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SPECIAL ARTICLES

THE GERMAN 1908 LAW OF CHECKS1.

BY ERNEST G. LORENZEN.

(COMPARATIVE NOTE.—See laws of France, June 14, 1865, and February 13, 1874; Belgium, June 20, 1873; England, 1882, arts. 73 to 82; Italy, Code of Commerce, arts. 339 to 343; Roumania, Code of Commerce, arts. 364 to 369; Switzerland, Code of Obligations, arts. 830 to 837; Spain, Code of Commerce, arts. 524 to 543; Portugal, Code, arts. 341 to 343; Peru, law of October 9, 1888; Argentina, Code of Commerce, arts. 527 to 534; Austria, law of April 3, 1906. The German law which is the subject of this article was approved by the Emperor March 11, 1908, and by its terms became effective April 1, 1908. A comprehensive review of it with a translation of the full text into French, comparative commentaries and copious German and French bibliographical references appeared in nos. 1-2, of the 1908 Revue de l'Institut de Droit Comparé having been written by Maître Fritz Norden, a distinguished barrister of the Court of Appeals, of Brussels.

In view of the efforts in this country to secure the passage of a uniform negotiable instruments law by the several states, this German check law, the German law of October 1, 1908, concerning protests, the Brazilian Bills of Exchange and Promissory Notes law of December 31, 1908, and the English Bills of Exchange Act, of 1882, make an interesting and educative study.—W. W. S.)

Sec. 1. The check must contain

1. the designation of check in the body of the instrument or, if the check is executed in a foreign language, the corresponding expression in the foreign language.

2. an order of the drawer to the drawee to pay a certain sum of money out of funds to his credit.

3. the signature of the drawer.

4. the indication of the place and day of issue.

All of the above are indispensible requisites of form.

1. This subdivision corresponds to Art. 4, subdiv. 1, of the German Bills of Exchange Act. In order to distinguish a bill, note, or check from similar instruments, the German legislator has deemed it necessary that it be labeled as such. The designation must be contained in the body of the instrument.

Checks drawn in a foreign country need, as regards matters of form, comply only with the law of the place where they are issued (Sec. 26, Check Law).

2. In order to limit the use of checks to transactions where the drawer has funds in the hands of the drawee he is required to insert as a matter of form that the drawee is to pay the check "out of funds to his credit." The words are to remind the drawer that the check is an instrument of payment and, unlike a bill of exchange, not an instrument of credit.

3. The signature must be below the body of the check. See 9 Rohg, 422.

The provision contained in Art. 95, Bills of Exchange Act, to the effect that if an agent signs a bill or note on behalf of a principal without authority, he shall become personally liable upon the instrument, has not been adopted in the law regarding checks. The liability of the agent will be governed therefore by Sec. 179, of the Civil Code.

4. Contrary to our own law an indication of the place and day of issue are essential to a German bill of exchange, note or check. See Art. 4, subdiv. 6, Bills of Exchange Act. It is only a formal requisite, however, and need not be true in fact. See 6 Rohg, 125; 32 R. G., 115.

Concerning the designation of the drawee, see Sec. 2 below; concerning that of the payee, see Sec. 4 below; concerning the indication of a place of payment, see Sec. 5 below, and concerning that of the time of payment, see Sec. 7 below.

Sec. 2. As drawees shall be indicated only,

1. those institutions of public law, those institutions subject to state supervision and those co-operative associations (Genossenschaften) entered upon the register for co-operative associations, which, in accordance with the regulations governing the management of their business, accept and pay money on foreign account; also savings banks subject to official supervision and complying with the rules of supervision prescribed for them by the local law.

2. commercial houses regularly engaged in banking and entered upon the commercial register.

A check under the German law need not be drawn upon a bank or banker. But the German legislator has not gone so far as some other European countries which allow a check to be drawn upon
merchants in general. On principle the drawee shall belong to the classes of persons, associations, or institutions mentioned in subdivisions 1 and 2. This is not an absolute requirement, however, for non-compliance with this section results only in the imposition of a stamp-duty (Sec. 29, Check Law), from which the regular checks are exempted.

Where a check is payable in a foreign country it may be drawn upon such drawees as may be properly designated under such foreign law (Sec. 25, Check Law).

Sec. 3. The sum of money to the extent of which the drawee is obliged to honor drawer’s checks in accordance with the legal relation existing between them, shall be regarded as funds.

