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Conflict of Laws with Special Reference to Bills and Notes

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T H E S I S

Conflict, of Laws with
Special Reference to Bills and Notes.

-by-

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CONFLICT OF LAWS WITH
SPECIAL REFERENCE TO BILLS AND NOTES.

Introduction.

Conflicts, between the laws of different jurisdictions arise from the fundamental principle that the laws of one country can have no efficacy, *proprio vigore*, except within the territorial limits and jurisdiction of that country. Whatever extra-territorial force a law may have is merely the result of that respect which from motives of public policy other nations are disposed to yield to it, and which is called comity of nations.

By the principles of comity, the laws of one country or state may be executed in another, but only so far as may be consistent with the religion, good morals, and public rights and interests of the country or state in which the remedy is sought.

If there were not some international principles governing the private contracts which arise from the free intercourse that the inhabitants of all countries have with each other, it would be almost impossible for the present vast and varied commerce, involving the use of such large quantities of negotiable paper, to be carried on successfully. Without such general rules all business transactions between the residents of different countries would be attended with so great confusion and so much risk, as to render extremely hazardous and to practically prevent them.

This subject is of great practical importance to the whole commercial world but becomes of especial importance in the United States, where each state is considered foreign to every other, as regards the laws governing commercial transactions. Thus a bill of exchange drawn in one of the states of the Union, upon a person in another, is a foreign bill and is so treated.

The object of this article is to state as briefly and concisely as possible the general principles and rules, by which to determine by what law questions, arising in regard to bills and notes are to be decided.

General Principles.

I. The formalities essential to the validity, interpretation and effect of a bill of exchange, or note are to be governed by the law of the place where made except where it is to be performed in another state.

II. To determine where a contract was made, the place where it was delivered controls.

III. As a general proposition, a contract valid where made is valid everywhere; but see exceptions mentioned under *Lex Loci Contractus*.

IV. A contract void by the law of the place where made is void everywhere.

V. The remedy is to be governed by the law of the place where the suit is brought.

VI. The laws, of a foreign country or state, must be pleaded and proved in the same manner as any other fact in

the case.

These principles are so well established that the citation of authorities is unnecessary.

Lex Loci Contractus.

As a general rule the laws, of the place where personal contract is made, govern as to its validity, interpretation, nature, obligation and effect; unless it appears from the terms used that it is intended to be performed elsewhere or is made with reference to the laws of some other jurisdiction. (Jewell v. Wright, 30 N.Y., 259; Scudder v. Union Nat.Bk., 91 U.S., 406).

If executed with the formalities essential to validity at the place where made, it is to be considered of equal validity and to be enforced everywhere, with the exception of cases in which the contract is immoral, or in which its enforcement in another state, would be prejudicial to the rights or interests of such state or its citizens; and on the contrary if a contract is void by the law of the place where made, or to be performed, it is to be considered as void everywhere and to be enforced nowhere. (Andrews v. Herriot, 4 Cow., 508; note; Harrison v. Baldwin, 5 O.Cir.Ct.Rep., 310).

Now the question arises where was the contract entered into? We find the general principle to be that the place where the contract was made is to be determined by the place where it was first delivered as a binding obligation and not the place where it was written, signed or dated.

(Briggs v. Lathan, 36 Kas., 255; Barrett v. Dodge, 10 At., 530) But there is a presumption that a contract was executed and delivered at the place where it bears date, (Parks v. Evans, 5 Del., 576) and this presumption may not be rebutted to the injury of a party who has acquired a negotiable instrument in the usual course of business for value and with no knowledge that it was not issued and delivered as a subsisting instrument at the place where it bears date. (Bank v. Showacre, 26 W.V., 48.)

Interpretation.-- By the interpretation of a contract, is meant the ascertainment of the real intention of the contracting parties as expressed therein. And when the contract is silent or ambiguous, to ascertain what is the true sense of the words used and what ought to be implied in order to give them their true and full effect. (Story on Bills Sec. 143.)

The same words may have different meanings attached to them in different places, by law or custom and may import different obligations, hence in order to carry out the intention of the parties such words must be interpreted according to the significance attached to them in the country or state in which the contract was made. Thus the word "month" may mean a "lunar month" or a "calendar month" according to the place where used; and "usage" imports a period of time varying from two weeks, in some countries, to two months, in others, or even more. A custom or usage of the place where the contract is made can be shown to interpretate it where the words do not show the full and entire intention of the parties. (Story on Bills, Section 143).

