

THE HAGUE CONVENTION OF 1912, RELATING TO BILLS OF EXCHANGE AND PROMISSORY NOTES: A COMPARISON WITH ANGLO-AMERICAN LAW

[CONCLUDED]

BY ERNEST G. LORENZEN

VIII. RECOURSE FOR NON-ACCEPTANCE AND NON-PAYMENT.

The continental law did not allow an immediate right of recourse for non-acceptance. A refusal to accept entitled the holder only to security from the drawer and the indorser that the bill would be paid on the day of maturity.¹⁵⁰ In practice this right amounted to very little. The Uniform Law adopts the Anglo-American rule, which allows immediate recourse.¹⁵¹ It goes beyond the Anglo-American law¹⁵² in providing that such right shall exist also in case of the bankruptcy of the drawee, whether an acceptor or not, of suspension of payments, of ineffective execution against his goods,¹⁵³ and in case of the bankruptcy of the drawer¹⁵⁴ of a bill not subject to acceptance.¹⁵⁵ The Uniform Law, however, does not allow the holder of a bill to treat the bill as dishonored by non-acceptance without presentment for acceptance or

150. Art. 120, French Code de Commerce; Art. 25, German Bills of Exchange Law; *Meyer*, I, pp. 464-471.

151. Art. 42. Where a drawer has stipulated that the instrument must be presented for acceptance within a certain period, a failure to present the same within the time stipulated will cause the holder to lose his right of recourse against the drawer and indorsers for non-payment as well as for non-acceptance, unless it results from the terms of the stipulation that the drawer intended to release himself only from the guaranty of acceptance. (Art. 52, par. 2). If the stipulation for a limit of time for presentment is contained in an indorsement, the indorser alone is able to avail himself of it. (Art. 52, par. 3) "Proceedings," 1912, p. 293; "Actes," 1912, I, p. 96.

152. According to Anglo-American law, where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors before the bill matures, the holder has only the right to have the bill protested for better security against the drawer and indorsers. N. I. L. s. 158; B. E. A. s. 51 (5). This was also the continental rule. *Meyer*, I, pp. 471-480.

153. The holder is entitled to exercise recourse only after presentment of the bill to the drawee for payment and after protest. Art. 43, par. 5.

154. The production of a judgment setting forth the bankruptcy of the drawer is sufficient to enable the holder to exercise recourse. Art. 43, par. 6.

155. Art. 42, par. 2.

protest, as he may in the United States, when the drawee is dead, or has absconded, or is a fictitious person, or a person not having capacity to contract by bill.¹⁵⁶

Wide differences existed and still exist in the law respecting the conditions precedent to the right of recourse upon non-acceptance and non-payment, and concerning the effect of an act of God and other circumstances rendering compliance with such conditions impossible or unnecessary.

Presentment for Payment and Protest. In England and in the United States only foreign bills, appearing to be such upon their face, require protest for non-acceptance or non-payment.¹⁵⁷ On the continent¹⁵⁸ and under the Uniform Law,¹⁵⁹ a protest is required whenever a bill or note is dishonored by non-acceptance or non-payment, except when protest is waived.¹⁶⁰ The laws differ also widely in regard to the time of presentment. According to Anglo-American law such presentment must be made on the day the instrument falls due, except in so far as this is modified by the rules relating to Sundays and holidays.¹⁶¹ Failure to make presentment on that day is excused, however, if it cannot be made in the exercise of reasonable diligence. Where presentment is not made as required by law, the drawer and indorsers are discharged.¹⁶² In other countries, France for example, when presentment is not made on the day of maturity, but takes place within the time allowed for the drawing of the protest the drawer or indorsers will not be discharged, provided the drawer has not become insolvent in the meanwhile.¹⁶³ Another group of countries, including Germany, authorizes presentment within the limits allowed for protesting and imposes upon the holder no penalty for a failure to present the instrument to the drawee on the day of maturity.¹⁶⁴ The

156. N. I. L. s. 148. In England he may do so "where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill." B. E. A. s. 41 (2) (a).

157. N. I. L. ss. 118, 152; B. E. A. s. 51 (2).

158. *Meyer*, I, p. 310.

159. Art. 43 (1). Upon the request of Italy and Belgium, Art. 9 of the Convention was adopted, according to which each contracting state may prescribe that, with the assent of the holder, protests to be drawn within its territory may be replaced by a declaration dated and written upon the bill itself, signed by the drawee, and transcribed in a public register within the time fixed for protests.

160. By a stipulation "return without costs," "without protest," and the like. Art. 45, par. 1.

161. N. I. L. ss. 71, 85; B. E. A. ss. 45 (1), 14 (1).

162. N. I. L. s. 70; B. E. A. s. 45.

163. *Williamson*, pp 143-144; *Lyon-Caen & Renault*, IV, pp. 298-299.

164. *Meyer*, I, p. 277; *Staub*, p. 108.

Uniform Law follows that of the group last mentioned, and requires that the holder present the instrument for payment either on the day when it is payable or on one of the two succeeding business days.¹⁶⁵ It allows, as it were, two days of grace to the holder while it denies all grace to the payer. Each contracting state is allowed to prescribe that, as regards bills payable within its territory, presentment shall be made on the day of their maturity. Failure to observe this rule shall give rise only to a claim for damages.¹⁶⁶

The Uniform Law requires protest for non-payment to be made either on the day when the bill or note is payable, or on one of the two succeeding business days.¹⁶⁷ In Anglo-American law, whenever protest is required, it must be made on the day of dishonor.¹⁶⁸ It suffices, however, that the bill be noted on that day. When duly noted, the protest may be subsequently extended as of the date of noting.¹⁶⁹ The system of noting is unknown to the continental countries¹⁷⁰ and to the Uniform Law.