Sec. 4. As payee may be designated either a specified person or a firm-name or bearer. The drawer may designate himself as payee.

If the words “or bearer” or an equivalent expression are added to the name or to the firm-name of the payee, or if the check fails to mention a payee, it shall be deemed payable to bearer.

Checks are usually payable to bearer in Germany. The Imperial Bank declines to accept checks not so drawn.

A bill or note, on the other hand, cannot be made payable to bearer. See Art. 4, subdiv. 3, Bills of Exchange Act, and 1 Rohg, 97. Staub, Kommentar Wechselordnung, Art. 4, Sec. 10, regards a bill or note payable to “A or bearer” as equivalent to “A or order” and hence as not destroying the validity of such bill or note.

Sec. 5. The address given with the name or firm-name of the drawee shall be regarded as the place of payment. The indication of another place of payment is deemed not written. If no address is given with the name or firm-name of the drawee the place of issue shall be regarded as the place of payment.

The provision contained in the first sentence corresponds with Art. 4, subdiv. 8, Bills of Exchange Act. It will be noted that the indication of another place of payment does not render the check void, but is regarded merely as not written.

Sec. 6. If the sum to be paid is expressed in words and also in figures, the sum denoted by the words shall obtain in case of a discrepancy. If the sum is written several times in words or several times in figures the smaller sum shall obtain in case of a discrepancy.
Sec. 7. A check is payable at sight. The indication of another time of payment renders the check void.

The consequence attached to a violation of this section is nullity. Differing from Sec. 5, of the Check Law, the insertion of another time of payment is not to be regarded as merely not written.

Sec. 8. A check which is payable to a specified payee may be transferred by indorsement if the drawer has not prohibited a transfer by the words "not to order" or by an equivalent expression.

In regard to the form of indorsement, in regard to the title of the holder of an indorsed check, and in regard to the examination of such title, as well as in regard to the holder’s duty to surrender the check, the provisions of Arts. 11-13, 36, 74, of the Bills of Exchange Act, shall apply. However, an indorsement on a copy of a check is ineffective. This applies also to an indorsement by the drawee. An indorsement to the drawee is equivalent to a receipt.

Par. 1 of this section corresponds with Art. 9, Bills of Exchange Act. Inasmuch as the negotiability of a bill, note or check is to-day a usual characteristic of such instruments, though not a necessary requirement, the intent of the drawer or maker to execute a bill, note or check, being apparent from the descriptive word required under the German law (see Sec. 1, Check Law), it has seemed more logical to presume negotiability without the words "or order" being contained in the instrument and to require that the maker or the drawer shall negative such presumption by the use of appropriate words whenever it is his intent to execute a non-negotiable instrument.

Art. 11, Bills of Exchange Act, to which reference is made, provides that the indorsement must be contained upon the instrument, or upon a copy of such instrument, or upon an allonge. The indorsement of a check upon a copy is prohibited, however, by the above section of the Check Law.

Art. 12, Bills of Exchange Act, provides that an indorsement may be in blank.

Art. 13, Bills of Exchange Act, provides that each holder may fill up a blank indorsement or may negotiate the same without its being filled up.

Art. 36, Bills of Exchange Act, provides in substance that the holder of a bill or note payable to order makes title through a correct change of indorsements. If a blank indorsement is followed by a special indorsement it is presumed that the person indorsing specially derived title through the indorsement in blank. Indorse-
ments which are struck out are not to be considered in making out the holder's title. The drawee is not bound to examine the genuineness of the indorsements.

Art. 74, Bills of Exchange Act, provides that a person who has obtained a bill or note in accordance with the provisions of Art. 36, can be required to surrender it only if he acquired it either in bad faith, or if he was grossly negligent in acquiring it.

It will be seen that gross negligence is equivalent to bad faith under the German law. In the absence of either the holder will be protected although the instrument was payable to order and an indorsement necessary to complete the chain of title was forged.

Sec. 9. Checks in favor of a specified payee and payable in a foreign country may be drawn in a set. Each part of the set must contain in the body the designation "first, second, third, etc., part" or an equivalent expression; if this is not done each part shall be regarded as a separate check.

If one of the several parts of the set is paid the other parts shall thereby lose their validity. But with respect to the other parts the indorser who has indorsed several parts to different persons and all subsequent indorsers whose signatures are on parts not surrendered at the time of payment shall remain liable upon their indorsements.