Nature.-- By the nature of a contract is meant those qualities which properly belong to it and by law or custom always accompany it. As whether it is joint or several, or joint and several; whether absolute or conditional; whether that of principal or surety; whether personal or real. (Story's Conflict of Laws, Section 263.)

Obligation.-- By the obligation of a contract is meant the law which binds the parties to perform their agree-

ment. (Ogden v. Saunders, 12 Wheat., 213 at page 257.)

Considering the legal obligation of a contract we find that the laws may limit the extent and force of that obligation in personam or in rem; it may bind the party personally and not his estate, or it may bind his estate and not his person. (Story on Bills, Section 141.) "Suppose a contract by the laws of one country to involve no personal liability but merely to confere a right to proceed in rem; such a contract would be held everywhere to involve no personal obligation." (Story on Bills, Sec. 142.)

Capacity of Parties.-- "It is a principle of universal law, --that the legal capacity of persons to act and make contracts for themselves, depends upon the law of the state or country where the transaction takes place, as to all personal matters." (Rorer on Inter-State law, 190; Graham v. First Na.Bk., 84 N.Y., 402.)

Defences and discharges should perhaps, be here discussed, but I prefer to devote a separate chapter to their consideration.

The Law of the Place of Payment.

When a personal contract is made in one country and either expressly or tacitly to be performed in another, the general rule is, in conformity to the presumed intention of the parties, that the law of the place of performance governs its validity, nature, obligation and interpretation. (Jewell v. Wright, 30 N.Y., 259; Andrews v. Pond, 13 Peters, 65; Dickenson v. Edwards, 77 N.Y., 573.) But what is meant by the place of performance of a bill of exchange or note, other than the place where it is payable. Thus in the case of Everett v. Vendryes, 19 N.Y., 437, where a suit was brought upon a bill of exchange made in New Granada addressed to a resident of New York city and consequently payable there, J.Denio stated that "the laws of this state are to be resorted to in ascertaining its nature and interpretation, and the duties and liabilities which it created."

Now the question arises how is the place of payment

determined when no particular place is designated in the instrument. In the absence of express statements to the contrary the place of payment is presumed to be the same as the place where the contract was made, or dated. (Thompson v. Ketchan, 4 Johns., 285; Jones v. Rider, 60 N.H., 452.) Except ^{that,} where both the contracting parties were in transitu at the place where the contract was made, the place of payment will be presumed to be the domicile of the obligor. (Wharton Conflict of Laws, Sec. 402.) But in case only one of the parties was in transitu the place of payment will be presumed to be where the contract was made. (Foten v. Slater, 4 Johns. 183.)

Whether a note is negotiable or non-negotiable, is it seems, to be determined by law of the state where it is payable. (Stephens v. Gregg, 12 S.W., 775.)

The law of the place of payment according to the uniform commercial practice regulates the formalities in respect to the presentation, protest and giving notice of dishonor of a bill of exchange or note. Also whether the instrument has days of grace and how many, as their number varies, in different countries, from three to thirty. (Bowen v.

Newell, 13 N.Y., 290; I. Dan.Neg.Instr., p. 923.)

Presentation.-- On the question of timely presentation, the law of the place where^a foreign bill of exchange is payable governs and not the law of the place where it is drawn. Whatever is required to be done at the place where the bill is drawn, to constitute a sufficient presentment either in time or manner, must be done according to that law; and whatever time is premitted within which the presentment may be made by that law the holder may take without losing his rights upon the drawer, in case the bill is not paid." (Pierce v. Indseth, 106 U.S., 546.) The same rule applies to promissory notes. (Woolley v. Lyon, 117 Ill., 214.)

Protest.-- In case a foreign bill of exchange or note is dishonored, it is necessary that it should be protested and the protest must be made, at the time, in the manner and by the person prescribed by the law of the place where the instrument is refused acceptance or payment. (I Dan. Sec. 909.)(Pierce v. Indseth, supra.)

Notice of Dishonor.-- The authorities are divided as to what law governs the requirements in respect to notice

of dishonor. One view, and it is held in New York, is that as the contract of endorsement is governed by the law of the place where made, the requirements as to giving notice of dishonor, which is a condition precedent to the liability of the endorser, must be determined in respect to each successive endorsement in accordance with the laws of the respective states or countries in which such endorsements were made.

