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PAPER ON

THE UNIFICATION OF THE LAW OF BILLS OF EXCHANGE.

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BY

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THE UNIFICATION OF THE LAW OF BILLS OF EXCHANGE.

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I APPROACH the subject of International Exchange Law with some diffidence since, as far as I am aware, the English commercial world have never, at least of recent years, given official expression by the agency of any Chamber of Commerce of their views on the subject, or of any desire for alteration of the existing Bills of Exchange Law of 1882, except as regards one minor point relating to banking practice which has been duly carried into effect. It is in fact a striking testimony to the efficacy of that law, that it does in truth, as of course it was intended to do, satisfy the requirements of the English trader. The position of affairs from the English point of view is therefore to a great extent a negative one. The English are notoriously a race averse to any violent changes based on views of purely theoretical utility. If change must come they will at least require cogent reasons based on practical grounds to induce them to accept the change. I do not suppose that any English trader would deny the advantages to be derived from the creation of an international bill of exchange law, but at the same time he would require that law to be of such a character as to involve the slightest possible alteration in the procedure to which he has been so long accustomed, a procedure which has, moreover, so long suited his requirements. This is notoriously the great stumbling-block in the path of all international codification. Every nation desires with singular unanimity that other nations should fall into line with them, and should adopt their law practically *in toto*. I do not attempt to defend what I honestly believe to be the opinion of ninety-nine out of every hundred English traders on the subject, since it constitutes, if I may so express it, an international trait by no means confined to the English race. This much may, however, be said in defence of such an attitude, and that is to lay stress on the antiquity, so to speak, of the English law. It

is quite true that our code is scarcely more than a quarter of a century old, far more recent in date, therefore, than either the French or German codes. On the other hand, the principles recognized in that code are in the vast majority of cases of long standing usage. The code, with but few minor exceptions, introduced no fundamental changes; it simply evolved from the tangled mazes of case-law a definite statement of law which might be understood by the average business man, who in former days would have had perforce in all probability to have obtained legal assistance to enable him to gain a clear idea of his legal position in any given set of circumstances. Exact dates it may well be impossible to give, but it is probably not an exaggeration to say that the leading principles of English law, as now embodied in the code, were definitely settled by the expensive and thorny process of litigation upwards of a hundred and fifty years ago, in the days of Lord Mansfield, who was Chief Justice of the King's Bench between the years 1756 and 1788. The earliest reported case appears to date from as early as 1603, while by the middle of the seventeenth century the employment of bills of exchange seems to have become fairly general. A treatise on the subject was written by a public notary, as he is described, named Marius about 1650, which contains many principles still to be found in our law.* It may well be, for all I know to the contrary, that as long standing a usage in connection with bills of exchange may be found in other countries. They may of course be traced back to the Italian republics of the Middle Ages, though their existence earlier than the 14th century seems doubtful;† but I am strongly inclined to believe that there are many countries where, till the law formally recognized their existence in the form of a code, their employment was comparatively infrequent and ill-defined. This was certainly not the case in England; the English code was not required as a legislative recognition of commercial practices. Those practices had long ago, as I have already stated, been acknowledged to have the force of law, and it required the passing of no legislative enactment to make them binding. I do not however for a moment wish to suggest that solely because a practice has been proved to have been in force over a considerable length of time that that alone is conclusive of the question of the retention of the practice. Such a view would be quite untenable, for instance,

* See Malyne's, *Lex Mercatoria.*

† *Vide* article *Law Quarterly Review*, vol. ix., p. 70.

in dealing with the question of days of grace in English law. On the other hand I do maintain that length of usage should never be lost sight of when, as in the case of English law, it is a question of dealing with principles which have been deliberately adopted by the trading community in the first instance and have subsequently, by slow but sure degrees, acquired the force of law; principles, indeed, made by traders for traders. It would be equally futile to maintain that the English law is susceptible of no improvement. The defects in the law may not, I submit, be many, but, as I propose to show later, they are of a somewhat glaring character. There can be little question, I think, that an international exchange law, when it comes into being, will partake of the character, to borrow an expression from the wine trade, of a blend of existing laws; it will be, in fact, that blessed word, a compromise. Of two things I am pretty well convinced. First, that no existing exchange law can, without considerable modification, be adopted as an international law; and, secondly, that as yet no so-called international code has to my knowledge been drafted which can have the least chance of international acceptance.

Regarded from one point of view the difficulties of the question might appear insuperable, and that is the actual number of the alleged points of difference. One authority, Dr. Norsa I think, enumerates somewhere about seventy-five disputed points arising on exchange law to be settled before unanimity can be reached. I cannot, however, undertake to specify those points for the excellent reason that I have never attempted to look up the authority. It is only to be supposed that the majority of these alleged points of difference are of a subsidiary character, otherwise the result would appear to be that, taking the average length of an exchange law as one hundred articles or sections (the length of both the German and English laws), and it being granted that each article or section deals with a separate point, somewhere about three-fourths of every existing law would require alteration. In other words, the chances of international codification would be practically nil. For my part, a careful comparison of existing exchange laws, in so far as they are to be found in a language with which I am acquainted (and thanks to the excellent *Annuaire de Législation Etrangère* that difficulty has been greatly modified), has induced in me the belief that the number of points on which real divergence is to be noted is by no means so numerous as is generally supposed. It is naturally these leading differences that require the most

careful attention, since until they are settled it seems almost superfluous to spend time on minor points.

