THE LEGAL ASPECT OF MONEY

WITH SPECIAL REFERENCE TO
COMPARATIVE AND PRIVATE
INTERNATIONAL LAW

BY

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PREFACE

'Although the civil law is not of itself authority in an English Court it affords great assistance in investigating the principles on which the law is grounded.'—Blackburn J. in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.

In general words, the object of this work is to treat the legal aspects of money in a systematic and comprehensive manner. There were, however, so many obstacles on the way to this goal which the author was unable to overcome in their entirety, that he must ask for the reader's indulgence. In support of this plea for leniency a few observations may perhaps be offered.

The first cause of the difficulties lies in the fact that there does not seem to exist any English (or American[1]) work dealing with the subject as defined above. The century from the end of the Bank Restriction period to the outbreak of the Great War in 1914, which witnessed so rich a development in the field of law, was marked by an unheard-of stability of economic and, consequently, of monetary conditions. It is, therefore, not surprising that lawyers were led to regard money, not as a problem of paramount importance, but as an established fact. This security was not shaken until the great and sometimes even chaotic disturbances of the monetary systems with which every country has been visited since 1914,[2] and which deeply imprinted themselves on the economic situation and the law not only of foreign countries but also of this country. Though it was never doubted that, whatever happened, the pound sterling remained the same in character and (internal) value, business men and courts were confronted with many intricate questions which originated from the depreciation or collapse of foreign currencies or from the changes in the international value of the pound. Thus, many important decisions of the English courts came into being, and yet it is probably no exaggeration to say that, in so far as the fundamental legal problems of money are concerned, the observations of Sir John

[1] The book by Bakewell, *Past and Present Facts about Money in the United States* (New York, 1936), is only of very limited value.

[2] A survey is given by Griziotti, 'L'Évolution monétaire dans le monde depuis la guerre de 1914', *Rec.* 1934 (49), pp. 1 sqq.

Davis on the *Case de Mixt Moneys*[1] still were the only English source of information, and that in respect of many questions of detail there was no guidance at all in the otherwise rich treasures of the common law. There is obviously a gap to be filled, but, in view of the lack of preliminary studies on the one hand, and the immense number of problems and foreign material on the other, this gap is so great that it could not be attempted to give more than a first introduction on the lines of a general survey of and a guide to an inaccessible, though theoretically fascinating and practically vital, part of the law.

The choice of problems suitable for and requiring discussion has been restricted to three groups. In the first place, all those questions have been included which, for the sake of systematical elucidation, had to be answered; for it is believed that the subject demands particular care in putting and arranging the questions, in drawing clear distinctions and demarcations, and in working a way through the labyrinth of material. Secondly, all those questions have been dealt with which have been raised or answered in the cases decided by English courts; it is hoped that all, or at least all important, cases have been considered, but as some have been hunted up which hitherto have escaped the attention due to them, the suspicion is justified that there are many more either hidden in the reports or known but treated under the head of other than purely monetary problems. Thirdly, only those problems have been treated which had been, or might reasonably be expected to be, of practical importance from the point of view of English (municipal or private international) law; mere theory and speculation have in general been eliminated, though in the first part it was necessary to give a certain amount of space to theory; the question of which problems might become important for the law of this country is naturally a difficult one, but in such connexions judgment has been based on the experiences of foreign countries.

Within these limits the legal aspects of money will be discussed from a purely legal point of view. Though economic theory will not be disregarded, it is no disparagement of it to say that its usefulness for legal research is not very great. Anglo-American monetary science has undoubtedly neglected the problem which from the point of view of the law is the

[1] (1604) Davis's Rep. (Ireland) 18.

vital one, namely, nominalism and its various phenomena. In this respect it has therefore been necessary to have resort to the research of continental economists. Nevertheless, the lawyer's gratitude is due to those economists who have dealt with the economic and, more particularly, the monetary history of Great Britain, to which the law will have to attribute considerable importance. Mr. Feavearyear's short but excellent book on *The Pound Sterling* (1931) is of particular assistance.

Though this book is devoted to the discussion of English law, an extensive space has been conceded to comparative research. The usual argument that comparative studies are necessary and useful because they place a wealth of experience at our disposal, and show what is right and what is wrong with us, is fortified by many circumstances. When Sir John Davis wrote more than 300 years ago, he largely drew on continental scholars, and if his observations have been accepted by the common law, as in the absence of other material they seem to have been, it follows that the sources of the English law of money are to a great extent of foreign origin. This may perhaps also be regarded as a justification for the fact that it is a lawyer originally trained under a foreign legal system who now ventures to revive the study of the law of money. Furthermore, the developments since 1914 have given rise to an abundance of foreign decisions and legal literature to which international value may justly be ascribed. In France, Italy, and Germany three important works have been published by Mater, Ascarelli, and Nussbaum respectively. The writer is particularly indebted to Professor Nussbaum,[1] who by his indispensable treatise as well as by many other publications dealing with various monetary problems paved the way for further research to a greater extent than any one of his contemporaries. Finally, it appears that in many foreign laws monetary problems have not been regulated by legislative measures, but left to be moulded and

[1] Formerly Professor at Berlin University, now visiting Professor at Columbia University in New York. Professor Nussbaum has announced that he is engaged in preparing a comprehensive study of the legal aspects of monetary theory and practice which, prepared under the auspices of the Columbia Council for Research in the Social Sciences, will 'primarily rest on Anglo-American law and will consider as well important developments which have occurred since the publication of the German volume'. See the article in 35 (1937) *Mich. L.R.* 865, which constitutes the first chapter of the forthcoming volume.

solved by judge-made law. This is a further reason why a comparison with English law is interesting.

The foreign material is so vast that the selection presented to the English reader is bound to be incomplete. Paramount importance has been attributed to the decisions of Supreme Courts; decisions of courts of first and second instance have generally been disregarded, because it is believed that decisions of such courts are very often unsuitable for comparative research, as their authority, under no circumstances binding, is especially assailable, and as the picture they convey can, therefore, too easily become misleading. Legal literature will be referred to rather eclectically, though a much greater quantity of books and articles have been consulted. All available decisions of the Supreme Court of the United States which 'are always considered with great respect in the courts of this country'[1] and many decisions of American State Courts have been used. Otherwise, comparative research has chiefly been directed to French and German law. The method of dealing with comparative material will vary. Sometimes it will be used as a mere illustration; in other connexions it will be referred to as a persuasive, or at least supporting, authority; in a third group of cases it will serve as a contrast to elucidate a rule of English law or to test its soundness.

Within these limits and on these foundations an attempt has been made to investigate the legal aspects of money, the subject being divided into two distinct parts the difference between which needs emphasis: the first part deals almost exclusively with English money in English municipal law, and comparative material is used for the single purpose of showing the position of a given domestic currency within the frame of the given domestic law. Where questions connected with a currency other than the domestic one are considered in the first part, this is due to the necessity of elaborating certain connexions between both. But otherwise, all questions relating to foreign currency, i.e. to the position of a currency within the ambit of a municipal or private international law of a country other than that to which the currency belongs (e.g. American money in England, German currency in France), have been reserved for the second part. It is the present writer's experience and con-

[1] *Beresford* v. *Royal Insurance Co.*, [1937] 2 All E.R. 243 (C.A.), at p. 252 B per Lord Wright.

viction that this separation between domestic and foreign money obligations is absolutely essential for a clear exposition of the subject, although it cannot be carried through without exceptions, and although it may sometimes cause inconvenience or overlapping. There is in each case not only a difference of problems, but there are also many differences of approach to the problems, which make it impossible to apply to the one case, without qualification, considerations operative in, or decisions relating to, the other.

The final revisions of the manuscript were completed on 29 July 1938; decisions and literature which appeared after that date could not be taken into consideration.

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F. A. M.

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ABBREVIATIONS

BGE.	*Entscheidungen des Bundesgerichts* (Collection of decisions of the Swiss Federal Tribunal)
B.I.J.I.	*Bulletin de l'Institut Juridique International*
Cass.	Cour de Cassation
Cass. Civ.	Cour de Cassation, Chambre Civile
Cass. Req.	Cour de Cassation, Chambre des Requêtes
Clunet	*Journal du droit international privé*, founded by Clunet, edited by André-Prudhomme
D.	*Recueil périodique de jurisprudence de Dalloz*
D.H.	*Recueil hebdomadaire de jurisprudence de Dalloz*
Gaz. Pal.	*Gazette du Palais*
IPRspr.	*Internationalprivatrechtliche Rechtsprechung* (Collection of German decisions relating to Conflict of Laws)
JW.	*Juristische Wochenschrift*
RabelsZ.	*Zeitschrift für ausländisches und internationales Privatrecht*, edited by Rabel and others
Rec.	*Recueil des Cours de l'Académie de droit international* (La Haye)
Rép. dr. int.	*Répertoire du droit international*, founded by Darras, edited by Lapradelle and Niboyet (1929–1934)
Rev. dr. banc.	*Revue du droit bancaire*, edited by Mater
RGSt.	*Amtliche Sammlung von Entscheidungen des Reichsgerichts in Strafsachen* (Official Reports on Criminal Law Cases of the German Supreme Court)
RGZ.	*Amtliche Sammlung von Entscheidungen des Reichsgerichts in Zivilsachen* (Official Reports on Civil Law Cases of the German Supreme Court)
ROHG.	*Amtliche Sammlung von Entscheidungen des Reichsoberhandelsgerichts* (Official Reports of the former German Supreme Commercial Court)
S.	*Recueil de jurisprudence de Sirey*

PART I

THE LEGAL PROBLEMS OF MONEY IN GENERAL

CHAPTER I

THE CONCEPTION OF MONEY

I. Importance of a definition. II. Meaning of money in general. III. Requirements of money in law; (1) chattel personal; (2) creature of the law; (3) denomination; (4) universal medium of exchange. IV. The intrinsic nature of money.

I

THE troublesome question, what is money? has so constantly engaged the minds of economists that a lawyer might hesitate to join in the attempt to solve it. Yet the true answer must, if possible, be determined. For money is a fundamental notion not only of the economic life of mankind but also of all departments of law. In fact, a great deal of a lawyer's daily work centres about the term 'money' itself and the many transactions or institutions based on that term, such as debt, damages, value, payment, price, capital, interest, pecuniary legacy. Money is a term so frequently used and of such importance that one is apt to overlook its inherent difficulties, and to forget that its multitude of functions has led to a multitude of meanings.

Thus it is an essential requisite of a contract of sale of goods that the goods be agreed to be transferred 'to the buyer for a money consideration, called the price'.[1] If there is no money consideration the contract constitutes a barter, which in many respects differs from a contract of a sale of goods.[2] Therefore it seems clear that the transaction would not be a contract of sale of goods if the consideration were the delivery of certain shares. It is an essential requisite of a bill of exchange that it require the payee to pay a sum certain 'in money',[3] and it therefore appears that an instrument requiring the payee to pay something other than 'money' is not a negotiable instrument.[4] On

[1] S. 1 (1), Sale of Goods Act, 1893.

[2] Chalmers, *Sale of Goods Act*, 11th ed., p. 5; Benjamin, *On Sale*, 7th ed., p. 3.

[3] Bills of Exchange Act, 1882, s. 3 (1).

[4] On the subject see Oliphant, 'The Theory of Money in the Law of Commercial Instruments,' 29 (1920) *Yale L.J.* 606. His contention that anything is money 'which for a substantial period of time and throughout any important community is, by general consent, used and treated in common payment as cash in the ordinary course and transaction of business' is not a suitable definition of money either generally or in the limited sphere of the law of negotiable instruments.

the other hand, though we speak of an action for money had and received, an equivalent of or a security for money can form the subject-matter of such an action provided that 'the parties have treated it as money or a sufficient time has elapsed so as to raise an inference that it has been converted into money by the defendant'.[1] Again, s. 100, Larceny Act, 1861, which has now been replaced by s. 45 (1), Larceny Act, 1916, provided that on the prosecution to conviction of a thief, the court may order the restitution of stolen money to the prosecutor; but though money would here include a five-pound gold piece which by Royal Proclamation had been made current coin of the realm and which had been the object of a sale as an article of curiosity, it is doubtful whether it would include money passing as currency.[2] The term 'money' receives a much wider meaning when it is used in a will. Then the term generally means money in the strict sense, which includes money actually in hand as cash or at bank on drawing account; but if the context sufficiently shows that the testator used the word in a wider, popular sense, it may include the whole personal, perhaps even the real estate.[3] A final example is supplied by the Truck Acts, 1831[4] and 1887,[5] which provide[6] that all wages in contracts of hiring of workmen shall be payable 'in current coin of the realm', which term comprises bank notes.[7] What is meant thereby is 'actual payment in coin. Payment in account will not do. Payment in goods will not do. Nothing is to discharge the wages debt except actual payment in current coin.'[8]

It thus becomes evident that the meaning of the term 'money' varies, and consequently it is necessary in each individual context to examine its meaning. No hard-and-fast rule exists.

[1] *MacLachlan* v. *Evans* (1827), 1 Y. & J. 380, 385 per Hullock B.; see *Pickard* v. *Bankes* (1810), 13 East 20, and *Spratt* v. *Hobhouse* (1827), 4 Bing. 173, where Best C.J. said at p. 179 that everything may be treated as money in an action for money had and received 'that may be readily turned into money'.

[2] *Moss* v. *Hancock*, [1899] 2 Q.B. 111.

[3] *In re Taylor*, [1923] 1 Ch. 99 (C.A.); *In re Collings* [1933] Ch. 920; see Halsbury, vol. xxviii, No. 1327.

[4] 1 & 2 Will. IV, ch. 37.

[5] 50 & 51 Vict., ch. 46.

[6] 1 & 2 Will. IV, ch. 37, s. 1.

[7] Currency and Bank Notes Act, 1914, 4 & 5 Geo. V, chs. 13, 14, s. 1 (5); Currency and Bank Notes Act, 1928, 18 & 19 Geo. V, ch. 13, s. 1 (5).

[8] Language of Bowen L.J. in *Hewlett* v. *Allen*, [1892] 2 Q.B. 662, 666, approved of in *Williams* v. *North's Navigation Collieries (1889) Ltd.*, [1906] A.C. 136, 142 per Lord Davey; *Penman* v. *The Fife Coal Co.*, [1936] A.C. 45, at p. 53 per Lord Macmillan, at p. 61 per Lord Wright.

II

But it would be wrong to be satisfied with this result. Whatever the meaning of money may be in an individual case, clearly the word also has an ordinary general meaning, which requires definition not only for the sake of theoretical classification but also for practical purposes.

It should be made clear at the outset that a distinction must be drawn between money in its concrete form and the abstract conception of money. It is with respect to the former that we ask: What are the characteristics in virtue of which a thing is called money? It is with regard to the latter that we inquire: What is the intrinsic nature of the phenomenon described by the word 'money'?

These two questions will have to be answered separately. In both connexions, it should be noted, results reached by economic theory are of no direct assistance to a lawyer. In the first place, economic theory is concerned with the question of sound and unsound money. Thus in the *Encyclopædia Britannica*[1] Mr. R. G. Hawtrey, under the head of characteristics required of money, deals with the qualities required of a commodity used as money 'if it is to fulfil this function well and efficiently', and concludes that such commodities must be specified, must have a sufficient degree of subdivision, and must be distinguishable, portable, and durable. Such postulates are important from the point of view of monetary policy, but they do not help to solve monetary problems in law. Another matter with which economic theory is primarily concerned is the functions of money in economic life. In this connexion it is pointed out that money serves as a general medium of exchange, as a medium of payment, as a medium of transfer of capital, as a common denominator of value, and as a medium of preservation and a carrier of value, the purpose being to find the basic function of money. Modern economic theory tends to the view that this cardinal function of money is that of serving as a universal medium of exchange;[2] and indeed, though from a

[1] 14th ed., vol. xv, pp. 692 sqq.

[2] See especially Menger, *Grundsätze der Volkswirtschaftslehre*, 2nd ed., 1923, pp. 251 sqq., 259 sqq., 278 sqq. (on Menger see Hayek, Introduction to the reprint of the first edition (1871) in No. 17 of the Series of Reprints of Scarce Tracts in Economic and Political Science, London School of Economics and

lawyer's point of view such a definition is not quite sufficient, it describes the primary function of money so well that lawyers still have to take it into account when laying down what money means to them.

III

Purely legal definitions of money *in concreto* generally include characteristics exclusively relating to coinage. Thus regard is had to weight, fineness, and impression.[1] But although even modern economists and jurists[2] have gone so far as to exclude things of valueless material, such as bank notes, from the notion of money, such a view is to-day certainly irreconcilable with the facts of commercial life.[3] It follows that incidents relating to substance can no longer be included in the notion of money. Blackstone,[4] on the other hand, has said that 'money is the medium of commerce . . . is a universal medium, or common standard, by comparison with which the value of all merchandize may be ascertained, or it is a sign which represents the respective values of all commodities'. It has already been observed that such descriptions of the economic functions of money are, from the point of view of the law, insufficient,

Political Science 1934); L. von Mises, *The Theory of Money and Credit* (London, 1934), pp. 34 sqq.; Nussbaum, p. 11; M. Wolff, *Geld*, pp. 567, 569; Sobernheim, *Rechtsvergleichendes Handwörterbuch*, iii. 659 sq.; Kemmerer, *Principles of Money* (1935), p. 10; see also Laughlin, *The Principles of Money* (1903), pp. 1 sqq.; Steiner, *Money and Banking* (1933), pp. 19, 26. Helfferich's view (*Money*, English edition by Gregory and Infield (London, 1927), pp. 291 sqq., 337) that the basic function of money is to serve as an instrument of economic intercourse does not materially differ; R. G. Hawtrey (*Currency and Credit* (1930), pp. 1 sqq.) and many others regard money primarily as a medium 'established by law (or custom) for the payments of debts'.

[1] *Case de Mixt Moneys* (1604), Davis, 18, 19; Comyns, *Dig.*, tit. 'Money' B. 1; Viner, *Abr.*, tit. 'Money', xv. 420; Blackstone, i. 277.

[2] For references see Nussbaum, p. 29, n. 6, or Wolff, *Geld*, p. 566, n. 7. See also Sobernheim, *Rechtsvergleichendes Handwörterbuch*, iii. 660. The view has found favour in France: see Mater, Nos. 65 to 71.

[3] Already in *Wright* v. *Reed* (1790), 3 T.R. 554, it was held that bank notes are money within the Annuity Act, 17 Geo. III, ch. 26, and Lord Kenyon said: 'Bank notes are considered as money to many purposes', and Buller J. added: 'In a case on the other side of the hall, the Lord Chancellor once suggested a doubt whether these notes were money; but here we have always been inclined to consider them as such, though the question has never yet been directly determined.' But in *R.* v. *Hill* (1811), Russ. & Ry. 191, it was held that bank notes were not 'money goods wares &c.' within the statute 30 Geo. II, ch. 24 (relating to the crime of obtaining by false pretences). See also *Klauber* v. *Biggerstaff* (1879); 47 Wis. 551, 3 N.W. 357; *Woodruff* v. *State of Mississippi* (1895), 162 U.S. 292, at p. 300 per Chief Justice Fuller.

[4] i. 276.

though not unimportant. In his book on *Money, Trade and Industry*[1] Mr. F. A. Walker stated that money is 'that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities'. Had this definition not been approved by Darling J. in *Moss* v. *Hancock*,[2] it would hardly be necessary to say that, though perfectly correct from the view-point of economics, it does not explain money in the legal sense.

It is suggested that, in law, the quality of being money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange. These characteristics will be explained separately.

1. Although at times money was not expressed by any corporeal symbols but was represented by accounts with a bank which, for the purpose of effecting payments, were credited or debited[3] (bank money), yet from primitive periods until the present day men have been accustomed to connect the idea of money with definite symbols, whether these were animals, commodities, quantities of metal,[4] or coins and bank notes, as we to-day find them in all civilized countries. Money is a chattel personal.[5]

[1] London, 1882; similarly, in Halsbury's *Laws of England*, xxi. 36, the definition given in the 13th edition of the *Encyclopædia Britannica* is accepted and money is described as 'means whereby the medium of exchange or the comparative values of different commodities is ascertained'.

[2] [1899] 2 Q.B. 111, 116. The *German* Supreme Court has repeatedly defined money as 'a medium of payment which, being certified as a bearer of value by the State or its authorized agent, is designated for public circulation regardless of its being a legal tender': 11 July 1924, *RGStr.* 58, 255, 256; 14 June 1937, *JW.* 1937, 2381.

[3] The chief examples are the Bank of Amsterdam, founded in 1609 and described by Adam Smith (*Wealth of Nations*, Book IV, ch. iii, before part ii), and the Hamburg Mark Banco from 1770 to 1873, about which see Nussbaum, p. 91 or Wolff, p. 578, where further references will be found.

[4] About early or modern, but unusual, forms of money see A. R. Burns, *Money and Monetary Policy in Early Times* (London, 1927); Mater, s. 2; Menger, *Grundsätze der Volkswirtschaftslehre*, 2nd ed., 1923, pp. 251 sq.

[5] But money is not a 'personal chattel' within the meaning of the Administration of Estates Act, 1925, 15 Geo. V, ch. 23; see s. 55 (x).

From the point of view of the rights which can be exercised over them, both coins and bank notes are chattels in possession, but bank notes are also choses in action, because (as for instance in this country) they express, or (as in other countries) they imply[1] the 'promise to pay the Bearer on Demand the sum of . . .'; in other words, bank notes are promissory notes within the meaning of s. 83 of the Bills of Exchange Act, 1882.[2]

But it must not be overlooked that a bank note 'is not an ordinary commercial contract to pay money. It is in one sense a promissory note in terms, but no one can describe it simply as a promissory note. It is part of the currency of the country.'[3]

On the one hand, it results from this that a bank note differs from an ordinary promissory note and that not all provisions of the Bills of Exchange Act, 1882, are applicable to bank notes without discrimination.[4] Thus a bank note may be reissued after payment.[5] But s. 84 of the Bills of Exchange Act, 1882, for instance, according to which a promissory note is inchoate and incomplete until delivery to the payee or bearer, does apply to bank notes, so that a piece of paper lost by the bank of issue before delivery is not a bank note.[6] Again, though it is a well-established principle that where a bill or note is given by way of payment the payment may be absolute or conditional, the strong presumption being in favour of conditional payment,[7] this does not apply to Bank of England notes, the payment of which was absolute payment even when gold coins were in circulation.[8]

[1] See *Banco de Portugal* v. *Waterlow & Sons*, [1932] A.C. 452, 487 per Lord Atkin; but see German Supreme Court 20 May 1926, *RGZ.* 114, 27; 20 June 1929, *JW.* 1929, 3491.

[2] S.C. and Chalmers, *Bills of Exchange*, 10th ed., p. 318; Goodeve, *Personal Property*, 8th ed., p. 312.

[3] *Suffel* v. *Bank of England* (1882), 9 Q.B.D. 555, at p. 563 per Jessel M.R., at p. 567 per Brett L.J.; also *The Guardians of the Poor of the Lichfield Union* v. *Greene* (1857), 26 L.J. Ex. 140, per Bramwell B.

[4] Chalmers, l.c., p. 318. [5] Chalmers, l.c.

[6] *Banco de Portugal* v. *Waterlow & Sons*, [1932] A.C. 452, 490, per Lord Atkin.

[7] See Chalmers, l.c., p. 365; Halsbury (Hailsham), vii, No. 331, with references.

[8] *Currie* v. *Misa* (1875), L.R. 10 Eq. 153, 164, per Lush J., who, however, does not attribute such effect to country bank notes. But on this point see *The Guardian of the Poor of the Lichfield Union* v. *Greene* (1857), 26 L.J. Ex. 140. In *Cross* v. *London & Provincial Trust, Ltd.*, [1938] 1 K.B. 792, 803, MacKinnon L.J. even said that though 'Bank of England notes, if subjected to the

On the other hand, this characteristic of bank notes has caused them to be put in many respects on the same level as coins. In this connexion the most interesting example is the negotiability of bank notes. The general rule, 'nemo potest dare quod non habet', was apparently never applied to coins, which always passed by delivery and which could not be recovered from a person who honestly and for valuable consideration had obtained possession.[1] The reason for this is not that the loser cannot know his money again, or in other words, that money has no ear-mark; 'for if his guineas or shillings had some private marks on them by which he could prove they had been his, he could not get them back from a bona-fide holder. The true reason of this rule is that by the use of money the interchange of all other properties is most readily accomplished. To fit it for its purpose the stamp denotes its value and possession alone must decide to whom it belongs';[2] or in the words of Lord Mansfield,[3] 'the true reason is upon account of the currency of it'. When bank notes came before the courts this reasoning, and the rules based thereon, were applied to them. Lord Mansfield[4] rejected the comparison of bank notes 'to what they do not resemble and what they ought not to be compared to, viz. to goods, or to securities or documents for debts. Now they are not goods, not securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash', and in 1820 it came to be said[5] 'that the representation of money which is made transferable by delivery only, must be subject to the same rules as the money which it represents'. Thus both coins and bank notes came to be united under the heading of 'negotiable chattels',[6] i.e. if they 'were received in good faith and for valuable consideration, the transferee got property though the transferor had none'.[6]

The assimilation of bank notes to chattels is illustrated by

unusual treatment of being read, will be found to be promises by a third party to pay', they are 'the best form of payment in the world'.

[1] *Higgs* v. *Holiday*, Cro. Eliz. 746; *Millar* v. *Race* (1758), 1 Burr. 452; *Wookey* v. *Poole* (1820), 4 B. & Ald. 1; Goodeve, l.c., p. 265; Smith, *Mercantile Law*, 13th ed., pp. 210, 523.

[2] *Wookey* v. *Poole* (1820), 4 B. & Ald. 1, 7, per Best J.

[3] *Millar* v. *Race* (1758), 1 Burr. 452, 457.

[4] S.C.; see Smith, *Leading Cases*, i. 52 sqq.

[5] *Wookey* v. *Poole* (1820), 4 B. & Ald. 1, 6, per Best J.

[6] *Banque Belge* v. *Hambrouck*, [1921] 1 K.B. 321, 329, per Scrutton L.J.

developments in other directions. In private international law it is clear that the transfer of a bank note, as that of coins or bills of exchange, is governed by the rules applicable to tangible movables, i.e. normally by the law of the country where the transfer takes place.[1] Moreover, wherever it is necessary to determine the situation of a bank note, it must be held to be situated where it is actually found, not where it can be enforced. With regard to bills of exchange and other negotiable instruments this general rule is recognized,[2] but it is said[3] that in certain cases effect should be given to the different view that the debt represented by the paper is situated where the debtor has bound himself to pay; indeed, it has been held that bills of exchange, drawn in India and payable in London, which at the time of the death of the testator were on board a ship on the high seas, were assets situated in England and therefore subject to probate duty, because 'they represent, but do not constitute the assets'.[4] But this reasoning does not apply to bank notes,[5] and therefore they cannot be subject to the qualification of the above stated general rule.

2. Only those chattels are money to which such character has been attributed by law, i.e. by or with the authority of the State. This doctrine is very old[6] and it has been widely accepted in practice as well as in theory; in modern times its chief exponent has been G. F. Knapp, to whose work on the *State Theory of Money*[7] it has given the title. According to the

[1] Cf. Dicey, p. 718; Goodrich, p. 364; the rule applicable to bills of exchange (see *Alcock* v. *Smith*, [1892] 1 Ch. 238; *Embericos* v. *Anglo-Austrian Bank*, [1905] 1 K.B. 677; *Koechlin* v. *Kestenbaum*, [1927] 1 K.B. 889) applies *a fortiori*.

[2] Dicey, pp. 342, 348, 616, 995.

[3] Ibid., p. 616; as to *De la Chaumette* v. *Bank of England* (1831), 2 B. & Ald. 385, see ibid., note K.

[4] *Pratt* v. *Attorney-General* (1874), L.R. 9 Ex. 140. In *Popham* v. *Lady Aylesbury* (1748), Amb. 69, Lord Hardwicke held that bank notes passed under the provision of a will disposing of a house 'with all that should be in it at his death', the reason being that bank notes are ready money, not bonds or securities, which are only evidence of money due. In *Stuart* v. *Bute* (1813), 11 Ves. 657, 662, however, Lord Eldon queried the decision and seemed inclined to hold that bank notes as well as securities were evidence of title to things out of the house, not to things in it. See also *Southcot* v. *Watson* (1745), 3 Atk. 228, 232, where bank notes were held to be cash, not securities within the meaning of a will.

[5] See p. 9, nn. 2, 3 above.

[6] It underlies the theory of the extrinsic value of money (nominalism), which will be dealt with in another connexion below, pp. 63 sqq.

[7] *Staatliche Theorie des Geldes*, 4th ed., 1923; English (abbreviated) edition

opposite view it is the usage and conception of commercial life and, consequently, the confidence of the people, which have the power to make things money. This opinion is held by many economists[1] and also by jurists,[2] who, however, concede that, normally, the creation of money is regulated by the State, but believe that under extraordinary circumstances chattels may circulate which do not derive the quality of money from the State, but which are in fact taken, and must therefore be regarded, as money. In recent times the question was of practical importance when, during the Franco-German War of 1870–71, certain French towns, while being besieged, issued what was called 'monnaie obsidionale', or when during and after the Great War, German towns, chambers of commerce, or industrial undertakings issued 'emergency money' (*Notgeld*).[3] Such 'money' was readily accepted by the community, and certain French police courts held the forger of such things to be liable to punishment for counterfeiting of currency;[4] the German Supreme Court arrived at the same conclusion,[5] but this was no

and translation by Lucas and Bonar, London, 1924. On Knapp's work see Ellis, *German Monetary Theory 1905–1933* (Harvard University Press, 1934). It attracted a great deal of discussion among economists, partly exuberant praise, partly the most adverse criticism; see, on the one hand, Max Weber, 'Wirtschaft und Gesellschaft' in *Grundriss der Sozialökonomik*, iii (1), 2nd ed., 1925, at pp. 40, 105, 109, and, on the other hand, L. v. Mises, *The Theory of Money and Credit* (London, 1934), pp. 415 sqq. Among jurists for whom Knapp's theories were less revolutionary its essence was readily accepted, although they were emphatic that it should not be regarded as a legal work: see M. Wolff, *Geld*, pp. 566, 568, 571, and *Internationales Privatrecht*, p. 98, n. 9. Knapp's theories are further discussed below, pp. 34, 63 sqq. See also Keynes, *Treatise of Money* (1930), i. 4; Gréciano, *Du rôle de l'État en matière monétaire*, Paris, 1896; Gerber, *Geld und Staat*, 1926; Nolde, *Rec.* 27 (1929), 243, 249 sqq.

[1] This is usually done by including the element of confidence in the theory or even the notion of money.

[2] Savigny, *Obligationenrecht*, p. 408; but especially Nussbaum, pp. 14–21, and 35 (1937) *Mich. L.R.* 865, 883 sqq. Nussbaum relies (p. 16) *inter alia* on the proposition that certain money tokens could lose the character of money if in fact they were no longer accepted according to their nominal, but according to their intrinsic, value. But though this may be the practice, in law the legal tender power of money never exceeds the nominal value (see below, p. 19).

[3] On the private issue of token coins during the Bank Restriction Period and during the nineteenth century in general see Falkner, 16 *Political Science Quarterly*, 303 (1901).