(Aymar v. Seldon, 12 Wend., 444; Lee v. Sellock, 33 N.Y., 615)

The other, which seems the more reasonable and which may be stated as the English view, is that notice of dishonor is sufficient if it is in accordance with the laws of the place where the dishonor occurs. (Rothschild v. Currie, 1 Ad.& El., (N.S.) 43.)

The first rule involves the law in regard to notice in great perplexities and casts an almost intolerable burden upon the holder of negotiable paper that has been transferred in sever different states or countries. Illinois and some other states have adopted the English rule, that the notice should be in accordance with the law of the place where the bill or note is payable, as resting upon the better reasoning. (Woolley v. Lyon, 117 Ill., 248.)

It was determined in a late case, that the time within which notice of dishonor must be mailed, is determined by the law of the place in which a bill is payable. (Brown v. Jones, 25 N.E., 452.)

Currency.-- The currency in which a contract is payable is to be that of the place where the money called for is payable. (Wharton C.L., Sec. 514.)

Alteration.-- It seems, that the law of the place of payment determines whether the addition of certain words is a material alteration. (Saxton v. Altman, 15 O.St., 464.)

Lex Domicili.

A question sometimes arises, the determination of which depends upon the domicile of one or more of the contracting parties. "By the term domicile is meant the place whereat a person a person makes his residence with intent to indefinitely there reside without any expectation of removing in the future therefrom." (Rorer on Inter-State Law, 183.) The ability of a party to contract depends upon the law of the domicile, when the question is one of personal ability or disability. Thus the right a married woman to contract depends upon the law of her domicile. (Mathews v. Murchison, 17 Fed. Rep., 760.) Apparently this is directly contrary to what has been previously stated, but it is explained in that the contract was actually made, in this case, at her domicile. Mr. Story states the rule thus: "The capacity, state, and condition of persons according to the law of their domicile, will generally be regarded as to acts done, rights

acquired and contracts made in the place of their domicile touching property situated therein." (Story C.L., Sec.101.)

Where a bill of exchange, payable in London, was drawn in England upon a firm in Boston and one of the firm, whose domicile was in Boston, being in England there accepted the bill in the firm name; it was held that the instrument was a foreign bill and to have the same effect as if it had been sent to Boston and there accepted. (Grimshaw v. Bender, 6 Mass., 157.) But under similar circumstances, a contrary view has been taken in New York. (Foden v. Slater, ante.)

It has been held, where all the parties went into another state merely for the purpose of effecting there negotiations, no place of performance being named, that the contract was to be performed at the place where the obligors resided. (James v. Arnold, 51 Ga., 210.)

Lex Fori.

The courts have always expounded and executed contracts made in a foreign country according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policies of their own country. (Bank of Augusta v. Earle, 13 Pet., 520; Scoville v. Canfield 14 Johns., 338.)

The remedy to be allowed upon the breach of a foreign contract, and all questions of procedure are to be determined by the then law of the place where the remedy is sought. (Scudder v. Union Nat.Bk., 91 U.S., 406; Scoville v. Canfield, supra.) But this should be in such a manner as to give effect to the contract according to the laws which give it validity. (Camfranke v. Burnell, 1 Wash.C.C., 340.) The form of the action to be brought; parties; admissibility of evidence; competency of witnesses; statute of limitation;

set-off; arrest; and form of judgment are some of the salient questions, determined by the lex fori, which I shall briefly discuss.

Form of Action.-- The question whether to bring an action of debt or assumpsit sometimes arises when there is a scroll attached to the promisor's name. If by the lex fori the scroll is recognized as a seal, the instrument is treated as a specialty and an action of debt or covenant should be brought; but if not so regarded then should bring action of assumpsit. (I. Dan section 805.)

Parties.-- Whether an assignee can maintain an action in his own name or is obliged to use the name of his assignor is determined by the lex fori. (Mayhew v. Bente cost, 129 Mass., 332.)

