) Annuaire, X, p. 96.
to contract or not, if by the law of the place where the bill is
issued the debtor had this capacity, and the person who sues on
the bill or some predecessor of his in title was in good faith when
he acquired the bill. Good faith is presumed. 47

Goldschmid submitted that the contract should be sustained,
notwithstanding an incapacity under the personal law, if it com­
piled with the law governing the validity of the contract in other
respects. 48

In addition to the above there may be mentioned the view
recently expressed by Professor Jitta, one of the most distin­
guished writers on the subject of the Conflict of Laws. In his
opinion the capacity to contract by bill or note should be gov­
erned by the law of what he terms "the fiduciary place of issue,"
by which he means the law of the place of issue mentioned in
the bill or note, and, in the absence of such an indication, that of
the party's domicile, or, in case of a person exercising a trade or
profession, the law of the state in which he has his place of busi­
ess or office. 49

As the question before us has nothing to do with the per­
formance of the contract, the lex loci solutionis can apply only
on one of two theories, either that it represents the seat of the
obligation, or that it expresses the probable intention of the par­
ties. That neither of these positions is tenable as regards the
formal and essential requisites of bills and notes will be shown
in another part of this article. The same is true also with re­
spect to capacity. In this place the bare statement must suffice
that the intention theory as such is inapplicable to capacity. Be­
fore there can be a legal intent, there must be capacity to form
such intent, and such capacity, in the very nature of things, can
be conferred only by law. This is admitted by the decisions of
the courts of all countries, excepting a few dicta in this coun­
try, 50 and by all text writers. There remain thus for our con­
sideration, the lex loci contractus and the lex domicilii.

The objection to the strict application of the personal law in
commercial contracts has been well expressed in the following
words by Burge:

"The obstacles to commercial intercourse between the sub­
jects of foreign states would be almost insurmountable, if a party
must pause to ascertain, not by the means within his reach, but
by recourse to the law of the domicile of the person with whom
he was dealing, whether the latter had attained the age of majori-
ty, and, consequently, whether he is competent to enter into a
valid and binding contract. 51

As between the unqualified lex domicilii and that of the lex
loci contractus, the balance of convenience would clearly favor
the latter. The real question at issue is whether a compromise
system between the personal law (lex domicilii or lex patriae)
and the lex loci contractus, in the form in which it obtains in
France or Germany, or in one of the other forms suggested above,
is not preferable to that of the lex loci contractus pure and simple,
which is the rule in the United States and Italy.

Supporters of the compromise system believe that the per-
sonal law should not be discarded in its entirety and that the
needs of commerce can be sufficiently met by certain concessions
to the law of the place where the contract was entered into.
Little argument is needed to show that neither the French nor
the German system can be approved. The French courts have
been inclined, when the contract was made in France, to protect
French subjects acting with due care, against the incapacity of
the other contracting party existing under the lex patriae. The
objection to this qualification of the personal law is the distinction
made between citizens and foreigners. 52 If the security of com-
merce demands that an incapacity existing under foreign law
shall not be set up, it includes citizens and foreigners alike. The
German law is equally arbitrary. It applies the lex loci to trans-
actions entered into in Germany when it will bind the party who
is incompetent under his personal law, but does not recognize
that a German subject, who has made a contract abroad, can be
held under like conditions. The giving of such a privileged posi-
tion to citizens is in violation of the principle of equality, which
is fundamental in the Conflict of Laws.

The recommendation of the Institute of International Law
adopted at its session at Lausanne, is open to the serious objec-
tion of indefiniteness, for the lex loci contractus is to apply
when "grave circumstances" exist, the appreciation of which is
to be left to the courts. Such a qualification as this is entirely
too vague to serve the purpose of commercial security.

52. The Supreme Court of Louisiana expressed similar views in Saul v.
The compromise system that has the weightiest support allows the application of the lex loci contractus whenever it will sustain the contract of a party who is incompetent under his personal law.

