THE LAWS ON NEGOTIABLE SECURITIES: A CONDENSED MANUAL; IN WHICH BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES ARE NOT DEALT WITH

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INTRODUCTION.

THE question of establishing international rules to regulate the rights and liabilities of the holders of negotiable securities, nominative or to bearer (not to include bank-notes, bills of exchange and promissory notes) has of late received an additional impulse by the action taken by continental bankers and the chambers of commerce of Frankfort-on-the-Main, Berlin, Vienna, Amsterdam, Hamburg and Bremen. At the Frankfort Conference of the Association for the Reform and Codification of the Law of Nations, the President of the chamber of commerce of that city, Herr de Neufville, brought forward the following propositions :—

"That great prejudice has accrued to the commercial interest of this city from the material differences in the laws of different countries with regard to papers to bearer: we mention only:

"1st. The issuing of instruments to bearer, their conversion into instruments nominative, and their reconversion.

"2nd. Hypothecations (mortgages to bearer).

"3rd. The pledging (mortgaging or charging) of large subjects of property, such as railways, &c., not to a particular creditor, but to a general body, showing title by the holding of certificates;

"4th. The impounding (seizure, attachment) of securities and the difficulties thence arising to *bonâ fide* owners.

"5th. The barring of rights of coupon holders through lapse of time.

"6th. Payment of expired coupons duly allotted.

"7th. The annulment (amortisation) of lost papers to bearer."

To consider these propositions and gather information an international committee was appointed, with power to add to its number. This committee has since established sub-committees in the various capitals of the European states, and in those of the United States and other transoceanic countries.

The importance of the question of negotiable securities is quite exceptional. According to Dr. KARL DE SCHERZER * the quoted values of these securities exceeds £6,800,000,000, and year by year the investing public augment this enormous sum by several hundred of millions of pounds sterling. Any change of the law, any proposal for altering the present state of things, hence necessarily involves points of paramount interest to the investing public; and yet important as it has become to consider the feasibility of creating common rules, based on applicable principles of law internationally for regulating the rights and liabilities under these securities, no attempt has heretofore been made in that direction.

To understand this tardiness in grasping with a question of such paramount importance to the civilized world (for the savings of the northern and Latin peoples are principally, save investments in land, represented by these securities), it is necessary to study the history of the origin and development and final state of the law regarding them, to the present day.

The Civil Law of ancient Rome does not touch upon the question of bonds and shares. These instruments were unknown in ancient Rome; the *congiaria* and *missilia* were but crude means by delivery of tickets for distributing provisions to the poor; and Dr. Gneist repudiates the notion of their ancient origin. Nor, indeed, until the twelfth century can we trace the employment of bonds to bearer; the first authentic record of their issue is that made by the *Camera del imprestiti* of Venice (A.D. 1171); which office put forward promises emitted by the state, to

* Dr. Karl de Scherzer, Austrian consul-general, Leipzig, 1876.

pay a stated sum to bearer, redeemable at a given period and carrying interest.* The example thus set by the Italian Republic was followed by the Dutch and Flemish States. In the year 1275, Marguerite, Countess of Flanders, caused treasury bonds to bearer to be issued. Gradually, following the example of Italy and Flanders, other States adopted their use. The town of Marseilles in the fourteenth century employed this form of document, and by degrees the public accepted (encouraged by the example of the clergy) the custom of furnishing money to their Governments in exchange for instruments to bearer acknowledging the indebtedness of the state. In the year A.D. 1407, the historically known Banca di St. Georgio was created at Genoa. This company issued share certificates to bearer; from that date both in Italy and France their employment may be traced in all the great undertakings of those countries during the fifteenth, sixteenth, and seventeenth centuries. With varying favour the French legislature has from time to time regarded these instruments; the Ordonnance of A.D. 1669, prohibiting that of A.D. 1673 permitting their employment. As might be expected after the collapse of the *financier* Law, A.D. 1716, a rigorous *ordonnance* forbade their use, and not until the days of the French Revolution, 25 Thermidor, an. iii (A.D. 1792), was the prohibitive law of 1714 repealed. The abhorrence caused by the excessive speculation in the early days of King George I., moved Parliament to pass the famous Bubble Act, the 3 George I., c. 18, only repealed in the year 1825 (the 4 & 5 William IV. c. 94). This prohibitive enactment repressed joint stock enterprise in England for upwards of a century; indeed, it may be safely said, that in England, possessed of the largest trade of all the European countries and the greatest amount of disposable capital, both the use of negotiable instruments (except bills and notes,) and the employment of joint stock capital in a common adventure, are but of very recent date. With tardy reluctance has our legislature relieved the co-adventurer (shareholder), from unlimited liability, and permitted dealings in these securities. Not until the year 1855 was a *general* statute passed (18 & 19