Evidence.-- In no case will the foreign law be permitted to control and supersede the rules of evidence of the lex fori. (Kirtland v. Wanzer, 2 Luer, 278.) Thus the lex fori determines whether parol evidence is admissible to explain a blank endorsement. (Downes v. Chesebrough, 30 Conn., 39.) And whether a foreign certificate of protest is admissible to prove demand and notice of dishonor. (Bk. of

Rochester v. Gray, 2 Hill, 227.)

Witnesses.-- Whether a witness is competent or not is to be determined by the lex fori. (Story C.L., sec. 635.) The fact that a witness is incompetent in another state by reason of his conviction for crime in that place does not effect him unless he is rendered incompetent by the lex fori. (Sims v. Sims, 75 N.Y., 466.)

Statute of Limitation.-- It is well settled that the time within which suit must be brought is determined by the lex fori. (Lincoln v. Batelle, 6 Wend., 475.) Even where by the lex loci contractus a much longer time is allowed ^{with} in which suit may be brought. (Nichols v. Rodgers, 2 Paine C.C. 437.) The question at what precise time a suit is deemed to have been commenced is determined by the law of the state where the action is pending. (Goldenburg v. Murphy, 108 U.S., 162.)

It has been held that the statute of limitation^s of the lex fori is a good defence or bar to a suit brought to enforce a foreign judgment. (Bailey v. Cohen, 13 Pet. 312.) Where a contract is made between residents of another state the statute of limitations of such other state cannot be pleaded to a suit brought in New York, though the parties continued

to reside in such other state until the statute became a complete bar. (Power v. Hathaway, 43 Barb., 214.)

Set-off or Counter-claim.-- The general rule is that at common law, a set-off to an action allowed by the local law, is to be regarded as a part of the remedy, and is therefore admissible by the lex fori, although not admissible by the lex loci contractus. (Ruggles v. Keeler, 3 Johns., 263.) And where a set-off is admissible by the law of the place where the contract is entered into and not by the lex fori it will not be enforced. (Bank of Gallipolis v. Trimble, 6 V.Mon., 600.) But it has been held that if a payment before maturity ^{is no defence} against a bona fide holder for value, by the lex loci contractus, that law will control the forum and exclude the defence. ((Harrison v. Edwards, 12 Vt., 648.)

Arrest.-- The right to an arrest of the defendant appertains to the remedy and not to the right. Thus you may have an arrest of the defendant in an action upon a personal contract, made in a foreign state or country, if the lex fori so provides, although by the law of the place of contract his arrest would not have been permitted. (Peck v.

Hozier, 14 John., 346.)

Form of Judgment.-- The form of judgment to be rendered and the execution to be issued must conform to the lex fori although the party defendant may, in his domestic forum, be entitled to a judgment exempting his person from imprisonment, (Woodbridge v. Wright, 3 Conn., 523.)

Foreign Laws.-- The courts do not take judicial notice of the laws of other states or countries and when a party wishes their benefit, they should be pleaded and proved like other facts in the case. In the absence of such allegations and proof, the foreign law will be presumed to be the same as the law of the place where suit is brought. (Monroe v. Douglass, 3 N.Y., 447; Chapin v. Dobson, 73 N.Y.,) "It is doubted, however, whether this presumption will be made of statute law. It will not be made of ^a statute imposing a penalty or forfeiture. And it has been declared that a court cannot take notice judicially, of any laws of other states not according to the common law." (Harris v. White, 81 N.Y., 544.) Thus a third party endorsing a note before it is delivered, is by Massachusetts law an endorser, and in the absence of any evidence to the contrary, this will be presumed to be the Rhode

Island law as to an endorsement made there, when suit is brought in the courts of Massachusetts. (Dubois v. Mason, 127 Mass., 37.) This presumption will not be made to render a note void because made on Sunday, it not being void at common law. (O'Rourke v. O'Rourke, 43 Mich., 58.)(Swann v. Swann, 21 Fed., 299; and contra, 41 Ga., 449)

The decisions of one state construing the common law or law merchant applicable to a contract made there do not bind the courts of other states. (Nat.Bk. of Mich. v. Green, 33 Ia., 140; StNicholas Bk. v. State Nat.Bk., 128 N.Y., 33) But the decisions, of the tribunals of another state as to the true construction of its laws, are binding upon the courts of other states. (Hunt v. Hunt, 72 N.Y., 217)

The lex mercatoria being of general, if not of universal application has been held to be prima facie, the foreign law as to the allowance of days of grace. (Lacus v. Ladeu, 28 Mo., 342)

It has been provided by statute in some countries, that the lex loci contractus shall govern their courts. (I. Randolph on Commercial Paper, sec. 59.)

