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THE UNIFICATION OF THE LAWS

CONCERNING

BILLS OF EXCHANGE.

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THE UNIFICATION OF THE LAWS CONCERNING BILLS OF EXCHANGE.

By BERNARD SICHERMANN.

FORTUNE does not seem to favour the attempts made for an international unification of the laws concerning bills of exchange. Whereas the idea of an international united railway-freight law, started in the year 1874, was successfully realized in the comparatively short space of time of sixteen years by the Treaty of Berne in 1890, in spite of the abundance of technical and legal difficulties and without any fuller scientific preparations, we still stand as far from our desired end as we did twenty years ago, indeed perhaps farther. For even in the last two years Austria (1906) and Germany (1908) have passed their new cheque laws, and Hungary will soon rank among them; which laws—thanks to the cheque conference of the "Mitteleuropäischer Wirtschaftsverein," held in Budapest in 1907—certainly show signs of the efforts made for unity; but still, however, differ in essential questions, and to my mind to their disadvantage, from the English-American laws, thereby considerably enlarging the gulf which exists between the German and Anglo-American legal views concerning the negotiable instruments.

Nevertheless it is our duty to continue in our efforts towards unification, for it is the task of the legal world to prepare the way for the development of a secure and undisturbed traffic, and the closer the international traffic becomes, the more will be felt the disadvantages arising from the diversity of the laws of the different countries.

That this particularly relates to the laws of bills of exchange needs no further argument.

The fluctuation of the international exchange intercourse amounts to hundreds of millions, and if in this colossal intercourse, in spite of the diversity of the laws of exchange, no

stagnation worth mentioning is noticeable, it is thanks to the fact that those classes which participate in this intercourse apply more particular care to it, and do all to preserve the demands of "good faith."

Moreover, no branch of law disposes over conditions so favourable for international unification. It deals with an abstract instrument, which naturally, with its independence of the legal relations forming the source of the liabilities of the bills, also connects an independence of the national laws ruling these legal relations.

Mr. Justice Story has rightly said: "The law respecting negotiable instruments may be truly declared .... to be in great measure not the law of a single country only, but of the whole commercial world."

A foundation on which one may confidently attempt the definite solution of the problem has also been laid by the so-called "Bremer Regeln," by the project of the Institut de Droit International, by the projects of Antwerp and Brussels, and, further, by the scientific treatment of the single questions. I here particularly mention the fundamental treatise of Dr. Felix Meyer, of Berlin.

Congresses and conferences cannot very well effect this very desirable solution; they cannot work out legal projects or hold protracted consultations over the extreme details of possibly submitted bills; still, such gatherings can certainly, as Dr. Meyer rightly says, give an impetus to a movement which shall rouse the interest of the participating classes, Parliaments, and Governments, and keep them aroused; they can take resolutions on single questions, and thereby prepare the ground for the successful working of an international committee sent out by the participating Governments.

Therefore, I suppose that this Conference will not reach beyond these limits either, and as to the unifying regulations of this branch of law will bind itself to the setting up, or rather to the overhauling, of resolutions touching the most important questions.

There was at one time much discussion as to which of the three types of the existing law of bills of exchange—the Anglo-American, French, or German—should be the standard in the composing of these resolutions, but about this opinions have now become quite cleared.

On all sides it is recognized that the German law of bills of exchange contains the most suitable rules for the bills in their abstract nature. Chalmers rightly indicates it as "the most elaborate and carefully worked-out of the foreign codes";

on the other hand, in its rules concerning the forms of the bills and the single legal acts it is hard and fast, and gives no room for equity. In the same way it is recognized that the English law of bills of exchange—if it does not work out the abstract nature of the bills in so plastic a manner—is still more flexible in its rules concerning the formalities, and more adaptable to the claims of equity. Lastly, it is not to be denied that the French code, however excellent it may have been at the time of its creation, seems to have been overtaken in one direction by the German, and in the other by the English code; but however, by the aid of the French jurisprudence, it contains much that is estimable and that can be used in unification.

This yields the natural inference that in general, with all due regard to the French jurisprudence, for questions relating to the abstract nature of the bill of exchange the German code takes the first place; but in questions of formality the English law is more fitting as a foundation of an international unification of laws concerning bills of exchange, respectively for stating the resolutions concerning this law.