Of the individual views above mentioned, those of Westlake and v. Bar do not differ essentially from the compromise view just stated. Both would require for the application of the local law, that the party dealing with the incompetent shall have been ignorant of the latter's incompetency (Westlake) or have acted in good faith (v. Bar), Westlake requiring in addition that the incompetent be twenty-one years of age. Meili regards the rule suggested by v. Bar as the best, and as satisfying all "rational commercial needs." Goldschmid properly remarks, however, that the condition of good faith opens the door wide to difficult questions of fact and that because of this, such a rule forms too vacillating a basis for the security of international relations. The same objections may be raised also against Westlake's proposition.

Goldschmid's view differs from that of the majority before mentioned in his substitution of the law governing the contract for that of the lex loci contractus. In a state or country which has adopted the lex loci solutionis for the determination of the validity of contracts, a person who is competent under such law would be bound under this rule notwithstanding the fact that he is incompetent under the lex domicilii and the lex loci contractus.

For practical purposes it may be said, then, that there are only two leading views involving a compromise between the personal law and the lex loci contractus: (1) The majority view, which sustains the contract, as far as capacity is concerned, if it satisfies either the personal law or that of the place of contracting; and, (2) Goldschmid's view, which regards the contract as valid if it complies with the requirements of the personal law or with those governing the contract in other respects. Widely differing from these, is the view entertained by Jitta, according to which the law of the place of issue mentioned in the instrument is to govern, and only in the absence of such an indication, the law of

His Creditors, (1827) 17 Mart. 596.
53. It will be recalled that it was recommended by the Association for the Reform and Codification of Law (1887); by the Congresses of Commercial Law of Antwerp (1885) and of Brussels (1888); by the Institute of International Law (1885); and by the Convention of the Hague (1912).
55. Annuaire, X, p. 91.
the domicile, or, in the case of a merchant or a professional man, the law of the state in which he has his place of business or office.

What are the merits of these views as compared with the American and Italian rule, which supports the lex loci contractus? In behalf of the lex loci contractus the following words of Justice Gray, from his opinion in Milliken v. Pratt,\(^{56}\) may be quoted:

"In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties must be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all."

A similar view is expressed by Burge:\(^{57}\)

"But if the principle be correct that the lex loci contractus ought to determine the validity of a contract when that validity depends on the capacity of the contracting party, it must be uniformly applied, whether the law prevailing in the domicile be that which capacitates or incapacitates. For it would not be reasonable that two different laws should be applied to one and the same contract, and that the liability of one of the parties should be decided by the lex loci contractus and that of the other by the lex loci domicilii."

In connection with the foregoing quotations it must be borne in mind that Justice Gray and Burge discussed the question as a pure judicial question, and did not express any view upon it from the standpoint of legislation. Story calls attention to the difference between the two viewpoint. Commenting upon a statement in Saul v. His Creditors,\(^{58}\) he says:

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58. The passage referred to was the following:
"But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that, at the age of twenty-four he came into this state, and entered into contracts;—would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge, and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them..."
"The case first put seems founded upon a principle entirely repugnant to that upon which the second rests. In the former case, the law of the place of the domicile of the party is allowed to prevail, in respect to a contract made in another country. In the latter case, the law of the place where the contract is made, is allowed to govern without any reference whatsoever to the law of the domicile of the party. Such a course of decision certainly may be adopted by a government if it shall so choose. But then it would seem to stand upon mere arbitrary legislation and positive law, and not upon principle. The difficulty is in seeing how a court, without any such positive legislation, could arrive at both conclusions. General reasoning would lead us to the opinion that both cases ought to be decided in the same way, that is, either by the law of the domicile of the party, or by that of the place where the contract is actually made. Many foreign jurists maintain the former opinion, some the latter.\textsuperscript{59}

As a judicial question it might naturally be felt that an alternative rule in the form of the foregoing compromise systems could not be adopted by our courts without the aid of positive legislation and that a choice had to be made between the lex domicilii and the lex loci contractus. In one or two instances, it is true, English and American courts have sanctioned an alternative rule either actually or in effect. For example, the English case of \textit{In re Hellmann's Will}\textsuperscript{60} held that a legacy under an English will might be paid to a German legatee on his attaining full age according to English law or according to the law of Germany, whichever first happened. The American courts, in their eagerness to uphold contracts against the defence of usury, have allowed the parties to contract with reference to the law of the place of execution or with reference to that of the place of performance or even with reference to the law of a third state with which the contract was connected.\textsuperscript{61} But these cases represent outstanding exceptions in the Conflict of Laws to the general attitude of Anglo-American courts, which declined to sanction a rule in the alternative even in the matter of the formal requirements of instruments,\textsuperscript{62} in regard to which the maxim locus actum in a permissive sense had been recognized on the continent for