Waiver of protest, according to Anglo-American law, is deemed to be a waiver of presentment and notice of dishonor, as well as of formal protest.¹⁷¹ Under the continental law¹⁷² and the Uniform Law,¹⁷³ it does not release the holders from presentment within the time prescribed, nor from giving notice. In some countries, Germany,¹⁷⁴ for example, and under the Uniform Law,¹⁷⁵ a waiver of protest, however, shifts the burden of proof as to due presentment

165. Art. 37.

166. Art. 7, Convention.

167. Art. 43, par. 2. Protest for non-acceptance must be made within the time fixed for presentment for acceptance. Art. 43, par. 3. Where the drawee asks that a second presentment be made to him on the day following the first, and the first presentment is made on the last day allowed for presentment, the protest may be drawn up on the next day. Art. 43, par. 3.

168. "This rule often gives rise to great inconvenience in country places, where it is difficult to obtain the services of a notary. It would be well to alter the rule if a preliminary difficulty can be got over. The noting or protest is generally taken as showing that the bill was duly presented on the proper day, but if the protest be not initiated until the next day, there is nothing to show that the bill was duly presented the day before. Moreover, notice of dishonor must, as a general rule, be sent off on the day after dishonor. Any change in our law requires careful consideration." "Memorandum on Uniform Law of Bills of Exchange" by Sir M. D. Chalmers and Mr. F. H. Jackson, British delegates, "Proceedings," 1912, at p. 404.

169. N. I. L. s. 155; B. E. A. s. 51 (4).

170. Meyer, I, p. 351.

171. N. I. L. s. 111; Daniel, s. 1095a.

172. Meyer, I, p. 312; Lyon-Caen & Renault, IV, pp. 328-329.

173. Art. 45.

174. Art. 42, German Bills of Exchange Law.

175. Art. 43, par. 2.

upon the person who claims that due presentment was not made. If, notwithstanding a waiver, the holder protested the bill or note he could recover the protest fees in Germany.¹⁷⁶ In France¹⁷⁷ and England,¹⁷⁸ such a stipulation is held to be a prohibition to protest, so that the fees are not recoverable. The same appears to be true in the United States,¹⁷⁹ although there is some dissenting opinion.¹⁸⁰ In some countries a waiver of protest would bind only the person who made it.¹⁸¹ In others, a distinction is made between the drawer and the indorsers. A stipulation by the drawer in the body of the instrument would bind all indorsers.¹⁸² A stipulation by an indorser would, in some countries, bind such indorser only,¹⁸³ in other countries it would bind him and subsequent indorsers.¹⁸⁴ The Uniform Law provides that where the stipulation is inserted by the drawer it is effective as to all signers.¹⁸⁵ Nothing is said about the effect of a stipulation by an indorser; by implication such a stipulation will bind the indorser only. If, in spite of a waiver of protest by the drawer, the holder protests the bill or note, the costs are at his expense. When the stipulation is inserted by an indorser, the costs of protest, when such has been drawn, may be recovered from all the parties.¹⁸⁶

Notice. Radical differences existed in the laws of the various countries relating to the requirement of notice. In the Anglo-American system, notice of dishonor is the important thing after due presentment, and failure to give due notice discharges the drawer and indorsers from liability on the bill or note.¹⁸⁷ Protest is required only in the case of foreign bills, and, according to Mr. Chalmers, "is looked upon rather as an interesting antiquarian form which must be complied with to please our foreign friends."¹⁸⁸ In continental countries protest is the all important thing. A very loose system of notice generally prevailed and failure to give

176. *Ibid.*

177. *Lyon-Caen & Renault*, IV, p. 328; *Thaller*, p. 741.

178. B. E. A. s. 57 (1) (c).

179. *Johnson v. Bank of Fulton*, 29 Ga. 260; *Legg v. Vinal*, 165 Mass. 555.

180. *Merrit & Myers v. Benton*, 10 Wend. (N. Y.) 117. See also *Daniel*, s. 933.

181. E. g. Germany; *Staub*, Art. 42, s. 3.

182. *Meyer*, I, p. 314; N. L. L. s. 111.

183. N. I. L. s. 111.

184. *Meyer*, I, p. 314; *Lyon-Caen & Renault*, IV, pp. 330-331; *Thaller*, p. 740.

185. Art. 45, par. 3.

186. *Ibid.*

187. N. I. L. s. 89; B. E. D. s. 48.

188. "Proceedings," 1912, p. 418.

notice did not discharge the drawer and indorser from liability on the instrument, but entitled them merely to damages against the holder for any loss suffered on account of the neglect.¹⁸⁹ Great differences existed in the details regarding the time and manner of giving notice.¹⁹⁰ In France the requirement of notice was combined with that of "prescription." In order to exercise his right of recourse against a drawer and indorser, the holder must notify the protest to him, and, in default of payment, summon him to appear before a commercial court within two weeks¹⁹¹ after the date of protest. The Uniform Law stands substantially upon the footing of the general continental law. It provides in Article 44 as follows:

"The holder must give notice of non-acceptance or non-payment to his indorser and to the drawer within the four business days which follow the day of the protest, or, in case of the stipulation, 'return without costs', within the four business days which follow the presentment.¹⁹²

"Each indorser must within two days give notice to his indorser of the notice which he has received, indicating the names and addresses of those who have given the preceding notices, and thus in succession back to the drawer. The limit of time above indicated shall run from the receipt of the preceding notice.

"In a case where an indorser has not indicated his address or has signed in an illegible manner, it shall suffice if notice is given to the preceding indorser.

"A party who has to give notice may do so in any form, even by the simple return of the bill of exchange. He must prove that he has done this within the time prescribed.

"This time limit shall be deemed to have been observed if

189. *Meyer*, I, pp. 368-369; Art. 45, German Bills of Exchange Law. The claim for damages is regarded as subject to the rules of the civil law, instead of those relating to bills of exchange. Excuses for delay on account of accident or vis major will be allowed even though they are not recognized in the exchange law of the country in question. *Meyer*, I, p. 368.

190. *Meyer*, I, pp. 367-377.