On the whole, the so-called "Bremer Regeln" answer to these views, and therefore it is still advisable to take them as a starting-point, with those alterations that, with regard to the since created English law, correspond to the wishes for further facilitating unification.

Consequently I take the liberty of proposing the following resolutions to the Conference, while adding a short argument, naturally only in the case where these differ from the so-called "Bremer Regeln":—

"1. The capacity to contract by means of a bill of exchange shall be governed by the general capacity to enter into an obligation.

"2. To constitute a bill of exchange it shall be necessary to insert on the face of the instrument the words 'Bill of Exchange,' or their equivalent.

"3. It shall not be obligatory to insert on the face of the instrument or on any indorsement the words 'value received,' nor to state a consideration.

"4. Usances shall be abolished.

"5. The validity of a bill of exchange shall not be affected by the absence or insufficiency of a stamp.

"6. A bill of exchange shall be deemed negotiable to order, unless restricted in express words on the face of the instrument or on an indorsement."

Referring to this resolution, I feel obliged to mention that, though the resolution settles the question in so far that it acknowledges the bill as negotiable by nature, there still remains a difference between the English and German law as to the effect of the restrictive indorsement prohibiting the further negotiation of the bill. According to the English law (§ 35) the restriction of the indorsement stops the negotiability altogether; according to the German law (§ 15) the indorser's prohibition of transfer saves this indorser only from the recourse of the followers of his indorsee.

But as this difference is not the outcome of any discrepancy in principle, I think that it will easily be settled among the other questions of less importance.

"7. The making of a bill of exchange to bearer shall *be* allowed.

"*The bill of exchange shall not be invalid by reason that it is not dated or does not specify the place where it is drawn, or the place where it is payable.*"

Differing from the "Bremer Regeln," the bills payable to bearer shall be admitted, and the place of payment and the date of drawing shall not be declared as essential requisites of the bills of exchange.

Dr. Felix Meyer defends this opinion in his treatise, giving reasons which I entirely agree with.

I only wish to emphasize here that it is generally recognized as desirable that the number of essential requisites in a bill of exchange should be reduced; further, that this standpoint corresponds to the Anglo-American law, and that it is easier in the unification of diverging laws to drop requisites than to take them up; and, lastly, that the bills payable to bearer have become so naturalized in the territories of Anglo-American law that it is hardly to be expected that they will give them up; while, on the other hand, the cheques payable to bearer have, in the last years, worked their way without any further harm into the countries ruled by the French and German laws:—

"8. The rule of law of *distantia loci* shall not apply to bills of exchange.

"9. A bill of exchange shall be negotiable by blank indorsement.

"10. *The indorsement of a bill of exchange shall not be affected by reason that the bill was overdue at the time of the indorsement.*"

The tenth resolution of the "Bremer Regeln" runs thus:—"The indorsement of an overdue bill of exchange

which has not been duly protested for dishonour for non-payment shall convey to the holder a right of recourse only against the acceptor and indorsers subsequent to due date. Where due protest has been made, the holder shall only possess the rights of the indorser to him against the acceptor, drawer, and prior indorsers," and corresponds to § 16 of the German law. Still, these regulations are not, for the most part, accepted, even by those codes which have otherwise adopted the German law of bills of exchange, Hungary being among their number.

However much Prof. Grünhut fights for the correctness of the German standpoint, it is still not obvious why such an influence should be granted to the protest, and that *in pejus* in this relation. But also this opinion, that the indorsee of an overdue bill only enters into the rights of his indorser—standpoint of the English and Hungarian laws, as well as of the German by the protested bill—does not answer to the abstract nature of the contracts of exchange, and not to the exigencies of the intercourse of bills; besides which this does not accord with § 74 of the German and § 80 of the Hungarian law. Therefore it seems more to the point to yield to the French jurisprudence, which grants to the indorsee of an overdue bill, without any regard to the protest, entirely independent rights, and places him on an equality with the indorsee of a not overdue bill.

Also the Congress in Brussels, on account of a motion from German quarters, spoke for the equality of all the indorsers, and I think this standpoint should be maintained.

The proposed solution settles also the question whether the indorsement of an overdue bill does create a bill payable on demand or not.