[4] See Mater, p. 57, who rejects these decisions.

[5] 14 June 1937, *JW.* 1937, 2381, with reference to older, partly different decisions.

departure from its repeatedly expressed view that money only exists by authority of the State,[1] because the State was held to have tolerated and even sanctioned the issue of such money. Another difficulty arises where in the course of a revolution against the lawful government rebels assume power within a certain district and, by irresistible force, impose a currency upon the community; although the rebels do not form a recognized government, such circulating media, issued by the *de facto* authority, must be recognized as money.[2]

Whatever one may be inclined to think of these doctrines in theory, it cannot be denied that in this country the State theory rules. It has never been doubted that the right of coinage was part of the King's prerogative,[3] and Black-

[1] *RGZ.* 107, 78 (28 Nov. 1923): Reichsbank notes were not legal tender in the former German Protectorate of South-West Africa; *RGZ.* 96, 262 (25 Sept. 1919): 'Money is measurement of value and means of payment by authority of the State only.' See the definitions p. 7, note 2, above.

[2] This is the effect of a long line of decisions of the Supreme Court of the United States: *Thorington* v. *Smith* (1869), 75 U.S. 1; *Hanauer* v. *Woodruff*, (1872), 82 U.S. 439; *Effinger* v. *Kenney* (1885), 115 U.S. 566; *New Orleans Waterworks* v. *Louisiana Sugar Co.* (1888), 125 U.S. 18; *Baldy* v. *Hunter* (1898), 171 U.S. 388; *Houston & Texas C.R. Co.* v. *Texas* (1900), 177 U.S. 66. See on the subject Sedgwick, *On Damages*, 9th ed., i, s. 278, and Eder, 20 (1934) *Cornell L.Q.* 52, 58–60. Nussbaum, 35 (1937) *Mich. L.R.* 865, 888, quotes these decisions in support of his society doctrine of money. But in doing so he overlooks the distinction between the creation of money by the force of the *de jure* or the *de facto* authority against or without the will of the community, on the one hand, and the creation of money by the will of the community against or without the will of the authority, on the other. Nussbaum's theory might be correct if events had taken the latter course, but they took the former. The 'State' which is able to create money may be defined by the words of s. 30 of the Foreign Enlistment Act, 1870, namely, as 'any foreign prince, colony, province or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province or part of any province or people'. Nussbaum also quotes the italicized words of Lord Campbell in *Emperor of Austria* v. *Day* (1861), 3 De G. F. & J. 217, 234: 'It is in evidence that the National Bank of Austria by the authority of the Emperor does issue notes which form the circulating medium of Hungary, and that from this arrangement a profit accrues to the Emperor. Objection is made that in Hungary it is unlawful or unconstitutional to issue such notes to pass as money and to be a legal tender, without the authority of the Diet; but they might pass as money without being a legal tender, and as *de facto* they are legal tender according to the law administered in Hungary, we can hardly inquire in an English Court of Justice whether this is a stretch of prerogative.' To say that this is 'in ovo the society theory of money' is surely a misinterpretation.

[3] *Case de mixt Moneys* (1604), Davis, 18, 19; Viner, *Abr.*, tit. 'Money', xv. 420; Comyns, *Dig*,. tit. 'Money', B. 1.—*Dixon* v. *Willows*, 3 Salkeld 238, dealt

Stone[1] went even so far as to say that 'the coining of money is in all states the act of the sovereign power'. Although for the most part these rights of the King have now been put on a statutory basis,[2] the principle is not affected.[3]

With regard to bank notes the development of the law was different, the reason being that their history is connected with that of bills of exchange and banking. Bank notes in the modern sense were not always distinguishable from other negotiable instruments. When goldsmiths and bankers began to issue notes,[4] nobody thought of the necessity or desirability of authorization or restriction by the government. The position is well described by Mr. Feavearyear, whose words deserve quotation:[5]

'It will be remembered that in the first half of the eighteenth century the customers of the London banks made use to about an equal extent of the notes of those banks and of drafts upon cash accounts kept with them. Between these two documents at the outset there was really very little difference. The notes were issued in favour of the person who deposited the money, were generally for large, and often for broken, amounts, were frequently made out, not to "bearer", but to "order", and in the latter case passed current by endorsement like a cheque. . . . It is not surprising therefore to find that the early writers upon paper currency drew no distinction between the various forms in which they found it. They grouped them all together as "paper credit", and held that all of them drove out and took the place of metallic money. There was no important difference between the note signed by Francis Child, the banker, which said: "I promise to pay to Mr. John Smith or order, on demand, the sum of £186 14*s*. 2*d*", and the draft signed by John Smith and addressed to Francis Child which said: "Pay to Robert Brown or order the sum of £186 14*s*. 2*d*." No one regarded the former as in any way more entitled to be considered money than the latter. Davenant, Hume, and Sir James Steuart all spoke of notes, bills, drafts, bank

with guineas made in respect to the value of £1 1*s*. 4*d*. set upon broadpieces by proclamation; it was said that 'though there is no Act of Parliament or Order of State for these guineas as they are now taken, yet being coined at the Mint and having the King's insignia on them, they are lawful money and current at the value they were coined and uttered at the Mint'. As to the judicial notice of the value of guineas see also Holt C.J. in *Pope* v. *St. Leiger* (1694), 5 Mod. 1, at p. 7.

[1] i. 277.

[2] Halsbury (Hailsham), vi, No. 688; see especially Coinage Act, 1870, 33 Vict., ch. 10, s. 5.

[3] Halsbury (Hailsham), l.c.

[4] Feavearyear, *The Pound Sterling*, 1931, p. 97 sq. *et passim*.

[5] p. 240.

credits, and even securities, as though they were a part of the circulating money of the country. Adam Smith gave most of his attention to notes, which by that time had become by far the most important form of credit currency, but his well-known account of the bank money of Amsterdam makes it clear that he regarded that equally as money; and indeed he says: "There are several sorts of paper money; but the circulating notes of banks and bankers are the species which is best known and which seems best adapted for this purpose".'

When in 1694 the Bank of England was created,[1] it was not a bank of issue in the modern sense. The statute did 'not confer any exclusive privilege whatever on the Bank . . . and the Statute is silent as to the intention of the legislature whether the Bank should be a bank of circulation and issue or merely a bank of deposit'.[2] Nevertheless, it is well established that, immediately after its incorporation and before an Act of 1707[3] to a certain extent restricted the issue of notes, the Bank began to act as a bank of circulation and issue, 'probably to a very considerable extent',[4] and that, in addition, various country banks continued to issue notes without government control.

The serious problems raised thereby were not appreciated before the second quarter of the nineteenth century, when they became the chief topic of discussion between the currency and banking schools. The former school aimed at using the terms money and currency for notes and coins only, at separating the creation of money from its distribution, and at 'putting the business of note issue under direct Government control, as was the business of issuing coin'.[5] These views were adopted by the Bank Charter Act, 1844,[6] by which the modern position was established and which made it clear that the privilege of issuing notes constituting money in England and Wales was exclusive to the Bank of England, whose notes had been made legal tender by the Bank of England Act, 1833.[7]

In view of the fact that at that time innumerable notes issued by various banks circulated in England and that the radical

[1] 5 & 6 W. and M., ch. 20, s. 19.

[2] *Bank of England* v. *Anderson* (1837), 3 Bing. N.C. 590, 652, per Tindal C.J.; a different view is held by Feavearyear, p. 115.

[3] 3 & 4 Anne, ch. 9; see Feavearyear, pp. 116–18, 146.

[4] *Bank of England* v. *Anderson* (1837), 3 Bing. N.C. 590, 653, per Tindal C.J.

[5] Feavearyear, pp. 243–53.

[6] 7 & 8 Vict., ch. 32.

[7] Feavearyear, pp. 254, 255.

changes effected by the Act of 1844 were not made without serious struggles and controversies, it is somewhat astonishing to find that less than twenty years later it could be said 'that the right of issuing notes for payment of money, as part of the circulating medium, in Hungary, seems to follow from the *jus cudendae monetae* belonging to the supreme power in every State',[1] and that there was 'no reason to doubt that the prerogative right reaches to the issue of paper money'.[2] If these words were meant to apply not only to Hungary, but also to this country, they were perhaps somewhat premature, but they do show how easily the State theory of money, the correctness of which cannot now be denied, was accepted and worked on in England.

3. Only those chattels issued by or on behalf of the State are money which are denominated with reference to a distinct unit of account.

The early jurists were agreed that denomination is a necessary ingredient of coins,[3] while naturally they omitted to deal with bank notes. Thus Blackstone said[4] that denomination is 'the value for which the coin is to pass current'. There can be no objection to this definition, if it is understood that the 'value of money', in so far as it is not restricted to the mere denomination as such, but comprises the problem of nominalism or valorism, is not an ingredient of money itself but of monetary obligations, their subject-matter and their extent; denomination or value of money in the sense of discharging power will therefore be dealt with in another connexion.[5]

[1] *Emperor of Austria* v. *Day* (1861), 3 De G. F. & J. 217, 234, per Lord Campbell.

[2] S.C. p. 251, per Turner L.J.—The Constitution of the United States grants to Congress the power 'to coin money, regulate the value thereof, and of foreign coin' (Art. I, s. 8, par. 5). It was never doubted that 'to determine what shall be lawful money and a legal tender is in its nature, and of necessity a governmental power. It is in all countries exercised by the governments': *Hepburn* v. *Griswold* (1869), 75 U.S. 603, 615, 616 per Chief Justice Chase; *Knox* v. *Lee* and *Parker* v. *Davies* (1870), 79 U.S. 457, 549, 552, per Mr. Justice Strong; *Juilliard* v. *Greenman* (1883), 110 U.S. 421, 447, per Mr. Justice Gray, who quoted *Emperor of Austria* v. *Day* (above n. 1). But until *Knox* v. *Lee* and *Parker* v. *Davies* upheld the validity of the Legal Tender Acts on broad principles, it was denied that the power to import the quality of legal tender on greenbacks could be derived from the coinage power or from any other power expressly given in the Constitution of the United States.

[3] See p. 12, n. 3.

[4] i. 278.

[5] Below, p. 63. This view is not unquestioned. Nussbaum, for example,

In a different sense, however, everything which is money is denominated inasmuch as it expressly refers to a unit of account on which it is based, or to its fraction or multiple. We speak of the pound sterling or a fraction or a multiple thereof, we speak of francs, dollars, and so forth, and in doing so we always refer to an ideal unit, a unit of account. This unit of account, it is true, is part of the various monetary systems, but it would not correspond to the actual circumstances of life if, for that reason, we were to refrain from regarding the unit of account as a necessary element of the notion of money itself.[1] In fact, nothing can rightly be called money which cannot be described by mere reference to the unit of account. Looking at a Bank of England note of one pound sterling, everybody would say: this *is* one pound; but this statement would be wrong if applied to a bill of exchange for one pound sterling. 'The reference to the ideal unit is to be found exclusively and always with money. If e.g. a share or a bond to bearer is denominated at 1,000 marks, the reference to the 1,000 marks obviously is a different one, namely an indirect only, as the document itself is connected with the holding of capital or the claim only which, in turn are related to the notion of money.'[2] Denomination by reference to a unit of account, its fraction or multiple, is therefore an indispensable feature of every object to which the quality of money is to be ascribed.

4. Chattels which have been created by law and which are

defines money as 'those chattels which are given and received in exchange, not for what they physically represent but for a fraction, the integer or a multiple of an ideal unit' (p. 6). He makes a strong point on including the nominalistic view in the notion of money itself. The same theory is less clearly advanced in 35 (1937) *Mich. L.R.* 865, where money is defined as a thing 'which, irrespective of its composition, is by common usage treated as a fraction, integer or multiple of an ideal unit' (p. 870). But the orthodox and correct view connects the problem of nominalism not with money but with monetary obligations and their extent (see e.g. the valuable remarks of Breit in Düringer–Hachenburg, *Kommentar zum Handelsgesetzbuch*, iv. 743). Nevertheless, in so far as Nussbaum emphasizes the importance of a reference to a distinct unit of account, he should be followed. The chief distinction between Nussbaum's and the present writer's definition of money is that Nussbaum adopts the society theory of money and includes the value of money in the notion of money.

[1] But this view is not generally accepted: see Nussbaum, p. 7; Helfferich, p. 364.

[2] Nussbaum, p. 6; for his definition see p. 15, n. 5. Money and securities are therefore entirely distinct conceptions; see above, p. 10, n. 4.

denominated by reference to a unit of account are not money, unless they are meant to serve as universal media of exchange.

It has already been observed[1] that of the many functions of money that of being the medium of exchange is the fundamental one. In this connexion lawyers cannot but accept what economic theory has elaborated, and they are compelled to do so because it is impossible to describe money *in concreto* without reference to its cardinal function. As has been mentioned above,[2] this experience has led lawyers even to accept definitions of money which merely refer to that economic function.

Because money is the medium of exchange, it is not an object of exchange or, in other words, it is not a commodity. 'Economic goods and money thus appear as opposite concrete phenomena.'[3] As Nussbaum points out,[4] this antithesis does not mean that money is exempt from the economic rules relating to the exchange of goods; on the other hand, it does not follow from such submission to economic rules of general validity that money has no distinct qualities in the eyes of the law, but is simply a commodity. Mater's conclusion[5] that money is a commodity ('la monnaie est une marchandise') is due to a misunderstanding of this situation.

But the quality of serving universally as a medium of exchange within a given economic area and in a given economic system is an essential requirement of money. This is one of the reasons why bills of exchange, cheques, bank bills, stamps, postal orders, chips such as are widely used in Monte Carlo, coupons, gold bars, treasury bills, and so forth are excluded from the notion of money.[6] In times of crisis, it is true, one or another of such objects has been assimilated to money. Thus at the beginning of the Great War, postal orders were made

[1] Above, p. 5. [2] pp. 6, 7.

[3] Helfferich, p. 2. In the same sense Hawtrey, *Currency and Credit* (1930), p. 197; L. v. Mises, *Theory of Money and Credit* (1934), pp. 79 sqq.; Nogaro, *La Monnaie* (Paris, 1935), pp. 385 sqq., 389. For the classical economists, notably John Stuart Mill, money was nothing but a commodity.

[4] p. 34.

[5] pp. 17–47. Mater's reasoning, chiefly based on certain remarks made by economists and in the French Parliament from 1789 to 1807, is very unsatisfactory. See Nussbaum, p. xv and p. 74, n. 4.

[6] See Wolff, *Geld*, p. 565. That even 'certified cheques' are not money suitable for payment into court was decided in Germany: Königsberg Court of Appeal, 22 Dec. 1930, *JW.* 1931, 3148.

legal tender by s. 1 (6) of the Currency and Bank Notes Act, 1914;[1] within the meaning of the German laws relating to foreign exchange restrictions, unused stamps are money and are therefore prohibited from being sent abroad without permission, 'if they fulfil the functions of money, i.e. are being used to effect payments'.[2] Even in less extraordinary circumstances or connexions such things are sometimes put on the same level with[3] or used as or instead of[4] money. Nevertheless, as a rule, they are not money, because they are accepted as media of exchange only by a small circle or only occasionally. Further, it is in accordance with principle that the expressions 'goods, wares and merchandise' or 'goods and chattels', where they occur in penal statutes relating to larceny and similar crimes, do not generally include money.[5] But there may be exceptions to this rule. Thus *R.* v. *Dickinson*[6] dealt with the question whether gold sovereigns were 'goods' within the meaning of the Defence of the Realm Regulations, 30 E, 48 & 58, prohibiting an attempt to melt down or use otherwise than as currency any current coin and giving power to order forfeiture of such 'goods'. As it was found that 'it was intended to put these sovereigns into a crucible and melt them down',[7] it was held that they were goods.

It is not, however, a requirement of the quality of money that the circulating objects actually serve as money, but it is sufficient that they are meant to serve as money.[8] This necessitates the conclusion that money, so long as it has not been invalidated by or on behalf of the sovereign power, retains its quality, even if it is no longer accepted as money by the community. This view is the logical consequence of the State theory of money[9] and is therefore rejected by those who oppose it.[10]

[1] 4 & 5 Geo. V, chs. 13, 14; repealed by s. 13 Currency and Bank Notes Act, 1928, 18 & 19 Geo. V, ch. 13.

[2] Runderlass, Nr. 157/36, Reichssteuerblatt, 1936, 1071.

[3] See e.g. Forgery Act, 1913, 3 & 4 Geo. V, ch. 27, s. 18 (1).

[4] In the early nineteenth century bills of exchange were current in Lancashire on which there were up to 150 endorsements. See Feavearyear, pp. 152 sqq., 241, 290.

[5] Note to *John Howard's* case (1751), Foster's c.c. 77; *R.* v. *Leigh* (1764), 1 Leach 52; *R.* v. *Guy* (1782), 1 Leach 241. See *R.* v. *Hill*, p. 6, n. 3 above.

[6] [1920] 3 K.B. 553.

[7] At p. 555 per Bray J.

[8] Wolff, *Geld*, p. 565 and n. 2 ibid.

[9] See above, p. 10.

[10] Notably Nussbaum, pp. 16, 36, 101, whom Eder, 20 (1934) *Cornell L.Q.* 52, 60, follows.

History supplies ample material relating to periods of debasement during which money, particularly coins, was withheld from circulation by individuals or lost the purchasing power which it formerly had.[1] But such events did not render it impossible to make use of the coins or notes at their nominal value, and therefore it cannot be said that they were no longer money.[2]

On the other hand, it often occurs that in an individual transaction things which generally are and remain money are used in a different capacity and, in fact, do not serve as media of exchange. Money in a bag, being sold per weight,[3] or a coin, being purchased as a curiosity,[4] cannot be described as money for the purposes of the respective transaction.[5]

[1] Nussbaum, l.c.

[2] This view is supported by the practice of American courts during the greenback period (1861–79), when gold dollars were at a premium. One gold dollar was always regarded as one dollar. Thus it was said by Chief Justice Waite in *Thompson* v. *Butler* (1877), 5 Otto (95 U.S.), 694, 696 that 'a coin dollar is worth no more for the purpose of tender in payment of an ordinary debt than a dollar'. Or if the creditor of a mere dollar debt of $5,000 had obtained $5,000 gold through the realization of a security given to him, the debtor could not recover the amount of the premium: *Stanwood* v. *Flagg* (1867), 98 Mass. 124; *Stark* v. *Coffin* (1870), 105 Mass. 328; *Hancock* v. *Franklin Insurance Co.* (1873), 114 Mass. 155. Nussbaum's view that such circumstances prove the society doctrine of money (above, p. 11, n. 2) is therefore unjustified. It must be remembered that at the present time gold sovereigns have a market value of approximately 33*s*. As gold sovereigns are still legal tender, it is submitted that if my debtor pays a debt of 20*s*. or perhaps even of 33*s*. by delivering a gold sovereign which has been stolen, I am not exposed to any claim by the real owner.

[3] Cf. *Taylor* v. *Plumer* (1815), 3 M. & S. 562, and the remarks of Bankes L.J. in *Banque Belge* v. *Hambrouck*, [1921] 1 K.B. 321, 326.

[4] *Moss* v. *Hancock*, [1899] 2 Q.B. 111.

[5] In the case of *Gay's Gold* (1872), 13 Wall. 358, the Supreme Court of the United States held gold coins in a package to be 'goods wares and merchandize' within the meaning of a certain statute. The New York courts also held that under certain circumstances gold coins were the subject-matter of a sale requiring the application of the Statute of Frauds: *Peabody* v. *Speyers* (1874), 56 N.Y. 230; *Fowler* v. *New York Gold Exchange Bank* (1867), 67 N.Y. 138 at p. 146. But during the inflation it was held in Germany that, if the plaintiff's servant stole his master's German gold coins and sold them to the defendant at a much higher price than their nominal value, the latter was not liable to return them to the plaintiff, because the gold coins were regarded as negotiable money: Dresden Court of Appeal, 19 Jan. 1922, *Bankarchiv*, xxii. 241. The decision is criticized by Breit in Düringer–Hachenburg, *Kommentar zum Handelsgesetzbuch*, iv. 1000 and Nussbaum, 35 (1937) *Mich. L.R.* 865, 905, and must surely be wrong, because in the particular context the gold coins were not used as money (as in the case mentioned at the end of n. 2 above,

IV

The foregoing considerations are concerned with the question, Under what circumstances may circulating objects rightly be described as money? They have, however, nothing to do with a different problem: What is money in an abstract sense, what is its essence, its intrinsic attribute, its inherent quality?

The answer given by economic theory is that money is 'wealth power', is 'purchasing power in terms of wealth in general'.[1] This conception deserves to be, and has been, approved of by the law.

As far as can be ascertained, the first lawyer to express it was Savigny, who said:[2]

'In the first place money appears in the function of a mere instrument for measuring the value of individual parts of wealth. As regards this function, money stands on the same basis as other instruments of measurement. . . . But money also appears in a second and higher function, viz. it embraces the value itself which is measured by it, and thus it represents the value of all other items of wealth. Therefore ownership over money gives the same power which assets measured thereby are able to give, and money thus appears to be an abstract means to dissolve all property into mere quantities. Therefore money gives its owner a general wealth power, applicable to all objects of free intercourse, and in its second function it appears as an independent bearer of such power, placed at the side of, and equivalent to and equally efficient as all particular objects of wealth. Such wealth power, characterizing money, has, moreover, the attribute of being independent of individual abilities and necessities, and consequently of having equal usefulness for all and under all circumstances.'

The idea that, according to its intrinsic nature, money is abstract purchasing power, though not unopposed,[3] has been widely accepted by German jurists,[4] and it has also been ex-

but as commodities. A better view was taken by the German Supreme Finance Court, which held that a turnover tax was payable where gold coins were sold as a commodity: 31 Jan. 1922, *Entscheidungen des Reichsfinanzhofs*, 8, 100.

[1] R. G. Hawtrey, *Encyclopædia Britannica*, 14th ed. xv. 693. It is needless to say that this view is not undisputed.

[2] *Obligationenrecht*, i. 405.

[3] Nussbaum, pp. 66–70.

[4] Wolff, *Geld*, p. 569; Breit, p. 15, n. 5; Enneccerus–Lehmann, *Recht der Schuldverhältnisse* (1932), p. 40. See also G. Simmel, *Die Philosophie des Geldes*, 4th ed., pp. 87 sqq., where he also discusses the reciprocity and relativity as a feature of the essence of money, the conclusion being that money

pressed by Lord Macmillan when he said[1] that money[2] is 'purchasing power in terms of commodities'. Indeed, it is a useful guide for appreciating one of the essential features of the memorable case of *Banco de Portugal* v. *Waterlow & Sons Limited*,[3] the principal facts of which were as follows: The defendants were employed by the plaintiffs, the Portuguese bank of issue, to print a series of bank notes, known as Vasco da Gama 500 escudo notes, and they delivered 600,000 of these to the plaintiffs, who put them into circulation. Subsequently, an ingenious criminal managed to obtain from the defendants 580,000 notes of the same type, printed from the original plates and indistinguishable from the first set. A great part of these notes was put into circulation in Portugal, but when the plaintiffs discovered the circulation of these unauthorized notes, they withdrew the whole of the issue of Vasco da Gama notes and undertook to exchange them for other notes. When the plaintiffs brought an action against the defendants in the English courts, many difficult questions connected with the measure of damages and banking law fell to be decided. But one of the most important problems was whether the plaintiffs were entitled to damages on the basis of the face value of the genuine notes issued by them in exchange for unauthorized notes, or whether the damages suffered by them consisted only in the cost of printing notes to replace the genuine notes with which they had parted. The latter view commended itself to Scrutton L.J. in the Court of Appeal and to Lords Warrington and Russell in the House of Lords, while the former view was accepted by a majority both in the Court of Appeal (Greer and Slesser L.JJ.) and in the House of Lords (Lords Sankey, Atkin, and Macmillan). In this connexion it is of special interest to note that Lord Atkin as well as Lord Macmillan made it clear that, having regard to their note-issuing power, the plaintiffs, when issuing the new

is 'die entschiedenste Sichtbarkeit, die deutlichste Wirklichkeit der Formel des allgemeinen Seins, nach der die Dinge ihren Sinn *aneinander* finden und die Gegenseitigkeit der Verhältnisse, in denen sie schweben, ihr Sein und Sosein ausmacht' (p. 98). Simmel's momentous work should not be overlooked by any student of monetary problems.

[1] *Banco de Portugal* v. *Waterlow & Sons*, [1932] A.C. 452, 508.

[2] Lord Macmillan spoke of issued notes, but his remark applied to money in general.

[3] [1932] A.C. 452; on this case see Sir Cecil Kisch, *The Portuguese Bank Note Case* (London, 1932).

notes, were parting with and putting into circulation a portion of their wealth, or in other words, were parting with money.[1] Thus Lord Macmillan said:[2]

'In my opinion this argument (that the Bank had only sacrificed some stationery) is fallacious. It overlooks the cardinal fact that a note when issued by the Bank of Portugal becomes by the mere fact of its issue legal tender for the sum which it bears on its face. The issued note represents so much purchasing power in terms of commodities. It can be used by the holder of it to purchase at current prices any commodity in the market, including gold and securities. It can equally be used by the Bank to purchase commodities, including gold and securities, or to discharge debts due by it. It must be accepted by the Bank in discharge of debts due to it.'

Or to quote Lord Atkin:[3]

'I therefore find the position to be that the Bank by issuing its note like the trader issues its promise to pay a fixed sum; issues a bit of its credit to that amount; like the trader, it is bound to pay the face value in currency; like the trader it is liable on default to judgment for the face value exigible out of its assets; and like the trader, if it is compelled by the wrong of another to incur that liability, its damages are measured by the liability it has incurred.'

These words also enable the general conclusion to be reached that it is the intrinsic nature of money to represent purchasing power.

[1] Lord Atkin, pp. 487 sqq.; Lord Macmillan, pp. 507 sqq.
[2] p. 508. [3] p. 489.

CHAPTER II

THE MONETARY SYSTEM, ITS ORGANIZATION AND INCIDENTS

I. Monetary systems in general and the British monetary system in particular: (1) administrative measures (the unit of account and its organization); (2) normative measures: (*a*) legal tender; (*b*) convertibility; (*c*) fiat money. II. Definition of the unit of account. III. Alterations of monetary systems. IV. Distinction between monetary systems having common characteristics. V. Relations between monetary systems: (1) the par of exchange; (2) the rate of exchange. VI. Protective currency measures.

I

'THE basic conception in the modern organization of money is that of a currency standard.'[1]

It is indeed true that, chiefly in the course of the nineteenth century, ideas developed in all civilized countries and statutes were enacted which organized the respective national currencies on more or less identical lines, the principal feature of which was the introduction of fixed relations between the various kinds of circulating media. It does not, however, fall within the scope of a discussion of the legal problems of money to describe in detail the various forms that these monetary systems may take, this being a matter of economic science.[2] From the point of view of law, it will suffice to indicate the broad lines on which all modern monetary systems are organized, and to state the characteristics of the English monetary system in particular.

Experience shows that the legal rules which form part of the modern monetary systems may roughly be divided into two groups. On the one hand, there are what have been called[3] mere 'fiscal laws', i.e. provisions of a purely administrative character, regulating the internal organization of the monetary system. On the other hand, provisions are to be found which deeply affect the relations between members of the community

[1] Helfferich, *Money*, p. 352.

[2] See the exhaustive discussion by Helfferich, pp. 352 sqq. As to the law of the dollar in particular see Nussbaum, 37 (1937) *Col. L.R.* 1057.

[3] *Anderson* v. *Equitable Life Assurance Society of the United States* (1926), 134 L.T. 557, at p. 565 per Warrington L.J., as he then was.

(and which therefore have a normative character). Both groups will have to be considered in some detail.

1. Under the head of the former group, the *unit of account* must first be mentioned.

'In all cases which occur in practice we deal with money in specific sums, in specific quantities, and not simply with money *per se*. Money, like all quantitive conceptions, such as length, weight, bulk, can only be expressed by a multiple or a fraction of a fixed unit. In our systems of linear measures a specific length, such as the metre or yard, functions as a unit in which all lengths can be expressed, just as in our system of weights a specific weight quantity, such as the gram, is the unit or standard by which all quantities are measured. In the same way money requires a specific quantity to serve as the unit in terms of which all sums of money can be expressed.'[1]

This is the unit of account which, in modern times, serves to express money and to measure values.[2] In the various monetary systems the unit has different names which, moreover, have not at all times been the same. In this country, 'the pound sterling as a unit of account came into existence in Anglo-Saxon times. There has been no break in the sequence of contracts in which pounds, shillings and pence have been the consideration from those times to the present day.'[3] And just as multiples and fractions are formed from the units of other quantitive conceptions, so is this done in monetary systems from the unit of account, the pound sterling being divided into 20 shillings and the shilling into 12 pennies.

The unit of account and its multiples and subdivisions thus having been established, the next step is to provide for the methods of issuing money, for the forms of money, for the definition of the weight of coins, their standard, content, fineness, limits of error, remedy allowances, and so forth.[4] In this connexion, however, the most important point is to decide whether or not there is a connecting link[5] between money value

[1] Helfferich, p. 364.

[2] The view that measurement of value is the basic, not one of the consecutive functions of money, has been rejected above, p. 5. Cf. also Wolff, *Geld*, p. 570, n. 20, with further references.

[3] Feavearyear, p. 2.

[4] Coinage Acts, 1870 to 1920, 33 Vict., ch. 10; 54 & 55 Vict., ch. 72; 10 Geo. V, ch. 3; Currency and Bank Notes Act, 1928, 18 & 19 Geo. V, ch. 13.

[5] Although this is regarded by some writers as the characteristic feature of a gold standard, or a metallic standard generally (Helfferich, p. 355; Zolotas,

and money substance. Where such a connecting link exists, it is now[1] usually gold, and we may then speak of a gold standard. The gold standard originated in England in the eighteenth century, when, on the basis of a Proclamation of 1717 fixing the price of a guinea at 21 shillings, 'it came to be recognized that gold had definitely supplanted silver as the standard upon the basis of a guinea weighing 129·4 gr. at 21*s.* 0*d.* or at a mint price of £3 17*s.* 10½*d.* per standard ounce'.[2] By 1819 this figure of £3 17*s.* 10½*d.* an ounce had come 'to be regarded as a magic price for gold from which we ought never to stray and to which, if we do, we must always return';[3] and when Peel's Act[4] put an end to the Bank Restriction period under which the country had laboured since the events of 1797,[5] this was effected by providing[6] that as from 1 May 1823[7] all restrictions upon cash payments were to cease and that the Bank was to pay its notes at par, i.e. at £3 17*s.* 10½*d.*[8] Again, when the monetary disturbances caused by the Great War were at last remedied by legislation,[9] it was provided[10] that only the Bank of England should be entitled to bring gold to the Mint and to have it coined, and that, so long as this provision was in force, the Bank should be required to sell gold bars of approximately 400 ounces of fine gold to any purchaser who tendered £3 17*s.* 10½*d.* per ounce

L'Étalon-or, Paris, 1933, p. 11), it is not intended to adopt one particular definition by the words 'connecting link'. If this were intended a more extensive discussion would be necessary, which, however, from a legal point of view, can be dispensed with. As to definitions see Molle, *Die modernen Geldtheorien und Währungssysteme* (Stuttgart, 1926); Nussbaum, *Geld*, pp. 51 sqq. It may suffice to observe that usually a differentiation is made between the gold specie standard, depending on free coinage and use of gold coins as medium of exchange, gold exchange standard, depending on convertibility of the currency into a foreign currency which is itself preserved at parity with gold, and gold bullion standard, depending on the obligation of the central bank of issue to buy and sell gold bullion, without restriction, at fixed prices. See Hawtrey, *The Gold Standard in Theory and Practice* (London, 1933), p. 109.