191. Art. 165-167, Code de Commerce, amended by law of December 22, 1906; *Lyon-Caen & Renault*, IV, pp. 320-324; *Thaller*, pp. 742-744; *Williamson*, pp. 156-161.

Two weeks is the minimum. Where the bill is drawn in France and is payable beyond the continent of Europe, the time may vary from one month to eight months. This period will be doubled in times of maritime war. If the holder sue the indorser and drawer collectively, he enjoys with reference to each of them the period stated. Each indorser may exercise recourse within the same period, the time beginning to run from the day following the date of summons. Arts. 165-167.

192. Four days are allowed to meet the necessities of some banks in countries like France, where a large number of bills mature at the end of a month or quarter of the year. See "Proceedings," 1912, p. 290; "Actes," 1912, I, p. 93.

an ordinary letter giving the notice has been mailed within the said time.

"The party who does not give notice within the time above indicated shall not lose his right of recourse; he shall be responsible for the injury, if any has occurred, caused by his negligence, but the damages shall not exceed the amount of the bill of exchange."

Act of God, etc. The question whether the duties necessary to be performed as conditions precedent to the right of recourse are absolute duties, or duties of reasonable diligence has been answered in different ways. In Anglo-American law only reasonable diligence is required, so that any delay is excused when caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence¹⁹³, and the act in question is dispensed with if, after the exercise of reasonable diligence, it can not be made.¹⁹⁴ At the opposite pole stood the law of Germany, which regarded them as absolute duties and accepted no excuses.¹⁹⁵ The French law followed the Anglo-American view, but recognized as excuses insuperable obstacles of a general character only, not personal excuses, such as arrest, sudden illness, or death.¹⁹⁶ The subject gave rise to vigorous discussion at the conferences of the Hague.¹⁹⁷ The Uniform Law adopts a middle course and provides that when presentment or protest is prevented by an insuperable obstacle (*vis major*) the time for performance is extended. After the cessation of the *vis major* the holder must present the bill or note and, if necessary, protest the same without delay. If the *vis major* continues for more than thirty days from maturity recourse may be exercised without presentment or protest.¹⁹⁸ The holder is bound to give notice without delay of the case of *vis major* to his indorser and to set forth this notice, dated and signed by him, on the bill of exchange, or on an allonge.¹⁹⁹ The requirement that the *vis major* must have continued for thirty days before allowing

193. N. I. L. ss. 81, 113, 147, 159; B. E. A. ss. 46 (1), 50 (1); 39 (4), 51 (9).

194. N. I. L. ss. 82 (1), 112, 148 (2), 159; B. E. A. ss. 46 (2) (a), 50 (2) (a), 41 (2) (b), 51 (9).

195. *Staub*, Art. 41, s. 3.

196. *Lyon-Caen & Renault*, IV, pp. 312-313; *Thaller*, pp. 741-742.

197. "Proceedings," 1910, pp. 212-219, 256-257; *Actes*, 1910, pp. 92-94, 339-345; "Proceedings," 1912, p. 293; "Actes," 1912, I, pp. 96-98.

198. For bills of exchange at sight or a certain time after sight the period of thirty days runs from the date on which the holder has, even before the expiration of the time for presentment, given notice of the *vis major* to his indorser. Art. 53, par. 5.

199. Art. 53. In other respects the rule governing notice applies. Art. 53, par. 2.

recourse seemed a fair compromise upon a consideration of the interests of the holder and of those of the parties liable upon the instrument. It was hoped, moreover, that in most cases, an amicable settlement might be reached during this time. What constitutes *vis major* is a question of fact. The Uniform Law provides, however, expressly that matters purely personal to the holder or to the person intrusted with presentment of the bill, or with the drawing of a protest, shall not be deemed to constitute cases of *vis major*.²⁰⁰ Such matters as railway accidents, delays in the mail, or interruptions of traffic, which affect a number of people, may, therefore, be regarded as cases of *vis major*. Different holdings upon this subject must be expected.²⁰¹

Other Excuses Dispensing with Presentment, Notice or Protest. Anglo-American Law excuses the holder from fulfilling the ordinary conditions required to fix the liability of the drawer and indorsers in other cases than those where the acts cannot be done in the exercise of reasonable diligence. The only excuse expressly recognized by the Uniform Law is that of an insuperable obstacle. Under the Uniform Law it would seem, therefore, that presentment and protest for non-acceptance will be necessary where the drawee is dead or has no capacity to contract by bill,²⁰² and that presentment and protest for non-payment will be required, in order to charge the drawer, where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument,²⁰³ and, in order to charge the indorser, where the instrument was made or accepted for his accommodation and he had no reason to expect that it would be paid if presented.²⁰⁴ Even where presentment is impossible, as where the drawee is a fictitious person, a formal protest may have to be made.²⁰⁵

Remedies where Recourse is Lost. Where the holder has failed to comply with the conditions prescribed by law in order to charge the drawer or the indorser, and has thus lost his right of recourse, he may not be deprived of all rights under the general law of a particular country. Countries belonging to the French group, for

200. Art. 53, par. 6. Inasmuch as the holder has under the Uniform Law two days of grace, so to speak, within which to present the instrument after maturity, these provisions will not operate as harshly as they would do if presentment on the day of maturity were required.

201. The recognition of foreign judgments as to what constitutes *vis major* will be subject to the ordinary rules of private international law relating to the recognition of foreign judgments.