* Marines, Sametens, Vit. duc. Venetiani.

Vict. c. 173), permitting companies to be created with limited liability; the limited liability Acts of 1862, 1867, being the first comprehensive measure, giving encouragement to joint stock enterprise, apart from that conceded by special Acts of Parliament, such as were granted to railway companies, or under special charters from the Crown. Whilst in England and France the public were passing through alternating states of frenzied speculation, or of unreasoning alarm and depression, in Holland and Flanders the habit of establishing Joint Stock companies was steadily progressing, and the great East Indian Companies of that country date from that period. In Germany, Frederic the Great, to meet the demands of his exhausted exchequer (Ordinance, 29 August, 1769), caused instruments to bearer to be issued, secured on mortgages on land; but Joint Stock companies were hardly known to the slow-to-be-moved German before the close of the eighteenth century, nor in fact until the close of the Napoleonic wars did the people of the Northern European States give their attention to this form of raising a joint fund to carry out common undertakings. Since that date, however, the jurists of the North have devoted their minds to the unravelling of the difficult questions involved in the creation and use of bonds, shares and instruments to bearer, and the legal principles upon which the rights arising out of these securities are founded.

The persistency of opposition on the part of the legislature of different countries, supported by jurists and Courts of law, has resulted in the creation of legal systems, not based upon common juridical principles, but resulting out of a compromise between the urgency of the requirements of modern commerce, and the unreasoning conservatism of the adherents of that which already existed. This struggle between the obsolete and the past and the incoming new is now manifested by singularly conflicting and varying, and in many respects complicated systems (in many of their essential principles) which have been adopted in different European States.

The principal questions which arise in regard to dealing with these conflicts of law and practice, are Firstly: as regards bonds

and debentures, their negotiability, and the charges or mortgages (hypothecs) created to secure the principal sum and interest on such; and secondly, respecting shares in joint stock companies.

As regards bonds, obligations issued by a Government, they are usually deemed a charge on the general revenues of the country borrowing money on these securities; in exceptional instances the customs revenues, or other sources of State revenue, are specially mortgaged; and though in diplomatic circles such engagements may be deemed binding, the creditor has himself no redress in case of default save through the intervention of his government. But when we come to deal with loans created by private companies, more especially railway and canal companies, it becomes a matter of importance, first to consider the legal character of a bond or debenture (obligation), and secondly, the validity of a charge or mortgage to secure its payment. And *first* as to the issue of obligations (bonds). In France, Russia, the German States, Austria, &c., the sanction of the Government is needed, in England the Legislature grants this permission in the special act of parliament creating a railway, canal or other public company; whilst in the Netherlands and Belgium no restriction is imposed. In the United States the law is in a great state of uncertainty, according to Judge Redfield;* in some of the States a registry of mortgages is kept by the borrowing company, but as a rule no registry having the authority of a Government office is kept. On referring to Chapter ii. s. 2, in the text, reference will be found to the laws of different States, and from the perusal of these the reader will be able readily to satisfy himself that one common system ought to be adopted. It is hence suggested, "That one common system of registration of all issues of bonds or debentures (obligations) ought to be observed, the registration to be invariable at a Government office established for that purpose, at the place where the company has its seat or legal domicil, and that the issue of bonds, save after registration, be deemed illegal, and the parties issuing them answerable as wrongdoers and penally liable. If this rule were

* Redfield, L. of Railways, v. ii. sect. 2.