I willingly admit that the English-German standpoint—that is, taking the indorsement of an overdue bill for the drawing of a bill payable on demand—may be logical, even ingenious; it forms a source of beautiful questions of law and of fact, questions the most acute lawyers may quarrel about; *e.g.*, where the indorsement bears no date, the question whether the negotiation has been effected before the maturity of the bill or after it was overdue?; or the question, from when the term of presentment shall be regarded as running, whether from the date of maturity, or the date to be proved, of the first indorsement after maturity? What about the holder, who got the overdue bill by a blank indorsement effected before maturity? &c.. &c.

But I do not think we are making laws to create most interesting questions and to sharpen our wits; on the contrary, the more simple our solutions are, and the less they give an opportunity of raising questions of law and of fact, the more they will suit the exigencies of commerce, especially of an international traffic.

Our practice shows that there is no real reason for giving the indorsee of an overdue bill recourse against his indorsers, and to treat, for this purpose only, the negotiation of an overdue bill as the creation of a bill payable on demand. If we do not do so, the rule that the indorsement shall not be affected by reason that at its date the bill was overdue, raises no new questions at all, the effect of this indorsement being then only that of transferring the ownership and giving full legitimation.

"11. The acceptance of a bill of exchange must be in writing *on the bill itself*. The signature of the drawee, without additional words, shall constitute acceptance, if written on the face of the bill."

It is true that the corresponding resolution in the "Bremer Regeln" requires that the distinct acceptance, too, should be written on the front of the bill of exchange; still this seems to be an unnecessary formality, to be found in neither the German, English, nor French codes:—

"12. The drawee may accept for a less sum than the amount of the bill.

"13. In case of dishonour for non-acceptance, or for conditional acceptance, the holder shall have an immediate right of action against the drawer and the indorsers for payment of the amount of the bill and expenses, less discount, *according to the legal rate of interest of the place of drawing*."

The corresponding resolution in the "Bremer Regeln" does not mention the amount of discount agreed to.

The nature of the claims on the bills, however, requires certainty in every direction, and it is therefore advisable to fix the amount of the discount, and that according to the legal rate of the place of drawing, for in the end it is the drawer who is responsible for repayment:—

"14. *Provided that where an acceptance is written on a bill, and the drawee is no longer in possession of it, or has given notice to or according to the directions of the person entitled to the bill that he has accepted it*, the cancellation of a written acceptance shall be of no effect."

The corresponding resolution of the "Bremer Regeln"

runs thus:—"The cancellation of a written acceptance shall be of no effect," according to § 21 of the German law.

As it is doubtless also the case that in the territories of the German law of bills of exchange, the drawers, indorsers, &c., may revoke their declaration placed on bills and respectively cancel their signatures, as long as they are in possession of it, so there exists no serious reason why one should make an exception for the acceptor, and for the sake of theoretical scruples render the unification more difficult.

It is therefore advisable in constructing these resolutions to yield to the French jurisprudence and the English law:—

"15. Where the acceptor shall have committed an act of bankruptcy before due date, the holder shall have an immediate right of action against the drawer and indorsers for payment of the amount of the bill and expenses, less discount, *according to the legal rate of interest of the place of drawing.*"

The reasons for the additions referring to the amount of the discount were given above, *vide* 13:—

"16. No days of grace shall be allowed.

"17. The holder of a bill of exchange shall not be bound, in seeking recourse, by the order of succession of the indorsements, nor by any prior election.

"18. Protest, or noting for protest, shall be necessary to preserve the right of recourse upon a bill of exchange dishonoured for non-acceptance or for non-payment.

"19. Immediate notice of dishonour shall *not* be necessary to preserve the right of recourse upon a bill of exchange."

The corresponding resolution of the "Bremer Regeln" accepts the English standpoint declaring notice to be necessary to preserve the right of recourse.

Though it be desirable that the dishonouring of a bill should be notified to the liable parties of the bill as soon as possible, still it seems too much that omission of notification should be punished by the loss of the entire right of recourse.

In most cases the holder of the bill will, in his own interest, notify the solvent preceding indorser as soon as possible, but should he, by way of exception, not do so, this omission can scarcely be so harmful to the not notified that it could justify the entire discharging of such a one.

Perhaps one should consider the constitution of a duty to notice in the sense of the German law, that is, under liability for damages and loss of the right to interests and costs, and must then complete the above resolution conformably.