202. Contra: N. I. L. s. 148; B. E. A. s. 41 (1).

203. Contra: N. I. L. s. 79; B. E. A. see s. 46 (2) (c).

204. Contra: N. I. L. s. 80; B. E. A. s. 46 (2) (d).

205. Contra: N. I. L. s. 82 (2); B. E. A. s. 46 (2) (b).

example, allow him to sue the drawer who has not provided cover.²⁰⁶ In countries belonging to the German group, he has a quasi-contractual remedy against the drawer or indorser who would otherwise be unjustly enriched. He will have a right of action on the consideration, save in so far as the drawer or indorser may have suffered loss as a result of the holder's failure to present the instrument or to protest it in time.²⁰⁷ The Uniform Law lays down no rule in this matter, but allows the contracting states to follow either the French or German practice.²⁰⁸ Anglo-American law, it would seem, denies generally recovery even of the original consideration.²⁰⁹

IX. RIGHTS AND LIABILITIES OF PARTIES.

Drawing Without Recourse. In Anglo-American law a drawer may draw without recourse;²¹⁰ under the Uniform Law such a stipulation is deemed not written.²¹¹

Forged Indorsement. The position of the Uniform Law with regard to forged indorsements may be gathered from the following articles:

"The possessor of a bill of exchange shall be deemed to be its lawful holder, provided that he proves his title by an uninterrupted series of indorsements, even though the last indorsement is in blank. When an indorsement in blank is followed by another indorsement, the signer of the latter shall be presumed to have acquired the bill under an indorsement in blank. Indorsements which have been cancelled shall be deemed null.

"If a party has been dispossessed of a bill of exchange in any manner whatever, the holder proving his title in the manner indicated in the preceding paragraph shall not be bound to surrender the bill, unless he has acquired it in bad faith or in acquiring it has been guilty of gross negligence."^{211a}

206. *Thaller*, p. 683.

207. Art. 83, German Bills of Exchange Law; *Meyer*, I, pp. 161-163.

208. Art. 13, Convention.

209. *Woodward*, "Quasi-Contracts," Sec. 92; *Continental National Bank v. Metropolitan Natl. Bank*, 107 Ill. App. 455; *Allan v. Eldred*, 50 Wis. 132.

210. N. I. L. s. 61; B. E. A. s. 16 (1).

211. Art. 9. In the "Memorandum on Uniform Law on Bills of Exchange," submitted by the British delegates, *Sir M. D. Chalmers* and *Mr. F. H. Jackson*, reprinted in "Proceedings," 1912, pp. 396 et seq., the following comment appears on p. 399: "Such bills are very uncommon, though, as we pointed out, they might be justifiable where a man was drawing for the account of a third party, or where the drawer was acting in a representative capacity, e. g., as an executor. The continental delegates adhered to their rule on the ground, that where a drawer drew a bill without recourse there was nobody liable on the bill at all at the time of its issue, and if it were refused acceptance there might never be any body liable on it."

211a. Art. 15.

"The drawee who pays before maturity does so at his own risk and peril.

"Any one who pays at maturity shall be validly discharged, unless he has been guilty of fraud or gross negligence. He is bound to verify the regularity of the series of indorsements, but not the signatures of the indorsers."²¹²

In Anglo-American law title to the bill or note payable to order can be acquired only through a correct chain of genuine indorsements. A forged indorsement will prevent the passing of title.²¹³ According to the continental view the negotiability of the instrument confers title upon every holder who has taken it when the chain of indorsements is only formally correct. The mere fact that one or more of the indorsements are forgeries is immaterial.²¹⁴ In some of the countries the holder will acquire an indefeasible title only when he is not guilty of fraud or gross negligence in the taking of the instrument.²¹⁵ This view has become that of the Uniform Law.²¹⁶ Where a holder has acquired title to a bill of exchange in a continental country under a forged indorsement, such title and that of every subsequent holder will be recognized in England under its rules relating to the Conflict of Laws.²¹⁷

It is equally well settled in English and American law that when an instrument is payable to order, a drawee, in order to be discharged, must pay to the person who holds the legal title or to his agent. He must examine the genuineness of the indorsements at his peril.²¹⁸ No exception to this rule exists in this country. In England,²¹⁹ the law relieves the banker upon whom checks or other demand drafts payable to order are drawn from the responsibility

212. Art. 39.

213. N. I. L. s. 23; B. E. A. s. 24.

214. *Meyer*, I, pp. 268-274. The harshness of the rule as regards the holder is mitigated somewhat in certain countries by a special procedure (amortization) which may be instituted when a bill or note is lost, for the purpose of declaring it null and void. See *Meyer* I, pp. 569 et seq.; *Staub* Art. 73; Secs. 824-850, German Code Civil Procedure. This procedure is of no avail, of course, where the loss is not discovered before the bill is paid. The rights of the holder in case of loss are not dealt with in the Uniform Law, the matter being left to the law of the contracting states. See Article 15, Convention.

215. The term "good faith" in the law of bills and notes has generally the same signification as it has in Anglo-American law. To charge a person with bad faith there must exist actual knowledge of the infirmity or defect or knowledge of such facts as to put him on notice. See N. I. L. s. 56 and B. E. A. s. 90. In Germany the term is equivalent to "a conviction, not resting upon gross negligence that through its acquisition no rights of third parties were affected detrimentally." *Meyer*, I, p. 44.

216. Art. 15, par. 2.

217. *Embricos v. Anglo-Austrian Bank*, (C. A.) 1905, 1 K. B. D. 677.

218. N. I. L. ss. 119 (1), 88, 191 ("holder"); B. E. A. s. 59 (1).

219. B. E. A. s. 60.

of verifying the indorsements where he pays the instrument in good faith and in the ordinary course of business. On the continent the payer need not inquire into the genuineness of the indorsement, and, in some countries at least, he would make such examination at his peril.²²⁰ With regard to inquiring into the identity of the party demanding payment the duty of the payer is limited to the exercise of due care.²²¹ The French law makes a distinction. Payment before the maturity of the instrument is made at the peril of the person so paying, imposing upon him the duty of examining the genuineness of the indorsements and the identity of the party presenting the instrument. Payment on the day of maturity exonerates him from these duties in the absence of fraud or gross negligence.²²² This distinction is attempted to be justified on the ground that the payer, who must pay the instrument promptly on the day of maturity, cannot take the time to inquire into the genuineness of the indorsements or into the identity of the holder. The Uniform Law²²³ adopts the distinction of the French law concerning the payer's duty to examine the validity of the indorsements, but leaves his obligation as regards the identity and capacity of the holder to the courts.²²⁴

At the conference, the British delegates opposed the adoption of the continental rule relating to forged indorsements, on the ground that it would encourage laxity in transactions involving bills and notes. The question, after all, is who of two innocent parties shall suffer, for neither the payer nor the holder is in a position to make certain of the genuineness of the indorsements. On the whole, it would seem fairer that the risk concerning the genuineness of the indorsements be thrown upon the holder who has taken the bill or note from a stranger. The distinction drawn in England between bankers and other drawees, seems arbitrary.