[1] For other systems see Helfferich, pp. 44 sqq., 363. In recent times many countries have linked their currency to other currencies, especially to the pound sterling. See the survey in *Foreign Exchange Restrictions*, issued by the Swiss Bank Corporation, from which it appears that the money unit of the Scandinavian countries, Esthonia, Lithuania, Bulgaria, Rumania, Turkey, Greece, and Bolivia, is based on the pound sterling.

[2] Feavearyear, p. 142. [3] Ibid., p. 137. [4] 59 Geo. III, ch. 49.

[5] 37 Geo. III, ch. 28, ch. 32, ch. 40. [6] See s. IV.

[7] By 1 & 2 Geo. IV, ch. 26, the date was fixed as from 1 May, 1821.

[8] See Feavearyear, p. 206.

[9] Gold Standard Act, 1925, 15 & 16 Geo. V, ch. 29. [10] s. 1.

of standard gold. It was this provision which was repealed by the Gold Standard (Amendment) Act, 1931.[1] Since then, for the third time in English economic history, the pound is not based on a metallic standard but on a paper currency which, as the words 'fiduciary issue'[2] pointedly make clear, is founded less on metallic wealth than on British credit.

2. Turning now to the second group of rules usually accompanying the organization of monetary systems, we have to consider the conceptions of legal tender, convertibility and inconvertibility, and forced currency (compulsory tender, fiat money).

(*a*) There does not appear to exist an English statutory provision relating to the meaning of the term 'legal tender'. It is, however, clear that legal tender is such money as, if proffered, it is incumbent on the creditor to accept in discharge of the debt (*cours légal, Annahmezwang*).[3] Under English law the creditor is not compelled to accept money legally tendered to him; for neither criminal[4] nor civil liability for damages ensues if he refuses acceptance.[5] The only consequence of such refusal is that the debtor is not liable to pay interest or costs if he has tendered the exact amount before action and continues ready and willing to pay and, after action brought, pays the amount of the debt into court.[6]

The question what money is to be considered legal tender[7] is usually answered by the statutes organizing the monetary system. As regards bank notes, although for a considerable

[1] 21 & 22 Geo. V, ch. 47.

[2] Currency and Bank Notes Act, 1928, 18 & 19 Geo. V, ch. 13, s. 2.

[3] As to *cours légal* in France see Degand, *Rép. dr. int.*, Change No. 12. As to *Annahmezwang* (or, sometimes, *gesetzliches Zahlungsmittel*) in Germany see, e.g., Nussbaum, p. 22; Sobernheim, *Rechtsvergleichendes Handwörterbuch*, iii. 658 sqq.

[4] *Aliter* in France; see Art. 475 (11), Penal Code.

[5] It is therefore misleading to say, as is often done, that the creditor must, or is bound to, or cannot refuse to accept legal tender.

[6] For details see Halsbury (Hailsham), vii, No. 276, and the usual textbooks.

[7] In 1923 a Virginia court said in *Vick* v. *Howard*, 136 Va. 101, 109, that 'the authorities . . . clearly recognize the distinction between money which is, and money which is not, legal tender. In other words, all legal tender is money, but not all money is legal tender'. The latter part of this statement, on which the formulation in the text is based, is theoretically sound, as was recognized by Lord Campbell in *Emperor of Austria* v. *Day* (1861), 3 De G. F. & J. 217, 234: 'But they might pass as money without being legal tender.' But as far as this country is concerned the statement is of no practical importance, as

time they had come to be treated as money,[1] the courts hesitated to decide that they also were legal tender. Since the Restriction Bill, 1797,[2] had been content to provide that bank notes should be 'deemed payments in cash, if made and accepted as such', it was possible to decide[3] that bank notes, in the absence of such agreement, were not legal tender. The position was remedied in 1811 and 1812,[4] and, after a short return to coins only,[5] it was provided[6] that notes of the Bank of England were legal tender for all sums above £5 'so long as the Bank of England shall continue to pay on demand their said notes in legal coin'. The present position results from the combined operation of this provision and of the Currency and Bank Notes Act, 1928,[7] and bank notes are now legal tender for the payment of any amount.

As regards coins, it is provided by s. 4 of the Coinage Act, 1870,[8] that gold coins are legal tender for the payment of any amount, silver coins for the payment of an amount not exceeding 40 shillings, and bronze coins for the payment of an amount not exceeding 1 shilling, and though gold coins are at the present time not in circulation, this provision stands unrepealed. But s. 4 makes the legal tender power of the coins dependent on three conditions, viz. that the coins have been duly issued

(with the exception of foreign money which is money, but not legal tender, below, p. 124) at the present time no money circulates in England which is not legal tender. The position was different when there existed country bank notes, and it is still different in the United States: see Nussbaum, 35 (1937) *Mich. L.R.* 865, 893 sqq. The first part of the above statement that all legal tender is money is justified, though it is opposed by Nussbaum, l.c., pp. 903 sqq. Nussbaum's reasoning is based on historical examples which are of no actual significance and on cases which we preferred to solve by the admission that under certain circumstances money-things may lose the character of money and acquire that of a commodity: see above, pp. 16 sqq.

[1] See above, p. 6. [2] 37 Geo. III, ch. 45.

[3] *Grigby* v. *Oakes* (1801), 2 Bos. & Pul. 527; see already *Lockyer* v. *Jones* (1796), Peake's N.P.C. 240 per Lord Kenyon. As to agreement to accept bank notes see *Brown* v. *Saul*, 4 Esp. 267. That country bank notes were good tender in case of agreement only was laid down in *Lockyer* v. *Jones* (1796), Peake's N.P.C. 239; *Tiley* v. *Courtier* (1817) not reported but referred to and approved of in *Polyglass* v. *Oliver* (1831), 2 Cr. & J. 15; see also above, p. 8, n. 8.

[4] 51 Geo. III, ch. 127; 52 Geo. III, ch. 50, extended by 53 Geo. III, ch. 5 and 54 Geo. III, ch. 52 until the resumption of cash payments.

[5] Lord Liverpool's Act, 56 Geo. III, ch. 68, s. 11.

[6] Bank of England Act, 1833, 3 & 4 Will. IV, ch. 98, s. 6.

[7] 18 & 19 Geo. V, ch. 13, s. 1 (2). [8] 33 Vict., ch. 10.

by the Mint, that they have not been called in, and that they have not become diminished in weight so as to be of less than the standard weight. The import of these three conditions is elaborated by ss. 5 to 7 of the Coinage Act, 1870. S. 5 provides that no piece of gold, silver, copper, or bronze, or of any metal shall be made, except by the Mint, as a coin or a token for money, or as purporting that the holder thereof is entitled to demand any value denoted thereon, and any contravention is liable to give rise to conviction. S. 7 provides that where any gold coin is below the current weight or where any coin has been called in by proclamation, every person shall cut, break, or deface such coin tendered to him in payment, and the person tendering the same shall bear the loss. S. 6, which is more difficult to understand, reads as follows:[1]

'Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing matter and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state.'

At first sight, one would be inclined to think that s. 6 relates to the second condition laid down in s. 4 and provides that no payment shall be promised or made in a coin which has been called in by proclamation and which is therefore not 'current and legal tender in pursuance of this Act'. Such a construction would be fortified by the fact that the proviso contrasts the currency of British possessions or a foreign state with that of this country; s. 6 would then mean that a payment may be promised or made either in the coins 'which are *current and* legal tender in pursuance of this Act', or in the currency of British possessions, or in that of a foreign State, and it would exclude any other currency. This could only be such a currency as is no longer 'current' or such coins as are not of the

[1] The same provision exists, e.g., in Canada (s. 15 (2), (3), Currency Act, 1910, Rev. Statutes of Canada, 1927, ch. 40) and in Australia (s. 7, Commonwealth Coinage Act, 1909).

weight and fineness prescribed in the Schedule of the Act.[1] Such a construction would not necessarily be made impossible by the fact that s. 7 allows the cutting or defacing of any coin called in by proclamation and thus relates to coins which are no longer current; for s. 7 would then refer to those cases where in contravention of s. 6 coins which are not current are tendered, and would ensure the prevention of their circulation. On the other hand, the contention that s. 6 of the Coinage Act, 1870, aims at securing the use of coins which are current and which correspond to the prescribed weight and fineness is strongly supported by an earlier enactment. The statute 6 Geo. IV, ch. 79, which was repealed by the second Schedule of the Coinage Act, 1870, provided 'for the assimilation of the currency and monies of account throughout the United Kingdom of Great Britain and Ireland', and s. 1, which is repeated almost verbatim by s. 6 of the Coinage Act, 1870, makes it quite clear that its purpose was to ensure that after the commencement of the Act only English money should be used in Ireland, to the exclusion of the Irish pound hitherto circulating and quoted at a discount. Moreover, the above construction of s. 6 may derive some support from a similar provision of an analogous Act, viz. from s. 19 of the Weights & Measures Act, 1878,[2] the clear purpose of which is to eliminate the use of old weights and measures and to ensure the use of the imperial weights and measures ascertained by the Act.[3]

The correct construction of s. 6 is, however, very doubtful. An alternative solution would be that by the combination of ss. 4 and 6 parties are prevented from making an effective bargain for a debt to be paid only in one form of legal tender. If this were so, the important practical consequence would ensue

[1] In Halsbury (Hailsham), xxiii, No. 251, it is said that under s. 6 every liability, unless it concerns some foreign currency, 'can only be discharged' by paying what is legal tender in England. It is believed that this somewhat general statement in fact fully corresponds to the explanation given in the text. See also Halsbury (Hailsham), i. 170.

[2] 41 & 42 Vict., ch. 49.

[3] S. 19 reads as follows: 'Every contract, bargain, sale or dealing made or had in the United Kingdom for any work goods wares or merchandise or other thing which has been or is to be done, sold, delivered, carried or agreed for by weight or measure, shall be deemed to be made and had according to the imperial weights and measures ascertained by this Act or to some multiple or part thereof, and if not so made or had, shall be void. . . .'

that payment exclusively in gold coin could not be validly stipulated for, and it seems therefore preferable to scrutinize that suggestion in connexion with the general discussion of the validity of gold clauses[1] and the like.

In any case one will have to agree with Lord Tomlin, who confessed[2] that he found 'difficulty in assigning any meaning of precision to this obscure section', namely, s. 6 of the Coinage Act, 1870.

(*b*) Money is convertible, or, as Knapp described it,[3] provisional, if the issuing authority or bank is bound to exchange it for other types[4] of money at the nominal rate; money is inconvertible, or definite, if such an obligation does not exist.

Convertibility is a feature of those currencies in which the standard money consists of metal, generally gold, and in which the paper money which may also be in circulation can always be exchanged for the standard money. It is the function of such convertibility to keep the paper money at its nominal value; for 'as long as this redeemability is not a dead letter, but an actuality, the value of the paper currency issued by the State, or of the bank notes issued by private individuals, cannot materially deviate from their nominal value expressed in terms of metallic currency. The value of the paper tokens is thus, indirectly, closely connected with the value of a specified quantity of metal which forms the basis of the existing currency system.'[5]

Convertibility differs from legal tender in that it lays the issuing bank under a definite obligation, which can be enforced by action.

Convertibility, being so closely connected with the existence or non-existence of a metallic (especially a gold) standard,[6] does not at present exist in England. It had been an essential feature of the Bank of England Act, 1833,[7] but it was modified by the Gold Standard Act, 1925,[8] which exempted the Bank of

[1] Below, pp. 104 sqq.

[2] *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 142.

[3] *State Theory of Money*, p. 103.

[4] Exchange against money of the same type is not convertibility in the usual sense. For such exchange see Coinage Act, 1891, 54 & 55 Vict., ch. 72: gold coins against gold coins; Currency and Bank Notes Act, 1928, 18 & 19 Geo. V, ch. 13, s. 4 (4): currency notes against bank notes.

[5] Helfferich, p. 65; see also Gregory, *The Gold Standard and its Future*, 2nd ed. (London, 1932), pp. 1 sqq.

[6] See above, p. 25.

[7] 3 & 4 Will. IV, ch. 98.

[8] 15 & 16 Geo. V, ch. 29, s. 1.

England from liability to redeem its notes with gold coin and merely placed it under the obligation to sell gold bullion at a fixed price, and, moreover, granted the exclusive right of obtaining coined gold from the Mint to the Bank of England. It was this limited convertibility which was abolished by the Gold Standard (Amendment) Act, 1931.[1]

(*c*) The combination of legal tender and inconvertibility constitutes what is called forced[2] issue or compulsory tender or fiat money (*cours forcé, Zwangskurs*). Thus the *Encyclopædia Britannica* defines[3] Fiat Money as irredeemable money issued and made legal by government order but not secured by gold or silver or other adequate reserve. Or, perhaps more correctly, it may be said that the issue is a forced one if paper money is the only circulating medium and if nothing but paper money can be tendered to or demanded by the creditor.

In view of the fact that at the present moment only irredeemable paper money is in circulation in this country and that, in respect of amounts exceeding 41*s*., paper money is the only legal tender in existence, it cannot be doubted that the present English currency is a forced one. The implications of this position will have to be further considered in other connexions.[4]

Inconvertibility exonerates the bank of issue from paying its notes in gold and puts it merely under the obligation to pay them in currency, i.e. in its own notes, it being irrelevant whether an individual note was issued before or after the introduction of inconvertibility[5] or whether it is held and situate inside or outside the country.[6] Therefore the promise 'to pay' which bank

[1] 21 & 22 Geo. V, ch. 46.

[2] This is the expression used by the translator of Helfferich, p. 65; as to definition of *cours forcé* in France see Degand, p. 26, n. 3 above.

[3] 14th ed., vol. ix, p. 212; see also Keynes, *Treatise on Money* (1930), p. 7.

[4] See below, pp. 109 sqq.

[5] In Germany there existed at one time a considerable body of holders of old mark notes who, stirred up by demagogues, claimed that their notes, issued before the war legislation suspending convertibility, ought to be paid in gold. In two long judgments the Supreme Court disposed of this absurd contention: 20 May 1926, *RGZ.* 114, 27; 20 June 1929, *JW.* 1929, 3491.

[6] Though, in general, the law of the country to which the bank of issue is subject governs the obligations arising out of bank notes (Nussbaum, *Geld*, p. 142), it is sometimes maintained that the introduction of inconvertibility does not affect the position of foreign holders; but this doctrine is fallacious, as the alleged principle that monetary laws have no extraterritorial effect does not exist (see below, p. 193). Where, however, the inability to redeem bank

notes express or imply[1] is of no real significance after the introduction of inconvertibility. Nevertheless, inconvertibility does not make bank notes mere tokens of money, depriving them of their character as negotiable instruments.[2]

II

After this brief survey of the more important aspects of a monetary system in general and the British monetary system in particular, it becomes necessary to consider more closely the meaning of the unit of account. It will be evident, not only when the nature and extent of money obligations come to be dealt with,[3] but also in other connexions,[4] that this is a question of such fundamental significance as to require further discussion.

The problem, what is to be understood by the unit of account, e.g. the pound, presents itself in its most serious form when the currency system is in no way based on metal, but merely on inconvertible paper, or in other words on the credit of the bank of issue. But substantially the problem is the same when paper money is convertible or when coins form the only currency. In this case, and in this case only, it is not unreasonable to ask the question: Is the pound to be defined as a certain quantity of metal, or as something else? If money is being regarded as a certain quantity of metal, i.e. with reference to its weight, there does not really exist a unit of account in the modern sense, because the basis of the currency is then not an independent, abstract, ideal unit of account, but a concrete, real unit of metal. It is therefore quite correct to say that a unit of account begins to be used as soon as coins are accepted in payment by tale and not by weight.[5] The names nowadays employed to designate the various units of account very often make it clear that originally they described a certain weight: 'pound', 'mark', or

notes in gold is due to exchange restrictions, not to the introduction of inconvertibility—this is the position, e.g., in Germany, where the full convertibility established by s. 31 of the Bank Act of 30 August 1924 and by the decree of 17 April 1930, *Reichsgesetzblatt*, 1930, ii. 691, has not been interfered with—the courts of some countries will be more readily disposed to enforce a claim for payment in gold: see below, pp. 261 sqq.

[1] Above, p. 8.

[2] Cf. *Banco de Portugal* v. *Waterlow & Sons*, [1932] A.C. 452; see also the German decisions quoted p. 31, n. 5 above, and Breit in Düringer–Hachenburg, *Kommentar zum Handelsgesetzbuch*, iv. 746.

[3] Below, p. 60.

[4] Below, pp. 37 sqq.

[5] Feavearyear, p. 2.

'peso'.[1] It is usually said that the advance to the unit of account in the modern sense was not achieved until the later part of the eighteenth century at the earliest. But Feavearyear[2] asserts that the pennies issued perhaps about 775 by Offa, King of Mercia, were already a hundred years later paid and accepted by tale, and that from then onwards 240 pennies, or the pound, never lost the character of an ideal unit of account. This is not the place to examine the historical exactitude of this view. It must, however, be noted that at least during the two decades which preceded the great reform of 1819 it came to be generally held that the pound was nothing but a definite quantity of gold. This was in effect the conclusion reached by the famous Report of the Bullion Committee (1810), and it was the principle underlying the legislation of 1819.[3] The idea of an 'abstract pound', or of a pound which could not be defined otherwise than by the admission that it was 'difficult to explain it, but every gentleman in England knows it',[4] was ridiculed in 1819 by Peel, who gave expression to the almost general view when he said in the House of Commons:[5] 'Every sound writer on the subject came to the conclusion that a certain weight of gold bullion, with an impression on it, denoting it to be of that certain weight, and of a certain fineness, constituted the only true, intelligible, and adequate standard of value.'

The *metallistic* doctrine expressed by these words has undoubtedly become discredited, and, indeed, at a time when the paper pound exists and proves workable, its unsoundness cannot be denied; but even when a paper currency is not in force, the doctrine is no longer being adhered to.[6] This is made clear by

[1] See *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.*, [1937] 3 All E.R. 349, at p. 357 per MacKinnon L.J.

[2] p. 7. [3] 59 Geo. III, ch. 49; Feavearyear, pp. 205 sqq.

[4] This was said in evidence before the Bullion Committee by a London accountant, Mr. Thomas Smith. Feavearyear, p. 1, suggests that 'Mr. Smith had at the back of his mind the germ of a truer notion of the nature of the pound than that of Peel'.

[5] 24 May 1819, Hansard, xl. 675 sqq., 679, 680. Professor Pollard in a letter to *The Times*, 20 Jan. 1937, suggests 'that historically a pound is 240 pennyweights of silver', which thesis provoked further letters to the Editor from Lord Desborough and Sir Joseph Chitty in *The Times* of 23 Jan. 1937. It seems indeed plausible that, as Nebolsine, 42 (1933) *Yale L.J.* 1050, 1060, asserts, to the framers of the American Constitution 'money was nothing more than so many pieces of precious metal of certified weight and fineness'.

[6] See below, p. 196, where the cases relating to foreign currency are dealt with.

a dictum of Lord Russell, who said:[1] 'It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account', and also by Lord Wright, who in another case observed:[2] 'Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency.'[3]

However evident this may be, it is more difficult to give a positive answer to the question how the unit of account is to be defined. Here, again, it was Knapp who offered a solution by his *historical* definition. Knapp held[4] that the unit of account can be defined historically only, and that it receives its meaning by nothing but by its 'recurrent linking' to the previous currency. According to Knapp, such linking is effected by the rate of conversion which the State stipulates in respect of the payment of debts denominated with reference to the old standard. Thus the present reichsmark is not to be defined as 1/2790 kilogram fine gold,[5] but as 1 billion (old) marks, the mark itself

[1] *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 148.

[2] *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587, 605 (P.C.).

[3] In the same sense Maugham J. (as he then was) in *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 373, 391, whose statement was approved of by Lord Wright in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 160, and Romer L.J. in the same case (C.A.) at pp. 407, 408, who very clearly explains that a pound is not a coin and that a contract to pay pounds is 'a contract to pay so many standard units of value by tendering coins or notes or other legal tender for the amount'; these remarks are still valid though the judgment has been overruled by *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122. See also *In re Chesterman's Trusts*, [1923], 2 Ch. 466, and *Ottoman Bank* v. *Chakarian* (No. 2), [1938] A.C. 260, at p. 271.

[4] *State Theory of Money*, p. 21.

[5] S. 3, Coinage Act of 30 August 1924, provides that out of 1 kg. fine gold there shall be coined 139½ pieces of 20 reichsmarks in gold or 279 pieces of 10 reichsmarks in gold; s. 1, Coinage Act, proclaims that Germany adopts the gold standard. These provisions only mean that the German unit of account has a fixed relation with gold, but they do not mean that 1 reichsmark is equal to 1/1390 kg. of gold. Though the wording of the provisions makes it quite clear that they simply indicate a policy or a programme (Nussbaum, *Geld*, p. 52; 35 (1937) *Mich. L.R.* 865, 875; see also Breit in Düringer–Hachenburg, *Kommentar zum Handelsgesetzbuch*, iv. 748; Gadow in Staub, *Kommentar zum Handelsgesetzbuch*, iii. 271), the Supreme Court recently said that 'he who owes one Reichsmark, owes 1/1395 pound fine gold, and he who is entitled to claim 1395 Reichsmark, is satisfied by the receipt of one pound fine gold': 28 Nov. 1930, *RGZ.* 130, 367, 371. This was clearly an *obiter dictum*, but it is nevertheless

being equivalent to $\frac{1}{3}$ thaler.[1] This view, it is true, has been criticized as being somewhat one-sided. It has been rightly pointed out[2] that a recurrent link does not exist where the rate of conversion varies according to the time at which the monetary obligation arose,[3] and that a rate of conversion could just as well refer to the rate of exchange of some foreign currency.[4] It must be added that the historical theory is bound to fail where, as in the case of the English currency system, a unit of account has a continuous history[5] which dates from so far back that a rate of conversion, if there was any, cannot be traced. Nevertheless, experience shows that in most, if not all modern cases, a unit of account can in fact be linked by a rate of conversion to an antecedent unit, and Knapp's doctrine can therefore be adopted as a useful working principle. As Professor Wolff said,[6] in a negative sense it was Knapp's merit not to have defined the unit of account according to the standard metal of the currency system, and positively, we are indebted to him for having explained a unit of account by connecting it with the unit of other systems. That Knapp explains the unit by connecting it with the antecedent unit only may be too one-sided,

surprising, because the theory there enunciated is obviously wrong and irreconcilable with the actual practice of the court. The question might be more doubtful in other countries where the proclamatic character of such provisions is less clearly indicated by the wording of the respective provisions; thus a French Act of 25 June 1928 provided that the franc is 'constituted by 65·5 milligrams of gold 9/10 fine'. Even in such cases it would be wrong to equiparate the unit of account to a certain quantity of gold; see especially Nussbaum, l.c.

[1] See the rates of conversion in Art. 14, Coinage Act, 1873.

[2] Nussbaum, p. 48.

[3] This happened in France when in 1795 the silver franc replaced the paper currency of the Revolution and when so-called 'tableaux de dépréciation' were introduced (see Mater, pp. 153 sqq.; *Rev. dr. bancaire*, ii. 172; iii. 74); for further examples see Nussbaum, p. 122. Similarly Russia: see *Buerger* v. *New York Life Assurance Co.*, 43 (1927) *T.L.R.* 601, 605 per Scrutton L.J.; *Perry* v. *Equitable Life Assurance Society*, 45 (1929), *T.L.R.* 468, 473, 474 per Branson J.; Freund, *Das Zivilrecht Sowjetrusslands*, pp. 179 sqq.; Bloch, *Ostrecht*, 1927, 249 sqq.; Maklezow-Timaschew–Alexejew–Sawalski, *Das Recht Sowjetrusslands*, pp. 224 sqq.

[4] Wolff, pp. 571–3.

[5] See above, p. 24. But it is particularly interesting to note that as regards Ireland the usefulness of the recurrent link theory can be proved. The statute 6 Geo. IV, ch. 79 (1825), provided 'for the assimilation of the currency and monies of account throughout the United Kingdom of Great Britain and Ireland'. English money was quoted at a premium of $\frac{1}{13\frac{1}{2}}$ over Irish money, and s. 2 provided that every sum of Irish money shall in future be paid in British money 'less by 1/13th part than the amount of such sum expressed according to the currency of Ireland'.

[6] p. 573, n. 26.

but so long as no better definition can be found, his principle, if it is not regarded as an inflexible one, cannot be abandoned.[1]

If it were abandoned, lawyers would needs be driven to extra-legal, especially sociological, explanations which, though correct and interesting in themselves, would not be very helpful for legal purposes. It would then become necessary to consider a unit of account, such as the pound sterling, simply as a name[2] for something which cannot be precisely defined, and to be satisfied with Nussbaum's attractive exposition:[3]

'Thus the value of the monetary unit seems to be somewhat disconnected from reality, or at least from materiality. Nevertheless, in the consciousness of the social community its significance is sufficiently distinctive. To take a modern example, even between April 1933, when the United States went off the gold standard, and 30th January 1934, when a new gold parity of the dollar was fixed by the President, there was at any given moment a neat idea of what a "dollar" meant. The existence of a monetary unit apparently is a group-psychological phenomenon which in respect to each unit can be depicted historically, yet it is impossible analytically to decompose the concept of the unit into simpler logical elements. The American dollar can be traced back, through many vicissitudes, to the Spanish "milled dollar", or peso, the value of which was in 1792 adopted by Congress as the basis of the American monetary system. Again, the Spanish peso may be eventually traced back to a weight unit. There exists an uninterrupted chain of value notions concomi-

[1] Similarly, Wolff, p. 571; Nussbaum, p. 48, though the above qualifications should not be overlooked. Their practical importance is, however, not very great. As in this country the history of the money unit is a continuous one (see above, p. 24), English municipal law is silent as to the acceptance of the 'recurrent link', but there are many cases of English private international law where the doctrine has been recognized (see below, p. 196). A most interesting example is supplied by a decision of the German Supreme Court (25 Feb. 1931, *RGZ.* 141, 1). In Germany a monetary system in the modern sense did not exist until the Coinage Act of 1873, passed after the creation of the Reich in 1871. Up to that time Germany had comprised numerous sovereign States and, consequently, an extraordinary monetary confusion existed, which is well exemplified in that decision. The case, which is too long and complicated to be of interest to non-German readers, dealt with the conversion into present reichsmark of a debt of 'Reichsthaler Gold' incurred in 1854 by the then Great Duke of Oldenburg.

[2] That the unit of account is simply a name has very often been said: see, e.g., Wolff, p. 571, or Austrian Supreme Court, 26 Nov. 1935, 9 (1935) *RabelsZ.* 891, 897. The problem is only this, whether in law the meaning of that name can be further elucidated by relating it to another conception.

[3] 35 (1937) *Mich. L.R.* 865, 871.

tant to the use of the peso-dollar terms. But the dollar concept existing at a given time is as little susceptible of definition as, say, the concept of "blue". No more can be said than that "dollar" is a name for a value which, at a definite moment, is understood in the same sense throughout the community.'

III

The unit of account which, in a perhaps not quite satisfactory but generally sufficient manner has thus been defined, not as a mere name nor as a certain quantity of metal, but as an abstract measure of the relation of a given currency standard to its predecessor, is the one essential characteristic of a monetary system. Neither the metallic basis nor such incidents as convertibility, legal tender, symbols of money, &c., are of such cardinal significance that alterations in these would involve an alteration of the monetary system itself.

Alterations of a currency may be of an intrinsic or an extrinsic nature.[1] In the former case they generally affect nothing but the value or the purchasing power of money, whether they result from the transition from a silver to a gold standard, or from a gold to a paper standard, or from the introduction of new coins or new notes, from the diminution or increase of the weight of coins (devaluation, revaluation), from the introduction or abolition of legal or compulsory tender power, from the expansion or restriction of credit and circulating money (inflation,[2] deflation), or from similar measures. These steps, as such, do not affect the identity of the monetary system of which the depreciated or appreciated money forms part. It cannot be doubted that, when England went off the gold standard in 1931 by relieving the Bank of England from the obligation to sell gold bullion against notes,[3] or when in 1933 the United States of America declared gold clauses to be irreconcilable with public policy and enacted that every obligation shall be discharged

[1] Nussbaum, p. 117.

[2] See, e.g., *Encyclopædia Britannica*, vi. 879, where some of the modern inflations, especially the British inflation from 1914 to 1920, are described; Watkins, 'Economic Aspects of Inflation', 33 (1934) *Mich. L.R.* 153; Willis and Chapman, *The Economics of Inflation* (New York, 1935); Harwood–Ferguson, *Inflation* (Cambridge, U.S.A., 1935); Bresciani-Turroni, *The Economics of Inflation, A Study of Currency Depreciation in Post-War Germany* (London, 1937).

[3] Gold Standard (Amendment) Act, 1931, 21 & 22 Geo. V, ch. 47.

upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender,[1] or when in 1936 the French franc was devalued by providing that the gold content of the franc was to be fixed at between 43 and 49 milligrams of gold (900/1000 fine) instead of the previous 63½ milligrams[2]— in all these and similar cases recorded in monetary history the unit of account remained untouched, because there was no rate of conversion linking the 'new' currency with the 'old', and therefore the identity of the monetary system remained unchanged, however seriously the national and international value of the money may have been reduced.[3]

Alterations of a currency are of an extrinsic nature if they do not, or do not only, affect the value of the money, but affect the identity of the unit of account and, thereby, of the monetary system itself. Generally speaking, such alterations are due to two causes, either to territorial changes[4] or to a complete collapse of the monetary system.[5]

A decision of the German Supreme Court[6] affords interesting illustration of the view that only alterations in the constitution of the unit of account as evidenced by a rate of conversion affect the identity of a monetary system, and that all other incidents

[1] Joint Resolution of Congress, 5 June 1933.

[2] *Journal Officiel*, 2 Oct. 1936; a fixed gold standard was finally abandoned by the decree of 30 June 1937.

[3] That the identity of the pound sterling was not affected when England went off the gold standard in 1931 was recognized by the German Supreme Court (21 June 1933, *RGZ.* 141, 212, 214) and by the Czechoslovakian Supreme Court, *RabelsZ.* 1934, 484. But the abolition of the gold clause by the United States in 1933 was regarded as an alteration of the currency by the Austrian Supreme Court, 26 Nov. 1935, *RabelsZ.* 1935, 891, 895.

[4] Thus after the Great War numerous new currency systems were established, and everywhere rates of conversion were introduced, e.g. in Czechoslovakia, South Tyrol, Alsace-Lorraine, Tanganyika, and other countries. A recent example is the German legislation following upon the return of the Saar Territory after the plebiscite in 1935: see the decrees of 22 and 25 Feb. 1935 in *Reichsgesetzblatt*, 1935, i. 250, 279 (see also at pp. 1039, 1365); the first decree contains elaborate provisions as to the ambit of the rate of conversion there introduced. The latest example probably is the replacement of the Austrian schilling by the German reichsmark, 1.50 schilling being equal to 1 reichsmark: *Reichsgesetzblatt*, 1938, 253.