There are what I have already described as certain somewhat glaring defects in English law. First and most obvious is the retention of the mediæval principle of days of grace in the case of all bills and notes payable otherwise than on demand, except where the instrument itself provides otherwise. I have already cited this question of days of grace as an example, as far as I can tell, of the retention of a principle on the grounds of its antiquity, with the result that the trading community had become so accustomed thereto that, however illogical the principle might be in theory, they declined to give it up, a state of mind very often to be met with in England, that of precedent being preferred to logic. An attempt was indeed made, when the Code of 1882 was being discussed in Parliament, to abolish days of grace, but it was unsuccessful. I cannot, however, imagine that at the present day the retention of the principle would be insisted on by the English mercantile world. If the retention of days of grace in 1882 was illogical, as it certainly was in my opinion, still more so is it nowadays. The continually increasing improvement in means of communication between different countries had, indeed, long before 1882, abolished their principal *raison d'être*, but since that date the isolation of England and her colonies in their retention of the principle has become yearly more marked. Nowhere outside the British Empire will you find (as far as I am aware) the principle of days of grace still in force, except possibly in those States of the American Union which have not yet adopted the Negotiable Instruments Law. Until this American code, as I presume it may be called, was so generally adopted, there might have been something to be said for the retention of days of grace, since at least it could be claimed for the principle that it was still recognized by two of the leading commercial nations. Now that this plea can no longer be raised, I do not imagine that the English trader would decline further to ignore the stern logic of facts, but would recognize the impossibility of the retention of out-of-date principles. I do not wish, so far as it can be avoided, to deal with too many minor points; but in connection with this question of payment the fact cannot be ignored that the principle on which the English code in section 14 deals with the case of bills falling due on a *dies non*, in some cases making the bill payable on the preceding and in others on the succeeding business-day, has been the subject of severe criticism. The reason for this somewhat

unnecessary complexity would appear to be an historical one, hence, it is hardly necessary to mention its illogical character. Statutory holidays were unknown in England till the institution of the so-called Bank Holidays in 1871, and at the time of their creation any dealings with bills and notes falling due on Bank Holidays were postponed till the following day. In the case, however, of Common Law holidays, practically equivalent to days which have been treated as holidays (at any rate in England, as distinguished from Scotland) time out of mind—Christmas Day, and Good Friday—the instrument has always been dealt with on the preceding day.* The distinction seems solely to have arisen from the Bank Holiday Act, 1871, not having followed the Common Law rule. (A proposal was in fact made to assimilate the two cases in 1871 but it was not accepted.) † It could not, indeed, have followed the Common Law directly, for all the Bank Holidays are in fact preceded by a *dies non*—either Christmas Day or a Sunday—but it would have been sufficient had it specified the previous *business*-day. The matter appears to be one that could be corrected without much difficulty, but whether the day selected should be the preceding business-day, as in codes of the French class, or the succeeding one, as in the German, might require practical consideration.

Another patent flaw in the English law, in my estimation, as compared with all other codes, except, however, in this case the American,‡ is the existence of the doctrine of reasonable time in reference to the time within which bills payable a certain time after sight, or actually at sight, are to be presented for acceptance or payment in order to charge the drawer and indorsers. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. In other words, three different questions have to be taken into consideration before the holder can be satisfied that he has complied with the requirements of the law. It is not to be wondered at that one English authority, his Honour Judge Willis, in a series of lectures intended not only for lawyers but for business-men, warned any of his hearers who might be engaged in business to have as little as possible to do with bills payable on demand (he probably intended to include in his denunciation bills payable a certain time after sight as well), since the law afforded them no certain

* *Vide* Lord Bramwell, House of Lords, July 18th, 1882.
† Parliamentary Debates, April 18th, 1871.
‡ *Cf.* American Negotiable Instruments Law, sec. 131.

rule for their guidance, in the matter of presentment. It seems beside the point to reply that bills payable absolutely on demand are but rarely met with in English commercial transactions, as I understand is the case. Whether it is equally true to say so of bills payable a certain time after sight may, however, be more doubtful. English law may well pride itself on its elasticity, but when elasticity becomes another name for mere vagueness, it certainly ceases to afford that clear guidance which the trader is entitled to demand of it. The doctrine of reasonable time may for obvious reasons not be altogether unfavourably regarded by the practising lawyer, and the unhappy trader caught within its meshes may well believe that its recognition by the English law is the result of leaving the drafting of laws too much in the hands of lawyers. That there is no justification for this view I need hardly say. The retention of the doctrine is probably owing as much as anything else to the impossibility, owing to mercantile opposition, of passing the Code of 1882 into law, had it effected too many changes in accustomed practice, however irrational those practices might be. German law appears to deal with this question in the simplest practicable way, since by Articles 19 and 31 it imposes a time-limit of two years in both cases, in so far as a time-limit is not imposed by either drawer or indorser. The time-limit may possibly be unnecessarily long—one authority suggests a year only as sufficient in these days of improved communications—but otherwise the provision is to be preferred to the complicated provisions contained in the French and many other codes, in accordance with which the time-limit varies according to the country on which the bill is drawn, thus inevitably introducing some complicated geographical problems. I do not suppose that there would be any serious opposition in England to the introduction of a practice on somewhat similar lines to the German, since the net result of such a change would be that bills payable on demand would be freed from the trammels that now render them practically useless for ordinary commercial transactions.