Warranties and Admissions. The Uniform Law contains no provisions similar to those found in the Negotiable Instruments Law²²⁵ relating to the admissions of the acceptor and to the warranties of a person negotiating a bill or note by means of a qualified or unqualified indorsement. The liability of the qualified indorser is regarded a matter of civil law and hence is not dealt with in the

220. Meyer, I, p. 269; Staub, Art. 36, s. 23.

221. Meyer, I, p. 269.

222. Lyon-Caen & Renault, IV, pp. 252-259; Thaller, p. 726; Williamson, pp. 121-125.

223. Art. 39.

224. "Proceedings," 1910, p. 252; "Actes," 1910, p. 89.

225. Secs. 62, 65, 66.

Uniform Law. The object of the Negotiable Instruments Law²²⁶ is attained in a measure by the simple provision that the forgery of a signature, even that of the drawer or acceptor, shall not in any way affect the validity of the other signatures.²²⁷

Defenses. In the advance draft of 1910 an attempt was made to enumerate the defenses which could be set up against the holder. At the second conference, this enumeration was deemed incomplete, and it was felt that it was practically impossible to make out a complete list. It was decided, therefore, to indicate merely the defenses which can not be set up against the holder, and to leave the question in other respects to the courts. According to Article 16 of the Uniform Law parties sued on a bill can not set up against the holder defenses based upon their personal relations with the drawer or with prior holders, unless the transfer has taken place in pursuance of a fraudulent understanding. The question of alterations, however, is dealt with specifically in the Uniform Law. There is but one article devoted to the subject, which reads as follows:

"In case of alteration of the text of a bill of exchange, parties who have signed subsequent to the alteration are bound according to the terms of the altered text; parties who have signed prior to the alteration are bound according to the terms of the original text."²²⁸

This article is couched in such general language as to leave doubt as to its meaning in important particulars. The Negotiable Instruments Law²²⁹ and the Bills of Exchange Act²³⁰ are more specific.²³¹

Amount of Recovery. In regard to the amount of recovery, the Uniform Law has the following provisions:²³²

Art. 47—"The holder may claim from the party against whom he exercises recourse:

"1. The amount of the bill of exchange not accepted or not paid, with the interest, if any has been stipulated for.

226. Secs. 62, 65.

227. Art. 68.

228. Art. 69.

229. N. I. L. s. 124.

230. B. E. A. s. 64.

231. Sec. 124, N. I. L., reads: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against the party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof, according to the original tenor."

232. The rules apply also to promissory notes. See Art. 79.

"2. Interest at the rate of five per cent. from the date of maturity.

"3. The costs of the protest, those of the notices given by the holder to the preceding indorser and to the drawer, as well as other expenses.

"4. A commission, which, in the absence of agreement, shall be one-sixth of one per cent. of the principal of the bill of exchange, and shall not in any case exceed this rate.

"If recourse is exercised before maturity, the amount of the bill shall be subject to a deduction for discount. This discount shall be calculated, at the option of the holder, either according to the official rate of discount (bank rate), or according to the rate in the open market on the date of the recourse in the place where the holder is domiciled."

Art. 48—"A party who has taken up and paid a bill of exchange may claim from the parties liable:

"1. The entire sum which he has paid.

"2. Interest on said sum, calculated at the rate of five per cent., beginning with the day of payment.

"3. The expenses which he has incurred.

"4. A commission on the principal of the bill of exchange, fixed in conformity with Article 47, subhead 4."

The Uniform Law provides further:

Art. 51—"Any party having the right to exercise recourse may, in the absence of contrary stipulation, recover the amount by means of a new bill of exchange (redraft), undomiciled and drawn at sight upon one of the parties liable to him.

"The redraft shall include, in addition to the amounts indicated in Articles 47 and 48, the brokerage paid and the stamp tax upon the redraft.

"If the redraft is drawn by the holder, the amount shall be fixed according to the rate ruling for a bill of exchange at sight, drawn in the place where the original bill was payable upon the place of residence of the party liable. If the redraft is drawn by an indorser, the amount shall be fixed according to the rate ruling for a bill of exchange at sight drawn in the place where the drawer of the redraft resides upon the place of residence of the party liable."

The Bills of Exchange Act²³³ awards the same damages to the holder, to the drawer, and to the indorser and allows them to recover:

(1) The amount of the bill.

(2) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case.

233. B. E. A. s. 57 (1). The rules under sect. 57 (1) apply also to notes. B. E. A. s. 89.

(3) The expenses of noting, or, when protest is necessary,²³⁴ and the protest has been extended, the expenses of protest.

The above rules do not cover the entire field. A foreign drawer, for example, who has paid re-exchange may recover it from an English acceptor.²³⁵

The rate of interest allowed in England appears to be usually five per cent.²³⁶ No commission is allowed.²³⁷ Where suit is brought before maturity, the full amount may be recovered, contrary to the Uniform Law, without deduction for a discount.

With regard to the question of a "redraft" the Bills of Exchange Act lays down the rule:

"In the case of a bill which has been dishonored abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment."²³⁸

Mr. Chalmers makes the following comment upon this subdivision:

"The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the *then rate of exchange* on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor. The expenses consequent on dishonor are the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn, the cost of the stamp.