But still this duty of notice is also difficult to accord with the indorsement in blank, and with the "simultaneous right of action on a bill"; therefore it would be advisable to meet the French law, and to abstract from the constitution of a special and immediate duty to notice:—

"20. The time within which protest must be made shall be extended in the case of *vis major* during the time of the cause of interruption."

The end of the corresponding resolution of the "Bremer Regeln"—"but shall not in any event exceed a short period of time to be fixed by the code"—should be left out, because it contradicts the antecedent part of the sentence; besides, the establishing of such a period is only arbitrary, and would lead to want of equity in case of letters of respite.

"21. No annulling clause need be inserted in duplicates."

This resolution still leaves a difference of importance between the English and German (French) law. The latter entitles *ex lege* the payee to demand a set from the drawer; and if a bill, issued singly, be destroyed or lost, the indorsee can demand duplicates without further security by addressing himself to his immediate indorser, who applies to the indorser before, and so on up to the drawer, who in the same turn deliver the duplicates, having signed them conformably.

In England the obligation to give a set is presumably a matter of bargain. If there was no agreement made about the giving of a set, no holder is entitled to demand it. Even where a bill has been lost (before it is overdue), the owner of it can apply only to the drawer to give him another bill of the same tenour, but not without giving security.

The institution of the bill in a set is on the way to become obsolete, and thanks to this the many dangers for creditors as well as debtors connected with the issue of duplicates are not so much felt or, rather, known; but they still exist, and therefore it is not right to compel the drawer and the indorser to deliver duplicates without agreement, and even without security, to holders they perhaps never had the least intention to trust.

In consequence the English law seems more to answer the real interests of the parties liable on the bill, and therefore this resolution should be supplemented in the following manner:—

"*There shall be no obligation to give a set or a duplicate without an agreement between the parties thereto.*

"*Only in case where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to*

give him another bill of the same tenour, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again." (§ 69 E).

"22. A simultaneous right of action on a bill of exchange shall be allowed against all or any one or more of the parties to the bill.

"23. The surety upon a bill of exchange, *donneur d'aval*, shall be primarily liable with the person whose surety he is.

"24. The capacity of a foreigner to contract by means of a bill of exchange shall be governed by the law of his country, or, *if he belong to more than one country or if his country cannot be established, by the law of his domicile;* but a foreigner who enters into a contract of exchange, being incapable of binding himself by such a contract in his own country or *domicile*, shall be bound, if he is capable of binding himself, by such a contract under the law of the country in which he contracts."

The corresponding resolution of the "Bremer Regeln" does not allude to those still not rare cases where the person concerned is the subject of divers countries, frequently the members of Royal families, or where it is not possible to ascertain to what State they belong. In such cases it is advisable to apply to the *lex domicilii*:—

"25. *The owner of a lost or destroyed bill of exchange has a right, upon giving security, to payment of the bill by the acceptor.*"

The corresponding resolution of the "Bremer Regeln" runs thus:—"The owner of a lost or destroyed bill of exchange, duly protested for want of payment, has a right, upon giving security, to payment of the bill by the acceptor, any indorser prior to himself, or the drawer." The statement contained in this, that protest is also necessary against the acceptor, evidently relates to an error, for in the sense of the "Bremer Regeln" protest for want of payment is in this case altogether unnecessary.

The further statement, according to which the owner of a lost bill may claim payment from the indorsers and the drawer too, does not appear to be justified.

Strictly speaking, the claim should also be lost with the instrument in which it is embodied. In spite of this a right to payment can be granted out of equity to the owner of a lost bill against the acceptor, for the acceptor has received funds for it and must deliver them, without being entitled to seek

recourse. Thus he does not fulfil more than he would have to fulfil if the bill were not lost. It is not so, however, with the other parties liable; each would have recourse against his preceding indorser by reason of his payment; but, if the owner had lost the bill and could not therefore deliver it, each would likewise have to give security to his preceding indorser, thus fulfilling more, and that in the amount of the bill of exchange, than he would have had to fulfil if no accident had befallen the owner; besides, he must run all risks of claiming and suing without an instrument—risks well known to every practitioner; thus, to entitle the losing owner against the preceding indorsers would mean dispensing equity in favour of the owner, but at the cost of the other parties liable.