Lastly I wish to draw attention not so much to a defect of the present English law as to the entire omission from that law of the well-known principle, the system of guaranteeing the payment of a bill by means of the aval. It has been definitely stated by a well-known English judge, Lord Blackburn, that there is no such thing in English law as an aval for the honour of the acceptor; one might indeed go further and say that the aval is absolutely unknown in the case of any

party to the instrument. By Section 56 of the English law, anybody signing a bill, otherwise than as drawer or acceptor, incurs the liability of an indorser only. He does not, as in Continental law, incur the same liability as the party for whose honour he intervenes. It has indeed been held that by English law* a drawer of a bill who wishes to obtain a guarantee for the acceptor's payment may effectually do so by drawing the bill to his own order and indorsing it to the guarantor, who then reindorses back to the drawer. The drawer can then quâ indorsee sue the guarantor as an indorser, since he is not in fact liable on his previous indorsement, there being no consideration therefor, and therefore there is no circuity of action. To say that such a method of procedure is a trifle involved is well-nigh superfluous. Moreover it would appear to invite litigation by reason of that same complexity, since, as in fact occurred in the case which is the authority for the view I have just cited, it is obvious that the guarantor (and most guarantors are in the nature of things litigiously disposed when proceeded against) may well be inclined to set up that the original indorsement to him by the drawer was in fact based on a good consideration, hence, of course, a law suit! I will leave out of consideration how far such a guarantee is in fact a sufficient guarantee within the so-called Statute of Frauds; the point may simply constitute another thorn in the side of the unfortunate drawer. It has indeed been stated that the safest and simplest way for a person who wishes to obtain a guarantee for the acceptor's payment is for the surety to draw to his own order on the drawee, the debtor, and then for the surety to indorse to the person desiring the guarantee, the creditor. Even such a method, constituting as it does a merely simulated transaction, will require careful handling to prevent the possibility of its being used for purposes of fraud, let alone that in practice it may be by no means so simple a matter to induce a would-be guarantor to assume the position of a drawer, since the rôle of a drawer is, even to a layman unlettered in the law, obviously a more onerous one than that of an indorser, or, as he is popularly called, the backer of a bill. The net result of the absence of the system of the aval from English law is indeed the multiplication of accommodation bills. English law no longer views accommodation bills with that disfavour with which it formerly seems to have treated them, indeed they appear to have been regarded at

* Wilkinson *v.* Unwin (1881) 7 Q.B.D., 636.

one time as barely distinguishable from absolutely fraudulent instruments, but it can hardly be suggested that a state of affairs where in a large number of cases things are not what they seem can be in any sense conducive to the credit of the country. Accommodation bills should at the most be tolerated and the law should abstain from doing anything even indirectly to encourage their issue. One authority, Sheriff Dove Wilson,* definitely states that the reason why the system of the aval was not acknowledged by English law in 1882, was owing to the fact that it would have involved too radical a change and would have thereby stirred up so much opposition as to have endangered the passing of the code into law. This view tends to bear out what I have already said, though only on my own authority, of the probable reasons for the retention of days of grace and the doctrine of reasonable time. The question naturally arises will the English trader now admit that the attitude he, or rather his forebears, for time is now passing away, took up in 1882 was a trifle irrational. I am strongly inclined to think that as regards this question of the aval opinion may well be changed. The average trader may not find the system of days of grace so onerous in practice as in theory, and if he avoids bills payable on demand he need never trouble himself about the question of reasonable time, but sooner or later he must come across the difficulty of getting the payment of bills he draws satisfactorily guaranteed, and will inevitably find, if he has foreign connections, that, as the phrase goes, they do these things better in other countries. Moreover, he will find, as far as I can judge, that the new American Negotiable Instruments Law has equally adopted what may be called the Continental principle, for though the first part of Section 113 of that law is practically identical with Section 56 of the English law, the significant proviso is added thereto that the liability merely as indorser is subject to any clearly indicated intention on the part of the person so signing of his willingness to be bound in *some other capacity*. This, it would appear, can only mean that the person so signing may, if he so desire, assume the same liability as the person for whose honour he intervenes. The American code is, I believe, to a great extent, founded on the earlier English code, but here again, as in the case of days of grace, the American has not followed the English law, with the result that in this case also the English position has become of recent years a very isolated one. Two points in

* Cf. *Law Quarterly Review*, vol. 2. p. 307.

reference to the aval would appear to require some notice. First, whether the aval may be conditional or partial in amount, and secondly whether it should be allowed to be written on a separate document from the bill itself. Since by English law a conditional indorsement is to be distinguished from a merely restrictive indorsement, and indeed, by Section 33 of the code, may be disregarded by the payer of the bill, it is *primâ facie* likely that the introduction of a conditional aval would meet with considerable opposition. I believe, however, that the majority of Continental laws permit special agreements in reference to the aval, and therefore it is to be presumed that in practice the principle does not involve such complications as theoretically would appear inevitable. English law does not permit partial indorsements, and therefore has not hitherto tolerated anything approaching to a partial aval. It is true that an acceptance for honour may be only partial, but the two cases are scarcely identical. It is perhaps unfortunate that a partial aval is so generally allowed by other laws, except, I believe, the new Russian code, so that the question may involve some difficulty. If anything in the nature of conditional avals is to be allowed, then at least it seems to me that the law should insist that the aval and all its terms should be written on the bill itself, as I understand is the practice at the present time in the German Empire, though the law itself is silent on the subject, whereas Article 142 of the French code allows the aval to be written on a separate document. I do not imagine that the "act séparé" of French law is at all akin to the allonge allowed by Section 32 of the English law for the purpose of containing indorsements for which there is no room on the bill itself, since the allonge must be attached to the bill and the "act séparé," as its name would imply, clearly cannot be. If in fine it is to be suggested to the English trader that he ought to welcome a system of guarantee which may involve a conditional aval written on an entirely separate document from the bill and without, so far as I am aware, any reference to the existence of the aval being required to be inserted on the bill, he may well be inclined to reply that the remedy, by reason of the possible complications involved, is worse than the disease.