This section corresponds to Arts. 66 and 67, of the Bills of Exchange Act.

Sec. 10. A check cannot be accepted. An acceptance written upon a check shall be deemed not written.

In regard to acceptance a check differs from a bill of exchange. The custom of certifying checks does not seem to prevail in Germany. Instead of rendering the check void its acceptance is merely regarded as not written.

Sec. 11. A check drawn and payable in Germany must be presented to the drawee for payment within ten days from its date of issue.

For checks drawn in a foreign country and payable in Germany the time for presentment shall be fixed by the Federal Council. This applies also to checks drawn in Germany and payable in a foreign country in so far as the foreign law does not contain any provision regarding the time of presentment.
If the last day falls upon a Sunday or a general holiday recognized by the state at the place of payment the following business day shall take the place of such Sunday or holiday.

By an order of March 19th, 1908, the Federal Council fixed the time for the presentment of checks above mentioned. It varies from three weeks to three months. Checks made in the United States and payable in Germany must be presented within two months. The doctrine of reasonable time plays no part in the German law of bills, notes or checks. Definite periods are prescribed which will not be extended even by an Act of God (I Rohg, 288). A bill of exchange payable at sight must be presented for payment within two years from its date of issue unless the drawer has prescribed a shorter period. (Art. 31, Bills of Exchange Act.) For checks, the time has been limited to the uniform period of ten days where the checks are inland checks. Germany does not follow the example of other European countries which allow a longer period for the presentment of checks payable at a place other than the place of issue than the period fixed for checks in which the place of issue and the place of payment coincide.

Sec. 12. The delivery of a check to a clearing-house at which the drawee is represented is equivalent to a presentment for payment at the place of payment, provided such delivery conforms to the business regulations of such clearing-house.

The Federal Council shall determine the clearing-houses that shall be regarded as such within the meaning of this law.

Sec. 13. The drawee who pays the check is entitled to a return of the receipted check.

The expiration of the time for presentment is without effect upon the drawee's right to pay.

The revocation of a check is effective only after the expiration of the time for presentment.

With regard to the question of revocation, Germany has taken an intermediate position. It allows it only after the expiration of the time allowed for the presentment of the check. Notwithstanding a wrongful refusal on the part of the drawee to honor a check the holder has no cause of action against such drawee, as the drawing of the check under the German law does not operate as an assignment of the funds pro tanto.

The death or subsequent incapacity of the drawer have no effect upon the validity of the check. Sec. 791, Civil Code.
Sec. 14. The drawer as well as any holder of a check may prohibit the payment of the check in cash by writing across its face the words “exclusively for set-off in account.” In such an event the drawee can pay the check only by means of such a set-off in account. The set-off in account is deemed equivalent to payment within the meaning of this law.

Such a prohibition cannot be retracted. A violation of the prohibition renders the drawee liable for the damages caused thereby.

The object of a check “exclusively for set-off in account” is, on the one hand, to economize cash and, on the other, to guard against a wrongful appropriation in case it is lost or stolen.

Sec. 15. The drawer and indorsers are responsible to the holder for the payment of the check.

In the case of a check payable to bearer each person writing his name or firm-name upon the back of the check is responsible also to the holder for its payment. This provision does not apply to the drawee.

If an indorser has added to his indorsement the words “without recourse” or an equivalent reservation, he is free from liability as indorser.

Sec. 16. For the exercise of the right of recourse there must be proof that the check was presented in time for payment and was not paid, or that the attempt to present it was ineffectual.

Such proof can be made only,

1. by means of a declaration upon the check signed by the drawee and indicating the day of presentment.
2. by means of a certificate from the clearing-house that the check was handed in before the expiration of the time for presentment and was not paid.
3. by means of a certificate of protest.

In regard to the presentment of a check and its protest the provisions of Arts. 87, 88, 90, 91, of the Bills of Exchange Act, shall apply.

If the check contains a direction not to protest the provisions of Art. 42, of the Bills of Exchange Act, shall apply.

By virtue of Sec. 30, of the Check Law, Arts. 87, 88, 90, 91, of the Bills of Exchange Act, have been superseded since October 1st, 1908, by the new articles of the Bills of Exchange Act, viz.,
'Arts. 87 to 88a, 89a, 90 to 91a, 92, par. 2, and by Secs. 3 and 4, of the law passed to facilitate the protesting of bills and notes. (See Reichs-Gesetzblatt, June 10, 1908.)