[5] Thus the fact that the German currency collapsed in 1922–3 meant that the mark of 1923 essentially differed from that of 1913 (see German Supreme Court, 13 Oct. 1933, *RGZ.* 142, 23, 30, 31), and for the same reason it should be held that the collapsed Russian currency essentially differed from the antecedent and subsequent currency. As to Russia see the references above, p. 35, n. 3.

[6] 13 Oct. 1933, *RGZ.* 142, 23.

which may have a bearing on the position of a monetary system relate merely to the value of money, though they may have consequences so disastrous as to amount to a destruction, i.e. to an alteration of the system. On 21 May 1931 the plaintiff bank discounted with the defendants, the German Reichsbank, a bill of exchange for 100,000 Mexican gold pesos, payable on 15 August 1931. On 27 July 1931 a new Monetary Law came into force in Mexico by which the currency was moved off the gold standard. It was provided that, though the unit of account was the peso of 75 centigrams fine gold, the token money consisted of notes, silver, and bronze only, that any payment of Mexican money had to be effected by tendering silver or bronze coins at the nominal value, and that this also applied to debts previously incurred. In view of this law, the acceptor of the bill paid at maturity the nominal amount of 100,000 Mexican gold pesos in silver coins. The defendants therefore received an amount less by 74,013·45 reichsmark than they would have received had the bill been paid before the law of 27 July 1931. They debited the plaintiffs' account accordingly, relying, *inter alia*, on a clause in their agreement with them which read as follows: 'If bills of exchange or cheques are not paid in the currency with reference to which they are denominated, the Reichsbank reserves the right to recover subsequently any eventual balances arising from the variation of the rates of exchange.' Applying German law, the Supreme Court held that this clause was inapplicable, because the currency in which the bill was paid did not differ from that by which it was denominated. The court took the view

'that the various reasons which combine to produce the international value of a currency system cannot be distinguished, and that, on the other hand, the question whether a currency has collapsed, does not depend on an examination of the circumstances which have led to a different valuation. The valuation of a monetary system can at the most indicate that an alteration of the currency has perhaps occurred. For the decision whether such an alteration in fact exists, the Court of Appeal was right in holding it to be necessary to go down to the basis of the individual monetary system, and this basis is the ideal unit on which the system is founded (Nussbaum, *Das Geld*, p. 44), or "the value represented by the unit which is the basis of the system" (Helfferich, *Geld*, p. 413).[1] An alteration of the currency only exists,

[1] English ed., p. 353.

if its basis is altered, whether this is due to the legislator consciously building up a new monetary system on a new unit of account, or to the events of economic life completely destroying that legal basis in disregard of the law.'

It follows from the State theory of money that, generally, extrinsic alterations of currency can only be effected by legislative measures. As regards the question under what circumstances intrinsic alterations may destroy the identity of the currency, a hard-and-fast rule cannot be laid down. With respect to depreciation of money, the working principle will probably have to be adopted that a 'collapse',[1] a 'catastrophical depreciation'[2] is required, or that the money must have become 'worthless'[2] or 'fantastically depreciated'[3] or, as was said in an American case,[4] so depreciated as to 'shock the conscience and produce an exclamation'.

IV

Although the unit of account thus characterizes the individual monetary system, it does not always serve to distinguish one monetary system from another. It may happen that two or more countries adopt money which is not only founded on a common rate of conversion but whose denomination (English, Canadian, Palestine pound; French, Belgian, Swiss franc, and so on), symbols, metallic basis, and circulation are also common to both or all of them. If these, or any of these, conditions are present, it is not easy to say whether there is one monetary system common to the respective countries, or whether each country has its own, independent, distinct, and complete monetary system. The answer can only be found by a definition of what is required of a monetary system.

A monetary system peculiar to a country exists where the monetary affairs of the country have been organized into a systematic entity. Such organization depends on many individual but interconnected measures. Thus the State must have

[1] Expression of Sankey J. (as he then was) in *Ivor An Christensen* v. *Furness Withy & Co.* (1922), 12 Ll. L.R. 288.

[2] On such circumstances the German Supreme Court founded its revalorization doctrine: see below, p. 73, and see *Franklin* v. *Westminster Bank Ltd.*, below, p. 315, at p. 319 per Lord Hanworth M.R.

[3] *Franklin* v. *Westminster Bank Ltd.*, below, p. 315, per Mackinnon J.

[4] *Seymour* v. *Delancy* (1824), 3 Cowen (N.Y.) 445.

assumed, and made use of, its sovereignty over the circulating medium in general; it must have taken charge of the coinage as well as of the notes in circulation, their types, issue, impression, and protection; it must have laid down rules as to what is legal tender, and as to whether the currency is or is not convertible, and in the latter case, how the credit of the bank of issue is to be secured—in short the State must have combined the various types of money and their legal position into a complete system.[1] Very often such organization will be a matter of degree, but where the completion of the system has gone so far as to necessitate the quotation of rates of exchange on foreign markets, this will generally indicate that, not only in a business sense but also in a legal sense, a distinct monetary system has come into existence.

The question whether or not a distinct monetary system existed came up for judicial decision in two very interesting connexions.

One of the most recent[2] examples of an international currency standard was the Latin Monetary Union of 1865 between France, Belgium, Italy, Greece, and Switzerland.[3] These countries formed a convention 'pour ce qui regarde le titre, le poids, le diamètre et le cours de leurs espèces monnayées d'or et d'argent'. The moneys were legal tender as against the Treasury of each country, but not as between nationals of different countries. Moreover, legislation was by no means uniform, and no provisions were made relating to the control of the exactness of coinage, the tolerated deficiency, the issue of inconvertible paper money, and so on; all these questions were left to the individual States. It seemed therefore clear that in each country there existed an independent monetary system,[4] and this was the result reached by the courts in certain cases connected with bonds issued by a Belgian company during the years 1903 to 1913, at a denomination of '500 francs' each. After the War

[1] Helfferich, p. 353; Wolff, p. 570.

[2] Another example is the Vienna Coinage Treaty of 1857 between the members of the Customs Union and Austria (see Nussbaum, p. 18, n. 1, and Mater, No. 159, with further references) or the Scandinavian Union formed in 1873–5. On the subject see generally Neumeyer, pp. 227 sqq.

[3] See Janssen, *Les Conventions Monétaires* (Paris, 1911); Helfferich, pp. 438 sqq.; Mater, l.c.; Nolde, 'La Monnaie en droit international public', *Rec.* 27 (1929), 243 sqq., 364 sqq.

[4] In this sense, e.g., Helfferich, l.c. and p. 140.

some of the bonds fell due for repayment and the company proposed to effect this by paying in respect of each bond 500 francs of the then Belgian currency. One of the creditors brought an action in the German courts, asserting that the company did not owe Belgian francs, because at the time of issue no distinct Belgian currency existed but francs of the Latin Monetary Union, which were alleged to be gold francs. The Berlin Court of Appeal, however, held[1] that for the above-mentioned reasons Belgium in fact had an independent monetary system and that the defendant company owed whatever were Belgian francs at the time of the repayment. The same question was tried in the English courts in the case of *Hopkins* v. *Compagnie Internationale des Wagons-Lits*,[2] where in support of the contention that the bond secured the repayment of 500 gold francs it was said 'that a number of countries had agreed upon the standard of the gold franc by various Treaties from 1865 onwards, and that it must have been in the contemplation of the parties when the bargain which is contained in the bond was made that there should be repayment in that which he (counsel for the plaintiff) has from time to time lapsed into calling the international franc, but which he says he does not really mean to call the international franc'. In view of this hesitation with which, in the English courts, the theory of the international franc was put forward, Swift J. had no difficulty in disposing of it by saying that the international franc was nothing but 'a standard which the different countries have agreed upon between themselves which their franc shall attain, and on condition that it attains that standard it shall be freely interchangeable between the treasuries of the various high contracting parties'. In a case between different parties, the same question fell to be decided by the French Cour de Cassation,[3] which had no difficulty in arriving at the result reached in England and Germany.[4]

[1] 25 Sept. 1928, *JW.* 1929, 446. [2] Below, p. 313.

[3] Cass. Civ. 21 Dec. 1932, S. 1932, 1.390, and Clunet, 1933, 1201; in the same sense certain Belgian courts: Piret, p. 255; and see Hof of Amsterdam, 11 Dec. 1929, *Weekblad*, No. 12121 (1930).

[4] Though the question which currency was meant when during the existence of the Latin Monetary Union the word 'franc' was used without a reference to a distinct country must be decided by the general principles relating to the determination of the money on account (below, Chap. VI), the use of the word 'franc gold' can more readily be construed as referring to the gold content on which the franc was based throughout the countries which were members

The problems were not essentially different when the courts had to decide the question whether the currencies circulating in certain British Dominions, such as Australia and New Zealand, were of an independent character or identical with the English monetary system.[1] In this connexion some recent cases require attention. In accordance with a remark made in *Westralian Farmers* v. *King Line*[2] Lord Wright held in the later case of *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[3] that 'not only in a business sense, but in a legal sense' the Australian currency was different from the English. In that case the shareholders of the appellant company, which was incorporated under the laws of England and whose business was conducted from Australia, in 1921 passed a resolution to the effect that all dividends should be declared at meetings to be held in Australasia and should be paid in and from Adelaide or elsewhere in Australasia. The respondents claimed that holders of certain preference shares of £1 each were entitled to be paid their dividends in sterling in English legal tender for the full nominal amount thereof, and not subject to deductions for Australian exchange. Reversing the Order of Farwell J. and of the Court of Appeal, and overruling the latter's decision in *Broken Hill Proprietary Co.* v. *Latham*,[4] the House of Lords held that the

of the Union. Thus in 1901 the then Austrian Lloyd Triestino issued a loan of '18.000.000 kroners equal to 18.900.000 francs gold equal to 15.300.000 German marks', the coupons providing for payment of interest of 42 kroners or 42 francs gold or 34 German marks. When the holder exercised the franc option the Supreme Courts of Austria and Italy held that the company had to pay so many Austrian schillings or Italian lire as were equal to the gold content of the franc of the Latin Monetary Union, i.e. 32·25806 grammes 900/1,000 fine for 100 fr.: Austrian Supreme Court, 1 June 1937, 37 (1937) *B.I.J.I.* 245 affirming Vienna Commercial Court, 4 Dec. 1936, 36 (1937) *B.I.J.I.* 286; Italian Corte di Cassazione, 4 Aug. 1936, *Foro Italiano*, 1936, 1397, and German translation in 36 (1937) *B.I.J.I.* 307.

[1] As to the monetary development in British Colonies and Dominions see: Jenkyns, *British Rule beyond the Seas* (1902), pp. 22 sqq.; Chalmers, *History of Currency in the British Colonies*; Dodds, *History of Currency in the British Empire and the United States* (London, 1911), pp. 209 sqq.

[2] (1932) 43 Ll. L.R. 378, 381.

[3] [1934] A.C. 122, 155. That the English and Australian currency are different is also the view of Mann J. of the Supreme Court of Victoria: *In re Tillam Boehme & Tickle Pty. Ltd.* (1932), Vict. L.R. 146, 148. See also the High Court of Australia in *McDonald & Co.* v. *Wells* (1931), 45 C.L.R. 506: Conversion of New Zealand in Australian pounds.

[4] [1933] Ch. 373; the question whether there exists in Australia a distinct unit of account was answered in the negative by Maugham J. at p. 391, but

company had discharged its obligations by paying in Australian currency that which was in Australia legal tender for the nominal amount of the dividend warrants.[1] The decision was unanimous, but the opinions delivered show great variance so far as concerns the problem whether at the material times the Australian pound was different from the English pound. Lords Warrington, Tomlin, and Russell held the Australian pound to be the same as the English pound, while Lord Atkin did not express a final opinion, and only Lord Wright arrived at the opposite conclusion. It is thus necessary to choose between his view on the one hand, and the opinion expressed by the majority of the House on the other hand.[2]

Lord Tomlin started from the proposition[3] that 'there has never in fact been either in the United Kingdom or Australia so far as I am aware any statute or Order in Council or other act in the law having the force of statute expressly separating the money of account of the United Kingdom from the money of account of Australia or creating a distinct Australian unit'. This apparently means that the Australian currency was never linked by a rate of conversion to the English currency; however, as has been shown above, this fact, in itself, is of no

in the affirmative by Lawrence and Romer L.JJ. at pp. 401, 407. As in the *Adelaide* case the opinions delivered by the learned Lords differed on this point (see the text), these observations in the *Broken Hill* case still require consideration, though the actual judgments of Lawrence and Romer L.JJ. are overruled.

[1] This part of the case, embodying the actual decision, and the recent case of *Auckland Corporation* v. *Alliance Assurance Co. Ltd.*, [1937] A.C. 587 will be considered below, p. 169.

[2] Whichever of these opinions is preferred, the Privy Council was justified in holding that neither of them could in any way affect the meaning of the word 'pound' in the Australian Assessment and Taxing Acts, neither of them being inconsistent with the view 'that for the purpose of assessing an Australian taxpayer to income tax under the Australian revenue legislation, it is necessary that his assessable income should be expressed in terms of Australian currency': *Payne* v. *The Deputy Federal Commissioner of Taxation*, [1936] A.C. 497, 509. In the case of *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587, the Privy Council also refrained from expressing an opinion on the point; a few remarks in Lord Wright's judgment, e.g. on the one hand his reference to the pound as the unit of account common to England and New Zealand or, on the other hand, his reference to the 'New Zealand currency' and 'the sterling currency in England', do not conclusively point in either direction. See also *De Bueger* v. *Ballantyne & Co. Ltd.*, [1938] A.C. 452 (P.C.).

[3] p. 143; Lords Warrington and Russell did not enter into a detailed reasoning on this point.

relevance to the question whether the Australian pound is part of a monetary system different from or identical with the English system. Lord Tomlin went on to examine the development of the Australian currency: the Commonwealth of Australia was given full power to make laws with respect to currency, coinage, and legal tender. The Australian coinage is based on the Australian Coinage Act, 1909, under which Australian coins were issued and which also provided that United Kingdom as well as Australian coins should be legal tender in Australia. Australian notes were issued, at first, by the Treasurer under the Australian Notes Act, 1910, and later by the Commonwealth Bank under an Act of 1920, and these notes were legal tender in Australia, but not in the United Kingdom. To Lord Tomlin's mind this legislation was not sufficient to separate the Australian from the English pound, the *ratio decidendi* being that no distinct unit of account had been introduced in Australia. To this point Lord Tomlin reverted at the end of this part of his opinion when he asked himself the question,[1] 'If there has been a change in the money of account, when did it take place and what caused it, and I find no answer.'

Lord Wright did not deny[2] the identity of the unit of account, but nevertheless, after tracing the history of the Australian pound and the development of the exchange rates, he regarded the two systems as distinct on the ground[2] that 'this difference is inherent in the difference of the law-making authority at either place, as well as in the different commercial conditions prevailing'.

The contrast thus becomes quite clear: is it necessary for the establishment of a distinct monetary system that a distinct unit of account be introduced by a rate of conversion or otherwise, or is it sufficient that, in the exercise of its sovereign power, the State should take upon itself to regulate its currency? The latter view should be preferred, because it seems clear that although one country may have originally adopted the unit of account of another, the subsequent organization of the currency may cause it to become entirely independent.

[1] p. 145.

[2] p. 155; similarly, Romer L.J. in *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 373, 407 relied on the fact 'that Australia had in 1920 its own currency system and every such system must be based on a standard unit of value'.

V

Monetary systems, thus having been ascertained to exist as separate entities, are related to each other by two means of measurement, the (nominal) par of exchange and the (real) rate of exchange.

1. The *par of exchange* is the equation between two money units each based on a metallic standard. If it is a gold standard, 'for each of these currencies there is an equation between the value of the money unit and that of a specific quantity, by weight, of gold. From these two equations each of which has on one side a quantity of gold, a third can be derived which gives the relation between the values of the two money units',[1] namely, the par of exchange. A par of exchange can also be found where two currencies are linked to different metals.[2] The par of exchange is sometimes fixed by law; thus the relation of the U.S.A. dollar and the pound sterling had long been fixed at $4.44.[3]

The par of exchange is independent of the rates of exchange of the day, and consequently it does not express the current value of a foreign money unit as resulting from general economic principles, especially those of supply and demand. Moreover, if one of the countries or both countries are on a paper standard, the par of exchange is meaningless, unless the rate of the paper money is itself linked to the currency of a gold-standard country.[4] It is therefore not surprising to find that at the present moment the par of exchange is no longer resorted to when two currencies have to be compared. In continental countries, apparently, the mint par never played any role, but in the United States of America it has long been uncertain whether it was the par or the rate of exchange which, in law, indicated the respective value of two monetary units. Story, who discusses the position at length,[5] starts from the principle[6] that it is necessary 'in all cases to allow that sum in the currency of the country where the suit is brought which should approxi-

[1] Helfferich, p. 413; Arnauné, *La Monnaie, le crédit et le change* (1922), pp. 123 sqq. [2] Helfferich, p. 434.

[3] U.S.A. Revised Statutes, s. 3565, repealed by s. 403 (d), Dye and Chemical Control Act, 1921 (67th Congress, ch. 14). In view of the fact that the weight-for-weight par was $4·866 (*Encyclopædia Britannica*, 14th ed., vii. 947), the statutory par was bound to become obsolete.

[4] See Nussbaum, p. 60. [5] ss. 308–13. [6] s. 309.

mate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par, and not by the nominal par', and consequently he draws a distinction[1] depending on the place of payment: if it is in a country with which there is an established par of exchange the nominal rate applies, in all other cases the real par. Story's discussion shows the divergencies existing in the various American jurisdictions during the earlier part of the nineteenth century, and even in the later part there were decisions to the effect that in an action in one country for debt made payable in another country, the plaintiff is entitled to judgment according to the par of exchange.[2] There is, however, no doubt that at the present time the rate of exchange is universally applied in American courts.[3]

In England it was at one time not quite clear that the real par, i.e. the rate of exchange, is the proper indicator of the value of a foreign money unit. In *Cockerell* v. *Barber*[4] the question was whether legacies expressed in sicca rupees were to be paid at the East India Company's rate between India and Great Britain, which was 2*s*. 6*d*. to the rupee, or at the East India Company's rate between Great Britain and India, which was 2*s*. 3*d*. to the rupee, or at the current value of the sicca rupee in England, which was 2*s*. 1*d*. to the rupee. Lord Eldon's declaration adopted the last alternative. But two decades later, in *Scott* v. *Bevan*,[5] where an action was brought in England for the value of a given sum of Jamaica currency upon a judgment obtained in that island, it was argued for the plaintiff that no regard should be had to the rate of exchange, while the defendant argued in favour of the real or actual par. Lord Tenterden, while adopting the actual par, said:[6] 'The practice has probably

[1] s. 310.

[2] See *Marburg* v. *Marburg* (1866), 26 Maryland 8, a case which was quoted in most of the English decisions discussed below, pp. 289 sqq.

[3] See cases below, pp. 282 sqq.; see especially *Nevillon* v. *Demmer* (1920), 114 Misc. 1, 185 N.Y. Supp. 443; Sedgwick, *On Damages*, s. 275; Fraenkel, 35 (1935) *Col. L. R.* 360, 361, 362; but cf. *Frontera Transportation Co.* v. *Abaunza*, 271 F. 199 (C.C.A. 5th, 1921).

[4] (1810) 16 Ves. 461; on this case see Story, s. 313.

[5] (1831) 2 B. & Ad. 78; see also *Delegal* v. *Naylor* (1831), 7 Bing. 460 and *Campbell* v. *Graham* (1830), 1 Russ. & My. 453, 461, affirmed sub nomine *Campbell* v. *Sandford* (1834), 2 Cl. & F. 429, 450, where both Sir John Leach and Lord Brougham apparently applied the par of exchange.

[6] At p. 85.

been in favour of the plaintiff, but there is no case that decides the question. Upon the whole we think that the defendant's mode of computation approximates most nearly to a payment in Jamaica in the currency of that island; though, speaking for myself personally, I must say that I still hesitate as to the propriety of this conclusion.'[1] To-day, however, the general and exclusive[2] validity of the current par of exchange cannot be doubted.[3] Perhaps the most interesting proof is supplied by the case of *Atlantic Trading and Shipping Co.* v. *Louis Dreyfus.*[4] The respondents as charterers and agents of a ship owned by the appellants became entitled to the repayment of certain expenses incurred by them in dollars, and to two sums of sterling in respect of dispatch money and commission. In payment they received from the appellants in Buenos Aires, 66,727.30 Argentine dollars in paper, any unexpended balance of which was to be repaid by them to the appellants. The respondents converted the sterling amounts due to them at the rate of $5.04 to the pound sterling. There remained a surplus of $3,433 in paper, which the respondents paid to the appellants in sterling after having converted them at the rate of exchange of $3.66 to the pound. The appellants contended that the respondents, when they deducted the sterling sum due to them from the dollar sum received, should have employed the rate of $3.66 to the pound, not that of $5.04. The former rate was the actual

[1] As to this case see Story, s. 308. Story makes it quite clear that these two cases concern the application of the nominal or actual par of exchange; in the same sense Negus 40 (1924), *L.Q.R.* 149 sqq. and Rifkind, 26 (1926) *Col. L. R.* 559, 562. Indeed, this interpretation seems to be so obvious and any reference in these cases to the proper *date* of the conversion is so clearly obiter that it is difficult to understand how it came about that in *The Volturno*, [1921] 2 A.C. 544 and in the other cases connected with the date of conversion (see below, pp. 289 sqq.) they were so strongly relied upon. But in *Di Ferdinando* v. *Simon Smits & Co. Ltd.*, [1920] 3 K.B. 409 both Bankes L.J. at p. 412 and Scrutton L.J. at p. 415 appear to have adopted the correct view. See also *In re Tillam Boehme & Tickle Pty., Ltd.* (1932), Vict. L.R. 146, 148, where the application of the par of exchange was expressly rejected and where *Scott* v. *Bevan* was understood as an authority for such a view.

[2] The mint par of exchange retains, however, a certain importance where it is attempted to arrive at an unequivocal determination of the respective values of currencies which at a certain date were or are on the gold standard; see Nussbaum, p. 60 and below, p. 99, n. 5.

[3] See the cases below, pp. 289 sqq.

[4] (1922) 10 Ll. L.R. 447, 703 (H.L.); followed in *Ellawood* v. *Ford & Co.* (1922), 12 Ll. L.R. 47 and in *Williams & Mordey* v. *Muller & Co.* (1924), 18 Ll. L.R. 50.

rate of exchange of the day, but the latter was fixed in an Argentine law of 1881 by which, for the purpose of stabilizing the relative value of the Argentine currencies, it was decreed that the value of the currency and the units in circulation, being legal tender in the country, as compared with the lawful units as established by the Currency Law Act, should be reckoned, *inter alia*, in terms of the English sovereign at the rate of 5.04. By this law, which Lord Sumner[1] held to be 'merely a legal tender law, fixing the parity at which certain gold coins then passing current in the Republic should be made legal tender concurrently with the national currency then recently established', the rate of the Argentine paper money was stabilized in terms of a (nominal) par of exchange with certain gold standard currencies.[2] The House of Lords took the view that the contract was governed by English law and that it provided for payment in English currency and in England;[3] it followed that the contract could not be regarded 'as anything but one to pay the commercial equivalent of the sums, measured in sterling',[4] and that the equivalent had 'to be ascertained not by a permanent legal tender law relating to currency, but by the current quotation for the exchange rate of sterling', or by the commercial rate of exchange of the day, while the law of 1881 merely 'regulates the parity of sovereigns with Argentine currency, but does not affect international transactions or obligations under contracts to pay in England'.[5] The House of Lords, therefore, allowed the appeal and reversing the order of the Court of Appeal[6] restored that of Rowlatt J.[7]

2. The *rate of exchange*, which thus superseded the nominal par, is the market value of foreign money. Generally, lawyers employ the spot rate, i.e. the rate of exchange for sight drafts,[8] not the forward rate. In most countries foreign money is regarded as a commodity, and therefore its price is quoted in the native currency,[9] but the London market[10] in most cases still

[1] p. 704.
[2] See Helfferich, p. 436.
[3] Lord Buckmaster at p. 703; Lord Sumner at p. 705.
[4] Lord Buckmaster at p. 704.
[5] Lord Sumner at p. 705.
[6] (1921) 6 Ll. L.R. 427.
[7] (1920) 5 Ll. L.R. 287; see also (1920) 3 Ll. L.R. 108.
[8] See s. 72 (4), Bills of Exchange Act, 1882.
[9] Nussbaum, p. 62; Pomméry, *Change et Monnaies* (1926), pp. 496 sqq.
[10] In this country the 'official rate' is issued under arrangements made by

employs the older method of expressing the price of the pound sterling in terms of foreign currency.[1]

In view of certain modern developments it is necessary to state that, on principle, from the legal standpoint nothing but the official rate of exchange is to be taken into account.[2]

It often happens that, owing to exchange restrictions or other measures, the monetary unit of a foreign country has not only an official or normal rate, but is quoted at varying discounts according to the kind of money involved. Thus it happens that there are official and unofficial 'black' markets for foreign notes or for foreign internal money which can be used for payments within the country only to which the currency belongs, or for foreign money credited to blocked accounts. Such measures may even have the effect of giving the official rate a purely nominal character. But nevertheless, even where it is necessary to translate sums expressed in a 'managed' currency, the principle is that the conversion must be effected according to the official rate. The authority for this rule is to be found in the recent case of *Arcos Ltd.* v. *London & Northern Trading Company*.[3] The plaintiffs had sold Russian timber to the defendants, who repudiated the contract and became liable for damages; the contract between the parties, who were English companies, was undoubtedly governed by English law. The plaintiffs, *inter alia*, alleged that they had incurred expenses in storing the goods in Russia, and they claimed a sum of 440,000 roubles which they translated into pounds sterling at the official rate of 7·42 roubles to the pound. The defendants replied that that rate was wholly fictitious, inasmuch as the real value of the rouble in terms of sterling is infinitely smaller. Mackinnon J., however, arrived at the conclusion[4] 'that the great bulk of exchange transactions between this country and Russia as between roubles and sterling are carried out at that (official) rate'. He rejected as irrelevant the assertions that at some black

the London banks, while in many continental countries the rate is ascertained by official authorities (Nussbaum, p. 61; Mater, pp. 348 sqq.).

[1] See Crump, *sub verbo* 'Exchange', *Encyclopædia Britannica*, 14th ed., viii. 947. According to *The Times* and the *Economist*, the rates on Manila, Montevideo, Rio de Janeiro, Singapore, Shanghai, Kobe, Hong Kong, and British India are quoted in pence per unit of local currency.

[2] *In re Hodgson & Co. and Wigglesworth & Co. Ltd.* (1920), W.N. 198.

[3] (1935) 53 Ll. L.R. 38, [4] p. 47.

markets in Berlin or Switzerland rouble notes, the importation of which is forbidden by Russia, are much cheaper, that the amount calculated was much higher than that which would be paid in Finland for similar work, and that inside Russia, roubles at this rate have greater purchasing power than those used by the populace and the workmen who did the business of storing. In view of the fact that the plaintiffs' damage apparently consisted in having been compelled to effect payments in Russia and, for this purpose, to send roubles to Russia, the last two contentions surely were irrelevant. But as the plaintiffs made a claim for damages, it was their duty to minimize their loss, and if it was possible to send rouble notes bought at discounts to Russia, this method ought to have been employed; if it was impossible,[1] as the learned judge apparently assumed, the general principle requiring the adoption of the official rate undoubtedly applied.

The still more recent case of *The Eisenach*[2] is in no way irreconcilable with this rule. It related to the ascertainment of the salvage value of a German ship salved and towed into Dover harbour. The usual method of assessing the value of the ship and the salvage services is the market value of the ship based on the sales of other vessels. Subsequently to the salvage the *Eisenach* had been sold by the owners for 550,000 reichsmarks, which amount, converted into pounds sterling at the official rate of exchange of the day of 12·20 marks to the pound, corresponded to £45,000. Bucknill J. refused to give judgment for this figure, because the nature of the sale by the owners 'was such that the owners of the *Eisenach* were obliged by law to spend the proceeds of sale on building new tonnage in Germany. They were not allowed by their law to convert the proceeds of sale into sterling—even if they had been able to do so.' The learned judge also found that 'the relative values of the mark and the £ sterling appear to be, on the evidence, in a very fluid and uncertain state so far as transactions like the sale and purchase of a ship are concerned', and he therefore did not believe that there was any reliable standard by which he could convert the sum of 550,000 reichsmarks into sterling. Under the circum-

[1] On this principle see, e.g., *Ralli* v. *Compania Naviera*, [1920] 2 K.B. 287 and the observations in *British Year Book of International Law*, 1937, pp. 97, 110 sqq.

[2] (1936) 54 Ll. L.R. 354; [1936] 1 All E.R. 855.

stances the sale of the ship was not effected in an open market, as it is usually understood, and for the purpose of determining the market value it was therefore justifiable to disregard that sale altogether.

In cases of that nature the decisive question is where the damage was suffered and where therefore the value must be restored. If through the defendant's wrongful act I suffer damage by being compelled to remit roubles to Russia, it may well be that the official rate is employed in effecting the payment, and this consequently is the basis for measuring the value of my loss; but if I suffer damage in Russia by losing money which is there tied up, my loss consists of that sum only which a sale of the money would fetch outside Russia and which I should have had if I had not been deprived of the money in Russia.[1]

VI

These difficulties, it has already been remarked, are due to measures which, in times of crisis, various countries had to adopt for the protection of their currencies and which gave their monetary systems the character of managed currencies. Such measures have, to a certain extent, been known for many centuries. Formerly they generally consisted of prohibitions against the export of precious metals. In this country it was at the beginning of the fourteenth century that the laws against export of gold and silver 'became a really important part of the commercial regulations of England'.[2] From then onwards through the centuries numerous enactments were passed which made the export of the precious metals illegal without the King's licence. The whole matter was dealt with by two Acts of 1663[3] and 1696[4] and the legal position created thereby was not altered until, at the end of the Bank Restriction period,

[1] As an example of this qualification one may take the case of an Englishman who fails to keep his promise to pay to the plaintiff, a Swiss firm, a sum of 10,000 reichsmarks in Berlin. At the official rate of exchange this sum now corresponds to about £800; but if it can be shown that the plaintiffs, if the money had duly been paid in Berlin, could only sell it as 'blocked marks', which are quoted at a discount of about 85 per cent., they cannot recover more than £120 in England. See the case of *Richard* v. *National City Bank of New York* (1931), 231 App. Div. 559, 248 N.Y. Supp. 113 and the comments in 31 (1931) *Col. L. R.* 882.

[2] Feavearyear, p. 3.

[3] 15 Chas. II, ch. 7, s. 12.

[4] 7 & 8 Will. III, ch. 19.