Lex Loci Rei Sitae.

The transfer of any real estate, the creation of any interest in or incumbrance thereon, must be made in conformity with the law of the place where such property is situated.

(Chapman v. Robertson, 6 Paige, 627.) While a note is to be governed by the law of the place where made or to be performed

The question, what law is to prevail in the settlement of interest when a mortgage is given as a security for a loan and the mortgage, is in one state and the place of payment of the loan is in another, has been frequently before the courts. "The true test is was the mortgage merely a collateral security, the money being employed in another state and under other laws or was the money, employed on the land, for which the mortgage was given. If the former be the case, then the law of the place where the money was actually used and not that of the mortgage, applies. If the latter,

then the law of the place where the mortgage is situated must prevail." (Wharton C.L., sec. 510.) The legal capacity of parties to make contract concerning the sale and conveyance of land depends upon the law of the state wherein the land is situated. This rule applies to questions of infancy, coverture, majority and legal capacity in general. (Rorer on Inter-State Law, 190.

Rights and Liabilities of Parties.

It may be stated as a general proposition that the rights and liabilities of every person who becomes a party to a negotiable instrument are to be determined by the laws of the place where he becomes a party, unless it stipulates for payment in another jurisdiction. (Hyde v. Goodnow, 3 N.Y., 269)

I shall now consider briefly the rights and liabilities of each of the parties to a negotiable instrument.

Drawer.-- Mr Daniel states the rule to be that: "the drawer of a bill does not bind himself to pay it specially where the acceptor is impliedly or expressly called on to pay it; but his contract is to pay generally, and is consequently construed to be a contract to pay at the place where the bill is drawn." Daniel section, 898. This rule apparently has some support, (Allen v. Kemble, 6 Moore P.C., 314) Freese v. Brownell, 35 N.J.L., 288; Lennig v.

Ralston, 23 Pa.St., 140) but noting the distinction between the rules applicable to the contract of the drawer and that of the endorser; the true rule is that the contract of the drawer of a bill of exchange is to governed by the law of the place of performance. (Everett v. Bendryes, 19 N.Y., 436; Hibernia Nat.Bk. v. Lacombe, 84 N.Y., 367) The case of Rouquette v. Overman, 10 L.Rep.Q.B., 525, criticises Allen v. Kembel, and treats the drawer of a bill of exchange as a surety for the due performance by the acceptor of the obligations which the latter takes upon himself by the acceptance. "His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be those of the surety."

Maker.-- The liabilities of the maker of a note are to be determined by the law of the place where the note was made unless it is payable elsewhere, in which case he will be deemed to have had reference to the law of such place and it will control his obligation. (Stephens v. Gregg, 12 S.W., 775; Hunt v. Standart, 77 Am.Dec., 79, note p. 87) Whether the party sued is to be regarded a joint promisor or otherwise, or as a surety is to be determined by the law of the

place of performance. (Lawrence v. Bassett, 5 Allen, 140; Backhouse v. Selden, 29 Grat., 581.)

Acceptor.-- The position of an acceptor of a bill of exchange is similar to that of a maker of a note and his acceptance is governed by the law of the place where made unless the bill is expressly payable elsewhere, in which case his liabilities are determined by the laws of the place of payment. (Bright v. Judson, 47 Barb., 29; Musson v. Lake, 4 How., 262; Webster v. Howe Machine Co., 8 At., 482.)

Endorser.-- Each endorser of a bill or note is regarded as creating a new contract by his endorsement and his rights and liabilities arising therefrom are to be determined by the law of the place where the endorsement was made. (Lee v. Selleck, 33 N.Y., 615; Everett v. Vendryes, 19N.Y., 436; Aymer v. Seldon, 12 Wend., 439; Williams v. Wade, 1 Metc., 82; Hunt v. Stedart, 15 Ind., 33) There is an indication in some cases and actually held in others that the law of the place of performance should govern in construing the contract of endorsement. (Briggs v. Latham, 13 Pac., 393; Rouquette v. Overman, 10 L.R., Q.B., 525; Wooley v. Lyon, 57 Am.Rep., 867) The liability of an accommodation endorser is to be determined by the law of the place where

the note is first negotiated to a bona fide holder. (Stubbs v. Colt, 30 Fed., 417; Lee v. Selleck, 33 N.Y., 615)