Art. 42, of the Bills of Exchange Act, provides that a waiver of protest does not excuse presentment, and that notwithstanding such a waiver of protest a bill or note may be protested and the protest fees recovered.

A waiver of protest contained in the body of an instrument applies only to the maker or drawer and does not excuse protest with respect to subsequent parties.

Sec. 17. In regard to the notification of the prior parties and their right of redemption as well as in regard to the amount of recovery and to the right to strike out indorsements, the provisions of Arts. 45-48, 50-52, and of Art. 55, of the Bills of Exchange Act, shall apply with the direction that the holder of a check which has been presented without effect shall be obliged to notify his immediate indorser of the non-payment of the check within two days after the making of the declaration, certification or certificate of protest referred to in Sec. 16, par. 1, and at the latest within two days after the expiration of the time for presentment.

Art. 45, Bills of Exchange Act, provides that the holder of a bill or note which has been protested for non-payment shall serve a written notice upon the indorser immediately preceding him within two days from the day of protest. Posting the notice within such time suffices. Each party so notified must notify the party preceding him in like manner. The holder or an indorsee who either fails to give notice or who fails to give notice to the party immediately preceding him is responsible to all prior parties or to those passed over for all damages caused thereby. He loses also all right to costs and interest. Want of notice as such does not discharge an indorser under German law.

Art. 46 provides that a timely notification may be proved by a post office certificate.

Art. 47 provides that where an indorser has not added an address to his indorsement the notice must be given to the first indorser preceding him who has added an address. The matter is not optional.

Art. 48 provides that each party upon payment of the sum specified therein with interest and costs is entitled to the delivery
of the receipted bill or note and to the delivery of the certificate of protest.

Arts. 50-52 deal with the amount of recovery and provide in substance that the holder shall be entitled to the amount specified in the bill or note together with interest at the rate of 6% from the date of maturity, protest fees and other expenses and a commission of 1-3%. If the debtor lives at a place other than the place of payment the amount shall be payable at the rate of exchange for sight drafts drawn at the place of payment upon the place where the debtor lives.

The indorser who has paid the instrument is entitled to the sum he has paid together with interest at the rate of 6% from the day of payment and costs and a commission of 1-3%. If the debtor lives at a place different from that of the indorser, the amount is to be paid at the rate of exchange for sight drafts drawn from the place of residence of the indorser upon the place where the debtor resides.

A debtor residing in a foreign country may be charged a higher amount if it is authorized by the law of such country.

Art. 55 provides that each indorser who has paid a subsequent party to the instrument may strike out his own and all subsequent indorsements.

Sec. 18. The holder of a check may proceed to recover the full amount to which he is entitled from all parties liable to him or only from some or one of them without thereby losing his right of recourse against those not sued. He may elect which of the parties liable to him he desires to hold first.

The defendant can interpose against the holder of the check only such defenses as affect the validity of his contract upon the check or such as result from the tenor of the check or as exist directly against the holder.

Par. 1 of this section corresponds to Art. 49, of the Bills of Exchange Act. Par. 2 corresponds to Art. 82, of the Bills of Exchange Act, and to Sec. 364, of the Commercial Code.

Three classes of defenses are recognized. Those of the first class relate to the validity of the defendant's contract itself, e. g., lack of capacity. It seems to be recognized also that want of delivery of the instrument or a delivery obtained through error, fraud, or duress, will constitute a defense as against all holders. Those of the second class result from the tenor of the instrument itself,
e. g., the defense that the instrument is invalid for insufficiency of form, that plaintiff does not trace his title through a complete chain of indorsements, etc. Those of the third class include such defenses as a right of set-off against the plaintiff, release by the plaintiff, etc., also any defense based upon the transaction which gave rise to the instrument or to its transfer, provided, however, that plaintiff is the payee, the immediate transferee or an assignee instead of a "holder" who has obtained title through indorsement or delivery.

Sec. 19. The defendant is bound to pay only upon a surrender of the check, upon the delivery of the documents proving its due presentment and non-payment or an ineffectual attempt to present the same, and upon the delivery of a receipted bill.

This section corresponds substantially with Art. 54, Bills of Exchange Act.

Sec. 20. The right of recourse against the drawer and the other parties is barred within three months if the check is payable in Europe, with the exception of Iceland and the Faroe Islands, otherwise within six months.