Parliament repealed[1] the long list of statutes prohibiting the export of precious metals and, after more than 500 years, finally established complete freedom of trade therein.[2] During the Great War of 1914–18 there was no specific prohibition of the export of gold, but by purely administrative measures the government succeeded in preventing any such export;[3] in 1919 an Order in Council prohibiting export was made,[4] and in 1920[5] the power given by this order was extended until the end of 1925. Complete freedom of trade was restored in 1925[6] and has not been encroached upon since.[7]

Many countries have, however, introduced much more far-reaching systems of exchange restrictions. They have not only prohibited the export of, or even the internal trade in, precious metals, but also the export of (foreign or local) money generally, the disposal by residents of assets situated abroad, the disposal by foreigners of assets situated within the country, the importation of native bank notes, transactions in foreign exchange generally, and so forth. Thus monetary systems exist which are not only managed, but have more or less the character of mere local currencies.[8]

Such systems give rise to many difficult questions of law. Apart from their already discussed effect on the rate of exchange,[9] they often create problems falling under the head of illegality and impossibility of performance, which in England have to be considered from the point of view of private international law.[10]

[1] 59 Geo. III, ch. 49, ss. 10–12; 1 & 2 Geo. IV, ch. 26, s. 4.

[2] On this development see Feavearyear, pp. 3, 4, 206.

[3] Ibid., p. 307.

[4] Under the power given by s. 8 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict., ch. 21), and by the Customs (Exportation Prohibition) Act, 1914, 4 & 5 Geo. V, ch. 64. The order was published in the *London Gazette* of 1 April 1919.

[5] Gold and Silver (Export Control, &c.) Act, 1920, 10 & 11 Geo. V, ch. 70, s. 1.

[6] On the development see Feavearyear, pp. 307, 315, 317, 324–6.

[7] Apart from the countries which have introduced the more extensive measures to be discussed in the text, France, the United States of America, and some other countries have prohibited the export of gold. See *Foreign Exchange Restrictions*, issued by the Swiss Bank Corporation (London, 1938).

[8] From the useful compilation made by the Swiss Bank Corporation (see above, n. 7) it appears that restrictions exist in more than twenty countries, namely in Bulgaria, Czechoslovakia, Danzig, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Rumania, Turkey, U.S.S.R., Yugoslavia, Nicaragua, Brazil, Chile, Colombia, Uruguay, Japan.

[9] Above, pp. 50 sqq.

[10] See below, pp. 259 sqq.

CHAPTER III

MONETARY OBLIGATIONS, THEIR SUBJECT-MATTER AND EXTENT (NOMINALISM)

I. Types of monetary obligations: (1) debts; (2) unliquidated claims. II. The nominalistic principle in general, its development and position in England. III. The scope of nominalism and its influence on individual questions: (1) debts; (2) damages for non-payment; (3) unliquidated damages and indemnities; (4) rescission; (5) specific performance.

I

BEFORE we consider in detail the most serious of the problems connected with the position of money in law, viz. the question of the subject-matter, or the extent, of monetary obligations, the various types of obligations which involve the payment of money must be explained.

It has already been observed[1] that it is one of the most important, though not the basic, functions of money to serve as a general medium of payment. In fact, in innumerable cases money not only functions as the envisaged, or immediate, means of fulfilling obligations, whether compulsorily imposed or voluntarily contracted, but may also be described as a 'medium of final compulsory liquidation or as a medium of final tender'.[2] The latter observation has particular force in this country, where the fundamental principle of the law of damages that the injured party is entitled to *restitutio in integrum*[3] cannot be taken in the literal sense of denoting *naturalis restitutio*,[4] but in the sense of the Roman maxim, 'omnis condemnatio est pecuniaria'. Thus, in the last resort, money becomes capable of discharging all obligations; it is the subsidiary means of performance. Consequently it is possible to arrive at the comprehensive notion of monetary obligations the various aspects of which, divested of all procedural attire, are to be considered.

1. Monetary obligations primarily exist where the debtor is bound to pay a fixed, certain, specific, or liquidated sum of money.

[1] Above, p. 5. [2] Helfferich, p. 309.

[3] Halsbury (Hailsham), x, No. 101.

[4] As it is on principle proclaimed by the German Civil Code, s. 249: see Kahn-Freund, 50 (1934), *L.Q.R.* 512, and Dawson-Cooper, 33 (1935), *Mich. L.R.* 854, 876.

While the certainty of the amount distinguishes this group from the following group of monetary obligations, it is the fact that a sum of *money* is owed which is the distinctive feature in respect of other obligations. If a debtor is bound to deliver a specific coin or note, e.g. the Bank of England note No. 1000 or the sovereign now lying in the left drawer of my writing-desk, this is not a money obligation, because the debtor does not owe a sum of money, but an individual object, which, in the circumstances, though being capable of having the character of money, has become a commodity.[1] Furthermore, if the parties envisage delivery of a specific quantity of a specific kind of money, e.g. 100 pieces of 20 French francs each or 100 pennies of Queen Victoria's impression, this likewise is not a monetary obligation, but an ordinary contract to transfer unascertained goods,[2] because here again the subject-matter of the contract is not a sum of money. The import of this distinction becomes clear if it is supposed that, in the above cases, the delivery of the promised objects had become impossible. In the first case the general rules relating to impossibility of performance would undoubtedly apply if the individual things promised to be delivered had perished;[3] in the second case, if the whole class had lost existence[4] the same result would follow.

Monetary obligations of the group now under discussion exist in three cases only. The usual type is to pay a sum of money pure and simple, e.g. 100 pounds sterling. Secondly, the parties

[1] See *Moss* v. *Hancock*, [1899] 2 Q.B. 111, and above, p. 19.

[2] Cf. s. 16, Sale of Goods Act, 1893. That contracts for the delivery of a specific quantity of coin or, still less, contracts for the delivery of a specified quantity of gold bullion are not money obligations should not be open to doubt. In *Holyoke Water Power Co.* v. *American Writing Co.* (1936), 300 U.S. 324 the Supreme Court of the United States, however, held that a lessee's promise to pay 'a quantity of gold which shall be equal to $1500 of the gold coin of the United States of the standard weight and fineness or the equivalent of this commodity in U.S. currency' fell within the ambit of the Joint Resolution of Congress of 5 June 1933 relating to 'obligations payable in money of the United States'. The decision rests on a broad construction of the contract as well as of the Joint Resolution and overrules *Emery Bird Thayer Dry Goods Co.* v. *Williams* (U.S. District Court, Western District, Missouri, 1936) reported in Plesch, *The Gold Clause*, ii. 59, where the promise was to deliver 557,280 grains of pure unalloyed gold, the lessors having the option to require the payment of $6,000. See also Arts. 1896, 1897 French Civil Code and Nussbaum, *Rec.* 43 (1933), 559, 562.

[3] Cf. *s.* 16, Sale of Goods Act, 1893.

[4] The maxim 'genus numquam perit' (on which see Chalmers, *Sale of Goods*, p. 34) is certainly not meant to apply to such a case.

may agree that a certain sum of money is to be paid in a certain manner, e.g. by delivery of two bronzes or of (unascertained) coins or notes of an ascertained type (£1,000 by delivery of Bank of England notes of £5 each; 50 shillings by delivery of 20 half-crown pieces). This is a genuine money obligation, because the contract, though determining the method of payment, provides for the payment of a sum of money.[1] Lastly the parties may agree that the debtor shall pay so many pounds sterling as two specific bronzes shall be valued at by Christie's, or as shall correspond to the value of a specific quantity of commodities at a certain date. This is a contract for 'converting bronzes into sterling';[2] it is a contract for an unascertained, but ascertainable sum of money, and it therefore creates a money obligation.[3]

Again, the result can be tested by having regard to the effects of impossibility. In the first case mentioned above there cannot be a supervening impossibility, because the theory of the 'recurrent link'[4] will practically always afford the solution of converting the promised sum of money of the extinct currency into the corresponding sum of money of the existing currency. In the second case it may happen that the thing, by the delivery of which the obligation is to be fulfilled, perishes, but this would leave the promise to pay a fixed sum of money unaffected.[5] In

[1] Its most important type is the gold coin clause, see below, p. 98. That the gold coin clause does not affect the money character of the obligation has been made clear by Lawrence L.J. in *Feist* v. *Société Intercommunale d'Électricité Belge*, [1933] Ch. 684, 702 and by Hilbery J. in *British & French Trust Corporation* v. *The New Brunswick Rly. Co.*, [1936] 1 All E.R. 13, at p. 16 reversed on other grounds [1937] 4 All E.R. 516. The same view has always been taken by the German Supreme Court: 22 Jan. 1902, *RGZ.* 50, 145, 148; 16 Jan. 1924, *RGZ.* 107, 401; 3 Dec. 1924, *JW.* 1925, 1183; see also Nussbaum, *Rec.* 43 (1933), 559, 563. But in the United States it was at one time thought that 'a contract to pay a certain sum in gold and silver coin is in legal effect a contract to deliver a certain weight of gold and silver of a certain fineness to be ascertained by count', see e.g. *Bronson* v. *Rhodes* (1868), 7 Wall. (74 U.S.) 229, and *Butler* v. *Horwitz* (1868), 7 Wall. (74 U.S.) 258. This commodity theory, on which see more fully Nebolsine, 42 (1933), *Yale L.J.* 1050, 1063 sqq., has now been definitely rejected by the Supreme Court in *Norman* v. *Baltimore & Ohio Rly. Co.* (1934), 294 U.S. 240 at p. 302 per Chief Justice Hughes delivering the opinion of the majority of the court.

[2] *Latter* v. *Colwill*, [1937] 1 All E.R. 442, 451 c, per Scott L.J.

[3] This type of contract frequently occurs in the shape of a gold value clause, see below, p. 98.

[4] Above, pp. 34 sqq.

[5] Where the gold coin clause is invalid, there therefore remains the obligation to pay the nominal amount in paper: *Greene* v. *Uniacke*, 46 Fed. R. (2d)

the third case difficulties cannot arise, unless the *tertium comparationis* is a specific thing, which it will very rarely be.

Another feature of these genuine money obligations is that the breach of the promise to pay a given sum does not involve an essential alteration of the structure of the obligation. It is true that if an action for debt is brought in respect of the non-performance, technically it is an action for the debt and for nominal damages, and this right of action, once vested, can be satisfied by accord and satisfaction only.[1] 'But, as Atkin L.J. remarked,[2] nominal damages in respect of the non-payment of a debt are a fond thing vainly invented, "a mere peg on which to hang costs" per Maule J. in *Beaumont* v. *Greathead*.[3] If a man being owed £50 receives from his debtor after the due date £50, what other inference can be drawn than that the debt is

916, 919 (C.C.A. 5th, 1931), cert. den., (1931) 283 U.S. 847. In *Germany* s. 245 of the Civil Code provides that if a monetary obligation is payable in a certain kind of money which at the time of payment is no longer in circulation, payment must be made in the same manner as if the kind of money had not been fixed. As to this provision see Supreme Court, 11 Jan. 1922, *RGZ.* 103, 384, 388; 1 March 1924, *RGZ.* 107, 370; 24 May 1924, *RGZ.* 108, 166, 181. The Supreme Court seems to regard the rule as an exception to the provisions relating to subsequent impossibility of performance; but the better view is probably that the section only clarifies what otherwise would have been the necessary consequence of the monetary character of such an obligation: see Breit in Düringer–Hachenburg, *Kommentar zum Handelsgesetzbuch*, iv. 760. In the absence of any statutory provision it is doubtful how the question is to be decided in *England*. If a gold coin clause is stipulated and gold coins are subsequently called in, the problem arises whether the general rules relating to impossibility of performance apply or whether the obligation is to be discharged in whatever is legal tender at the time of payment in the same manner as if the gold coin clause had not been stipulated. It cannot be doubted that the latter view is preferable. But while in Germany s. 245 applies, if gold coins are no longer 'in circulation', in England the further question arises how gold coin clauses are to be discharged if gold coins still exist, though they no longer circulate. It seems to be generally assumed that, even under such circumstances where there exists no impossibility, the gold coin clause is replaced by a simple monetary obligation and that there only remains the question whether in fact the parties did not stipulate a gold value clause (see below, pp. 100 sqq.). But it is not easy to ascertain the basis of this view. As English legal tender legislation does not invalidate gold clauses, whether they are coin or value clauses (see pp. 104 sqq.), it might well be irrelevant to ask whether there exists a coin or a value clause. From the point of view of the debtor who has promised to pay £1 in gold coins it does not matter whether he has to pay 33*s*. in paper (if the clause is taken to be a value clause) or whether he has to deliver one gold sovereign which he can and must buy at 33*s*. (if the clause is held to be a coin clause).

[1] *Société des Hôtels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451.

[2] S.C., p. 464.

[3] (1846), 2 C.B. 494, 499, 500.

discharged?' From this view, which, though it is not very firmly established,[1] appears to be exceedingly reasonable, it follows that, disregarding technicalities, the obligation, even after action brought, remains capable of being performed by the payment of the due sum, though such performance may have to be classified as accord and satisfaction.

2. Where a contractual promise, e.g. to deliver goods, or where a non-contractual duty is broken, a sum of money becomes payable and the resulting obligation is therefore a monetary one.

The monetary character of the obligation is in no way impaired by the fact that, even if special damage is claimed, nothing but 'damages', i.e. an unascertained and unliquidated sum of money, is due, the special damage being 'only an item in a general claim for damages for a wrong done'.[2] It is true that this means that the debtor, though bound to pay, cannot be said to be indebted to the creditor until the amount of the compensation is ascertained by the court; consequently, though in respect of liquidated sums tender in payment is permitted and required,[3] this is not so in respect of unliquidated sums,[4] and moreover, rules relating to debts, as, e.g., those allowing a judgment creditor to attach 'debts' of the judgment debtor in garnishee proceedings,[5] cannot be applied to cases involving the payment of unliquidated sums of money. But these distinctions between debt and damages should not overshadow the fact that in both cases sums of money are to be paid and that there is therefore justification for uniting both under the head of monetary obligations.

This is made clearer by the fact that the determination of the

[1] In *Société des Hôtels Le Touquet* v. *Cummings*, *ubi supra*, Bankes and Scrutton L.JJ. expressed views which are less readily understandable than that of Atkin L.J. Bankes L.J. emphasized that *Beaumont* v. *Greathead*, *ubi supra*, merely decided that payment after breach, but before action brought, was a discharge, but in the result he held that payment was sufficient even after action brought (pp. 457, 458). Scrutton L.J. said that accord and satisfaction was a question of fact, and although he found that 'there was here no accord and satisfaction' (p. 460) he arrived at the same result as the other members of the court. The case is more fully discussed below, pp. 292 sqq.

[2] *The Volturno*, [1921] 2 A.C. 544, 553, per Lord Sumner.

[3] Halsbury (Hailsham), vii. 197 sqq.

[4] *Dearle* v. *Barrett* (1834), 2 Ad. & El. 821; *Davys* v. *Richardson* (1888), 21 Q.B. 202 (C.A.).

[5] Rules of the Supreme Court, O.XLV, r. 1. Numerous cases dealing with the meaning of debt are collected in *Annual Practice*, 1938, pp. 859 sqq.

amounts due, though eventually reserved for the judgment of the court, is not quite discretionary. When the Courts are called upon to assess damages they are guided by the principle that, in order to compensate the plaintiff for the loss suffered by him, a *value* must be put on the loss, and, as will be shown,[1] such value is measured by looking at the position as it existed at the time of the wrong, taking into account relevant subsequent events. This fundamental principle of English law makes it possible to arrive at the somewhat closer definition that the monetary obligation created by the liability to pay damages involves the payment of that sum of money which, subject to the court's ascertainment, represents the value of the loss as at the time of the breach or wrong.

Monetary obligations thus appear to be obligations the subject-matter of which is the payment of a sum of money whether it is fixed at the outset or subsequently.

II

This preliminary discussion provides general ground from which to approach the vital problem of the meaning of the phrase 'payment of a sum of money'.

It has already been explained that the notion of money involves the reference to a distinct unit of account,[2] and as the unit of account is not a specific quantity of metal but an abstract unit of measurement,[3] it follows that the payment of a sum of money does not involve the delivery of a specific quantity of coined metal. If in 1935 a sum of 1,000 French francs was promised to be paid in 1937, the creditor is not entitled to demand delivery of 63½ grammes fine gold,[4] but simply to receive francs or whatever currency has replaced the franc in the course of an extrinsic currency alteration.[5]

But how many francs, how much 'abstract wealth power', is the debtor bound to pay? It is this question of the value of money or the extent of money obligations which has not yet been dealt with[6] and which must now be answered.

[1] Below, pp. 85 sqq.
[2] Above, p. 15. [3] Above, pp. 32 sqq. [4] On France see above, p. 38.
[5] Above, p. 34.
[6] That legal tender legislation (see above, pp. 26 sqq.) does not in itself

The so-called *intrinsic* value of money, i.e. its substance, cannot have any direct or indirect bearing on this question. As the unit of account, e.g. the pound, is not identical with a quantity of metal, the obligation to pay pounds cannot be equiparated to an obligation to deliver a certain weight of metal. For the same reason it is impossible to hold that the extent of an obligation to pay pounds is determined by the rate of exchange of the standard metal, e.g. gold: the creditor of a sum of £3 17*s.* 10½*d.* who in 1930 could obtain one ounce of standard gold cannot now claim £7 because this sum is now required to buy the same quantity of gold. It was Savigny[1] who propounded a rate-of-exchange theory in this sense, which in effect is not very different from metallism in the narrower meaning of the word. This theory presupposes that all currency systems are necessarily founded on the adoption of a certain precious metal as a standard metal. At a time when there are so many free currencies, it is clear that this primary prerequisite of the theory does not exist, and as it does not appear at present to have any adherents, it is unnecessary to review it in further detail.[2]

Moreover, the extent of monetary obligations is independent of any *functional* or exchange value of money, i.e. its purchasing power. Modern economic science concentrates on the discussion of the value of the money as determined by its exchange value; the quantity theory and Professor Irving Fisher's attempt to adjust by means of indices the unit of account to its fluctuating purchasing power[3] are some of the outstanding topics of discussion among economists.[4] The functional value of money is in the minds of those legal writers who, under the influence of recent monetary troubles, have advanced a legal theory of *valorism*. The most remarkable attempt in this direction was made by Eckstein, who, in common with other representatives

and necessarily determine the quantum of the money to be paid is rightly emphasized by Eckstein, *Geldschuld und Geldwert* (Berlin, 1932), pp. 10 sqq., and Dawson-Cooper, 33 (1935), *Mich. L.R.* 852, 904 sq. See also below, pp. 104 sqq.

[1] *Obligationenrecht* (1851), 432 sqq., 454 sqq.

[2] For further criticism see Nussbaum, *Geld*, pp. 66, 70.

[3] *Stabilizing the Dollar* (1920); *The Purchasing Power of Money* (1931).

[4] All economists who write on money discuss this question. The reader is referred to L. v. Mises, *Theory of Money and Credit* (London, 1934), or to Steiner, *Money and Banking* (1933), or to Hawtrey, *Currency and Credit* (1930), or to Neisser, *Der Tauschwert des Geldes* (1928).

of that school of thought,[1] largely relies on the alleged intention of the parties to secure 'economic value',[2] and who, excluding certain well-defined cases only, develops a system of valorization which is to apply wherever money loses its 'relative stability of value'.[3] Legal science of money, however, cannot pay any attention to the functional value of money or accept any valoristic theory based thereon.[4] Theoretically it is clear that two sources may co-operate to determine the exchange value of money. There may be fluctuations of monetary value originating from changes in the prices of goods; the scarcity of goods may lead to an increase of prices, the abundance of supply may cause a reduction of the price level. On the other hand, the expansion of credit (inflation) creates an increased volume of money, an increased capacity to purchase and therefore higher prices, while restriction of credit (deflation) produces a dearth of capital and consequently lower prices. It thus appears that the price level or the purchasing power of money may be influenced by factors moving from the side of goods and by factors moving from the side of money. The former determine what has been described as the outer exchange value of money, the latter determine the inner exchange value of money.[5] If it were possible in practice to discern the two elements forming the value of money, it might be arguable that changes in the inner exchange value of money should affect the extent of monetary obligations; on the other hand, it cannot be doubted that from a legal point of view fluctuations in the outer exchange value must under any circumstances be irrelevant; for there is no rule of law which would allow an increase or a reduction in the extent of monetary obligations as a result of changes of the price level of goods. But in fact it is impossible to draw a line of demarcation between the two factors deter-

[1] *Geldschuld und Geldwert* (Berlin, 1932), and see Hubrecht, *La Stabilisation du franc* (Paris, 1928), who mention and discuss other attempts in the same direction at pp. 131 and 203 sqq. respectively.

[2] pp. 27 to 48. [3] p. 51.

[4] It must, however, be admitted that Eckstein's criticism of the theoretical foundation of nominalism is thoughtful, interesting, and partly even attractive. Thus it is indeed surprising (see Eckstein, p. 74) that nominalism should not have the character of *jus cogens* and should allow the parties to deviate from the principle by stipulating gold clauses and so forth: see below, p. 104.

[5] Menger, *Handwörterbuch der Staatswissenschaften*, 3rd ed., iv. 588 to 593. These terms are not accepted in this country.

mining the value of money, and therefore in modern times even economists have rejected the usefulness of that distinction.[1] At the outbreak of the Great War England took no steps to bring about the legal abandonment of the gold standard or the stoppage of gold payments, and it might therefore be a matter of argument whether there was any change in the inner exchange value of the pound sterling; nevertheless a serious rise of prices ensued.[2] The departure from the gold standard in 1931, however, was certainly a factor operating on the side of money; but if consideration is given to the economic development since 1931 and to the movement of indices,[3] nobody will dare to assert that the rise of the price level was caused by that measure. As the inner exchange value can therefore not be separated from the outer exchange value, lawyers are driven to adopt one or other of the following alternatives: either changes of the functional value of money are allowed to affect the quantum of an obligation, whether they originate from the side of money or from the side of goods; or the functional value of money is considered to be entirely irrelevant for legal purposes. It is the latter view which commands approval, for this among other sufficient reasons, that, as has been shown, the inner exchange value of money which might legally be relevant cannot be separated from the outer exchange value which is undoubtedly irrelevant. It will appear later that the law has fully adopted the results to which the preceding discussion leads. There is no legal rule which allows the revision of monetary obligations in consequence of changes of value moving from the side of money. But there are some legal rules which

[1] See especially Helfferich, pp. 503 sqq., 511 sqq., who, under the influence of the economic events since 1915, withdrew his assent to that distinction (p. 514).

[2] See Feavearyear, pp. 306 sqq. and the index numbers on p. 334.

[3] See the *Economist* indices:

	Wholesale (total)	*Cost of living*
1929	100	100
1930	84·0	96·3
1931	70·2	90·0
1932	67·8	87·8
1933	68·3	85·4
1934	71·0	86·0
1935	74·3	87·2
1936	78·8	89·7
1937	89·3	94·5

relate to the determination of prices and the influence of price changes. These rules equally apply where it is obvious that it is not the price which increases or falls, but money which depreciates or appreciates, these being different aspects of the same phenomenon. It is submitted that any other solution is unworkable, even though the soundness of this view has been questioned, particularly in connexion with claims for unliquidated damages, and even though some of those writers who generally do not favour valorism have in certain cases attributed legal affects to changes in the purchasing power of money.[1]

The extent of monetary obligations cannot be determined otherwise than by the adoption of *nominalism*. The nominalistic principle, in so far as it relates to the extent of liquidated sums, means that a monetary obligation involves the delivery of chattels which at the time of delivery are money, and of so many of such chattels as represent units of measurement which, if added together according to their nominal value, would produce the owed sum of money.[2] In other words, the obligation to pay £10 is discharged if the creditor receives what at the time of performance are £10, regardless of both their intrinsic and their functional value. In so far as claims for unliquidated damages are concerned, the nominalistic principle means that generally a liability is to be measured without regard to any depreciation or appreciation of monetary value. Nominalism in this sense is a legal principle, but it is empirically derived from a generalization of the normal factual situation. In the vast majority of cases the possibility of changes in monetary value does not enter the parties' mind, though they may have a definite idea of the exchange value, or purchasing power, of the stipulated amount of money. If they have regard to that

[1] See Nussbaum, *Geld*, pp. 144 sqq.; Mayer, *Die Valutaschuld nach Deutschem Recht* (1934), pp. 29 sqq.; Ascarelli, *RabelsZ.* 2 (1928), 793, 800 sqq.; but see the exceedingly interesting decisions of the German Supreme Court of 31 March 1925, *RGZ.* 110, 371; 28 Nov. 1930, *RGZ.* 130, 368. As to the questions raised by these writers and these decisions, see the detailed discussions below, pp. 77, 79–81. As to the part played by the conception of the functional value of money in the law of usury during the German inflation, see Supreme Court, 19 Dec. 1922, *RGStr.* 57, 35 with note by Alsberg in *JW.* 1922, 381; 6 May 1924, *JW.* 1924, 1607.

[2] See Professor Wolff's formulation in *Das Geld*, p. 637. See also Sedgwick, *On Damages*, ss. 267, 268. Nussbaum, 35 (1937), *Mich. L.R.* 865, 879, states that 'the essence of nominalism consists in the arithmetical relationship of a given money to the pertinent ideal unit'. *Sed quaere.*

possibility, they may protect themselves by special clauses such as gold or currency clauses; if they fail to do so, although they anticipate disarrangements of monetary value, they must be taken to have accepted the risks involved. The law does not allow the implication of terms which either do not exist at all or to which the parties failed to give adequate expression. This negative statement, put into positive language, results in the rule that, in the absence of special clauses, parties must be understood to contract with reference to the nominal value of the money concerned as expressed by whatever is legal tender at the time of payment. Nominalism thus finds its justification in the legally relevant intention of the parties.[1]

Nominalism in the above sense, together with the view of money as a creature of the law and the 'recurrent link' principle involving the rejection of the metallistic doctrine, form part of the State theory of money as revived by Knapp.[2] But the nominalistic principle, although it received fresh force from Knapp's theoretical investigations and his striking formulations, goes back to ancient times; in fact, as throughout the economic history of mankind there is evidence of continuous variations in the value of money and especially of its depreciation,[3] it is not surprising to find that the principle of nominalism is almost as old as the problem of money value. Its history is of such importance and interest that it must be set out here in outline.[4]

[1] The view that the nominalistic principle is based on the intention of the parties is supported, e.g., by Mr. Justice Strong of the Supreme Court of the United States (see p. 67, n. 4 below) and by the Swiss Federal Tribunal: 'Les fluctuations des changes constituent donc un des aléas du contrat' (26 March 1931, *BGE.* 57, ii. 370). An early decision of the Supreme Court of the United States affords a good example of the transitory stage when a general rule had not yet been deduced from the intention of the parties. *Searight* v. *Calbraith* (1796), 4 U.S. 325, concerned an action on a bill of exchange for '150,000 livres tournois' payable in Paris. Since the bill was issued assignats were introduced in France, acceptance of which the plaintiff refused. Mr. Justice Peters said: 'The decision depends entirely on the intention of the parties of which the jury must judge. If a specie payment was meant, a tender in assignats was unavailing. But if the current money of France was in view, the tender in assignats was lawfully made.' Those writers who favour valorism, particularly Eckstein, l.c., pp. 28 sqq., also invoke the intention of the parties, but their method of implying terms into a contract which do not exist is arbitrary.

[2] See above, pp. 10, 34; on Knapp's nominalism see also Palyi, *Der Streit um die staatliche Theorie des Geldes* (1922); Wagemann, *Allgemeine Geldlehre* (1923).

[3] Feaveryear, p. 333.

[4] On the history of nominalism in general see Stampe, *Die geschichtliche*

The nominalistic principle is usually said to have been laid down first by Aristotle in his *Nichomachean Ethics*, where he said:[1] 'Money has been introduced by convention as a kind of substitute for a need or demand, and this is why we call it *νόμισμα*, because its value is derived not from nature (*φύσις*) but from law (*νόμος*) and can be altered or abolished at will'.[2] In Rome,[3] though various depreciations of money took place, the nominalistic principle does not appear to have been established quite firmly, the texts relating to the subject being inconclusive. The principal authorities are somewhat ambiguous dicta of Papinianus[4] and Paulus,[5] but as both contrast substance and quantity, and as the term 'quantity' is not quite unequivocal, a reliable conclusion cannot be drawn. Indeed, when the books of Justinian were studied by the school of glossators, the old texts came to be interpreted in the sense which Accursius (1182–1260) in his great gloss summarized by the words: 'tantum valet unus nummus quantum argenti tantundem in massa'.[6] The post-glossators, relying on their predecessors' ideas, developed the distinction between *bonitas intrinseca* and *bonitas extrinseca*, and it was the former, i.e. the metallic value of money, which they held to be the subject-matter of monetary obliga-

Entwicklung des Geldnominalismus (Berlin, 1927); Sulkowski, *Rec.* 29 (1929), 1 sqq., 5 sqq. and the literature there referred to; Ascarelli, *La Moneta*, pp. 3–42; Endemann, *Studien in der romanisch-kanonistischen Wirtschafts- und Rechtslehre bis gegen Ende des 17. Jahrhunderts* (Berlin, 1883), ii. 170 sqq.; Gonnard, *Histoire des doctrines monétaires* (2 vols., 1935, 1936); Despaux, *Les Dévaluations monétaires dans l'histoire* (Paris, 1936); Monroe, *Monetary Theory before Adam Smith* (1923).

[1] Book 5, chap. 5, translation by F. H. Peters, 15th ed. (London, 1893), p. 156.

[2] It has recently been suggested that in the context *νόμος* does not mean law, but convention or usage; Gemaehling, *Les Grands Économistes* (1925), p. 7, quoted by Hubrecht, *La Stabilisation du franc et la valorisation des créances* (1928), p. 7.

[3] Mommsen, *Geschichte des römischen Münzwesens* (Berlin, 1860); Savigny, *Obligationenrecht*, i. 469 sqq.; Hartmann, *Begriff des Geldes*, pp. 111 sqq.; Knies, *Das Geld*, 2nd ed., pp. 401 sqq.; Appleton, *La Monnaie romaine et la loi des XII tables*; Hubrecht, pp. 17–31.

[4] D. 46. 3, *de solut.* 94. 1: '. . . sive in pecunia non corpora quis cogitet sed quantitatem'.

[5] D. 18. 1, *de contrah. emptione*, 1 pr.: '. . . eaque materia forma publica percussa usum dominiumque non tam ex substantia praebet quam ex quantitate'.