So much for the improvements that might be imported into English law. It is a truism to say that it is far easier to note our neighbour's faults than to perceive our own, and no doubt foreign critics will be by no means prepared to admit that the three points above mentioned are the only patent defects to be found in English law. I cannot

myself honestly say that I am aware of any others, except of a comparatively minor character, such for instance as the absence of the necessity to date bills, to which I hope to refer later. But of one thing I am practically convinced, and that is that these three, or possibly four, suggested alterations are the only ones that would not at the outset raise a storm of opposition in the English mercantile world since (except possibly as regards the details I have referred to in connection with the principle of the aval) they would not involve the employment of complicated legislative enactments for their introduction nor would they involve any serious change in mercantile practice. That this latter consideration is the all-important one I submit is evident from what I have already stated as to the genesis of the Act of 1882. I do not pretend that I have any personal recollection of the subject since I was not in 1882 of an age to take any abiding interest in the question of bills of exchange, but one has only to study the speeches of the promoters of the law of 1882 when passing through Parliament, as reported in the Parliamentary debates, to note how carefully they lay stress on the fact that the measure did not propose to make any material changes in existing law. If the anxiety of the English trader lest he should find himself confronted with new and alien methods had to be allayed in 1882, I know of no reason why similar precautions would not require to be taken at the present day. One English authority stated some time ago that the more recently formed the law of any country the more it tended to harmonise with the English law. That is a view, however, I regret that I cannot undertake to maintain. It seems to me *primâ facie* incompatible with the results of the grouping of laws in Dr. Meyer's able and instructive pamphlet. to which I take this opportunity of acknowledging my great indebtedness.* That that grouping according to the population and area of the various countries is entirely conclusive of the matter, it would on the other hand be too much to admit. In grouping the laws on the basis of population, but leaving out of the question superficial area, since the latter seems somewhat beside the point, the laws of extra-European countries ought clearly, I suggest, to be taken into consideration as well, for it is impossible to maintain that the English law of 1882 has been definitely taken as the model of recent European codes, and unless the population of the United States and of the English colonies is added to that

* *Loi universelle sur le change*, p. 12.

of the United Kingdom, the so-called Anglo-American group is bound to run a bad third, if the expression may be allowed, in the race for supremacy, the German group being an easy first, and the French a somewhat bad second. If, however, to the English group be added the population of the United States and the English colonies (other than certain exceptional cases such as Malta and Mauritius), then the Anglo-American group probably displaces the French group for second place, but is still a long way behind the leader—the German group. English law is, I must admit, very far from being in a position to claim any supremacy, but that is no reason why the English trader should submit to dictation on certain questions, though I am not aware that there has ever been any suggestion of dictation. In comparing other codes with the English code, certain elementary distinctions become apparent, distinctions which are no mere legal subtleties, but which seem to indicate a totally different method of business procedure, methods which it may without hesitation be stated it would be hopeless to expect the English trader ever to adopt; the mere suggestion would probably be sufficient to raise a storm of indignant protest.

I would like to deal first of all with the case of what is known in Anglo-American law as dishonour by non-acceptance. I wish thus to express myself since it seems to me that, alike in French and German law, there is no such thing as dishonour by non-acceptance. Dishonour in the majority of laws outside the Anglo-American means dishonour by non-payment at maturity alone. There, however, appears to be this essential difference between laws of the French type and those of the German. The French do allow the party proceeded against, when the drawee has declined to accept, and thus in the Anglo-American sense of the term there has been dishonour by non-acceptance, to pay the holder the amount of the bill after due protest for non-acceptance, but he may if he prefer merely give security that the bill will be eventually met at maturity. The German rule, I understand, is otherwise: the party liable on the bill has, under Article 25 of the German law, no alternative; he cannot pay the bill and have done with the matter, all he can do, if he does not give security, is to pay the amount either into Court or into some recognised institution for the receipt of deposits, a process (since the law provides that he must bear the expenses of the deposit) simply productive of extra expense, and he is already, be it remembered, in an unfortunate position, having put his name to a bill with which the

drawee will have nothing to do, or which, at any rate, he has only accepted conditionally or in part. The party liable is, it seems, between Scylla and Charybdis, he either must give security, a somewhat vague term at the best, and often I believe onerous in practice, or make this deposit and thereby fling good money after bad, with the added disadvantage of a certain amount of publicity, even though it be confined to officials. This latter disadvantage I need hardly say is a mere suggestion on my part, but the fewer the people, whether officials or others, who are aware that a man in business has a dishonoured bill on his hands, the better it will probably be for that man's credit. Long ago, Rule 13 of the well-known Bremen rules dealt with commendable brevity with this point, when it provided that in case of refusal to accept, or of conditional acceptance, the holder is to have an immediate right of action against the drawer and indorsers for payment of the amount of the bill and expenses less discount. It has been stated by an English authority that the principles contained in the Bremen rules, which seem to date, roughly speaking, from between the years 1875 to 1878, have been generally adopted by those laws that have come into being since. That seems to me an example of a case where the wish has been father to the thought, for there can be little doubt, I think, that had the Bremen rules been so generally adopted as alleged, we should be far nearer to an international exchange law than we appear to be at present. At any rate, as far as relates to the important question of non-acceptance, the statement seems wide of the mark. The laws of Italy, Spain, Portugal, Roumania, the Argentine, and Mexico are all subsequent in date to the promulgation of the Bremen rules, but it would be vain to seek for any trace of Rule 13 in those laws. On the other hand, the influence of the Bremen rule can be directly traced at any rate in Article 97 of the Russian law of 1902. According to Dr. Meyer, the Russian trading community insisted on the acknowledgment of the principle, the Bremen rules having been brought to their attention, and this is a somewhat significant commentary on the mercantile view of the question, for it must be remembered that the system of finding security had been in force in the former Russian law, and therefore the natural deduction is that it had been tried and found wanting. Again, it seems to me that the Bremen rule has been adopted by the Swedish code of 1880, for so I read Article 29 of that code in the translation given in the *Annuaire de Législation Etrangère*; I give this example with all reserve, however, for such an authority as