The statute of limitations begins to run against the holder of the check from the expiration of the time for presentment; against each indorser, if he paid before suit was brought against him, from the time of payment; in all other cases from the bringing of the action.

This section corresponds in substance with Arts. 78 and 79, of the Bills of Exchange Act. Instead of the six months' limitation, however, eighteen months are usually allowed with reference to bills and notes.

Sec. 21. The drawer whose liability upon the check has been extinguished for want of due presentment or as a result of the statute of limitations remains liable to the holder of the check to the extent that he would be enriched at his expense.

This section is patterned after Art. 83, Bills of Exchange Act. As will be noticed the above rule applies only to the drawer and not to the indorser. The claim, moreover, must comply with all the terms of this section and cannot be based upon Sec. 812, of the Civil Code (See 6 Rohg, 381; 10 Rohg, 42). The action will lie only in so far as the defendant will be enriched at plaintiff's expense. If, for example, the holder did not take the check in
absolute payment so as to be able to sue upon the original cause of action a right of recovery against the drawer will ordinarily not exist. As long as plaintiff can recover the amount in some other way the holder is regarded as not having suffered any detriment within the meaning of this section.

Sec. 22. Actions based upon Sec. 14, par. 2, and Sec. 21, shall be barred within one year from the making of the check.

Sec. 23. Where the signature of the drawer of a check or of an indorser is forged, the parties whose signatures are genuine remain liable.

This section corresponds to Arts. 75 and 76, of the Bills of Exchange Act.

Sec. 24. The provisions of Sec. 34, of the Bankruptcy Law, shall apply with respect to the avoiding of payments made upon a check.

Sec. 25. Checks payable in a foreign country may be drawn also upon persons authorized by such foreign law.

Sec. 26. The essential requisites of a check drawn in a foreign country, as well as any contract placed upon a check in a foreign country, shall be governed by the law of the place where the check was drawn or the contract was made.

But if a check issued in a foreign country or a contract placed thereon in a foreign country conforms to the requirements of German law a defect existing with respect thereto under the foreign law does not impair the validity of contracts subsequently placed thereon in Germany. A check issued in a foreign country but payable in Germany and a contract placed thereon in the foreign country are valid also if they conform solely to the requirements of German law.

This section corresponds to Arts. 85 and 86, of the Bills of Exchange Act.

Sec. 27. Lost or destroyed checks are subject to invalidation in a proceeding by public citation (Aufgebotsverfahren). The citation must be for a period of at least two months.

After the proceeding by public citation has been instituted its owner may demand payment of the drawee upon giving security until the rendering of the decree, provided the check was presented in time for payment and was not paid by the drawee.
Sec. 28. This section relates to matters of jurisdiction and procedure.

Sec. 29. This section provides that checks complying with Secs. 1, 2, 7, 25, 26, of the present law shall be free from stamp-duty in accordance with Sec. 24, of the law of June 10th, 1869. Checks which are put into circulation before the date of issue indicated therein shall be subjected to the stamp-duty.

Sec. 30. This law shall go into effect April 1st, 1908. It shall not apply to checks drawn before such date.

When the law passed to facilitate the protesting of bills and notes goes into effect the provisions contained in Sec. 16 of the present law shall be superseded by the new articles 87-88a, 89a, 90-91a, 92, par. 2, of the Bills of Exchange Act, and by Secs. 3 and 4, of the law first mentioned.

HOLLAND LAW OF MASTER AND SERVANT.

BY ADOLPH L. PINCOFFS.

The most important law which has been passed in Holland within the last few years is the recent revision of the Civil Code on the relation between master and servant. The provisions in the Code of 1838 were entirely inadequate from a strictly legal point of view and entirely opposed to modern conceptions from a sociological standpoint. The present law was adopted in 1907, amended and revised in 1908, and went into effect in February of this year. Perhaps its most characteristic features are that the greater part of its provisions are declared to be based on public policy and cannot be waived by the parties and that in its application great latitude is left to the judiciary. The latter feature especially is a departure from the theory which till a short time ago was the prevailing one in all legislation, by which all details were provided for by the statute itself.

The only other countries which have attempted a codification of this subject are Switzerland, Germany and Belgium. The Dutch statute differs from the legislation of these countries in several important particulars. In all of them the Civil Code contains only comparatively few provisions which are applicable to all cases where the relation of master and servant exists. These general rules are