[6] See Hubrecht, pp. 31 sqq., quoting Bridrey, *Nicole Oresme* (Paris, 1906). Oresme, who died in 1382, is the author of the first French work on money, *De origine, natura, jure et mutationibus monetarum*. On Oresme's work see also Laurent, *Revue d'histoire économique et sociale*, 21 (1933), 13.

tions.[1] While the views expressed by the canonists generally tended in the same direction,[2] a decisive reaction set in after the publication in 1546 of Carolus Molinaeus's (Dumoulin's) *Tractatus contractuum et usurarum.* In this work, interpreting Paulus's decision by the words, 'Quantitas, id est valor impositus', the author laid the foundations of the nominalistic principle as now understood. Dumoulin's ideas,[3] being so agreeable to the princes whose financial interests demanded a theoretical basis for their practice of debasing coins, were readily accepted in France,[4] where a decree of 1602 compelled the parties to contract by tale (sous, livres, deniers), not by weight (metal). From that moment the courts, too, adopted the nominalistic principle, which, in Germany also, gained a complete victory in the course of the seventeenth century.[5] When we come to the eighteenth century, Pothier repeatedly affirms the principle and declares: 'Notre jurisprudence est fondée sur ce principe que dans la monnaie on ne considère pas les corps et pièces de monnaie, mais seulement la valeur que le prince y a attachée. . . . Il suit de ce principe que ce ne sont point les pièces de monnaie, mais la valeur qu'elles signifient qui fait la matière du prêt ainsi que des autres contrats.'[6] Under the influence of the physiocrats and their theory of the 'monnaie marchandise', a second reaction occurred during the French Revolution,[7] but the Code Civil of 1803 declares in Art. 1895:[8]

[1] Stampe, *Das Zahlkraftrecht der Postglossatorenzeit* (1928); Hubrecht, p. 33 sq.; Täuber, *Geld und Kredit im Mittelalter* (1933).

[2] Hubrecht, pp. 37–52. [3] See Täuber, *Molinaeus' Geldschuldlehre* (1928).

[4] For literature on the position in early France see Mater, p. 112; Stampe, *Das Zahlkraftrecht in den Königsgesetzen Frankreichs von 1306–1547* (1930). A case decided in 1349 is described by Hubrecht, *Revue d'histoire du droit,* 16 (1937), 252.

[5] Stampe, *Das deutsche Schuldtilgungsrecht des 17. Jahrhunderts* (1925).

[6] *Traité du prêt consomption,* v. 55; *du contrat de vente,* iii. 173; *du contrat de constitution de rente,* iii. 473 (edition Bugnet).

[7] For details see Mater, pp. 137 sqq., and Hubrecht, pp. 66–81.

[8] On the history of this provision, which has found its way into the Belgian, Dutch, and Italian Codes, see Hubrecht, pp. 86–93. The substance of the provision has also been adopted in Egypt by Art. 577 of the Code Mixte; the Court of Appeal of the Mixed Tribunal in a decision of 19 May 1927, Clunet, 1928, 765 (*re* Marquis de la Celle) expressed the view that Art. 1895 of the French Civil Code and Art. 577 of the Code Mixte concern 'uniquement les variations des espèces métalliques', excluding any variations in the value of paper money. This view seems to have remained isolated and has since been abandoned: 9 March 1929, *Gazette des Tribunaux mixtes,* XX, 108, No. 115.

'L'obligation qui résulte d'un prêt en argent, n'est toujours que de la somme numérique énoncée au contrat. S'il y a eu augmentation ou diminution d'espèces avant l'époque du payement, le débiteur doit rendre la somme numérique prêtée, et ne doit rendre que cette somme dans les espèces ayant cours au moment du payement.'

Although the rule is laid down with regard to loans only, it is almost generally recognized that it is of universal application. Thus it is said by Planiol–Ripert:[1] 'Le débiteur doit fournir la somme due d'après la valeur nominale des monnaies au jour du paiement et non d'après la valeur qu'avaient les monnaies au jour où l'obligation a été contractée. . . . La loi a formulé cette règle à propos du prêt d'argent, en des termes qui ne laissent pas place à aucune discussion.' Although from time to time attempts have been made to replace nominalism by metallistic or valoristic doctrines,[2] it cannot be doubted that nominalism, without which 'capitalism is economically inconceivable',[3] universally predominates.[4]

[1] *Traité pratique du droit civil français*, vii (1931), No. 1159. See in the same sense the judgment of the Belgian Cour de Cassation (9 March 1933), Clunet 1933, 731, and of the Italian Corte di Cassazione (30 May 1927), *Giurisprudenza Italiana*, 1927, 1016.

[2] See above, pp. 60 sqq. Metallistic views have recently been expressed by Thormann, 'Die Geldschuld im schweizerischen Privatrecht', 56 (1937) *Zeitschrift für schweizerisches Recht*, pp. 10 sqq. As to *Switzerland* generally see Müller and Barth, *Zeitschrift für schweizerisches Recht*, 43 (1924), 95a sqq., 175a sqq.; Henggeler and Guisan, ibid. 56 (1937), 158a sqq., 260a sqq. It appears that the control of nominalism cannot be doubted.

[3] Berlin Court of Appeal, 25 Oct. 1927, *JW.* 1929, 446, 448.

[4] On the Continent its existence is secured, and while with regard to individual questions reference is made to the discussion below, pp. 76 sqq., it is worth mentioning that the German Supreme Court was called upon to answer the question whether public international law contains a rule to the effect that loans must be repaid according to the intrinsic gold value which the money had when the loans were given. The court had no difficulty in rejecting this purely metallistic doctrine (6 June 1928, *RGZ.* 121, 203, and *Annual Digest of Public International Law Cases 1927–1928*, at p. 338). In the *United States* the modern law has repeatedly been stated, the chief authority being the interesting dictum of Mr. Justice Strong in *Knox* v. *Lee* and *Parker* v. *Davies* (1870), 12 Wall. (79 U.S.) 457, at p. 548: 'it was not a duty to pay gold or silver or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. . . . But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision, it is this, and we do not understand it to be controverted. Davis 28; *Barrington* v. *Potter*, Dyer 81b; *Faw* v. *Marsteller* 2 Cranch. 29. . . . Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that

The investigations of continental scholars have made themselves felt in this country. It appears to have already been recognized in the Middle Ages that the King had not only the prerogative right of issuing coin,[1] but also of determining the denomination or value at which the coin was to pass current.[2] Consequently, the King could debase or enhance the value, and this power was repeatedly made use of.[3,4] The whole problem was very fully and learnedly discussed in Sir John Davis's report of the famous *Case de Mixt Moneys*,[5] which is still the leading authority[6] and in which the results of the Year Book period as well as the ideas developed on the Continent from Aristotle onwards were exhaustively referred to. Gilbert of London had sold goods to Brett of Drogheda for '£100 sterling current and lawful money of England' to be paid in Dublin. Before the sum became due, Queen Elizabeth, by proclamation,

power may be, and *the obligation of the parties is therefore assumed with reference to that power*'. See also *Juillard* v. *Greenman* (1883), 110 U.S. 421, at p. 449 per Mr. Justice Gray delivering the opinion of the Court; *Effinger* v. *Kenney* (1885), 115 U.S. 566, at p. 575 per Mr. Justice Field; *Woodruff* v. *State of Mississippi* (1895), 162 U.S. 292, at p. 302 per Chief Justice Fuller; *Ling Su Fan* v. *United States* (1910), 218 U.S. 302, where it was said 'that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange', and where it was concluded that this power involves that of prohibiting exportation of money. Finally in *Deutsche Bank* v. *Humphreys* (1926), 272 U.S. 517, 519, Mr. Justice Holmes said: 'obviously in fact a dollar or a mark may have different values at different times but to the law that establishes it, it is always the same.' See also Sedgwick, *On Damages*, ss. 267, 268.

[1] See above, p. 12.

[2] Y.B. 21 Edw. III, f. 60b; 9 Edw. IV, f. 49a; Dyer, 81b–83a; Blackstone i. 278; see also Breckinridge, *Legal Tender, A Study in English and American Monetary History* (1903).

[3] Feavearyear, pp. 9, 14, 17, 30, 34 sqq., 43 sqq.

[4] It was, however, somewhat doubtful whether the King could debase or enhance the value below or above the sterling value which Blackstone, l.c., defines by the words: 'when a given weight of gold or silver is of a given fineness, it is then of the true standard and called sterling metal. . . . And of this metal all the coin of the kingdom must be made by the Statute 25 Edw. 3 ch. 13.' Blackstone gave a negative answer to the question, while Sir Matthew Hale (1 Hale P.C. 194) answered it in the affirmative. See Halsbury (Hailsham) vi, No. 716, note N. See also Vansittart's observations in the House of Commons, 13 May 1811, Hansard, p. 38.

[5] *Gilbert* v. *Brett* (1604), Davis 18; 2 State Trials 114.

[6] Story, s. 313; Wallace, *Reporters*, p. 235; the case was of great importance in the judgment of the Supreme Court of the United States in the famous case of *Knox* v. *Lee* and *Parker* v. *Davies* (1870), 12 Wall. (79 U.S.) 457, at p. 548 per Mr. Justice Strong, at p. 565 per Mr. Justice Bradley.

recalled the existing currency of Ireland and issued a new debased coinage (called mixed money) which was declared to be 'le loyall and currant money de cest realme de Ireland'. Every creditor was bound to accept it, a refusal to accept it 'solong le denominatio ou valuatio' being punishable. Tender was made in the debased coin, and the question which the Privy Council of Ireland asked the Chief Judges to decide was whether or not it was a good tender. The reporter first dealt with the necessity of having a certain standard of money in every commonwealth and with the King's right to make money, to determine its substance and form and also its value. He goes on to state[1] that

'le doubt prima facie fuit, come cest mixt money serra dit sterling. Et pur le cleering de cest doubt, fuit dit que en chescun coine ou piece de money est bonitas intrinseca et bonitas extrinseca. Intrinseca consistit in pretiositate materiae et pondere, viz. finenesse and weight. Extrinseca bonitas consistit in valuatione seu denominatione, and in forma seu charactere. Budelius de re nummaria lib. 1 cap. 7. Et cest bonitas extrinseca, que cest auxy dit aestimatio sive valor impositititius est formalis and essentialis bonitas monetae; and cest forme dat nomen and esse a le money: car sans tiel forme le plus precious and pure mettall que poet estre nest pas money. Et pur ceo Molinaeus libro de mutatione monetae dit, non materia naturalis corporis monae, sed valor impositititius est forma et substantia monetae, quae non est corpur physicum sed artificiale, come Aristotle dit Ethicorum lib. 5.'

Thus the result was reached that the mixed money, having the impression and inscription of the Queen of England and being proclaimed for current and lawful money within the kingdom of Ireland, ought to be taken and accepted for sterling money. The reporter then turns to the constitutional question whether the mixed money circulating in Ireland could be said to be current and lawful money 'of England' within the meaning of the contract. After having given an affirmative answer, he proceeds to examine the importance of the fact that, at the time when the contract was made, better money was in circulation. This was, however, considered to be irrelevant. 'Car le temps est future, that if the said Brett shall pay or cause to be paid one hundred pounds sterling currant money etc. Et pur ceo tiel money serra pay que serra currant a tiel future temps,

[1] p. 24.

issint que le temps del payment, and nemy le temps de contract, serra respect.'[1] The case is thus a clear authority for the nominalistic principle that the obligation to pay £100 sterling is to pay what the law denominates as £100 sterling at the time of the payment.

This principle has never been departed from, although two cases decided by the Privy Council require some consideration. *Deering* v. *Parker*[2] arose from an appeal from New Hampshire heard before a Committee of the Privy Council in 1760. The defendant Parker had given a bond to the appellant Deering, payable in 1735, for the payment of £2,460 'in good public bills of the province of Massachusetts Bay or current lawful money of New England'. In 1752 the defendant tendered a large sum in the bills of credit then current in New Hampshire. The Chancery Court of New Hampshire gave judgment for a balance of £354 6*s*. 9*d*. in bills of credit of New Hampshire, 'being the nominal sum due at the time of tender deducting the sums paid and endorsed. So that the Court went upon the principle that the plaintiff should take the bills as tendered and that the debtor was not bound to make good their depreciation nor to pay in silver or real money'. On appeal the appellant insisted that he had not received what he contracted for, namely either bills of Massachusetts Bay, which had been called in and sunk before the tender, or silver money agreeable to Queen Anne's proclamation, which he insisted was the true meaning of the words 'current lawful money of New England'. The respondent contended that this clause referred to the bills of credit of any of the New England colonies. The court accepted the appellant's construction that the words 'current lawful money of New England' did not mean bills of credit of any colony. Lord Mansfield, being a member of the Board, said that he was at a loss to determine the quantum of the debt. He quoted information given to him by a Mr. J., 'a New England gentleman who had practised the law', from which it appeared that the 'more general method was to take the value of the bills when they should have been paid by contract'. The Board as a whole, 'instead of taking the price of silver at the time of the contract and the time set for the payment (which was about 27 sh. per

[1] p. 27; he relied on the Year Book cases referred to above, p. 68, n. 2.
[2] (1760) 4 Dallas, p. xxiii.

ounce) fixed it at 37 sh. per ounce and computed the debt, accordingly'. This case undoubtedly seems to imply the recognition of metallistic views, but as it does not appear to have been reported in any of the English reports, and as it has never been relied upon in this country, it cannot be said to have even a persuasive authority. In the next case of *Pilkington* v. *Commissioners for Claims*[1] Sir William Grant, in delivering the opinion of the Board, made some remarks on the subject which, however, have not even the force of definite *obiter dicta*. The case concerned the confiscation by the French Government of a debt due from a French subject to a British subject in respect of which the French Government was bound to pay an indemnity. The actual decision related to the question whether the debt was to be converted into pounds at the value of the French currency at the time when the confiscation took place or subsequently.[2] But in the course of the judgment the following passage occurs:[3]

'Great part of the argument at the bar would undoubtedly go to shew that the Commissioners have acted wrong in throwing that loss upon the French Government in any case; for they resemble it to the case of depreciation of currency happening between the time that a debt is contracted and the time that it is paid; and they have quoted authorities for the purpose of showing that in such a case the loss must be borne by the creditor, and not by the debtor. That point is unnecessary to consider, though Vinnius whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davis's Reports. He takes the distinction that if between the time of contracting the debt and the time of its payment, the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money, that is, he may pay in the debased money, being the current coin, but he must pay so much more as would make it equal to the sum he borrowed. But he says, if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for 30s., the debtor may liberate himself from a debt of 1 £ 10 sh. by paying a guinea, although he had borrowed the guinea when it was but worth 21 sh. I have said it is unnecessary to consider whether the conclusion

[1] (1821) 2 Knapp 7. [2] Below, p. 289. [3] p. 18.

drawn by Vinnius, or the decision in Davis's Reports, be the correct one; for we think this has no analogy to the case of creditor and debtor.'

The importance of this dictum, put at its highest, is merely that to Sir William Grant's mind the authority and correctness of the decision in *Gilbert* v. *Brett* was not so firmly established that a consideration of differing views expressed by Vinnius could at once be dispensed with.

There does not appear to be any other case throwing light on the problem until very recently, when part of the rule laid down in *Gilbert* v. *Brett* was reaffirmed, viz. that it is at the due date of payment that the measure of value is to be ascertained,[1] and when Scrutton L.J. alluded to it in the following terms:[2]

'I take it that if a tort had been committed in England before England went off the gold standard, the plaintiffs could not say: "We insist, after England has gone off the gold standard and the pound has depreciated in international purchasing power, on being paid the value of the gold standard pound at the time of the commission of the tort." *A pound in England is a pound whatever its international value.*'

The scarcity of English authorities for the nominalistic principle, and the complete lack of any legal discussion thereof are very remarkable indeed and cannot be explained otherwise than by the fact that the conviction that 'a pound in England is a pound whatever its international value' is so deeply rooted in the minds of the nation that not even an attempt is made to question it. This is to be attributed not only to the sense of security and stability which England was allowed to enjoy during the hundred years preceding the outbreak of the Great War in 1914, but to the truly patriotic spirit which showed itself so impressively during the economic and monetary crisis in 1931. The measures of 1931 were accepted so quietly and readily that the agitation during a somewhat similar crisis in 1811 is still of considerable interest and significance. The Bullion Committee in their Report, 'one of the most important documents

[1] *Auckland City Council* v. *Alliance Assurance Co.*, [1937] A.C. 587, 603 (P.C.), language of Lord Wright; *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 373, 408 per Romer L.J., whose further remarks do not deal with the quantum of the debt with which we are here concerned, but with the metallistic doctrine which they reject: see above, p. 34, n. 3.

[2] *The Baarn* (No. 1), [1933] P. 251, 265.

in English currency history',[1] had arrived at the conclusion that the rise in prices was due to an over-issue of Bank of England notes, as a result of which the value of the notes had depreciated. On 6 May 1811 Horner introduced his resolution in the House of Commons supporting the Report and affirming the depreciation of money.[2] But although in 1811 gold had risen from the parity of £3 17*s.* 6*d.* to £4 19*s.* 6*d.* per ounce and the value in sterling of most foreign currencies and commodities had gone up by approximately 20 per cent.,[3] the resolutions were lost with heavy majorities. On 13 May 1811 Vansittart introduced resolutions which rejected the Bullion Report and one of which contained the memorable words 'that the promissory notes of the said Company [the Bank of England] have hitherto been, and are at this time, held in public estimation to be equivalent to the legal coin of the realm and generally accepted as such in all pecuniary transactions to which such coin is lawfully applicable',[4] and these resolutions were carried. But shortly afterwards Lord King announced that in view of the depreciation of money he would no longer accept from his tenants bank notes at their face value in payment of rents, but calculate the rents on a gold basis. His proposals provoked great excitement and were strongly resented. His opponents 'held to the time-honoured principle that a man who contracted to receive a pound, must take whatever was by general consent called a pound when payment was made. This was the principle which had been followed for a thousand years in spite of all the many changes of form and value, some of them very rapid, which the pound had undergone'.[5] The House of Commons at once passed Lord Stanhope's Act[6] by which for all practical purposes bank notes were made legal tender[7] and which provided that no one should pay or receive more for guineas or less for bank notes than their face value.[8] The Vansittart Resolution and the promptness with which Lord King's proposals were defeated, support the conclusion that the principle laid down in the report of *Gilbert* v. *Brett* is firmly established in English law,

[1] Feavearyear, p. 182.
[2] Hansard, 6 May 1811, p. 831.
[3] Feavearyear, p. 181 sq. and the table, p. 215.
[4] Hansard, 13 May 1811, p. 70.
[5] Feavearyear, p. 191.
[6] 51 Geo. III, ch. 127; it became law on 24 July 1811.
[7] See above, p. 27.
[8] See below, p. 111.

however small the number of judicial authorities may be.[1] And this is borne out by the lack of success of all attempts to remedy the serious effects of deflation that followed on the restoration of the gold standard in 1821.[2]

III

After these observations on the development and existence of the nominalistic principle in general, it remains to trace the scope and extent of its application to individual questions in times of fluctuations of monetary value, and to ascertain whether or not exceptions to the rule have been or are to be admitted.

In this connexion it is of great importance to draw a clear distinction between intrinsic and extrinsic currency alterations, between mere fluctuations of monetary value and alterations of the monetary system caused by the collapse of a currency.[3] This separation is necessary because in the latter case legal rules have sometimes been developed which originated from and applied to the extraordinary circumstances of the time, but which lack general validity so as to cover the case of mere intrinsic currency alterations.

Suppose 10,000 German marks were borrowed by a German in Germany in 1914 and invested in securities or real property which more or less retained their intrinsic value; should the borrower be allowed to discharge his debt by paying 10,000 marks in 1923, when the cost of a stamp was 1 milliard of marks, or in 1924, when, owing to the then established recurrent link[4] of 1 billion marks = 1 reichsmark, the amount to be tendered would be an inconceivable fraction of the new unit of account? In the course of monetary history numerous countries have been confronted by such problems, and it appears that in many of them it was found impossible to abide by nominalism in all its rigidity and strictness, and that legislative

[1] The events of 1811 are shortly but lucidly described by Feavearyear, pp. 182–94, but the debates in Parliament on the Horner and Vansittart Resolutions and on Lord Stanhope's Act make so exceedingly interesting reading that they should be looked up in Hansard. It is certain that the opponents of the Bullion Report were, consciously or unconsciously, under a delusion, as became clear in 1819 (see Feavearyear, pp. 204 sqq.), but this does not affect the importance of their attitude. See also Charles Rist, 'Le cours forcé en Angleterre (1797–1821)', *Revue d'histoire économique et sociale*, 23 (1937), 5.

[2] See Feavearyear, pp. 209–11.

[3] See above, p. 37.

[4] Above, p. 34.

or judicial measures, encroaching upon the nominalistic principle and allowing partial or general revalorization, had to be adopted. Although the effect of such revalorizing measures is a deviation from nominalism, it is evident that the means employed were in no case of a really monetary character and that the problem was not approached from the point of view of the fiscal law, which, on the contrary, envisaged a fixed rate of conversion,[1] but from the point of view of equity and the law of contracts.

No complete collapse of the currency has ever occurred in England and such events are consequently of interest from the point of view of private international law only. Moreover, there is no lack of reliable comparative material dealing with the general aspects of failures of currencies such as have occurred in the course of history[2] and in recent times,[3] especially in Central and Eastern Europe. It is therefore not proposed to enter into a detailed discussion of the methods adopted in these circumstances and of the results reached in each individual country. The most interesting and comprehensive movement in favour of revalorization took place in Germany, but it has already been very lucidly described in the English language.[4] The rules adopted will therefore be described only in so far as they require attention from the point of view of monetary theory in general and as they throw light on the working of

[1] Above, p. 34.

[2] Sobernheim, 'Die Geldentwertung als Gesetzgebungsproblem des Privatrechts', *Gruchot's Beiträge*, lxvi. 260 sqq., 265–316. As regards the effect of inflation in the Southern States after the outbreak of the American Civil War in 1861, Professor Dawson and Mr. Cooper have recently published an illuminating article in 33 (1935) *Mich. L.R.* 706. As to the French experiences from 1709 to 1800 see Mater, *Rev. dr. banc.* 1924, 72, 168, 266, 367.

[3] Harmening, 'Aufwertung', *Rechtsvergleichendes Handwörterbuch*, ii. 282; Krohn, 'Das Aufwertungsrecht des Auslands', *Niemeyer's Zeitschrift für internationales Recht*, xxxviii (1928), 1 sqq.; Wahle, *Das Valorisationsproblem in Mittel- und Osteuropa* (Vienna, 1924); Nussbaum, *Geld*, pp. 130–8, and *Bilanz der Aufwertungstheorie* (1929); Guisan, *La Dépréciation monétaire* (Lausanne, 1934), pp. 180 sqq.; Sulkowski, *Rec.* 29 (1929), 1–29.

[4] Dawson, 33 (1934) *Mich. L.R.* 171: Fischer, 'The German Revalorisation Act, 1925', 10 (1928) *Journal of Comparative Legislation*, 94; Kahn, 'Depreciation of Currency under German Law', 14 (1932) *Journal of Comparative Legislation*, 66. The following discussion will consider the German revalorization practice in particular, but it will disregard legislative measures taken in Germany or in any other country since, from the point of view of monetary theory in general, they are less interesting.

nominalism in circumstances less exceptional and therefore of greater practical importance and thus deserving of more detailed treatment.

1. In modern times most countries have passed through times of fluctuating value of money, but since nominalism universally prevailed, it is not surprising that the principle was nowhere interfered with in so far as *simple debts* were concerned. In England, as has been shown, the unimpaired application of nominalism was not even questioned, and elsewhere attempts made for the purpose of deviating from the principle were rejected without hesitation,[1] for it was held that a reduction of the purchasing power of the native currency could not create an obligation of the debtor to make additional payments, and that it was on the creditor that the loss fell. In the United States, likewise, the correctness of this view was not doubted after the Legal Tender Acts had been held valid by the Supreme Court in 1871.[2] As has been indicated above, in some countries, notably in Germany, the complete collapse of a currency led to a practice of *revalorization*, as follows. According to s. 242 of the German Civil Code (which binds the debtor to effect the performance of his obligation according to the requirements of good faith, ordinary usage being taken into consideration) the whole of the circumstances, including the financial position of both parties, are to be reviewed in order to translate a sum of marks into reichsmarks; it is therefore necessary and possible

[1] In *France* the problem is usually discussed under the head of the *imprévision* doctrine on which see, e.g., Planiol–Ripert, vi, No. 395. The doctrine has been categorically rejected by the Court de Cassation (6 March 1876, S. 1876, I. 161) in connexion with an attempt to increase an amount of 15 centimes promised in 1560 and 1567 to 60 centimes. The court said that 'dans aucun cas il n'appartient aux tribunaux, quelque équitable que puisse leur paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles, qui ont été librement acceptées par les contractants'. The French Conseil d'État took a more liberal view (see Planiol–Ripert, vi, No. 392), but it seems to be agreed that the *imprévision* doctrine can only be invoked in case of alterations of the price level, not in case of a depreciation of money (see Planiol–Ripert, vi, No. 397 (3)). As to *Belgium* see Piret, pp. 10–21, 30 sqq. and judgments of the Cour de Cassation of 26 Feb. 1931, 3 March 1933, and 9 March 1933 on p. 33, n. 1; certain legislative measures are dealt with on pp. 22–8. *Holland*, Nussbaum, *Geld*, p. 131; *Switzerland*, Guisan, pp. 36, 158 sq.; *Scandinavia*, Bloch, *JW.* 1931, 3649; *Italy*, Ascarelli, *RabelsZ.* 1928, 793.

[2] Dawson–Cooper, 33 (1935) *Mich. L.R.* 852, 860 sq.; see especially *Dooley* v. *Smith* (1871), 13 Wall. (80 U.S.) 604; *Bigler* v. *Waller* (1871), 14 Wall. (81 U.S.) 297.

to investigate whether and to what extent the creditor would have been able to protect the owed sum of money from the effects of inflation, and to consider the 'impoverishment factor', i.e. the general reduction of the national wealth;[1] but it is of particular interest to note the fact that the reduction of the purchasing power of the reichsmark as compared with that of the mark could not lead to an increase in the rate of revalorization.[2]

The question whether a rise in the value of money, due to

[1] See the definition of the Supreme Court in the decision of 10 Jan. 1933, *JW.* 1933, 2449, and see, e.g., Mügel, *Das Gesamte Aufwertungsrecht* (1927), p. 146. It must be borne in mind that 'revalorization' is only possible in case of liquidated sums. As to other monetary obligations see below, p. 80. In two cases English Courts had to apply German revalorization rules: *In re Schnapper*, [1936] 1 All E.R. 322; *Kornatzki* v. *Oppenheimer*, [1937] 4 All E.R. 133. The former of these cases concerned the revalorization of a legacy. As to the rules of revalorization applicable in case of a legacy see e.g. German Supreme Court, 15 Dec. 1927, *JW.* 1928, 885; 14 Oct. 1929, *JW.* 1929, 3488; 13 June 1929, *JW.* 1930, 995. As to revalorization generally see *Kommentar von Reichsgerichtsräten*, 8th ed. i (1934), 372 sqq.

[2] Supreme Court 21 Nov. 1927, *JW.* 1928, 962; 16 June 1930, *RGZ.* 129, 208; 28 Nov. 1930, *RGZ.* 130, 368, 375. Compare the above discussion of the importance of the functional value of money: pp. 60 sqq. The problem was dealt with in an exceedingly interesting decision of the Assembled Civil Chambers of the Supreme Court: 31 March 1925, *RGZ.* 110, 371. The 6th Chamber of the Supreme Court had taken the view that, at least as regards transactions between wholesale dealers, a revalorization was confined to such an amount as would compensate the plaintiff in respect of the depreciation of the 'inner exchange value' of the mark (on this conception see above, p. 61 sq.) and should not include compensation in respect of changes in the outer exchange value of the mark; it was also said that the best method of measuring variations of the inner exchange value was on the basis of the rate of exchange between the mark and one of the stable currencies, e.g. pound or dollar, and that revalorization could not exceed the amount of reichsmarks calculated by translating the originally stipulated sum of marks into dollars at the rate of exchange of the day when the contract was made, and by reconverting that amount of dollars into reichsmarks. This theory, however, did not succeed. It was laid down that the guiding principle was exclusively to be found in s. 242 of the German Civil Code requiring consideration of all the circumstances of the case, and that any other theory would be unable to do justice. In the latter connexion the decisive argument was that during the inflation the price level in Germany was extremely low, and that, therefore, the method proposed by the 6th Chamber would have the effect that the revalorized prices would be far below the price level prevailing after the introduction of the reichsmark. That the decision on principle rejected the distinction between the inner and the outer exchange value of money has already been mentioned above, p. 63. See also Supreme Court, 30 May 1929, *RGZ.* 125, 3: at the height of the inflation the plaintiff agreed to let a house at a rental expressed in U.S.A. dollars; the fact that after the stabilization and the introduction of the reichsmark the purchasing power of the dollar in Germany was considerably reduced did not entitle the plaintiff to demand an increase of the rental.

deflation, enables a debtor to reduce the amount promised to be paid was considered in Germany during the years of depression after 1930, in connexion with agreements to pay pensions to former employees. While some lower courts reduced the amounts payable by 25 per cent. and more, the Supreme Labour Court rejected such attempts at devalorization.[1, 2]

2. The second question is whether a creditor who is not paid by his debtor at the due date is entitled to claim damages in respect of the depreciation of money since the date of maturity. There does not seem to be any doubt that according to the law of this country the answer must be in the negative; the creditor may be entitled to demand interest[3] but nothing else.[4] In France[5] and in the countries influenced by the Code Civil[6] the position is identical, while in Austria[7] and Germany[8] such damages were freely allowed during the period of inflation. The burden of proving damage in fact suffered by the creditor owing to the non-payment was held to be on the creditor by the Austrian Supreme Court, but according to German decisions there was a rebuttable presumption in favour of the creditor. In case of a less catastrophical depreciation the German courts will probably take the view that the German creditor of reichs-

[1] 10 Aug. 1932, *JW.* 1932, 3119; 21 Jan. 1933, *JW.* 1933, 1276; 24 May 1933, *JW.* 1933, 1677. See on the subject Hamburger, *Deflation und Rechtsordnung* (Mannheim, 1933); Oertmann, *JW.* 1933, 1297. The position is slightly different in case of agreements to pay alimony; Supreme Court 6 May 1934, *JW.* 1934, 2609; 24 Sept. and 10 Oct. 1934, *JW.* 1934, 3195.

[2] Similarly the Supreme Court of the State of Iowa rejected a plea of a defendant in a foreclosure action that, as monetary deflation and the ensuing rise in the value of money had reduced the value of the mortgaged land, a mortgaged debt of $20,000 should be scaled down to $10,000: *Federal Land Bank of Omata* v. *Wilmarth* (1934), 252 N.W. 507.

[3] Halsbury (Hailsham), xxiii. 174 sqq.

[4] *See Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409, 416, per Scrutton L.J., who puts the rule on the ground that such damages would be too remote.

[5] Art. 1153 Code Civil; see Hubrecht, pp. 169–71.

[6] Belgium, Art. 1153; Italy, Art. 1231; Rumania, Art. 1088.

[7] Nussbaum, p. 150.

[8] Staudinger (Werner), *Kommentar zum bürgerlichen Gesetzbuch*, ii. 1, pp. 314–16. There was no essential difference between a non-German and a German creditor of marks, although the presumption to be mentioned in the text was stronger in case of a non-German creditor and weaker in case of a German creditor. As to the former case see Supreme Court, 25 Sept. 1919, *RGZ.* 96, 262; 20 Feb. 1920, *RGZ.* 98, 264; 16 March 1920, *JW.* 1920, 704; 22 April 1923, *RGZ.* 107, 212; 22 Oct. 1926, *JW.* 1927, 980. As to the latter case see Supreme Court, 29 Sept. 1926, *JW.* 1928, 2841 with further references.

marks is not precluded from claiming damages in respect of the depreciation of the reichsmark after maturity, though he must strictly prove his damage, but that the non-German creditor whose domestic currency remained stable may invoke the presumption that he would have avoided the loss by converting the reichsmarks into his own currency.[1]

3. The application of the nominalistic principle presents much greater difficulties in cases involving the payment of unliquidated damages or indemnities. In the law of all countries it is clear that a value must be put on the loss, but the problem is to fix the date with reference to which this value is to be ascertained, and in this connexion the above-mentioned difference between a genuine rise of prices and a depreciation of monetary value causing such rise has proved of particular importance.