\textsuperscript{59} Story, Conflict of Laws, 8th ed., pp. 96-97.
\textsuperscript{60} L. R. 2 Eq. 363; 14 W. R. 682.
\textsuperscript{61} Miller v. Tiffany, (1863) 1 Wall. 298; 17 Law ed. 540; Arnold v. Potter, (1867) 22 La. 194; Green v. Northwestern Trust Co., (1914) 128 Minn. 30, 150 N. W. 229; Scott v. Perlee, (1863) 39 Ohio St. 63.
centuries. This maxim has since been adopted by statute in England as regards wills disposing of personalty, and in many jurisdictions of this country as regards wills and deeds. A will of personal property is valid under these statutes if it satisfies, as regards formal execution, the law of the testator’s domicile or that of the place of execution, and a will devising realty, or a deed of land, if it conforms to the law of the situs or to the lex loci contractus. In like manner it might be provided by statute that a legal transaction, or, to narrow the question to the subject under consideration, a commercial contract, shall be valid, as regards capacity, if it meets the requirements of the law of the place of execution or those of another state, be that law the lex domicilii or the lex loci solutionis. But is there a sufficient reason for the adoption of such an alternative rule in this instance?

Field, in his Outlines of an International Code, recommends the lex loci contractus as the rule governing capacity to contract. In Sec. 542 he states:

"The civil capacities and incapacities of an individual in reference to a transaction between living persons, except so far as it affects immovable property, * * * are governed by the law of the place where the transaction is had, whatever may be his national character or domicile."

In answer to the continental writers who dwell upon the inconvenience which would result from a fluctuating rule of capacity upon every accidental change of the person or of his movable property, he says:

"The inconvenience of a fluctuating rule is an inconvenience to the individual only, requiring him to ascertain and conform to the law of the place where he may be. It is the most convenient form for facilitating commercial transactions and the administration of justice."63

These words were written before the Institute of International Law and the international commercial congresses above mentioned had indorsed the view upholding commercial contracts with respect to capacity, if they satisfied either the personal law or the law of the place where the contract was made. It is especially interesting to note, therefore, that Field had reached the same result in an independent way, as regards foreign infants. With respect to them he suggested the following exception:

"543. No transaction had by a foreigner, being one between living persons, is voidable on the ground of his infancy, except

63. p. 380.
so far as it may affect immovables, if either the law of his domicile, or the law of the place where the transaction is had, sustains his capacity."

In considering the relative merits of the compromise systems which have been put forward on the continent, and those of the lex loci contractus, the difference in the point of view between the continental and American law must be clearly borne in mind. On the continent the established rule governing capacity, on principle, is the personal law (the lex patriae or the lex domicilii). The only question as regards the capacity to execute bills and notes, therefore, is whether the personal law should not yield on grounds of commercial convenience, at least in part, to the law of the place where the contract is made. The problem assumes quite a different aspect in the United States, where the simplicity and convenience of the lex loci contractus as the governing law have seemed so manifest as to overshadow completely the claims of the lex domicilii.

Although a uniform law would raise the question in a somewhat different form by reason of the fact that it is concerned with international and not with inter-state relations, the burden of proving the desirability of a modification of the present law which shall sustain a bill or note, as regards capacity, in the event the party in question is incompetent under the lex loci contractus but has capacity under the lex domicilii, would be upon the person proposing such a change.

All partisans of the lex domicilii having been compelled, on grounds of commercial convenience, to admit the necessity of the application of the lex loci contractus, as regards capacity to enter commercial contracts, when such law is unfavorable to a party, the question naturally arising is why the same law, rather than the lex domicilii, should not govern also when it is favorable to such party. The main argument advanced by continental writers in support of the lex domicilii in the matter of capacity is the following,—that rules of law which are concerned with capacity to act have for their object

64. Notwithstanding the fact that the majority of an infant for the purpose of receiving his property from his guardian is determined by the lex domicilii. Woodward v. Woodward, (1889), 87 Tenn. 644; 11 S. W. 892.