"The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a 're-draft.' The indorser who pays a re-draft may in like manner draw upon the antecedent party."²³⁹

In the United States there is great lack of uniformity with respect to the subject of damages. The Negotiable Instruments Law does not undertake to regulate the matter. In lieu of re-

234. For the law of the United States, see, ante, text and notes 178-179.

235. *Chalmers*, p. 195; *Ex parte Robarts, in re Gillespie* (1886) 16 Q. B. D. 702; 18 Q. B. D. 286, C. A.

236. *Chalmers*, p. 195.

237. A commission is allowed under the continental and the Uniform Law by way of compensation for the damage which the holder may have suffered as a consequence of the non-fulfillment of the obligations assumed towards him; "Proceedings," 1910 p. 172; "Actes," 1910, p. 299.

238. Sec. 57, Subd. 2.

239. *Chalmers*, p. 196.

exchange the statutes frequently establish fixed amounts of damages.²⁴⁰

Partial Payments. The question whether partial payment should be allowed was debated a good deal at the Hague conferences. In England and in the United States, the holder has the option whether he will accept partial payment or not.²⁴¹ The Uniform Law obliges him to accept such payment in the interest of the drawer and indorsers, who are discharged to that extent.²⁴² Upon the express demand of the French Government the convention²⁴³ permits each contracting state to authorize the holder to refuse partial payment of instruments payable within its own territory.

Payment into Court. In default of presentment of a bill or note within the time specified by law, the Uniform Law²⁴⁴ authorizes the debtor to pay the amount due into court, a right which he does not enjoy under Anglo-American law.

Statute of Limitations. Contrary to the Negotiable Instruments Law and to the Bills of Exchange Act, the Uniform Law lays down rules concerning the running of the statute of limitations. Against the acceptor all actions arising out of a bill of exchange are barred after three years calculated from the date of maturity. Actions by the holder against the indorsers and against the drawer are barred after one year from the date of the protest drawn up within the legal time or from the date of maturity where there is a stipulation "return without costs". Actions of recourse by indorsers against each other, and against the drawer, are barred after six months, counting from the day when the indorser took up the bill, or from the day that he himself was sued.²⁴⁵

Much time was spent at the conference in the discussion of what facts should be regarded as sufficient to interrupt the running of the statute of limitations, but no agreement was reached, and the matter was left to the legislation of the contracting states.²⁴⁶

240. See *Daniel*, ss. 1438-1460.

241. *Wood's Byles*, *234.

242. Art. 38, par. 2. The drawee may require that such payment shall be specified on the bill and that a receipt therefor be given to him. Art. 38, par. 3.

243. Art. 8.

244. Art. 41.

245. Art. 70. Each contracting state is at liberty to decide whether, where the statute of limitations has run, an action shall not lie against the drawer who has not provided cover, or against a drawer or indorser who is unjustly enriched. The same right exists when the acceptor has received cover or has been unjustly enriched. Art. 13, Convention.

246. Convention, Art. 15.

X. ACCEPTANCE AND PAYMENT FOR HONOR. REFEREE IN CASE OF NEED.

The Uniform Law deals with the referee in case of need and with the subject of acceptance and payment for honor under the title of "Intervention for Honor". It lays down a few general rules and then deals separately with "acceptance for honor" and "payment for honor". The general provisions differ from Anglo-American law in allowing "a third party, even the drawee, or a party already liable on the bill, except only the acceptor," to intervene.²⁴⁷ The Negotiable Instruments Law and the Bills of Exchange Act restrict acceptance for honor to "any person not being a party already liable thereon,"²⁴⁸ though they permit *any* person to pay for honor.²⁴⁹ The Uniform Law prescribes for both forms of intervention that the party intervening is bound to give notice without delay of his intervention to the party for whom he has intervened.²⁵⁰ Failure to do so may result in liability for damages. There is no such requirement in Anglo-American law.

Acceptance for Honor. The Uniform Law differs from the Negotiable Instruments Law but agrees with the Bills of Exchange Act in not providing for a further acceptance by a different party,²⁵¹ and in requiring acceptance for honor to be written on the bill.²⁵² The Negotiable Instruments Law and the Bills of Exchange Act prescribe that where a bill has been accepted for honor or contains a referee in case of need it must be protested for non-payment before it is presented for payment to the acceptor for honor or to the referee in case of need.²⁵³ The Uniform Law contains no such requirement concerning the referee in case of need. Regarding the acceptor for honor, it adopts the rule that he shall be held in the same manner as the person for whose honor he intervenes.²⁵⁴ Presentment for payment and protest would be necessary, therefore, if he intervened on behalf of the drawer or an indorser.

According to the Negotiable Instruments Law and the Bills of Exchange Act presentment to the acceptor for honor must be made at maturity, and, when he refuses to pay, the instrument must be

247. Art. 54, par. 3.

248. N. I. L. s. 161; B. E. A., s. 65 (1).

249. N. I. L. s. 171; B. E. A. s. 68 (1).

250. Art. 54, par. 4.

251. N. I. L. s. 161; cf. B. E. A. s. 65 (1).

252. Uniform Law, Art. 56; B. E. A. s. 65 (3). The N. I. L. s. 162 is satisfied if the acceptance for honor is in writing.

253. N. I. L. s. 167; B. E. A. s. 67 (1).

254. Art. 57, par.1.

protested.²⁵⁵ Under the Uniform Law the holder must present the bill to the acceptor for honor "at the place of payment", and, in case of non-payment, protest the same.²⁵⁶ Such presentment is not necessary if the acceptor for honor does not have an office at the place fixed for payment according to the terms of the bill of exchange itself.²⁵⁷ Presentment for payment to the referee in case of need is required under the same conditions;²⁵⁸ whereas under Anglo-American law no presentment to such referee need be made.²⁵⁹ In default of protest within the time specified by law, the parties who have indicated the case of need or for whose account the bill has been accepted and the subsequent indorsers are discharged from liability.²⁶⁰ The Uniform Law allows the party for whose honor an acceptance is given and the parties liable to him to take up the instrument at once under discount and to proceed against the parties liable to them.²⁶¹ No such right exists under Anglo-American law.