This distinction is of minor consequence in *Germany*, for instance, where damages are assessed on the broad principle that the judgment of the court must be based on the circumstances existing at the time of judgment, the reason being that it is only by this method that the plaintiff recovers what he lost.[2] This does not exclude the possibility of taking into account the fact that at the time when the claim arose, or subsequently between that time and the judgment, the value was higher than at the time of judgment; in such a case the plaintiff must, however, prove that he would have benefited from such higher value, e.g. by selling the goods which the defendant failed to deliver.[3] On the other hand, if the value since the time of breach or wrong has increased and is higher at the time of judgment, the principle of *restitutio in integrum* demands that the plaintiff be awarded so much as at the time of judgment will enable him to make good his loss.[4] These rules are primarily designed for a valuation of a loss suffered through damage to

[1] This is the result arrived at in *Switzerland* (see Henggeler and Guisan, 56 (1937) *Zeitschrift für schweizerisches Recht*, 226a, 230a, 334a sqq.) and in *Czechoslovakia*, where the Supreme Court held that a Prague debtor is liable to compensate his German creditor in respect of the devaluation of the Czechoslovakian kroner effected after maturity, but before payment of the debt. (10 Dec. 1936, *Zeitschrift für osteuropäisches Recht*, iv (1937), 54).

[2] Supreme Court, 6 Oct. 1933, *RGZ.* 142, 8 sqq., 11; Enneccerus–Lehmann, *Recht der Schuldverhältnisse*, p. 84.

[3] Supreme Court, l.c. and 25 Oct. 1934, *RGZ.* 145, 296, 299.

[4] Staudinger (Werner), l.c., p. 137, with further references.

goods, but it is obvious that there is no difficulty in adapting them to cases where the change of value is attributable not to changes in the value of the thing, the subject-matter of the breach or wrong, but to monetary factors, or, in other words, where the fluctuations moving from the side of money affect not the damage but the measurement of value on the basis of which the damage is calculated. Therefore fluctuations of monetary value and their effect on prices are easily taken into account, and during the inflation there was neither a need nor a possibility of any revalorization, but general rules of German law made a *transvalorization* (*Umwertung*) practice readily available. Transvalorization consists in measuring the damage, i.e. the value of a thing, in the new currency, not in translating a sum of money into that currency; therefore the individual circumstances of the parties or the 'impoverishment factor' cannot on principle be taken into account. Thus if through the defendant's wrongful act damage is caused to the plaintiff's horse,

'the defendant must compensate the plaintiff in respect of that value which, in view of the reduction of the purchasing power of the mark which set in after the wrong was done, corresponds to the valuation of the money at the time of judgment. For only by this method the plaintiff receives the value of the horse at the time when the wrong was done and the due compensation for his damage, as he could not at the present time buy the same horse at the former nominal sum of depreciated paper marks. . . .'[2]

In a number of cases, however, German law provides that the plaintiff is entitled to recover the value of goods as it existed at a certain moment, e.g. in case of compulsory purchase of land where the value is to be estimated as at the time of the service of the decree,[3] or in case of claims against a railway company for damage to goods where their value must be ascertained as

[1] See Supreme Court, 10 Jan. 1933, *JW.* 1933, 2449. Some cases of transvalorization are mentioned there. They are collected by Mügel, *Das Gesamte Aufwertungsrecht* (1927), pp. 146 sqq., or in *Kommentar von Reichsgerichtsräten*, 8th ed. i (1934), 391 sqq. Some of them will presently be mentioned in the text. It should be observed that the 'impoverishment factor' was not always disregarded: see Supreme Court, 15 June 1927, *RGZ.* 117, 252.

[2] Supreme Court, 6 May 1924, *JW.* 1924, 1358.

[3] Supreme Court, 6 Jan. 1931, *RGZ.* 131, 125, 128. In England the value is ascertained with reference to the date of the service of notice to treat: Halsbury (Hailsham), iv. 42.

at the date when they were delivered to the railway company.[1] During the inflation, it is true, even in such cases transvalorization in the sense explained above was effected,[2] but after the stabilization on the basis of the reichsmark the amount, duly ascertained with reference to the relevant date, was held to be absolutely binding: if it was ascertained that real property, the subject-matter of the compulsory purchase, had a certain reichsmark value, this amount could not be increased by reason of the fact that at the time of payment the exchange value or the purchasing power of the reichsmark was reduced.[3]

It is worthy of notice that in *Austria*, where unliquidated damages or an indemnity were claimed, 'transvalorization' was allowed, although revalorization of liquidated sums was not granted except in certain cases regulated by statute. In the leading case, which related to unliquidated damages, the Supreme Court said:[4]

'This is not revalorization in the technical sense . . . but the necessary consequence of the measurement of value function of money . . . no statute lays it down that an altered measure should remain the basis of measurement without having regard to the alteration. . . .'

In *France* the modern[5] rule seems to be that both contractual and non-contractual damages are to be assessed on the basis of the value of the loss at the date of judgment,[6] although it is not quite clear to what extent this rule allows regard to be had to

[1] s. 88 Eisenbahnverkehrsordnung.

[2] Supreme Court, 15 Jan. 1924, *RGZ.* 107, 228; 13 Dec. 1924, *JW.* 1925, 348; 20 Feb. 1925, *JW.* 1925, 1105; 5 May 1925, *JW.* 1926, 2364; 11 Jan. 1927, *JW.* 1927, 986, 988; 29 March 1927, *RGZ.* 116, 324.

[3] See the remarkable decision of the Supreme Court, 28 Nov. 1930, *RGZ.* 130, 368. Legal writers favour transvalorization even under such circumstances: Nussbaum, *Geld*, p. 146; Mayer, *Die Valutaschuld nach Deutschem Recht*, pp. 29 sqq.; Ascarelli, *RabelsZ.* 2 (1928), 793. They say that the determination of the time relates to the value of the goods, not to the value of the money. They thus presuppose that it is possible to distinguish between the inner and the outer exchange value of money. This is not so. See above, pp. 60 sqq.

[4] 18 June 1924, *JW.* 1925, 1326, and see Mügel, *JW.* 1931, 636.

[5] But see Cass. Civ. 30 July 1877, S. 1878, 1. 151 relating to torts.

[6] Planiol–Ripert, vi, No. 682 for torts; as to contractual damages Cass. Req. 5 May 1928, S. 1928, 1. 239; David, *Journal of Comparative Legislation*, 17 (1935), 61 sqq., 64, 65. In *Italy* damages are assessed at the date of breach (Cass. 3 Dec. 1926, *Giurisprudenza Italiana*, 1927, 5) or wrong (Cass. 13 June 1927, Corte Cass. 1928, 86 quoted by Ascarelli, *RabelsZ.* 2 (1928), 793, 802).

monetary depreciation.[1] In the case of contractual damages the rule of Art. 1150, Code Civil, that, except in case of fraud, the debtor is to pay such damages only as he has 'prévus ou pu prévoir lors du contrat', has been interpreted as meaning that the damages themselves, not only the cause of the damage, must have been within the contemplation of the debtor,[2] which principle necessarily exercises a restrictive influence. But as it is generally recognized that the assessment of the amount of damages is a matter falling exclusively within the province of the judges of fact and cannot be interfered with by the Cour de Cassation, it appears that monetary depreciation can in fact be taken into account.[3]

In *Belgium* the starting-point undoubtedly was that the indemnity due to the creditor crystallizes at the date when the claim arises. Therefore, with regard to claims in respect of expropriation of property it was held that the value of the property at the time of the decree ordering expropriation had to be ascertained,[4] whatever the value of the expropriated property might be at the time when the compensation was fixed by the judge. But after the Belgian franc was stabilized the Cour de Cassation changed its opinion, for the interesting reason[5] that 'tant que la loi ne consacre pas l'adoption d'une nouvelle mesure, il est interdit aux juges de fonder leurs décisions sur l'existence, contraire à l'ordre légal, d'une telle diminution; il s'ensuit que le juge auquel incombe le devoir de traduire en monnaie la valeur d'une

[1] Planiol–Ripert, l.c., n. 4; Hubrecht, p. 166 sq.

[2] Cass. Civ. 7 July 1924, S. 1925, 1. 321; David, l.c., pp. 68, 69; contra *Italy*: Cass. 24 June 1927, Corte Cass. 1927, 859.

[3] Planiol–Ripert, vii, No. 856; Hubrecht, p. 165 sq. See the following decisions of the Cour de Cassation: 29 Oct. 1917, S. 1920, 1. 270; 3 Nov. 1920, S. 1921, 1. 99; 23 Oct. 1922, S. 1922, 1. 376; 16 June 1926, S. 1927, 1. 221. It is doubtful whether these judgments relate to fluctuations of money or market value, but it is noteworthy that in the first-mentioned judgment even the question of determining the proper date is left to the sovereign decision of the judges of fact.

[4] Cass. 5 June 1926; 18 March 1926; 27 May 1926; 8 July 1926, quoted by Piret, p. 134, n. 2; 17 March 1927, *Rev. dr. banc.* 1929, 194. In the judgment of 8 July 1926 the court said that 'La dépréciation de l'unité monétaire sur laquelle les demandeurs fondaient leur préjudice est d'ailleurs légalement inexistante'.

[5] 14 Feb. 1929, Clunet 1931, 1195; S. 1929, 4. 12, and *Rev. dr. banc.* 1929, 196 sqq.; commented upon by Mater on pp. 255 sqq.; the lower courts, having already anticipated this rule (Piret, p. 131, n. 1), accepted it without hesitation; Piret, pp. 164, 169.

chose, et notamment celle d'un bien exproprié n'a pu tant que le franc belge était invariable en droit, et pour raison qu'il aurait été déprécie en réalité, majorer la somme d'argent que le juge déclare correspondre à la valeur de la chose; au contraire, après une loi modifiant l'unité monétaire ancienne, le juge est tenu de faire usage de l'unité légale, telle qu'elle est fixée au moment où il statue; il n'y a pas lieu d'excepter de cette règle le cas où la valeur à exprimer en monnaie est celle qu'avait la chose à une date antérieure à l'entrée en vigueur de la loi.'

Nevertheless, mere market fluctuations in the value of property since the date of expropriation were not allowed to be considered.[1] As regards damages for breach of contract or tort, the initial tendency to fix the amount as at the date when the damage was suffered[2] was modified when the lower courts began to calculate the damages as at the date of judgment,[3] ascertaining the value at the date of damage in terms of a stable foreign currency and translating it into Belgian francs at the date of judgment. With this practice the Cour de Cassation did not interfere, partly because it was within the powers of the judges of fact to determine the damages,[4] partly because the new tendency was in accordance with the principle that the plaintiff is entitled to 'réparation intégrale'.[5]

The hesitation of the Belgian courts to take judicial cognizance of monetary depreciation, not recognized in law, even as a mere fact bearing on the valuation of the damage, has a precedent in the law of the *United States of America*[6] as developed during the greenback period 1861–79. Cash payments were suspended at the end of 1861 and notes were issued during the two following years; their value rapidly depreciated until it reached its lowest point in 1864–5, when the purchasing power of the dollar was half its pre-war purchasing power, and when the premium on gold coins was more than 100 per cent. in terms

[1] Cass. 3 May 1934, Piret, pp. 173 sqq.

[2] For contractual damages see Piret, pp. 152–8; the Belgian Cour de Cassation adopted the French interpretation of Art. 1150 Code Civil (above, p. 82, n. 2) in a judgment of 23 February 1928; Piret, p. 151. For damages in tort see Piret, pp. 137 sqq.

[3] Piret, pp. 143 sq., 178 sqq.

[4] Cass. 17 Jan. 1929, Piret, p. 145.

[5] Cass. 26 Feb. 1931; 28 May 1931, Piret, pp. 33, 178. See the judgments discussed and reported *Rev. dr. banc.* 1931, 243 sqq.

[6] See the interesting article by Dawson and Cooper, 33 (1935) *Mich. L.R.* 852 sqq. on which the following observations are largely based.

of notes.[1] But 'gold coin and treasury notes were both legal tender. In that sense they were declared by law to be "equivalent". Could courts, without undermining the language and policy of the legal tender acts, officially recognize that the purchasing power of these two currencies diverged in fact very widely?'[2] In view of the decision in *Bronson* v. *Rodes*,[3] there could be no real difficulty in cases where payment in gold coin was expressly or impliedly[4] provided for, because in such cases specific judgments for gold or silver or judgments for so many dollars and cents as corresponded to the currency value of gold could be and were given.[5] But the idea underlying the decision in *Bronson* v. *Rodes*, viz. the judicial recognition of the depreciation of legal tender notes, enabled the courts not only to extend the latter form of judgment to cases concerning bailments of gold coin and contracts for the delivery of a quantity of gold coin or bullion, estimated by weight,[6] but also to assess damages on the basis of the real purchasing power of legal tender notes.[7] That this method of taking account of the depreciated value of money did not interfere with the undoubted principle that the value of the loss was to be ascertained as at the date when it was suffered was decided by the Supreme Court in the interesting case of *The Vaughan & Telegraph*,[8] which will be more fully

[1] Dawson and Cooper, l.c., pp. 854–6.

[2] Dawson and Cooper, l.c., p. 882. See below, p. 108.

[3] (1868) 7 Wall. (74 U.S.) 229.

[4] *Gregory* v. *Morris* (1877), 6 Otto (96 U.S.) 619.

[5] For the latter form of judgment see *Gregory* v. *Morris*, *ubi supra*.

[6] Dawson and Cooper, l.c., pp. 880–3; Sedgwick, *On Damages*, ss. 271, 272.

[7] Dawson and Cooper, l.c., p. 884 sq. See, e.g., the Californian case of *Spencer* v. *Prindle* (1865), 28 Cal. 276, where the jury was charged on the strength of the evidence that the value of the services the subject-matter of the claim was $1,000 in notes or $500 in coin. On the defendant's appeal this instruction was approved of, because for measuring the value of services the question was 'not whether a dollar in greenbacks is worth more or less than a dollar in gold, but what are the goods, or services worth'. See also *Effinger* v. *Kenney* (1885), 115 U.S. 566, where Mr. Justice Field said at p. 575: 'the damages recoverable for a breach of contract are to be measured by the value of the currency (*sic!*) at its maturity.'

[8] (1871) 14 Wall. (81 U.S.) 258. The general principle that damages for non-delivery of goods must be measured with reference to the time when they should have been delivered has recently been reaffirmed by the Supreme Court in *Ansaldo San Giorgio* v. *Rheinstrom Bros.* (1934), 294 U.S. 494. For further references see n. 6 ibid. and *Effinger* v. *Kenney* (1885), 115 U.S. 566, at p. 575 per Mr. Justice Field, and see *Hopkins* v. *Lee* (1821), 6 Wheat. 109; *Preston* v. *Prather* (1891), 137 U.S. 604.

dealt with below.[1] Similar problems arose during the period of inflation from 1915 to 1921 when, though the United States remained on the gold standard, there set in a general rise in prices, caused by the expansion of credit. It was generally recognized that juries, when assessing damages, were entitled and perhaps even obliged to take account of the decline of the value of money, and that such judgments could not be set aside as excessive, the monetary depreciation being only one among the facts to be considered in the process of valuation.[2] Professor Dawson and Mr. Cooper therefore felt entitled to say of American law that 'the cases of the greenback period, as well as the tort cases of the last two decades, support the general proposition that in measuring the plaintiff's loss through tort or in estimating the value of the defendant's performance in contract actions, an intervening change in the value of money must be taken into account'.[3]

In *England* the nominalistic principle 'pound = pound' seems to be much more strictly adhered to. As regards damages due in respect of the non-delivery of goods, it has been laid down in *Rice* v. *Baxendale*,[4] and often reaffirmed,[5] that the defendant is liable for the value of the goods at the time when they ought to have been delivered, and a similar rule applies to damages in tort. Thus, if it is assumed that a plaintiff has been damaged by the defendant tortiously depriving him on

[1] p. 308.

[2] See Dawson and Cooper, l.c., pp. 885–8; compare the French and Belgian law above, pp. 82, 83. In *Hurst* v. *Chicago B.Q.R. Co.* (1920), 280 Mo. 566, 219 S.W. 566, the Supreme Court of Missouri said: 'The value of money lies not in what it is, but in what it will buy. It follows that if $10,000 was a fair compensation in value for such injuries (loss of leg) as are here involved 10 years ago, when money was dear and its purchasing power was great, a larger sum will now be required when money is cheap and its purchasing power is small.' Therefore $15,000 were not held to be excessive. The court cited numerous authorities and emphasized that 'ordinary variations' should not give rise to any increase or reduction. 'But when radical, material, and apparently permanent changes in social and economic conditions confront mankind, courts must take cognisance of them.' In *Halloran* v. *New England Tel. & Tel. Co.* (1920), 95 Vt. 273, 115 A. 143, it was held that in an action for personal injuries the jury could be instructed that they might consider the impaired purchasing power of the dollar in assessing damages. As to this case, see the comments in (1922) 35 *Harv. L.R.* 616.

[3] l.c., p. 888.

[4] (1861) 7 H. & N. 96.

[5] *O'Hanlan* v. *Great Western Railway Co.*, 6 B. & S. 484, 491 per Blackburn J.; *Ströms Bruks Aktie Bolag* v. *Hutchison*, [1905] A.C. 515; *The Arpad*, [1934] P. 189. See s. 51 (3), Sale of Goods Acts, 1893.

1 January of three cows at the value of £150, 'it would be *nihil ad rem* to say that in July similar cows would have cost in the market £300. The defendant is not bound to supply the plaintiff with cows. . . . The defendant is liable to pay damages, that is to say, money to some amount for the loss of the cows: the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.'[1] These principles primarily apply to genuine fluctuations in market prices, but the dictum of Scrutton L.J. in *The Baarn* (No. 1)[2] and also the general tendency of English law as discussed hereinbefore[3] render it rather unlikely that English courts will ever hold that a depreciation of English money is a fact which entitles the plaintiff to damages exceeding the nominal sums ascertained with reference to the date of breach or wrong. In *Gilbert* v. *Brett*,[4] it is true, it was suggested *obiter* that under certain circumstances exceptions from nominalism were to be admitted. It was said that legacies were to be paid in that money which was current at the time of making the will, or that a man who has received £1,000 of pure silver in marriage with his wife, the marriage being dissolved *causa praecontractus*, or a judgment creditor who, on the strength of a judgment which was later reversed, has recovered £1,000 of pure silver from his debtor, must restore such money as was current at the time of marriage or of recovery, though in the meantime debased money has been introduced. But there does not appear to be any doubt that such a view would now not be followed by English courts. On the other hand, the nominalistic principle does not mean that under no circumstances are English courts allowed to have regard to changes in the value of money. The interesting decision of the Exchequer Chamber in *Bryant* v. *Foot*[5] concerned a claim for a

[1] *The Volturno*, [1921] 2 A.C. 544, 563 per Lord Wrenbury.

[2] [1933] P. 251, 265; it is quoted in full above, p. 72.

[3] The strict adherence to the principle that 'damages must be assessed according to the general rule as at the time of the wrong' caused Lord Finlay to dissent from the judgment of the majority of the Permanent Court of International Justice at The Hague in the case concerning the factory at Chorzow: Judgment No. 13, Collection of Judgments, Series A, 1928–30, pp. 71 sqq.

[4] (1604) Davis's Rep. (Ireland) 18, 27, 28; *State Trials*, ii. 130. These remarks were mentioned in *Pilkington* v. *Commissioners for Claims on France* (1821), 2 Knapp P.C. 7, at p. 20.

[5] (1868) L.R. 3 Q.B. 497; see also *Rex* v. *Marks* (1701), 1 Raym.Ld.

marriage fee of 13*s.* made by the rector of the parish of Horton. It had been proved to have been paid since 1808, but the court refused to draw the inference that the right existed since time immemorial, because, considering the difference in the value of money in 1189 and 1886 of which the court took judicial cognizance, it was impossible that a payment of 13*s.* on every marriage could have been made at the earlier date, so that the claim to these fees by prescription failed.

4. The question whether a change of monetary value and its effects might give rise to *rescission* of a contract or operate as a discharge cannot be definitely answered in the present state of English law. The answer depends on the scope of the general doctrine of impossibility of performance and of frustration as developed in and since *Taylor* v. *Caldwell*.[1] It is clear that a contract may be regarded as discharged if, though there is no real commercial impossibility, it appears from the nature of the contract that 'the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist',[2] and if through a supervening change of circumstances this particular state of things is materially altered. In a number of cases it was held that a rise of prices caused by the outbreak of the War did not operate as a discharge of the contract,[3] and since, as we have seen,[4] a rise of prices and a depreciation of money cannot be easily distinguished and could not be distinguished in the course of the years following upon the outbreak of the War, it may be concluded that the *ratio decidendi* of these decisions equally applies to depreciation of money; this is particularly so in view of the dictum of Swinfen Eady L.J. in one of those cases[5] to the effect that 'a person was not entitled to be excused from the performance of a contract merely because it had become more costly to perform it'. There is, however, no reason to assume that a serious depreciation of monetary value,

702; *A.G.* v. *Lade* (1746), Park 57, 64; *Lawrence* v. *Hitch* (1868), L.R. 3 Q.B. 521.

[1] (1863), 3 B. & S. 826.

[2] *Tamplin* v. *Anglo-Mexican Co.*, [1916] 2 A.C. 397, 403 per Lord Loreburn, and see e.g. *Krell* v. *Henry*, [1903] 2 K.B. 740; *In re Badische Co. Ltd.*, [1921] 2 Ch. 379 per Russell J.

[3] *Tennants (Lancashire) Ltd.* v. *Wilson & Co. Ltd.* (1917), 23 Com. Cases 41 (H.L.); *Bolckow Vaughan & Co.* v. *Compania Minera de Sierra Minera* (1916), 33 T.L.R. 111 (C.A.); *Greenway Bros. Ltd.* v. *Jones & Co.* (1916), 32 T.L.R. 184.

[4] Above, pp. 61, 62.

[5] *Bolckow Vaughan & Co.* v. *Compania Minera de Sierra Minera, ubi supra.*

causing a derangement of the intended equivalence between performances on either side, can never be regarded as a supervening change of circumstances within the above-stated principle.

In other countries, too, the question is bound up with the general doctrines of frustration the application of which in connexion with unforeseen depreciation of money is sometimes difficult to determine. In the *United States* there is no judicial decision covering the point, and the influence of the frustration doctrine cannot be put higher than in this country.[1] In *France* there is considerable conflict of opinion regarding the existence and scope of a general 'imprévision' doctrine,[2] but the better opinion seems to be that no such general doctrine exists, and the attitude of the Cour de Cassation, at any rate, has been quite uncompromising.[3] In *Germany* the extraordinary depreciation of the mark forced upon the courts a general 'clausula rebus sic stantibus' doctrine,[4] but it is extremely doubtful whether and how far this doctrine has become part of the general law of contracts[5] and is available in case of a less catastrophical change in the value of German money.[6] As remains to be shown below,[7] however, it is of great importance in the case of a change in the value of non-German money.

5. In view of the inherent connexion between the two remedies, it is not surprising to observe that the reluctance of the courts to allow rescission made itself felt when they came to consider the equitable remedy of specific performance.

In the early eighteenth century, it is true, Lord Macclesfield refused to order specific performance in a case which arose out

[1] Dawson and Copper, l.c., pp. 893 sqq.

[2] See e.g. Planiol–Ripert, vi, Nos. 391 sqq.

[3] Above, p. 76, n. 1. As to certain legislative measures adopted during the last War, see Planiol–Ripert, vi, No. 393; Hubrecht, pp. 138, 141 sqq. To a certain extent rescission is allowed by Arts. 1674–83 Code Civil, if land is sold for less than five-twelfths of its value at the time of the contract, which in cases where an option previously given is exercised subsequently, means the time of the exercise of the option: Cass. Req. 1 Aug. 1924, D.P. 1925, 1. 23.

[4] *RGZ.* 106, 7 and 11; 107, 19; *Warneyer, Rechtsprechung*, 1925, No. 82, 122. As to *Switzerland* see Henggeler and Guisan, *Zeitschrift für schweizerisches Recht*, 56 (1937), 238a sqq., 314a sqq.

[5] The better opinion seems to be that unless the construction of the contract allows an implied intention of the parties to be ascertained, no general 'clausula rebus sic stantibus' exists: *RGZ.* 140, 173; 140, 339; *Seufferts Archiv*, 83, No. 42; 87, No. 125; *JW.* 1934, 2685.

[6] See the cases p. 78, n. 1, above.

[7] p. 212.

of the effects of the change in money value brought about by the collapse of the South Sea Bubble, the reason being that 'a Court of Equity ought to take notice under what a general delusion the nation was at the time when this contract was made . . . when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on estates'.[1] But the case is now distinctly out of favour and cannot be regarded as an authority.[2] The leading principle as stated by Lord Eldon,[3] that the inadequacy must be such 'as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud', involves the further proposition that the question of inadequacy of consideration must be examined from the point of view of the time when the contract was made,[4] and it is therefore doubtful whether the doctrine is available even in case of a complete collapse of a currency.

In the *United States* the position is not substantially different. The leading case is *Willard* v. *Tayloe*,[5] the facts of which were as follows. In 1854 the plaintiff took a ten years' lease of certain real property coupled with an option to purchase the property before the end of the lease for $22,500, $2,000 of which were to be paid at the exercise of the option. Shortly before the expiration of the lease in 1864, when, owing to the issue of greenbacks, the premium on gold was more than 50 per cent., the plaintiff exercised the option and sent the defendant a cheque for $2,000 payable in notes, and subsequently he tendered the amount in notes, but the defendant refused to accept them. The plaintiff applied for specific performance, which was granted on the condition that he paid the purchase price in gold or silver coin and executed a mortgage as security therefor. Mr. Justice Field, delivering the opinion of the court, said that they perceived no reason which should preclude the plaintiff from claiming a specific performance of the contract,[6] but as regards the compensation granted by the conditions attached, he said[7] that 'it strikes one at once as inequitable to compel a transfer of the property for notes, worth when tendered in the

[1] *Savile* v. *Savile* (1721), 1 P.Wms. 745.
[2] Fry, *Specific Performance*, s. 448.
[3] *Coles* v. *Trecothick* (1804), 9 Ves. 246.
[4] Fry, l.c.
[5] (1869) 8 Wall. (75 U.S.) 557.
[6] At p. 573.
[7] At p. 574.

market only a little more than one half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution'. But although the case is now 'probably the leading American case on the subject of specific performance in general',[1] it cannot be, and has never been, understood as allowing a general price revision in case of monetary fluctuations, and as regards this very question, there are many reasons for which its authority is somewhat doubtful.[2]

[1] Dawson and Cooper, 33 (1935) *Mich. L.R.* 852, 867.

[2] See the detailed arguments of Dawson and Cooper, l.c., pp. 865–76, and the decision quoted, p. 78, n. 2, above.

CHAPTER IV

METHODS OF NEGATIVING THE EFFECTS OF NOMINALISM

I. Methods of protection. II. The gold clause (and similar clauses): (1) existence of a gold clause; (2) coin or value clause? III. Validity of protective clauses under (1) the nominalistic principle; (2) ordinary legal tender legislation; (3) compulsory tender legislation; (4) special statutes.

I

THE conclusion to be drawn from the discussion in the preceding chapter is that the effects of nominalism can to a very limited degree only be averted by the general principles of private law. It is therefore comprehensible that contracting parties often agree upon special stipulations for the purpose of protecting themselves against fluctuations in the value of money. This is particularly so in long-term contracts, such as bonds, insurance policies, or charter parties, especially if they have an international character. In this country, it is true, such provisions are very rare. No purely internal contract containing such a clause has come up for judicial decision, and even in international transactions British parties do not often insist upon protection against monetary fluctuations; they are generally content to provide for payment in pounds sterling and to rely on the stability of the British currency. This spirit sometimes prompted the British Government to abstain from the insertion of protective clauses even in transactions in which other co-contracting governments, placing less confidence in their currencies, insisted on protection.[1] Consequently it is not so much the frequency of such clauses in England as the intricacy of the legal problems raised by them which renders it necessary to scrutinize their nature and application.

[1] See Art. 262, Treaty of Versailles: 'Any monetary obligation due by Germany arising out of the present Treaty and expressed in terms of gold marks shall be payable at the option of the creditor in pounds sterling payable in London; gold dollars of the United States payable in New York; gold francs payable in Paris; or gold lire payable in Rome.' See also Art. 214, Treaty of St. Germain; Art. 197, Treaty of Trianon; Art. 146, Treaty of Neuilly. There is no gold clause in the English issue of the Young Loan; see Nussbaum, *Rec.* 43 (1933), p. 570.

If parties intend to provide for protection against monetary fluctuations, they have several means at their disposal. In the first place they may abstain from stipulating any sum of money at all, but may provide for a consideration consisting of a quantity of some commodity, e.g. gold or wheat; such contracts are not money obligations[1] and therefore are outside the province of this study. The parties may also stipulate for the consideration to be paid in some foreign currency in which they have greater confidence than in that of their own country; this case will have to be discussed in connexion with foreign currency debts in general.[2] Finally, the parties may agree on the payment of a sum of money of local currency, linking it to something which may be expected to be less exposed to fluctuations in value.

The nature of this 'something' may vary greatly.[3] The most stable object which is known and which therefore most frequently functions as a medium for securing value is gold, and, to a lesser extent, silver also. The gold clause has therefore in in all countries become the most familiar protective currency clause. But the parties may also refer to other commodities, such as rye or wheat or wine, and from a legal point of view such clauses are not inherently different from the gold clause. Another method is to connect the promised sum of local currency with some foreign currency, either with or without the addition of a rate of exchange guarantee. Finally the parties may refer to a sliding scale (*échelle mobile*) linked to price or other indices.

It is proposed to deal first with the gold and other commodity clauses, while from a legal point of view very little need be said about sliding scale clauses. Foreign currency clauses, to which different considerations apply, will be treated in connexion with foreign money obligations (below, Chapter V).

II

If there exists a mere promise to pay a certain sum of money of a certain currency, payment must be made in whatever is the

[1] See above, p. 55. [2] See below, p. 139.

[3] See generally, Sulkowski, *Rec.* 29 (1929), pp. 1, 77 sqq.; Planiol–Ripert, vii, Nos. 1166 sqq.; Hubrecht, pp. 341 sqq.; Piret, p. 227; as to contracting by reference to price indices see especially Dawson and Coultrap, 33 (1935) *Mich. L.R.* 685.

money of that currency at the date of maturity,[1] and it does not matter that at the time when the contract was made that currency was understood to be of a specific 'value' or on the gold standard, whether it was a gold specie, exchange, or bullion standard.[2] Thus the bare promise to pay francs ('francs sans épithète') does not imply the promise to pay gold francs, and it follows that the protection given by a special clause, whether it is a gold or any other clause, cannot come into existence save by agreement between the parties. 'La stipulation d'un paiement international à effectuer en francs-or ne peut résulter que de la convention des parties.'[3] On the other hand, it is not necessary that such a clause be expressed; it suffices if it can be inferred.