Dr. Meyer does not appear to consider that under that law a holder has a right to immediate payment on dishonour by non-acceptance. Thus what may be called the Anglo-American principle, as represented by the Bremen rule, has as yet found only one or at the most two adherents outside the Anglo-American group, but from what I have already stated in reference to the causes which led to its adoption by the Russian law, I submit that it is evidently a principle which is growing in favour with the mercantile community. That that is the opinion held by Dr. Meyer I have little doubt. Moreover, he mentions that at the Fourteenth Congress of German jurists (I am not sure of the exact date) it was definitely maintained by some of those present that *honourable* business men—the adjective was I suspect not used inadvisedly—infinitely preferred to pay rather than to have to find security.* Further, and this I can well believe, that actions dealing with the necessity for giving security were invariably of the most vexatious character. Lastly, and this is perhaps the most noteworthy point of all, it seems to have been freely admitted that there was but little chance of England and America giving up their principle in favour of one which, as it seems to have been frankly described, is of such an unpractical character. This view, I need hardly say, I entirely indorse. I do not wish to labour the point, but I have not the faintest hesitation in saying that the English trader would decline to even consider the principle of giving security, far less would dream of adopting it. Were it not that, as I have already pointed out, the Bremen rule has made such little headway as a legal principle, I should be inclined to maintain that to advocate the retention of the principle of giving security rather than payment on non-acceptance is to advocate a lost cause. As it is, the trading community generally, if not the lawyers, seem to have adopted a strong view on the matter, and I think they will see to it that no international code of the future contains such provisions.

The question of giving security on non-acceptance is in Continental law, of course, closely allied with that of giving it when the drawee after acceptance becomes bankrupt or suspends payment. English law confers no such remedy, and the so-called protest for better security under Section 51 (5) is, I believe, of comparatively rare occurrence, its only effect is to enable the bill to be accepted for honour. There is in fact no such connection between the two forms of dishonour,

* Meyer, 91.

if one may talk of dishonour by bankruptcy, in English as in Continental law, and I should otherwise have not felt bound to touch, however briefly, on the question, since compared with the far more important subject of dishonour by non-acceptance it is a comparatively minor matter. The English law in its present form cannot be said to afford much practical consolation to the unfortunate holder of a bankrupt's acceptances, but whether the English trader would therefore be prepared to go to the extreme length of adopting the foreign principle I cannot undertake to say. He might well be chary of adopting the principle of giving security with all its admitted defects. Moreover, the suggested change would undoubtedly strike him as of a distinctly revolutionary character, introducing as it does in fact, if not in name, a new form of dishonour, and that fact is sufficient without more to make its adoption by no means a foregone conclusion.

Another most important question it seems to me from the English mercantile point of view is the question of protest. If the English are as a race remarkable for their conservative tendencies, they are almost equally remarkable, though the characteristic may be somewhat on the wane, for their objection to official or bureaucratic control. The obligation to formally protest a bill involves a notary, and the latter involves fees. I do not mean to say that it is the question of fees alone which weighs with the English trader. He objects to having to call in official aid more often than absolutely necessary in connection with what he not unnaturally considers his own private affairs. Protest was long ago required by English law in the case of all foreign bills, not, I take it, because there was considered to be any special efficacy in the process, but solely because its adoption was inevitable having regard to the universal requirement of foreign law. The English mercantile world tolerated the practice because it was in the circumstances a matter of necessity, but that they would ever tolerate the system of protest being legally extended to the dishonour of all bills whether inland or foreign I cannot for a moment imagine. Dr. Meyer, if I may be permitted to quote him again, deals with his accustomed fairness with this knotty question. On the one hand he cites many examples of the spirit of growing discontent with the practice, while on the other he yet maintains that the "consensus gentium" insists on its continuance.* I cannot however follow him in his suggestion that the English sys-

* Meyer, 121.

tem of notice, in force for inland bills, is as rigorous in character and therefore scarcely to be distinguished from that of protest. Practically the only pitfall awaiting the English trader is that of not giving notice within the right time, for all practical purposes he need not trouble himself about the form of notice, for no notice has been held bad for want of form since the year 1841. I have carefully read through the provisions contained in many codes relating to protest, and the one prevailing feature in those provisions has always seemed to be their want of elasticity and the pitfalls they afford for the unwary, and that is well-nigh equivalent to saying that they may be regarded as a happy hunting-ground for the dishonest in pursuit of technical defences. One feature in particular has attracted my attention, and that is that, with the possible exception of the Norwegian and Danish laws, no law outside the Anglo-American group appears to contain provisions allowing the preparation of a protest without official assistance, even in cases of an exceptional character. English law, by Section 94, provides that where a bill is required to be protested, and the services of a notary are not available, any householder, or substantial resident, of the place where the bill has been dishonoured may, in the presence of two witnesses, give a certificate attesting the dishonour, and such certificate shall operate as a formal protest. The American Negotiable Instruments Law goes even further, for by s. 262 it appears to make the employment of a notary optional in any case. Otherwise, except for the case of the Norwegian and Danish laws, I know of no similar provisions in Continental law. What therefore is the exact position of a holder of a bill who, through no fault of his own, cannot obtain the services of a notary I do not know. He seems to be a victim offered up on the altar of officialdom. Moreover, in Continental law notice of protest or of the actual dishonour seems invariably to be required in addition to the protest itself. I admit that in the German and many other laws the omission to give notice does not entail, as it would in English law, the loss of all rights on the bill; the negligent party only renders himself liable in damages for his negligence. But I think there are cases where neglect to give notice does involve this severe penalty, in the cases, for instance, of the French, certainly of the Argentine and Mexican, laws. Thus in these instances it would seem that the unfortunate holder is exposed to a double risk, as far as his remedy against the drawer and indorsers is concerned, since even if he effect proper protest of the bill he may yet