65. The Negotiable Instruments Law has unified the law of bills and notes in this country to all intents and purposes. Only a few jurisdictions have modified the proposed uniform law in some particulars.
the protection of the parties against loss by their own acts. "This care for the person must be a permanent one," says v. Bar,66 "if it is to have effect; it extends, therefore, to all persons who permanently belong to the state, i. e., who are domiciled there." In other words, it is because of the uniform and permanent protection which the parties need and which the lex domicilii, ex hypothesi, is best able to afford that its claim to a preference over any other law is based. But if the lex domicilii must yield to the lex loci contractus in all commercial contracts in the interest of commercial security, it fails to afford the very protection which its adoption was intended to give. Under these circumstances no theoretical basis remains for its application. For it must be remembered that the lex loci contractus is put forward by most of the advocates of the compromise view as an alternative rule entitled to extraterritorial recognition and not merely as an exception to the lex domicilii, based upon the public policy of the state where the contract is made, and hence having only an intra-territorial effect. Having adopted the lex loci contractus as the governing rule when it will sustain the contract, the logic of the situation and sound principle demand that it control also when its application will defeat the contract.67

In the absence of a willingness on the part of the American law to accept the lex domicilii as the law governing both status and capacity, its introduction as an alternative rule with the lex loci in the matter of commercial capacity can be justified only on grounds of expediency based on a desire to sustain contracts. What does sound policy require in this regard? The statutes relating to the formal execution of wills and deeds fall short of giving any support to the proposition under discussion, for neither the English nor the American statutes include contracts. Even if it were conceded, for the sake of argument, that the reasons or policy which led to the adoption of these statutes apply with equal force to contracts, it would not follow that they would embrace capacity as well. There is a fundamental distinction between capacity and

67. "There is, no doubt, much to be said for a thorough-going application of the lex loci actus to rule capacity to undertake these obligations, such as prevails in the jurisprudence of England and in that of the United States, although it does not suit the circumstances of the Continent of Europe, and may, as intercourse goes on increasing, soon bring disadvantages even to England and to the United States." v. Bar, p 665.
formalities and a policy applicable to the one may have no bearing upon the other. Before the statutes referred to were passed, a will of personal property, not executed in the form prescribed by the law of the testator’s domicile at the time of death, was void, even though it conformed to the law of the testator’s domicile at the time of execution and to the law of the place of execution. A will or deed disposing of realty was null and void unless it satisfied the law of the state in which the property was situated. Following the continental practice, many American legislators felt that the validity of a will or deed, as regards formal execution, should be recognized also if the testator or grantor had followed the requirements of the law of the state in which the will or deed was executed. The rule locus regit actum, which was thus sanctioned, sprang from and rests upon a desire to facilitate international intercourse. Its sole object is to free the parties from the embarrassments which may follow if they must clothe their legal transactions at their peril in a form prescribed by a law to which they have no ready access at the time.

The situation is quite different, as regards capacity. The question here is whether a party who is incompetent under the lex loci contractus, which applies upon principle, shall be bound nevertheless if he is competent to contract under the law of his domicile or the law of some other state that is deemed to govern the validity of contracts in other respects. Before an answer can be given, the question must be considered in its broader aspects. It raises many grave problems involving the basic theory of the rules of Private International Law. If a rule in the alternative is proper in the matter of commercial capacity because of its tendency to give stability to international transactions, why should not the same policy require its extension to capacity in general? And if the rule is expedient in matters relating to capacity and form, why should it not be applied also to the other essential requirements of contracts and, indeed, to those of all other legal transactions? Heretofore it was taken for granted in the science of Private International Law, that a unitary rule governing each legal relationship would best answer the

70. See Laine, II, pp. 116-198.
needs of an international community. The maxim locus regit actum, in matters of formal requirements, constituted the only exception, and, according to some writers,\textsuperscript{71} even this rule had lost its original permissive character and become a unitary and mandatory rule. Must it be conceded to-day that the aim of the science of the Conflict of Laws to discover unitary rules for the solution of the problems arising from the diversity of legal systems has so far failed of accomplishing its object that international justice would be promoted if the validity of legal transactions in general, as regards capacity, form and legality, were sustained upon principles of the broadest liberality?