In case a bill is drawn or note made, in one state and endorsed in several states, the liabilities of each of the successive endorsers may be wholly different. One may be bound as a surety; another may not be liable until the holder has exhausted his remedy against the acceptor or maker; while a third may be liable, according to the general principles of the law merchant, immediately upon due notice of dishonor. (Daniel on Neg.Instr., sec. 899)

Assignor.-- The liability of an assignor of a note assigned in one state and sued upon in another will be governed by the laws of the state where assigned.(Crouch v. Hall, 15 Ill., 263)

Transfer.-- The mode of transferring a bill of exchange payable in a specific country or state is governed by the laws of that country or state. (Everett v. Vendryes, 25 Barb., 383, & 19 N.Y., 436.)

Mr Ames at page 807-8, Vol. II., criticises Everett v. Vendryes, and states the rule to be that "the transfer of a bill is governed by the law of the place where it is at

the time of transfer." Whether the transferor of a bill or note is liable as an endorser or assignor is to be determined by the law of the place of transfer.

"If an instrument is negotiable by the *lex loci contractus* and is transferred in accordance with the law of the place of transfer the transferee will get a good title although the bill would not be negotiable according to the law of the place of transfer." "If an instrument is not negotiable by the *lex loci contractus* its transfer wherever made will be no more than an assignment of a chose in action, and whether the assignee should bring an action upon the instrument in his own name or in that of the assignor will depend upon the *lex fori*." "If by the law of the place of transfer the legal title does not pass but only the beneficial interest, the question whether the transferee should bring an action in his own name or in the name of his transferor must be decided by the *lex fori*." (II. Ames on Bills and Notes, 808.)

Purchaser for Value.-- What constitutes one a purchaser for value is a question of commercial law and not a question of jurisdiction, accordingly it will be practically governed by the *lex fori*. (II. Ames B. & N., 806; *Swift v. Tyson*, 16 Peters, 1)

Defences and Discharges.

A defence or discharge, valid by the law of the place where the contract was made or to be performed is, as a general rule, to be held of equal validity in whatever jurisdiction the question is to be litigated. ((Andrews v. Herriot, 4 Cow., 515, note.) Thus if infancy, coverture, or a discharge by insolvent laws is a good defence by the *lex loci contractus*, it will be a good defence everywhere. (Daniel on Neg.Instr., Sec., 874.) The same is true of a tender and refusal which amounts to a full discharge by the *lex loci contractus*. (Wardor v. Arell, 2 Wash., (Va.) 282) The maker of a promissory note is entitled to any discount, against the payee, given by the *lex loci contractus*, although suit is brought in another jurisdiction. (Gilman v. A.King & Co., 2 Cr.C.C., 48.)

It may safely be laid down as a settled doctrine

that a discharge under the insolvent laws of one state is not a valid defence to an action brought by a creditor who is a citizen of another state and was at the time that the contract was entered into, although the contract was made and was to be performed in the state where the debtor received his discharge. (Baldwin v. Hale, 1 Wall., 223.) It is a general rule that a discharge of a contract by the laws of a place where it was not made or to be performed, will not be a discharge of it in another country. (Smith v. Smith, 2 Johns, 235; M'Millan v. M'Neill, 4 Wheat., 209.) Such a discharge relates merely to the remedy and will not be recognized by the courts of another state. (4 Cowen., note 530.)

If by the lex loci, payment by bill or note is condition^{al} payment only, it will be so regarded in states which hold such payment to be absolute, (Bartsch v. Atwater, 1 Conn., 409.) and vice versa. (Ward v. Howe, 38 N.H., 42.)

It is no defence to a suit brought here, upon a note payable here, that it was not stamped in accordance with the revenue laws of the country where made, (Ludlow v. Van Rensselaer, 1 Johns., 94.) but if the bill or note is void, for the want of a stamp, by the lex loci contractus, it will

be void every where. (1 Randolph on Com.Paper, Sec. 30.)

In an action **upon** a note made in violation of the **usury** laws, of a foreign state, which do not avoid the contract, the defendant cannot avail himself of the penalty given by the foreign law, even by way of defence, as our court will not enforce the penal laws of another state. (Willis v. Cammeron, 12 Abb.Pr., 245.)