fail to give notice in due time. It is difficult to understand why his position should be made such an onerous one. From an English point of view the principle of German law (Article 45), and also of many other codes, whereby the holder can only give notice to his immediate predecessor in title seems unsatisfactory. *Primâ facie* it would appear to handicap him in suing anybody but his immediate transferor since he might apparently be met by the defence that the party sued had himself had no notice from his transferee. It is true that in German law, at any rate, that would not prevent him from recovering the amount of the bill, but still he would, it seems, be liable in damages for somebody else's default, a default which, as I read the German code, it is beyond his power to forestall, the only compensation granted him being the somewhat circuitous one of suing the party actually in fault for the amount of damages so incurred. Generally this question of the necessity of protest for inland bills is, of course, entirely dependent on the scope to be afforded to an international bill of exchange law, since if an international law is confined to foreign bills only it is manifest that each country can be left to deal with the question of protest for inland bills as seems best for its own interests. I have personally come across but few suggestions that an international law should be so limited in its application. Apart from the necessity of strictly defining what is meant by the term a *foreign bill*, such a limitation would in fact tend to leave unsettled those terribly vexed questions relating to the nationality of parties, and the problems arising in connection with the *lex loci contractus* and the *lex solutionis*. An international law so limited would indeed be but a half measure, and I have therefore not hesitated to treat the general question of international codification as though no such restriction was in fact contemplated. As regards this particular question of protest, I think the view of the English mercantile world would be, that if the necessity for protest of inland bills is really insisted on, however the protest be modified and amended in form in accordance with recent Continental suggestions, the price to be paid for an international exchange law is too heavy a one, with the result that an international exchange law would inevitably have to confine itself to foreign bills only; for I venture to submit that an international law which was not accepted by the English commercial community would be (having regard to the acknowledged importance of London as an exchange centre), to use a well-known metaphor, like the play of Hamlet without the

Prince. None of the suggested amendments or alterations (Dr. Meyer refers with particular approval to the Belgian system of postal protest) are free, from an English point of view, from the taint of officialdom, and I have already said enough to show what a fatal objection that is in the average Englishman's estimation, whether in this or any other connection. The real solution of the problem would appear to be found in the fact that the German and several other codes do allow the necessity for protest to be waived. Under German law it may, it seems, be waived even by word of mouth, while in France, though the law does not explicitly allow waiver, the practice is said to be of frequent occurrence. If the system of protest possesses all the merits that are claimed for it, then this acknowledgment of the right to waive protest seems somewhat illogical. It would be interesting to know whether in practice large numbers of bills are to be found in circulation with the waiver clause attached; it would thus constitute a striking commentary on the mercantile view of the practice. The question does not seem so much of amending as of ending the necessity for protest of inland bills. I cannot believe that, human nature the world over having so many traits in common, the Continental trader is any more attached to a system involving official interference in his mercantile affairs than is his English confrère. At the most he tolerates the practice. I go so far as to say that the evidences of dissatisfaction with the practice cited by Dr. Meyer can have but one meaning, and that is that the trading community would willingly accept its abolition. In this case the move must be made by the Continental mercantile world; the English trader can, I venture to prophesy, safely afford to wait the trend of events.

The last point I propose to deal with at any length is that of prescription. From an English point of view the question would seem to be outside the subject proper of bills of exchange, since you may search in vain in the English Code of 1882 for any sections dealing with prescription. The reason therefor is simple enough. English law has declined to treat bills in this respect as exceptional instruments involving contractual relations differing in any way from those arising under other simple contracts; no special provisions therefore were required. It is far otherwise it seems in the case of all laws outside the Anglo-American group. The elaborate and complicated provisions not only as to the parties, but, as in German law (in the case of drawer and indorsers), as to the exact geographical position of the place of payment, point to

an exceptional treatment of the matter. I may say at once that I do not understand the French treatment of the subject, for though by Article 189 of the Code de Commerce *all* actions on bills are barred after five years, yet by Article 166 actions against drawers and indorsers must be brought within a far shorter period, depending in this case also on geographical considerations. That the English trader would ever agree to give up the simple principle whereby every party liable on a bill remains liable for one and the same time from the time his liability first accrued, is in my opinion inconceivable. There may be, as indeed has been stated by one English authority, very good reason why the period of limitation in the case of the acceptor should be different from that of the drawer or indorsers, though I confessedly cannot appreciate it, but in my opinion it would be a matter of practical impossibility to bring that fact home to the average English trader. His reply would as likely as not take the form of laying stress on the fact that, to use a well-known English colloquialism, all the parties to a bill are in the same boat and ought to have identical treatment meted out to them. The Anglo-American group is in this matter undoubtedly in direct issue with the French and German groups alike, and the question inevitably arises whether the Anglo-American principle or, as it may be called, the Continental principle is to prevail. The 26th Bremen rule provides that the limitation of actions upon bills against all parties shall be eighteen months. In this instance also, as in the case already dealt with of dishonour by non-acceptance, the Bremen rules may be regarded as having been productive of practical results, for the principle laid down in Rule 26 seems to have found its way into the Spanish Code of 1885, the Portuguese of 1888, and the Mexican of 1889. Thus it can hardly be claimed for the principle which distinguishes between the various parties to the instrument that it is still the absolutely dominant principle outside the Anglo-American group. Still more than in the case of dishonour by non-acceptance the Anglo-American principle in relation to prescription has come to the front, even though it be not found in the most recent code that I am acquainted with, the Russian code of 1902. That the Anglo-American principle is attracting more and more attention would seem to be evident. Dr. Meyer cites the case of a draft Prussian code or project—I am not certain what the correct designation should be—which undoubtedly appears to adopt the Anglo-American principle, since it provides that *all* actions relating to bills

shall be prescribed at the end of a year from maturity.* It seems scarcely unreasonable to suggest that the growing needs of the commercial community must have originated a proposal such as this so sharply in contrast with the existing German law. That the Anglo-American principle as distinguished from the Continental is a model of simplicity is, I submit, well-nigh a truism, and the simpler the provision the more chance will it have of international adoption in these days of hurry and stress, compared with a provision of a more complicated character.