The writer of this article is not ready to give a final answer to this question, affecting as it does the very basis of the rules in the Conflict of Laws. He is of opinion that the adoption of alternative rules in matters affecting the validity of legal transactions would afford, at least in some instances, more satisfactory results than it is possible to attain as long as a unitary rule must be found. Abundant proof of this fact is furnished by the cases and in the juristic literature dealing with the essential validity or legality of contracts. The vast bulk of the case law, as well as the almost total concensus of opinion of continental and English writers on the subject of the Conflict of Laws hold that a contract is valid if it meets the requirements of the law with reference to which the parties must be deemed to have contracted.\textsuperscript{72} In most of the decided cases the law of the state that would sustain the contract was found to be the applicatory law and not infrequently a presumption was raised that the parties contracted with reference to such law.\textsuperscript{73} With the recognition of the propriety of alternative rules in the Conflict of Laws, such cases, which now rest upon an unsatisfactory basis, would present no difficulties whatever. Neither the territorial theory, which underlies the doctrine of the lex loci contractus, nor the intention theory, which is now dominant so far as it applies to contracts, leads to satisfactory results, as the

\begin{footnotes}
\textsuperscript{71.} See Buzzati, L'Autorità delle Leggi Straniere Relative alla Forma degli Atti Civili, pp. 142 et seq.
\textsuperscript{72.} For the law of the English courts, of the Federal courts, and of the State courts, see article by Professor Beale in 23 Harvard Law Review, pp. 1, 79, 194, 260.
\textsuperscript{73.} See, for example, Pritchard v. Norton, (1882) 106 U. S. 124; 1 Sup. Ct. 102; 27 Law Ed. 104.
\end{footnotes}
actual state of our law sufficiently attests. A rule to the effect that the validity of a contract, as regards capacity, form, and legality, should be recognized if it satisfies the lex loci contractus or the law of some other state with which the contract has an intimate relation, might, with proper limitations, furnish a more secure basis for international transactions than has existed heretofore.

As for bills and notes, an alternative rule cannot be applied to matters of form or legality for the reason that the obligations created by such instruments depend upon, and are therefore inseparable from, its formal and essential requirements, as will be shown below, and an alternative rule cannot possibly control the obligations of contracts. Limited, however, to capacity, a rule which would sustain a bill or note, or a particular contract thereon, if it satisfied either the lex loci contractus or the lex domicilii, would not only be practicable, but would possess certain advantages over the unitary rule of the lex locus contractus. From the standpoint of municipal law it would promote the negotiability of such instruments by giving to the contracts of the different parties another chance of validity. From the broader viewpoint of international law such a rule would make it possible for the English law, which has tended to accept the lex domicilii, to agree with the American law, and would bring the Anglo-American law, so far as it can be done, into harmony with the best thought on the subject in continental Europe.

Nor would the rule suggested constitute an injustice to the party obligated. True, he cannot escape liability under it unless he lacks capacity under both the lex domicilii and the lex loci contractus, but the justice or injustice of a rule cannot be determined from the viewpoint of a party who is desirous of avoiding his obligations. A person who is domiciled in one state but wishes to transact business in another cannot in good conscience complain of a rule which enables him to do so more effectively by increasing his capacity to contract.

As against the advantages before mentioned there must be offset, however, certain disadvantages which inhere in every alternative rule. The lex loci contractus as such has simplicity and certainty in its favor. These important qualities would be lost by the adoption of the lex domicilii as an alternative rule, for the latter might raise the issue of domicile in
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every case in which a party is incompetent under the law of the place where the contract is made. The increased litigation which would result would constitute a serious draw-back which can be overcome only by strong grounds of expediency speaking for the lex domicilii. Such grounds do not exist. The international advantages, referred to above, cannot actually weigh heavily in the framing of a Uniform Law for the United States. Moreover, international uniformity is unattainable as long as the continental countries adhere to the law of nationality, instead of the law of domicile, and as for England, it may accept the doctrine of Male v. Roberts, the lex loci contractus, as the rule governing commercial contracts and thus agree with the law of this country without the introduction of the lex domicilii. The only advantage that would arise from the adoption of the lex domicilii in the form suggested is its tendency to promote the negotiability of bills and notes. This advantage, it is submitted, is not strong enough to overcome the serious disadvantages to which attention has been called above. The burden of proving the desirability of departing from the established law being on the party advocating the change, it is apparent that no sufficient case has been made out. The conclusion reached is, that the Uniform Law should adopt the lex loci contractus as the law governing capacity to incur liability by bill or note.