Payment for Honor. Anglo-American law allows a bill which has been protested for non-payment to be paid for honor without fixing a time within which such intervention may take place.²⁶² Under the Uniform Law payment for honor cannot be made later than the day following the last day allowed for the drawing of the protest for non-payment.²⁶³ It provides also that it must be for the entire sum which the party in whose behalf it is made would have to pay, excepting the commission, and that it must be established by a receipt given on the bill, showing for whose honor payment was made.²⁶⁴ In default of such indication, the payment shall be deemed to have been made for the drawer.²⁶⁵ According to the

255. N. I. L. s. 170; B. E. A. s. 67 (4).

256. Art. 59, par. 1.

257. "Proceedings," 1912, p. 296; Actes, 1912, I, p. 99.

258. Art. 59, par. 1.

259. N. I. L. s. 131; B. E. A. s. 15.

260. Art. 59, par. 2.

261. Art. 57, par. 2.

262. N. I. L. s. 171; B. E. A. s. 68 (1).

263. Art. 58. In the "Memorandum on the Uniform Law submitted by the British Delegates," "Proceedings," 1912, at page 406, it is stated: "The foreign delegates said that the rule was required because the holder ought at once to send off the protest to the indorser he sought to hold liable. But take the case of a bill drawn in South America and dishonored in England. There may be no mail for a fortnight. Why should not the bill be paid for honor at any time within this fortnight? According to English law, any number of duplicate protests may be drawn up from the original noting, so that the foreign reason for the rule has no application here."

264. Arts. 60, par. 1; 61, par. 1.

265. Art. 61, par. 1. *Wood's Byles*, *267.

Negotiable Instruments Law and the Bills of Exchange Act, payment for honor must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.²⁶⁶

The Uniform Law contains a specific provision that the party paying for honor cannot indorse the bill of exchange anew.²⁶⁷ Both systems of law give the preference in case of competition of payment for honor to the one whose payment will discharge most parties to the bill.²⁶⁸ The Uniform Law adds that, if this rule is not observed, the party intervening who has knowledge of it shall lose his right of recourse against those who would have been released.²⁶⁹ The Anglo-American law, as well as the Uniform Law, oblige the holder to accept payment for honor, and, in case of his refusal to do so, he forfeits his right of recourse against the parties who would have been discharged by such payment.²⁷⁰

XI. BILLS IN A SET.

The law governing bills in a set is very similar in the different countries. One or two differences, however, should be noted. According to the Uniform Law any holder of a bill which does not indicate that it has been drawn in a single specimen, may require at his own expense the delivery of two or more specimens.²⁷¹ This duty was imposed upon the drawer for the benefit of an importer beyond the seas who is dependent upon the bills for his means of remittance.²⁷² In Anglo-American law this seems to be a matter of private arrangement.²⁷³ Another difference is expressed in Article 65 of the Uniform Law, which provides as follows:

"A party who has sent one specimen of a set for acceptance must indicate on the other specimens the name of the party with whom said specimen may be found. The latter is bound to surrender it to the lawful holder of another specimen.

"If he refuses to do so, the holder can not exercise recourse until after he has established by a protest:

"1. That the specimen sent for acceptance has not been delivered to him on his demand.

"2. That acceptance or payment can not be obtained on another specimen."

No such regulations exist in Anglo-American law. The question who shall be deemed the owner of the bill, when two or more

266. N. I. L. s. 172; B. E. A. s. 68 (3).

267. Art. 62, par. 1.

268. Uniform Law, Art. 62, par. 3; N. I. L. s. 174; B. E. A. s. 68 (2).

269. Art. 62, par. 3.

270. Uniform Law, Art. 60, par. 1; N. I. L. s. 176; B. E. A. s. 68 (7).

271. Art. 63, par. 3.

272. *Conant's* report, "Proceedings," 1910, p. 20.

273. See *Chalmers*, p. 238.

parts of a set have been negotiated to different persons in due course, as between such holders, is not answered in the Uniform Law. The Negotiable Instruments Law and the Bills of Exchange Act make the person whose title first accrued the true owner of the bill.²⁷⁴

XII. COPIES.

There are no general provisions in Anglo-American law relating to the subject of copies. The Uniform Law has the following:

Art. 66—"Every holder of a bill of exchange shall have the right to make copies of it.

"A copy must reproduce the original exactly, including indorsements and all other declarations which appear thereon. It must indicate how far it extends as a copy.

"It may be indorsed and guaranteed by aval in the same manner and with the same effects as the original."

Art. 67—"The copy must specify the party in possession of the original instrument. Such party is bound to surrender the aforesaid instrument to the lawful holder of the copy.

"If he refuses to do so, the holder can not exercise recourse against the parties who have indorsed the copy until after he has established by a protest that the original has not been surrendered to him on his demand."

XIII. CONFLICT OF LAWS.

The Uniform Law devotes three articles to the Conflict of Laws. Such rules were necessary because the entire subject of capacity and matters relating to form and to the mode of performance, to a considerable extent remain subject to the law of the contracting states.²⁷⁵ The provisions are as follows:²⁷⁶

Art. 74—"The capacity of a person to bind himself by a bill of exchange shall be determined by his national law. If such national law declares the law of another state to be applicable, such latter law shall be applied.

"A person who lacks capacity under the law indicated in the preceding paragraph shall nevertheless be validly bound, if he has entered into the obligation within the territory of a

274. N. I. L. s. 179; B. E. A. s. 71 (3).

275. The sole object of the provision was to lay down rules for those cases with respect to which no complete uniformity had been secured. There is no obligation to apply these rules to non-contracting states. As to them the ordinary national rules governing the Conflict of Laws will, therefore, in all probability continue to govern.

The English rules governing the Conflict of Laws are found in section 72 of B. E. A. The N. I. L. failed to codify the American law on the subject.