Cognate with the question of prescription are it seems the French principle of reference to oath and the German principle of enrichment, if the expressions used in Article 83 of the German code may be thus anglicized. It may be said that in the British Islands a somewhat similar principle is to be found in the existence of the " resting owing " principle of Scotch law under a still unrepealed section of an Act of 1772. Beyond the bare fact of the existence of such a principle I, as an English lawyer, know little, for Scotch and English law are by no means in all respects identical, but it would seem that action cannot be brought on the bill or note itself,† but only on the debt represented thereby. Further, I am unable to state whether or not this procedure is of practical consequence at the present day; whether the principle is or is not a dead letter! It is at any rate to be distinguished from the French reference to oath, a form of procedure whose continued existence Sheriff Dove Wilson, himself a Scotch lawyer, in an article he wrote in the English *Law Quarterly Review* ‡ after attending the Antwerp Congress of 1885, pointedly and tersely described as a scandal. The basis of this practice has been stated to be that of insuring that if a debtor escapes paying his just debts in this world he shall not thereby escape the penalty presumably attached to perjury in the next, for the reference to oath compels him either to pay or to commit perjury, and as regards this latter offence prosecutions are I understand almost unknown, since the debtor invariably takes care to couch his denial in some evasive and non-committal form. This treatment of a legal question from a purely moral point of view is certainly original, and would probably strike the English trader as being somewhat too abstract in conception to be adopted by an international code. That the question of the enrichment clause as admitted by German

* Meyer, 140.
† *Thomson Bills*, p. 470.
‡ Vol. 2, p. 310.

law is more difficult of consideration would appear to be obvious having regard to its acknowledged position in German law. I cannot find that Dr. Meyer deals with the subject. The real justification of this principle, as indeed, apart from moral considerations, that of the French also, seems to me to be found in the extreme brevity of the period of prescription enforced under these laws. Thus for instance in the case of French law, by Article 166, a drawer or indorser must in certain circumstances be sued within one month, and in the case of German law by Article 78 within three months (to take the minimum period in each case), and it seems manifestly inequitable to allow parties to an instrument to escape liability within such a brief period. Hence the, from an English point of view, most distinctly unsatisfactory, not to say objectionable, procedure of the reference to oath or the enrichment clause, as apparently a kind of *via media* between law and equity. The obvious remedy seems to be to adopt a longer period, not of months but of years. The six years' prescription of English law may be, other than in some exceptional cases, such as for instance the thirty years' prescription for non-commercial notes in French law, longer than that of any Continental law, and it may be that the five years of French law would be sufficient, but in any case I venture to submit that the only way of satisfactorily dealing with these problems is by adopting some such lengthy period for all parties equally who are liable on the bill. It is scarcely possible to maintain that there is any moral liability, apart of course from special circumstances, let alone a legal one, attaching to the person who has put his name to a bill but of whom payment has not been demanded for so long a period. Moreover, the establishment of one uniform period of such length would tend to render unnecessary those terribly complicated geographical distinctions, at least so they appear from an English point of view, to be found in many Continental codes, since the time would be far more than sufficient to cover the case of bills drawn from, or on, the most widely separated countries. At the present day the most distant post from London to places of any importance, as given in the official Postal Guide, is that to New Zealand via Suez, which takes thirty-nine days, or just short of six weeks. The question of prescription, unlike that of protest, is one that cannot, so to speak, be shelved by confining an international exchange law to foreign bills only. I notice that two of the draft codes, as given *in extenso* in Dr. Meyer's pamphlet, those that were drafted at the Antwerp and Brussels Conferences, while generally

admitting a prescription of five years, leave the question of the time within which actions in recourse must be brought, and thereby I presume are meant actions against other than the principal debtor, to be settled by each country for itself. I must protest strongly against such a proposal; having regard to the discrepancy at present existing between the Anglo-American group and the majority of the laws included in the other groups on the question of prescription, some uniformity is imperatively called for, otherwise confusion will be simply worse confounded. If an international code is to be confined to foreign bills only, then of course the question may be easier of solution, but it will be more than ever necessary to define what is meant by a foreign bill or an international bill, as it is also termed, if most vexatious problems relating to this question of prescription are to be obviated. I can only repeat what I have already stated to the effect that in my opinion the English trader will never for a moment countenance any other principle of prescription, apart from a possible amendment of the actual time, than the simple one to which he has been so long accustomed, for it should not be forgotten that the English law of prescription in reference to simple contracts dates from the reign of James I. Further, in spite of the doubtful analogy of Scotch law, that the English trader would ever admit the principle of the reference to oath or the enrichment principle is, I am strongly inclined to suspect, not even hoped for by the most ardent adherents of those principles, even though the principle of the reference to oath is to be found in Article 54 of the draft Antwerp Code of 1885.

So much for the principal defects of the English law on the one hand, and the most objectionable features (I use the adjective purely from the English trader's point of view) of Continental law generally on the other. It is accident rather than design that there are three points on either side, that the decision of the matter might therefore take the elementary form of the *quid pro quo*, each side agreeing to give up one principle in exchange for another. It would be absurd of course to contend that that is conclusive of the matter. My only excuse for so dealing with the question is that the adoption by the English trader of the principles of foreign law with which I have dealt has been hitherto taken far too much as a matter of course, judging at least from the provisions to be found in the three draft codes contained in Dr. Meyer's pamphlet. Even Dr. Meyer himself, if I may venture to say so, does not appear to appreciate the well-nigh insuperable difficulties involved in attempting to win over the