If, contrary to the conclusion just stated, the policy of sustaining contracts is deemed to outweigh the expense and inconvenience of increased litigation, so that the principle of an alternative rule as regards capacity, stands approved, the question, brought to prominence by Goldschmid before the Institute of International Law, would be whether the law governing the contract in general should not be accepted as the alternative rule, rather than the lex domicilii. Goldschmid assumed that the law of the place of performance would govern the contract in general (apart from capacity and form), and such is still the German law74 and the prevailing rule in this country.75 Why should a party, who is incompetent under the lex loci contractus, not be regarded in jurisdictions following the above rule as competent to contract if he pos-

74. See RG July 4, 1904 (15 Niemeyer 285); RG Apr. 26, 1907 (18 Niemeyer 177).
serves such capacity under the law of the place of performance? This question cannot be answered until the rule governing the validity and obligation of bills and notes has been discussed. If the conclusion is there reached that the lex loci contractus, and not the lex loci solutionis, should control, no ground will be left upon which Goldschmid's proposition can stand. The only other law that could possibly control the contract would be the personal law, on the theory that the parties must be deemed to have contracted with reference to such law. This would make Goldschmid's rule coincide with the one discussed above. But if the Uniform Law should follow the weight of authority in this country and accept the lex loci solutionis as the law determining the validity and obligation of contracts, Goldschmid's suggestion would have great force. The problem would then be whether the lex loci solutionis should supplant the lex domicilii as the alternative rule with the lex loci contractus, or whether the Uniform Law should go still further in its liberality and support a bill and note, if capacity exists under the lex loci contractus, the lex domicilii, or the lex loci solutionis?

Whether the lex loci contractus be adopted as an absolute rule or in one of the alternative forms suggested, its meaning remains to be determined. On the continent it signifies generally, the law of the place where the signature is attached. In England and the United States, inasmuch as the contract is not complete until the delivery of the instrument, it is the place of delivery. But what if, on the continent, the place mentioned in the instrument is not the place where the signature was actually affixed, and if, in the United States, such place is not the actual place of delivery? Continental law is not settled on this point. In this country the place from which a bill or note or an indorsement is dated, is deemed

77. B. E. A. s. 21; N. I. L. s. 16.
78. In favor of the actual place where the signature was affixed Diena, III, p. 52; Meili, II, p. 327; Grünhut, Wechselrecht, p. 570, note 6. If the date was allowed to control, even as to holders in due course, it would enable a party who is incompetent to confer capacity upon himself by the simple expedient of dating the instrument or contract from a place, according to the law of which he is competent. To allow him to do so is regarded by the above authors as opposed to public policy.

Other authors are of opinion that the holder in due course should be protected if the party has capacity according to the law of the place from which it is dated. See v. Bar, p. 688.
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prima facie the place of delivery.79 With respect to a holder in due course this presumption is conclusive.80 Where the indorsement does not indicate the place at which it is presumptively made, i.e., delivered, but the original instrument contains such an indication, the indorsement will be deemed made at that place,81 and if a party has capacity under such law, he will be estopped as to a holder in due course, to show that he had no capacity under the law of the state where the indorsement was made in fact.82

The law of the "fiduciary place of issue", proposed by Jitta as the governing rule, according to which the place mentioned in the bill, note, or indorsement, controls, and, in the absence of such an indication, the law of the party's domicile, or, in the case of a person exercising a trade or profession, the law of the state in which he has his place of business or office, though it bears a slight resemblance to the American law above set forth, differs from it too profoundly to be of any practical value in the framing of a uniform law for the United States. The rules of the American law should be retained.

(To be continued.)

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81. N. I. L. s. 46.