The right of a surety to discharge his obligation by notifying a creditor to pursue the debtor, is part of the contract and the sufficiency of the notice is to be determined by the *lex loci contractus*. (Tennant v. Tennant, 100 Pa.St., 478.)

Interest and Usury .

Interest is payable, upon a personal contract, when no rate is fixed by the parties, according to the law of the country where the contract is made, unless it is payable in another country or state. (Fanning v. Consequa, 17 Johns. 510; Clarke v. Searight, 135 Pa.St., 173.)

"The general principle in relation to contracts made in one place to be performed in another is well settled. They are governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury'. The converse of this proposition is also well settled. If the rate of interest be higher at the place of contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate. These rules are subject to the qualification

that the parties act in good faith, and that the form of the transaction is not adopted to ^{dis}guise its real character."

(Miller v. Tiffany, 1 Wall., 310.)

The rate of interest ex mora, payable by an acceptor or maker is the rate which prevails where the bill or note is payable; while the rate payable by the drawer or endorser is the rate which prevails at the place where the drawer or endorser is bound to fulfill his contract of indemnity. (II. Ames Cases on B.&N., 806.) This rule as to the drawer or endorser is true which ever view is taken as to the law governing their contracts.

Where interest is allowed not under contract but by way of damage, the rate after maturity is according to the law of the forum. (Goddard v. Foster, 17 Wall., 123; Cromwell v. Co. of Sac., 6 Otto, 51.) After judgment recovered the rate of interest is governed by the lex fori. (Hoag v. Dessan, 1 Pitts, (Pa.) 390.)

Re-exchange is governed by the same rules as interest proper. (Randolph on Com.Paper, Vol. I., Sec. 42.)

USURY.- Blackstone's definition of usury is:

"An unlawful contract upon the loan of money to receive the

same again with exorbitant increase." (IV. Bl.Comm., 156.) Questions of usury must be determined by the *lex loci contractus*, even though the debt is to be secured by a mortgage on real property in another state. (*DeWolfe v. Johnson*, 10 Wheat., 383.)

Suppose a bill of exchange or note bears a rate of interest usurious both by the law of the place where drawn or made and by the law of the place of payment. Which law is to determine the legal consequences of the usurious agreement? "Unquestionably it must be the law of the state where the agreement was made and the instrument taken to secure its performance." (*Andrews v. Pond*, 13 Pet., 78.) Thus a bill drawn in New York and payable in Alabama, if tainted with usury, is void by the laws of New York, and no recovery can be had thereon; while by the laws of Alabama, the principal is recoverable, but without any interest.

To render an agreement void for usury, there must have been established an usurious intent in its making and that must be shown by the party who sets it up. (16 Wkly.Dig. 231.)

"In *Dickinson v. Edwards*, 17 N.Y., 573, the decision

in Jewell v. Wright, 30 N.Y., 259, was adhered to, and it was held that where a promissory note was made in this state by a resident thereof, bearing date and, by its terms, payable in this state, with no rate of interest specified, and was delivered to the payees without consideration, to be used by them for their accommodation, without restriction, and was first negotiated in another state at a rate lawful there but greater than that allowed by law in this state, it was usurious and void, there being no evidence in the case of any intention on the part of the maker that the note should be discounted out of this state." But upon its being shown that such note was intended to be first negotiated in another state or was made in accordance with an agreement there made, it will be held valid. (Wayne Co. Sav.Bk. v. Low., 81 N.Y., 570; West. T.&Coal Co. of Mich. v. Kilderhouse, 87 N.Y., 439; Staples v. Nott, 128 N.Y., 407; Sheldon v. Haxton, 91 N.Y., 129; Tilden v. Blair, 21 Wall., 241.) In determining whether a bill or note is usurious, the courts have leaned noticeably to decisions sustaining the instrument, if valid, either, by the law of the place of contract, or of payment. (I. Randolph, on Com.Paper, Sec. 43; 19 Albany L.J., 387.)

Owing to the peculiar nature of this treatise it is impracticable to attempt, to draw any general conclusion except the statement, that the present tendency of the courts is apparently in the direction of applying the law of the place of performance to the determination of all questions, not strictly appertaining to the remedy. This is especially true of New York decisions.

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