Therefore the Hungarian law quite rightly allows the owner a claim on the acceptor only, which is according to the text of the German law, and is the opinion which has been expressed in its time by the "Deutsches Reichsoberhandelsgericht" on the basis of this text, as well as on that of the protocols of the Conference of Leipsic. Still, it must be allowed that in the newer German jurisprudence distinguished authors—Dernburg, Cosack, Staub, Grünhut, Felix Meyer—are of the opinion that the owner of a lost bill, if duly protested, may seek recourse against the preceding indorsers too, after the amortization of the bill, just as it must be allowed that, according to the French and English laws, such recourse is also admissible:—

> "26. The limitation of actions upon bills of exchange against the acceptor and his surety shall be *three years from due date and six months against all the other parties from the same date, provided the holder of the bill is claiming, else from the date when the indorser or drawer has paid the dishonoured bill, or has received summons referring to that bill.*"

The corresponding resolution of the "Bremer Regeln" runs thus:—"The limitation of actions upon bills of exchange against all the parties—acceptor, drawer, indorsers, and sureties=*donneurs d'aval*—shall be eighteen months from due date."

It would certainly be advisable to regulate the limitation of actions against all the liable parties uniformly, but this would mean presuming a strict duty to give notice, such a one as is intended in the nineteenth resolution of the "Bremer Regeln"; for only then is the preceding indorser of the holder assured that he gets immediate notice of dishonour, and is so

enabled to take up the bill at once and to sue his own preceding indorser in due time.

But if the immediate notice of dishonour shall not be necessary to preserve the right of recourse, then the term of prescription for the drawer, indorser, &c., must be shortened accordingly; otherwise the holder would have it in his power to bring an action against the drawer or indorser at a time when they could no longer sue their preceding indorsers, or receive any reimbursement from them.

The German law states this shortened term differently, according to the situation of the place of payment, respectively the domicile of the preceding indorser who was compelled to pay the dishonoured bill; but such differences would be out of place in an international united law, and it is not even necessary nowadays, communication being so rapid.

The term of the limitation of the action against the acceptor is according to the German law, and should be preserved, as being nearer to the longer term in the French and English laws:—

> "27. In the foregoing articles the term 'bill of exchange' shall include promissory notes, where such interpretation is applicable; but 'promissory note' shall not apply to coupons, bankers' cheques, and other similar instruments in those countries where such instruments are classed as promissory notes."

Among the many laws of bills of exchange, even among those belonging to one type, there are of course still a great number of discrepancies—as, for instance, the form in which the sum payable shall be expressed. Whether a promise of interest is admissible, does the stating of instalments avoid a bill? May the bill be payable at a market or at a fair or at a fixed period after the occurrence of a specified event which is certain to happen? How do holydays, &c., affect the day on which the bills falls due? What about the time and form of protest? Still, these are mostly details which would be solved without difficulty by the draftsmen of the unification bill and the international committee to which that bill would be submitted; they also will surely decide the question of forged or unauthorized signatures, not in the sense of the English law (§ 24), but in that of the German (§§ 36, 74), that is, that whosoever pays or acquires a bill in good faith, is not obliged to prove that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person, whose indorsement it

purports to be, and that he has paid or acquired it in due course, although such indorsement has been forged or made without authority; as this standpoint has been already accepted unanimously by the project of the *Institut de Droit International*, (§ 54), as well as by those of Antwerp (§ 32) and Brussels (§ 32).

One question of a more serious nature is the question of the funds in the hands of the drawee—that is, whether the drawing of a bill may operate as an assignment of them in favour of the holder, and create a privity between holder and drawee. But this question, though important with regard to France (and its followers) and Scotland, belongs rather to the common law and may, if these countries would not yield, be left free to them.

It is therefore advisable not to exceed the limits of the "Bremer Regeln" here, but instead to insist with still greater energy that the edifice of the unification of the law for bills of exchange shall be at length erected on the foundation here given.

Therefore I propose that:—

"The Conference declares that it considers the unification of the laws for bills of exchange a pressing necessity in the interests of international traffic.

"The Conference further declares that it will maintain the so-called 'Resolutions of Bremen' with the modifications proposed above.

"Consequently the Conference should apply to the ——— Government that it should, with regard to the above resolutions, have the draft of a Bill drawn up as *loi type*, and shall forward the same for discussion to a select committee sent out by international agreement."