276. These rules also apply to promissory notes. Art. 79.

state according to the law of which he would have been competent."²⁷⁷

Art. 75—"The form of any contract arising from a bill of exchange shall be regulated by the laws of the state within whose territory such contract has been signed."

Art. 76—"The form and the limits of time of the protest, as well as the form of other proceedings necessary for the exercise or preservation of rights arising from a bill of exchange, shall be regulated by the laws of the state within whose territory the protest must be drawn up or the act in question must be done."

According to Article 20 of the Convention, the right is reserved to the contracting states not to apply the above principles: (1), when an engagement is entered into within the territory of a non-contracting state; (2), when the law applicable by virtue of the foregoing principles is the law of a non-contracting state.

A comparison between the rules of the Conflict of Laws applicable by reason of the Convention of the Hague with those of Anglo-American law, is beyond the scope of the present article.

XIV. STAMP DUTIES.

In certain countries,²⁷⁸ including England,²⁷⁹ a bill or note may be void for want of compliance with the stamp laws. This seemed unjust to the delegates at the Hague conferences.²⁸⁰ The convention, therefore, specifically prohibits the contracting states from subordinating the validity of engagements taken in matters of bills and notes to a compliance with the stamp laws. It authorizes them however, to suspend the exercise of such rights until the prescribed stamp duties have been paid.²⁸¹

The above prohibition does not apply, of course, to non-contracting states.

XV. PROMISSORY NOTES.

The rules governing bills of exchange apply under the Uniform Law equally to promissory notes, in so far as they are not inconsistent with the nature of such instruments.²⁸²

277. Article 18 of the Convention gives to each contracting state the power to refuse to recognize the validity of an engagement entered into in regard to a bill of exchange by any one within its jurisdiction which would not be held valid within the territory of the other contracting states except by application of Article 74, par. 2, of the law.

278. *Meyer*, I, pp. 144-148.

279. See Stamp Act, 1891, 55 & 55 Vict. c. 39.

280. "Proceedings," 1910, p. 296; "Actes" 1910, p. 133.

281. Art. 19, Convention.

282. Art. 79. Upon the request of Russia each contracting state is authorized not to introduce the Uniform Law in so far as it relates to promissory notes. Article 22, Convention.

The limits set to this article have made it inexpedient in the preceding comparative study to enter upon a consideration of the respective advantages and disadvantages of the individual rules adopted by the Uniform Law, the Bills Exchange Act or the Negotiable Instruments Law. Such a critical examination of the Uniform Law was made by the British government, by the Committee on Bills of Exchange of the English Institute of Bankers, and by the British delegates at the Hague Conferences, Mr. F. Huth Jackson and Sir M. D. Chalmers. The conclusion reached by them was that only in very few instances, the balance of convenience was clearly in favor of the provisions of the Uniform Law. The British delegates in their report to their government felt warranted in recommending only the following amendments to the Bills of Exchange Act:

"1. That days of grace should be abolished.

"2. That in all cases where a bill falls due on a non-business day it should be payable on the succeeding business day.

"3. That where the sum payable by a bill is expressed more than once in words, or more than once in figures, and there is a discrepancy, the lesser sum shall be the sum payable.

"4. That where a bill is expressed to be payable with interest and no rate of interest is specified, interest at the rate of 5 per cent. shall be payable.

"5. That where an acceptance consists of a simple signature of the drawee, it must be on the face of the bill.

"6. That where a bill is dishonored by non-acceptance, a party who is liable on the bill may nevertheless accept it for honor."²⁸³

The suggestion was made also that it might perhaps be advisable, after a careful consideration of the questions in all their bearings, to bring the English law into closer harmony with the rules of the Uniform Law with regard to three other points.²⁸⁴

1. Should not the English principle which exempts a banker from the responsibility of verifying the indorsements on a demand draft drawn upon him be extended to all drawees of bills of exchange and makers of promissory notes, or at any rate, to all demand drafts whether drawn on a banker or not? 2. Should not a bill be allowed to be noted for non-payment both on the day of dishonor and on the next succeeding business day? 3. Should not the English law allow immediate recourse against the drawer and indorsers in case of the failure of the acceptor before maturity?

283. See "Proceedings," 1912, pp. 409-410.

284. See *ibid.*, p. 410.

Of the six recommendations made, the first and second are already law in the United States. Of the rest, only the fourth and the fifth are of any real importance. Recommendation 3 would clearly be a useful addition to the Negotiable Instruments Law. Recommendation 6 likewise deserves approval. There would appear to be no sufficient reason for a distinction between acceptance and payment for honor which should preclude a person already liable on the instrument from accepting it for honor.²⁸⁵ As regards the fifth recommendation, the rule of the Bills of Exchange Act, which requires an acceptance to be on the bill, is clearly preferable to the provisions of the Negotiable Instruments Law. Where the mere name of the drawee is written, acceptance should be on the face of the bill, as prescribed by the Uniform Law, in order to avoid confusion with indorsements. The fourth recommendation has the great advantage of fixing a definite rate of interest in lieu of a rate varying with the law of the place of payment.²⁸⁶

With respect to the other points mentioned, it is clear that the right to protest the bill for better security, in the case of the failure of the acceptor before maturity, is of little practical value, and that the granting of an immediate right of recourse is a far more effective remedy. The expediency of allowing the noting of a bill of exchange on the day following the day of dishonor, has been discussed *ante*. As regards the duty of the drawee to verify the indorsements, American law differs from that of England and imposes such duty in all cases. In view of the fact that the Negotiable Instruments Law declined to admit any exception to this rule, contrary to the example of the English law, the provision of the Uniform Law, which overthrows the American doctrine in its entirety, would be, of course, unacceptable in this country.

285. See "Memorandum on Uniform Law by British Delegates," "Proceedings," 1912, p. 406.

286. Under the rules governing the Conflict of Laws, the law of the place of payment would control the rate of legal interest. *Daniel*, ss. 895-901.