average English trader to adopt these principles. I have deliberately selected these points because they would appear to be the points that would be the most obvious to the trader who might take the trouble to read through any draft international code which contained them. Their retention would, I am sure, foredoom the measure to failure. The average trader whom I have in my mind's eye would trouble to read no further if, for example, he came across a provision requiring all bills, inland and foreign alike, to be protested on dishonour; the immediate result would be that the draft code would go into the waste-paper basket and the trader himself would henceforth, as likely as not, become an uncompromising if not violent opponent of the principle of international codification, for once imbue the average Englishman of whatever calling with the least suspicion that an attempt is being made to overreach him, though I need hardly say that such a suspicion would in this case be entirely baseless, and it is notoriously difficult to eradicate that suspicion. His subsequent opposition may be none the less deadly because it is not founded on logical grounds, since he may have neither the time nor inclination to study the pros and cons of the question. In short I can see no hope of compromise on these questions. Their retention would, I am convinced, shipwreck any code, however ideal it otherwise be, on the rocks of English opposition. That the result of the matter is an absolute deadlock I do not however for a moment admit. The mercantile world would appear to be gradually, albeit unconsciously perhaps, trending towards a solution of these questions which is, for all practical purposes, the solution afforded by Anglo-American law, and where the trader leads the lawyer must *nolens volens* follow.

I feel it would be presumptuous for me to deal with many of the other points so ably treated by Dr. Meyer, since he who runs may now read, even if I had not already taken up time enough, but I should like, however briefly, to refer to a few of them. The main question would seem to be whether the formalist views of Continental and particularly of German law should prevail, or the somewhat laxer principles of Anglo-American law. The distinctions involved seem to me in principle to be somewhat exaggerated. Thus German law requires a bill to be described as such and English law does not, but in practice there is but little difference, since, in the case of all bills or notes other than inland bills payable on demand or at not more than three days sight, the stamp required by English law is, in fact descriptive of the instru-

ment. It is true that the stamp does not afford a definite answer to the often vexed question whether the instrument be a bill or note, but it at least puts any person dealing with it on his guard as to its negotiable character, and that, I take it, is the principle underlying the German requirement. That the necessity to describe a bill as such has been the subject of considerable criticism I am aware, and it would probably be advisable not to insist too strongly on its retention. To the English trader the matter would not however appear, for the reasons given above, to be of very vital interest. Then, again, Continental law requires a bill to be dated, and English law does not. In practice, however, it is manifestly irregular to issue a bill undated, and in the case of cheques the bankers on whom they are drawn do in fact decline to honour undated cheques, though the law does not discriminate between bills and cheques in this regard. At the same time, though the English trader might agree to the necessity of the imposition of a date on a bill, I am not prepared to say that he would be ready to agree with the further proposition, that is to say, that an undated bill is to be considered absolutely void. One code at any rate outside the Anglo-American group, the Portuguese, though it requires in the first instance a bill to be dated, yet by Article 282 (1) admits subsequent proof of date by the holder. Some such provision I feel sure the English mercantile community would insist on ; otherwise the penalty for what may be an entirely honest mistake would be too strikingly in contrast with the existing English law.

It is extremely satisfactory to find from the statements made by Dr. Meyer that the objection to bills originally drawn payable to bearer is steadily waning. As Dr. Meyer himself points out, the objection to bills drawn payable to bearer is irreconcilable with the toleration of the indorsement in blank, for no code that I am aware of absolutely forbids such indorsement, since in effect, if not in theory, a bill may by means of the employment of the blank indorsement be originally drawn payable to bearer. Moreover, there seems to be no attempt to dispute the fact that, owing to the extensive use of instruments drawn payable to bearer in England and America, it would be idle to expect either country to agree to their abolition.

One point in conclusion I wish to touch on, and that is in relation to the question of bills made payable at fairs and markets. Regular pay-days (*Kassirtage* or *jours de caisse*), it is satisfactory to find, are now in practice obsolete and so

may be left out of the question, but I venture to doubt whether it is equally true to say so of bills payable at fairs or markets, at any rate in the case of Russia, since we find the new Russian code dealing with these instruments with great particularity, even going to the length of conferring on them, it would seem, by Article 92, a special designation. So too in the case of bills payable otherwise than in money, such as the Mexican "libranza" (though not the Spanish or Chilian instruments of the same name, which are only payable in money), the Italian "ordine in derrate," and a similar instrument in Roumanian law. I know of nothing to justify one in supposing that these instruments are now obsolete, and under Italian and Roumanian law, at any rate, if not the Mexican, such instruments are to be considered true bills of exchange. While it is at once hopeless to contend that instruments of this class can possibly expect recognition in an international code, it is equally hopeless to expect an exchange law to have any chance of international acceptance if it is to ride rough-shod over still existing practices. Short of the, to my thinking, unsatisfactory *modus vivendi* of an international exchange law confined to foreign bills only, the only way out of the difficulty would appear to be to confine the international law to such countries as are willing to discard instruments obsolete or unknown in other countries, to confine in fact the application of the law to a group of countries, as in the somewhat parallel case of the Latin Monetary Union.

To sum up the whole matter as briefly as I may, for I feel I have been unduly lengthy, I wish at the conclusion as at the commencement of my paper to lay stress on the fact that the English are not, like the Athenians of old, always wanting some new thing. From what I have stated I trust it is evident to you that the greatest tact was required to pass the Code of 1882 into law, for had it contained the remotest suggestion of revolutionary change the mercantile world would assuredly have prevented its becoming law. That an international exchange law would inevitably effect some sweeping, if scarcely revolutionary, changes is obvious, and the more advanced the changes the more carefully ought the advocates of those changes be prepared to support their views with arrays of facts drawn from the actual world of commerce and not with mere logical deductions from principles of abstract utility. The English trader may be inclined to reply to foreign critics of English law that the English law is clearly proved to work well enough, otherwise London

would not hold such a prominent place among the exchange centres of the world. The English trader can afford to wait; there are no such traces of dissatisfaction with existing law to be noted in England as appear to be noticeable in other countries, and, after all said and done, the law which suits a commercial community like the English cannot be far removed from a law suitable for international adoption.