1. The question in what circumstances a gold clause[4] can be

[1] This is the principle of nominalism as discussed above, pp. 63 sqq.

[2] On these terms see above, p. 24, n. 5.

[3] Cass. Civ. 23 Jan. 1924, Clunet 1925, 169 (3e espèce); Cass. Civ. 21 Dec. 1932, Clunet 1933, 1201 and S. 1932, 1. 390; Cass. Req. 6 Dec. 1933, Clunet 1934, 946 and D.H. 1934, 34; Cass. Civ. 24 Jan. 1934 (2e espèce), D.P. 1934, 1. 73, 78; Cass. Req. 5 Nov. 1934, S. 1935, 1. 34; cf. Cass. Civ. 23 Jan. 1924, S. 1925, 1. 257.—In view of the international character of the franc and its importance in certain Eastern countries, it is not surprising to find that at one time a different solution was reached in *Egypt*. Thus the Court of Appeal of the Mixed Tribunal in Alexandria held that the Suez Canal Company had to pay their bonds, denominated in 'francs', at the gold value, the reason being that the franc referred to was 'ni le franc dit français, ni le franc dit égyptien, mais que ce franc était plus exactement le franc tout court, le franc universel d'un étalon monétaire commun à plusieurs pays, ayant une valeur fixe et déterminée en Égypte où le louis d'or avait alors cours légal en vertu des dispositions législatives de 1834' (4 June 1925, Clunet 1925, 1080; cf. also Paris Court of Appeal, 25 Feb. 1924, Clunet 1924, 688). But a recent judgment of the Court of Appeal has departed from these decisions, it now being held that the 'franc' is not 'une monnaie internationale', but that it is legal tender in Egypt at the tariff fixed in 1834, 'non pas comme une monnaie étrangère, mais comme une monnaie nationalisée ou adoptée': see the three judgments of 18 Feb. 1936 in *Gazette des Tribunaux Mixtes*, xxvi. 147, No. 127 (*re* Crédit Foncier Égyptien and Land Bank of Egypt); one of them also in Clunet 1936, 1004, and D. 1936, 2. 78. It is somewhat surprising that the argument has now been revived in the *French* Crédit Foncier Égyptien case: Trib. Civ. de la Seine, 31 May 1933, and Cour de Paris, 3 April 1936, D. 1936, 2. 88. See also Cour de Cassation of *Syria*, 20 June 1928, S. 1929, 4. 1, where it was said that 'le mot franc signifie non pas la monnaie ayant cours libératoire dans tel ou tel pays, mais un certain poids d'or relié par un rapport fixe avec le poids de métal fin contenu dans la livre turque'.

[4] The literature on the gold clause and its many problems is immense. In so far as it appeared up to 1933 it is collected by Nussbaum, *Rec.* 43 (1933), 559, 655. For later years see the successive reports in the *Bulletin de l'Institut Juridique International*; see also Wortley, *British Year Book*

read into the contract has engaged the courts on many occasions, and continental courts have gone rather far in admitting it: if the contract provides for payment in one of several currencies at the option of the creditor, a gold clause being attached to one currency only, it extends to the other currencies;[1] if bonds do not contain a gold clause, but if the prospectus does, this is sufficient;[2] if bonds refer to the minutes of the shareholders' meeting authorizing an issue of bonds 'produisant intérêt de 5 p. 100 en or', interest on the bonds is payable in gold.[3] On the other hand, there are countries where the interpretation appears to have been too restrictive. In Chile the words '. . . pesos of 183·057 millionths of a gramme of fine gold' do not apparently constitute a gold clause, but are merely 'a statutory synonym for Chilean pesos' or 'a transcription of Art. 1 of Decree Law 606 of the statutory description of the monetary unit of Chile by that law established'.[4] Similarly, the Austrian Supreme Court held[5] that the clause 'effektiv in Goldwährung des Deutschen Reiches' has no greater import than that payment must be made according to German currency laws. In Belgium the clause 'au cours de l'or' was held to be a mere 'clause de style' and therefore disregarded.[6] In Canada it was

of International Law, 1936, 112, and the valuable note in 1 (1937) *Modern L.R.* 158.

[1] Swiss Federal Tribunal, 11 Feb. 1931, Clunet 1931, 510 (Société d'Héraclée); Cass. Civ. 7 July 1931, Clunet 1932, 403 and S. 1932, 1. 255, and Cass. Req. 25 July 1933, S. 1933, 1. 350 (both Société d'Héraclée). See German Supreme Court, 5 Oct. 1936, *RGZ.* 152, 213. This is not the view of English law: *International Trustee for the Protection of Bondholders A.G.* v. *The King*, [1936] 3 All E.R. 407 (C.A.) at pp. 430, 431, where Lord Wright said that the gold clause attached to one option could not be imported into another.

[2] Cass. Civ. 9 July 1930, Clunet 1931, 124 (Société du Port de Rosario); but see Cass. Civ. 14 Feb. 1934, S. 1934, 1. 297 and D.P. 1934, 1. 73, 78 (Banque hypothécaire franco-argentine). See also the judgment of the Permanent Court of International Justice, Series A, Collection of Judgments 1928–30, judgment No. 15 at p. 113.

[3] Cass. Civ. 24 Jan. 1934 (1e espèce), D.P. 1934, 1. 73, with note by Trotabas (Compagnie du Chemin de fer de São Paolo à Rio Grande); but see the decision of the same day relating to the same bonds which, illustrating the very restricted power of the French Cour de Cassation, was to a different effect, because the minutes of the shareholders' meeting were not relied upon before the Court of Appeal: ibid. at p. 78 (2e espèce).

[4] *St. Pierre* v. *South American Stores Ltd.*, [1937] 1 All E.R. 206, affirmed by the Court of Appeal, [1937] 3 All E.R. 349.

[5] 12 March 1930, *JW.* 1930, 2480. In the same sense Supreme Court of Czechoslovakia, 17 March 1927, *Zeitschrift für Ostrecht*, 1928, 1208.

[6] Cass. 19 June 1930, *Rev. dr. banc.* 1931, 266.

held that the fact that a bond providing for payment of francs in Paris, Brussels, or Toronto was headed by the words '5 per cent. Gold Bond' did not involve the stipulation of a gold clause.[1]

The English courts may be expected to keep a middle course, though the Privy Council in *Ottoman Bank of Nicosia* v. *Dascalopoulos*[2] adopted rather liberal canons of construction. In 1905 the plaintiff became a member of the pensionable staff of a Turkish bank and in 1923 was transferred to its Cyprus branch, the appellant company. His salary, on which his pension was based, was a sum in Turkish pounds. Before 1915 the Turkish pound was a coin of specified gold content, but in 1915 paper money was issued in Turkey. Until the end of 1931, when the plaintiff retired, his salary was paid in Cyprus at the rate of 100 Cyprus pounds per 110 Turkish pounds. That rate was adopted when both England and Turkey were on the gold standard. But subsequently the Cyprus currency was moved off the gold standard and depreciated in terms of gold. The plaintiff contended that he was entitled to a pension payable in Turkish gold pounds translated into Cyprus currency at the rate of exchange of the day; while the bank contended primarily that he was entitled to a sum of Turkish pounds pure and simple, or, alternatively, that he was entitled to a sum of Turkish pounds payable in Cyprus pounds at the fixed rate of £cp.100 to £tq.110. The Privy Council decided in the plaintiff's favour, though there was nowhere an express reference to gold pounds. Lord Blanesburgh, delivering the opinion of the Board, said that the parties, when they referred to Turkish pounds, intended to indicate gold pounds[3] and that this intention was made clear by their conduct, inasmuch as the salary was never paid in Turkish paper pounds, but always on a gold basis,[4] and as in the bank's salary book the plaintiff's net salary of £tq.46·75 was equiparated to a sum of £cp.42 10*s*., which in the opinion of the Board could only refer to 'the Cyprus equivalent for a Turkish gold pound and for nothing else'.[5]

In the later case of *Ottoman Bank* v. *Chakarian* (No. 2),[6] how-

[1] *Derwa* v. *Rio de Janeiro Tramway Light & Power Co.* (1928), 4 D.L.R. 542, 553, 554 (Ontario Supreme Court, Rose J.).
[2] [1934] A.C. 354. [3] p. 357. [4] p. 362. [5] p. 360.
[6] [1938] A.C. 260; and see *Sforza* v. *Ottoman*, ibid. at p. 282.

ever, in which the facts were almost identical, the Privy Council arrived at the opposite result. The plaintiff-respondent retired from active service in 1931, when he became entitled to a pension of 48 per cent. of the basic salary of £tq.30 a month received on 31 December 1930, i.e. £tq.14·40 a month. The defendants-respondents declared that they were bound and prepared to pay that sum in accordance with the terms of a letter written to the plaintiff when he was transferred to Cyprus, namely 'on the basis of the system customary in that island' which was to pay the salary at the rate of £tq.110 to £cp.100. On 31 December 1930 the actual rate of exchange was £tq.900 to £cp.100,[1] so that whereas under the terms of the letter the plaintiff was entitled to a salary of about £cp.27⅓, the rate of exchange would have given him only about £cp.3⅓. But in view of the depreciation of British and, consequently, of Cyprus sterling in September 1931 the plaintiff demanded payment on the basis of a gold value clause, namely, of a fluctuating sum of money sufficient to purchase the quantity of gold bullion which would have been represented by the sum of Turkish pounds on a gold basis. This claim failed. Lord Wright, delivering the judgment of the Board, started from the fact that the contract, which was governed by Turkish law, contained no express stipulation of a gold clause. He emphasized that a contract providing for a sum of money pure and simple was subject to the nominalistic principle,[2] as opposed to any metallistic theory, and that this principle would be blurred, 'if it were now to be held that the gold clause is unnecessary because it is to be implied in every contract which was made at a time when the country was on gold and when payments were normally made on a gold basis'.[3] The evidence of the experts on Turkish law showed that by Turkish law a contract made, say, in 1912, subject to Turkish law, to pay £tq.20 a month would not be construed by that law as a contract to pay twenty pieces of gold, even though gold was the normal form of the then legal tender, but as a contract to pay £tq.20 in whatever might be legal tender in Turkey according to Turkish law at the material time.[4]

[1] At p. 278. [2] As explained above, pp. 63 sqq. [3] At p. 272.

[4] p. 270. Lord Wright reviewed the relevant provisions of Turkish law. They are also referred to in *Dascalopoulos's* case at pp. 361, 362, and in *Kricorian* v. *Ottoman Bank* (1932), 48 T.L.R. 247. It is, however, very remarkable that Turkey is perhaps the only country in the world where the existence of the

Lord Wright proceeded to state that a gold clause might have been inserted subsequently by the conduct of the parties if this had been so clear and unambiguous as to 'raise the inference that the parties have agreed to modify their contract'.[1] He could find no such facts and was of opinion that the practice to pay the basic salary at the rate of 110 : 100 'had the effect of making up to some extent the depreciation of the Turkish currency. It did not, however, put the payment of the Turkish salary when converted into Cyprus currency on a gold basis'.[2] Finally he distinguished *Dascalopoulos*'s case on the paramount ground that there the Board had no evidence before them on Turkish law.

The decision in the later case deserves approval. In both cases the actions were entirely misconceived. There was nothing in the nature of a gold clause. But there existed a promise to pay Turkish pounds coupled with a foreign currency clause '110 Turkish pounds being equal to 100 Cyprus pounds'. It will appear later[3] that in such circumstances the only problem could be whether that clause afforded an absolute or a relative measure of value. There was no justification for the view that the basic sum of Turkish pounds was meant to be a sum of gold pounds; it would have been another matter if the plaintiffs had contended that the *Cyprus* pound referred to in the clause was the gold pound.[4]

It remains, however, a question of some difficulty to decide which of the two cases has greater force as an authority. In *Ottoman Bank* v. *Chakarian* (No. 2)[5] Lord Wright emphasized

nominalistic principle is by no means secure; moreover, the effect of the Turkish legislation of 1915 authorizing the issue of paper money, particularly on payments to be made outside Turkey, is not at all free from doubt. See Cour de Cassation at Constantinople, 24 June 1921, discussed by Ténékidès Clunet, 1922, 71 sqq.; 24 July 1924, Clunet, 1925, 492, with note by Salem. The result reached in *Dascalopoulos's* case was also arrived at by the Court of Appeal of the Mixed Tribunal at Alexandria, 18 June 1934, *Gazette des Tribunaux Mixtes*, xxiv. 349, No. 412 (*Hanna* v. *Ottoman Bank*), whose judgment was followed by Trib. Comm. Alexandria, 15 April 1935, ibid. xxv. 320, No. 361 (*Nacouz* v. *Ottoman Bank*), but rejected by Trib. Comm. Cairo, 13 April 1935, ibid. xxv. 326, No. 362 (*Mazas* v. *Ottoman Bank*); see also Haifa District Court, Clunet, 1937, 912 (*Menni* v. *Ottoman Bank*). Cf. below, p. 193, n. 3.

[1] At p. 272. [2] At p. 276. [3] Below, pp. 143 sqq.

[4] Lord Wright said at p. 278 that 'it was, in the strict sense, merely accidental that the English pound was on gold in December 1930'. *Sed quaere*. This was certainly not the point of view prevailing in foreign countries: see the German decisions discussed below, p. 212. [5] [1938] A.C. 260.

that the contract of employment under which the claim arose was governed by Turkish law; but many of his subsequent statements and the reliance placed on English authorities suggest that on some of the material points English law was not without influence. In *Dascalopoulos*'s case,[1] on the other hand, the Board evidently disregarded Turkish law and therefore in effect proceeded on the basis of English law. It follows that, as regards English law, the less fortunate decision in *Dascalopoulos*'s case may have greater authority.

2. Where a gold or other commodity clause has either expressly or impliedly been incorporated in a contract, the question very often arises whether the stipulated amount is to be paid by the delivery of that to which the clause refers (gold coin, quantity of rye, and so forth) or whether the amount, being uncertain and variable, is to be paid in whatever is money at the time of payment, but in so much of such money as corresponds to the then existing value of the thing mentioned in the clause.[2,3] In other words, the question arises whether the clause fixes the instrument or mode of payment (*modality clause*) or the substance or amount of the debt (*value clause*).

In normal circumstances this distinction, though theoretically important, is not of great practical interest, because it does not matter to either party whether the creditor is entitled to £10 in gold (or to a quantity of rye), or is entitled to a sum of

[1] [1934] A.C. 354.

[2] A third method of construction was adopted in the United States: If the debtor undertakes to pay, say, $1,000 'in paper hangings at the regular trade price', the American courts held that the contract provided for an alternative promise, namely either to pay $1,000 or to deliver paper hangings, and that the option was stipulated for the benefit of the debtor who, unless he chose to deliver the commodity, was bound to pay not the stipulated sum of money, but the value of the paper hangings: see Sedgwick, *On Damages*, s. 279c, and see, e.g., *Meseroe* v. *Ammidon* (1872), 109 Mass. 415, and recently *Moore* v. *Clines* (1933), 247 Ky. 605, 57 S.W. (2d) 509, where, however, on the particular facts of the case, a different construction was arrived at. From the point of view of English law it seems rather far-fetched to read into such a contract an alternative promise. It would seem preferable to regard the clause as a monetary obligation to which a modality clause is added: To deliver so many paper hangings as at the regular trade price prevailing at the date of performance have a value of $1,000.

[3] The essence of a gold value clause has been very well described as 'a measuring rod or measure of liability': *International Trustee for the Protection of Bondholders A.-G.* v. *The King*, [1936] 3 All E.R. 407 (C.A.), 419 per Lord Wright.

money in notes with which he can buy the gold (or rye). The distinction, however, becomes important when monetary disturbances occur; for experience shows that in such circumstances modern States often resort to the remedy of making notes inconvertible legal tender, i.e. compulsory tender,[1] thereby often enabling the debtor to discharge the debt by handing notes to his creditor. If the clause defines the instrument of payment, the creditor must be satisfied to receive so many notes as correspond to the nominal amount of the debt;[2] if, on the other hand, it determines the substance of the obligation, i.e. the amount, the creditor is entitled to receive so much in addition to the nominal amount of the debt as corresponds to the increased value of the *tertium comparationis* referred to in the clause. This distinction between modality and value clauses is recognized in all countries, particularly since it was accepted by the Permanent Court of International Justice at The Hague.[3]

In some cases it clearly follows from the wording of the clause that it has the character of a value clause. This is obviously so if the parties refer to indices or to the price of commodities, not to the commodities themselves. It is also clear that certain statutory provisions made in consequence of international conventions envisage a value clause. Thus Art. IX of the Schedule of the Carriage of Goods by Sea Act, 1924,[4] based on the proposals of the International Conference on Maritime Law held at Brussels in 1922, provides that 'the monetary units mentioned in these Rules are to be taken to be gold value'.[5] Similarly Art. 22 (4) of the First Schedule of the Carriage by Air Act, 1932,[6] based on the Convention signed at Warsaw, provides that 'the sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams gold of millesimal fineness 900'.[7] In both these cases it is clear that value clauses have been enacted.

[1] See above, p. 31.

[2] But see p. 56, n. 5.

[3] Case of Serbian Loans, Collection of Judgments, Series A, No. 14 (1928–30), pp. 32, 41.

[4] 14 & 15 Geo. V, ch. 22.

[5] The meaning of this provision is mysterious inasmuch as it is not clear with reference to what date the gold value of the monetary units is to be ascertained. On the important questions how, and with reference to what date, the gold value is to be determined, see generally Nussbaum, *Rec.* 43 (1933), 559, 624–31.

[6] 22 & 23 Geo. V, ch. 36.

[7] S. 1 (5) of the Act provides for conversion 'into sterling at the rate of

In a greater number of cases the clause prima facie refers to the instrument of payment, and then two questions of construction arise. If the meaning of the clause is doubtful, the question is whether the parties meant a modality or a value clause; if the clause is, or on construction has been found to be, a modality clause, it is still necessary to examine the question whether it is or is not permissible to transform a modality clause into a value clause.

The latter question must be and has always[1] been answered in the negative. The clause, having once been ascertained as defining the instrument of payment, cannot be given an entirely different character for reasons which are not really founded on the construction of the individual clause, but on general considerations. Thus the German Supreme Court, having held such expressions as 'Goldmark', 'in gold of German Reich currency', &c., to be gold coin clauses, refused to transform them into gold value clauses,[2] and the same attitude has been taken by the Belgian courts.[3]

As regards the question whether a clause is a modality or a value clause, the answer depends on the construction of each individual contract, and no hard-and-fast rule can be laid down.[4] The only guiding principle is this, that, 'as it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word "gold" cannot be ignored, the question is: what must be deemed to be the significance of that expression?'[5] In general it will appear that the parties intended to guard against the fluctua-

exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the Court'. See on this provision below, p. 291.

[1] But see Dutch Hooge Raad, 13 March 1936, Plesch, *The Gold Clause*, ii. 8. The decision is, however, not quite conclusive on the point.

[2] See, e.g., 26 April 1928, *RGZ.* 121, 110; 30 April 1932, *RGZ.* 136, 169, 171.

[3] Cass. 27 April 1933, Clunet, 1933, 739; Piret, pp. 246–8.

[4] The suggestion (Schmitthoff, *Journal of Comparative Legislation*, xviii (1937), 266, 272) that 'there is a strong presumption that the gold clause is always in the nature of a gold value clause, this presumption being rebuttable only if a particular intention of the parties is apparent', is untenable and irreconcilable with the prevailing practice, which puts the burden of showing the existence of a gold value clause on the creditor. There is only one type of gold clause with regard to which Schmitthoff's statement may be correct: see p. 102, n. 8.

[5] Permanent Court of International Justice, Case of Serbian Loans, Collection of Judgments 1928–1930, Series A, No. 14, p. 32.

tions of a particular currency. Though this will most frequently be done in the interest of the creditor, it should not be overlooked that monetary value may not only decrease, but also increase (e.g. by an increase of the gold content of coins), and that in the latter case (which, it is true, is rare in modern history) it would be in the interest of the debtor to stipulate for a gold value clause.

As each individual clause requires its own construction, and as the application of the general rules of interpreting contracts vary in each country, decisions of the various courts lack general validity, and their authority should not be overrated when the problem arises in another case, though judicial precedents may contain important principles relating to the proper method of approaching the question. In this country the proper method to be applied has been authoritatively stated in *Feist* v. *Société Intercommunale Belge d'Électricité*,[1] where Lord Russell first examined the literal meaning of the clause and then asked himself this question:[2]

'If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document,[3] to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means,[3] effect should be given to it.'

Though generalization cannot be carried further, it may be useful to give a survey of the results arrived at by various courts in interpreting gold clauses.

The most restrictive construction has been adopted by the *German* Supreme Court when dealing with the usual types of German clauses, such as: 'Goldmark', 'in Gold deutscher Reichswährung', 'in Gold', and so forth; these clauses were always held to be gold coin clauses.[4] On the other hand, the most

[1] [1934] A.C. 161. [2] At p. 172.

[3] These words, which so closely correspond to the general canons of construction prevailing in this country, require particular emphasis.

[4] 30 April 1932, *RGZ.* 136, 169, 172, with numerous references to previous decisions. In a very interesting decision the *Austrian* Supreme Court held that an old clause 'guilders of Austrian currency in silver' was a silver value clause

liberal construction has prevailed with the *Permanent Court of International Justice*[1] and in *France*[2] and *Switzerland*,[3] where, it appears, the mere fact that the word gold is used in such connexions as francs-or, piastres-or, marks-or, and so on renders the clause a value clause. The usual *American* clause 'in gold coin of the United States of America of or equal to the standard of weight and fineness existing on . . .' was held to be a value clause by the Supreme Court of the United States,[4] and this interpretation was accepted in other countries even where the construction of the clause was not held to be governed by American law.[5] A similar *English* clause, '£100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928,' was held to be a gold value clause by the House of Lords[6] and by the Court of Appeal.[7] The result reached with regard to the construction of such clauses has been stated by Lord Russell in the following words:[8]

and thus survived many monetary changes: 17 Dec. 1930, *Bankarchiv*, 30 (1931), 247.

[1] Case of Serbian loans, see p. 99, n. 3 above.

[2] Cass. Civ. 23 Jan. 1924, Clunet, 1924, 685, and Clunet, 1925, 166, 168 (three judgments); Cass. Civ. 9 July, 1930, S. 1931, 1. 124 (Société du Port de Rosario); 7 July 1931, S. 1932, 1. 255 (Société d'Heraclée); 21 Dec. 1932, S. 1932, 1. 390 and Clunet, 1933, 1201 (Chemin de fer de Rosario); cf. 14 Jan. 1931, S. 1931, 1. 125, and Clunet, 1931, 126 (Ville de Tokio). It is probably no exaggeration to say that in France every gold clause is a gold value clause.

[3] Federal Tribunal, 11 Feb. 1931, Clunet, 1931, 510 (Société d'Heraclée).

[4] *Norman* v. *Baltimore & Ohio Railway Co.* (1935), 294 U.S. 240, at p. 302 per Chief Justice Hughes; *Perry* v. *United States* (1935), 294 U.S. 330 at p. 348 per Chief Justice Hughes, at p. 338 per Mr. Justice Stone, at p. 366 per Mr. Justice McReynolds.

[5] *England*: *The King* v. *International Trustee for the Protection of Bondholders*, [1936] 2 All E.R. 407 (C.A.); though on appeal the decision was reversed ([1937] A.C. 500), the *ratio decidendi* being that the contract was governed by American law under which the clause was illegal, the construction of the Court of Appeal was obiter approved of by Lords Atkin, Russell, and Roche (pp. 555, 556, 573). *Austria*: Supreme Court, 26 Nov. 1935, *RabelsZ.* 1935, 891, 892. *Finland*: Supreme Court, 18 Jan. 1933, *RabelsZ.* 1933, 467. *Germany*: Supreme Court, 24 April 1936, *B.I.J.I.* 35 (1936), 124, and Plesch, *The Gold Clause*, ii. 25; 28 May 1936, *RabelsZ.* 1936, 385, and Plesch, l.c., p. 30, confirming Berlin Court of Appeal, *B.I.J.I.* 33 (1935), 78, and Plesch, l.c. i. 99. *Holland*: Hooge Raad, 13 May 1936, Plesch, *The Gold Clause*, ii. 8.

[6] *Feist* v. *Société Intercommunale Belge d'Électricité*, [1934] A.C. 161.

[7] *British & French Trust Corporation* v. *The New Brunswick Railway Co.*, [1937] 4 All E.R. 516 reversing the decision of Hilbery J. in [1936] 1 All E.R. 13. On this case see below, p. 224.

[8] *The King* v. *International Trustee for the Protection of Bondholders A.-G.*,

'The gold clauses have, however, come under the review of judicial tribunals in many countries and the "Feist construction" has prevailed in that they are generally regarded merely as clauses to protect one of the contracting parties against a depreciation of the currency. It would I think be regrettable if a uniformity in this respect did not prevail, and that a different construction should be applied, except in cases where the "Feist construction" is expressly excluded.'

In another English case Branson J. disregarded the word 'gold',[1] but as the clause was differently worded, his decision is not affected by the later cases or statements relating to the usual American or the 'Feist' clause.

III

The last question which remains to be considered is whether and how far agreements made for the purpose of averting the consequences of nominalism and discussed in the preceding paragraphs are valid in law. This problem[2] must be treated under four different headings.

1. It seems to be generally recognized that the *nominalistic principle as such*, apart from any legal tender or special legislation, does not invalidate gold or similar clauses.[3] This is so even in France and some other countries where nominalism has been

[1937] A.C. 500, 556. The clearest method of expressing a gold value clause is pointed out in the Order made by the House of Lords in *Feist's* case, *ubi supra*; it would read as follows: 'to pay £100 in gold coin of the United Kingdom or in so much current legal tender of the United Kingdom that every pound comprised in the nominal amount of such payment represents the price in London in sterling (calculated at the due date of payment) of 123·27447 grains of gold of the standard of fineness specified in the First Schedule to the Coinage Act, 1870.' The type of clause mentioned in the text is so similar to this clause that a gold value clause can readily be inferred. But in the absence of the words 'of or equal to the standard of weight and fineness existing on . . . ' it will be very difficult for an English lawyer to find any reference to the 'value'.

[1] *Modiano Bros.* v. *Bailey & Sons* (1933), 47 Ll. L.R. 134 ('freight charges: 22/6 sh. per ton of 1,000 kilos payable at destination. Freight collect on basis of pound sterling equals 4.86 U.S. gold dollars, shipowners to have option of collecting U.S. dollars or their own country's currency at ruling rate of exchange for U.S. gold dollars').

[2] For comparative surveys see Guisan, *La Dépréciation monétaire*, pp. 155 sqq.; Reiss, *Portée internationale des lois interdisant la clause-or*, pp. 11–90.

[3] If an English authority is wanted, it is supplied by *Feist's* case ([1934] A.C. 161) which, though it does not solve all problems relating to the question of validity and though it does not expressly discuss the question of validity at all, by giving judgment for the plaintiffs implies the validity of the gold value clause.

put on a statutory basis.[1] Though the question whether the rule of Art. 1895 Code Civil has the character of *jus cogens* or of *jus dispositivum* is in dispute, the answer given by the greater number of jurists is in the latter sense,[2] and gold and similar clauses are in normal circumstances held to be valid.[3] The fact that nominalism has not the character of strict law is certainly at first sight surprising, and it has therefore been used as an argument against the soundness of the nominalistic principle.[4] But the explanation is that nominalism is not founded on public policy, but on the supposed intention of the parties.[5]

2. Nor are protective currency clauses irreconcilable with *ordinary legal tender legislation* providing for convertible money and regulating its denomination. In so far as (gold) value clauses and foreign currency clauses are concerned, this proposition is not doubted.[6] It is, however, a serious problem whether a promise to pay in one kind of money only to the exclusion of others (gold coin clause) is valid and, if not, how the validity of the contract in general is affected thereby.

While in Germany, for instance, the validity of the gold coin clause is firmly established,[7] the problem is much disputed in France[8] and Italy.[9] In this country, too, the question is an open one, the difficulties with regard to it arising from the provisions of the Coinage Act, 1870, and the decision of the majority of the Court of Appeal (Lawrence and Romer L.JJ., Lord Hanworth M.R. dissenting) in *Feist* v. *Société Intercommunale Belge d'Élec-*

[1] See above, p. 67.

[2] Degand, *Rép. dr. int.* iii (1929), 'Change', No. 24, with further references.

[3] Degand, l.c., No. 28; Planiol–Ripert, ii, No. 424; vii, Nos. 1167, 1169.

[4] See Eckstein, *Geldschuld und Geldwert*, pp. 60–76.

[5] Above, p. 63.

[6] See the concluding remarks of Lord Russell in *Feist* v. *Société Intercommunale Belge d'Électricité*, [1934] A.C. 161, 174.

[7] It even does not matter that gold coins are not in circulation, because it follows from s. 245, Civil Code (above, p. 56, n. 5), that so long as this situation persists, obligations are to be fulfilled by the tender of paper money at the nominal rate: see, e.g., Staub (Gadow), *Kommentar zum Handelsgesetzbuch*, iii. 274, 275, with further references.

[8] See Mater, p. 178, n. 8, with further references; but see also Planiol–Ripert, who regard the gold coin clause as invalid (vii, No. 1167) and apparently adopt the same attitude with regard to gold value clauses (vii, No. 1170,) though commodity and sliding scale clauses, unless they refer to gold, are regarded as valid (vii, Nos. 1174, 1175). According to Lyon–Caen et Renault, *Traité de droit commercial* (1925), iv, No. 762, gold coin clauses are valid.

[9] Ascarelli, *RabelsZ.* 1928, 793, 796.

tricité.[1] This case, it will be remembered, concerned the interpretation of a bond issued in 1928 which provided for payment of £100 and interest 'in sterling gold coin of the United Kingdom or equal to the standard of weight and fineness existing on the 1st September 1928'. As the House of Lords regarded the clause as a gold value clause, the question of the validity of the gold coin clause did not arise[2] and therefore the observations made in the courts below, where the clause was held to be a gold coin clause, still require attention.

In the court of first instance, Farwell J.[3] held that the contract was to pay fixed sums by one particular form of legal tender and none other, that such a contract was not illegal, but that the defendants were notwithstanding it entitled to pay the fixed sums 'in whatever was legal tender at the time when the tender was made'.[4] He added[4] that 'that is clearly shown by s. 6 of the Coinage Act 1870' and he therefore regarded s. 6[5] as meaning that a debt is discharged by the payment of whatever is legal tender, notwithstanding any special agreements between the parties. In the Court of Appeal, Lawrence L.J. said[6] that the clause differed

'only from what would otherwise have been implied by virtue of s. 6 of the Act of 1870, in that there is no reference in it to silver and bronze coins which under s. 4 are legal tender for an aggregate amount of 41*s*. 0*d*. In these circumstances, the stipulation in question either states in substance what would be implied by law or, if the omission of silver and bronze coins be regarded as a substantial departure from the provisions of s. 6, is contrary to those provisions and therefore invalid. In either case the stipulation does not and cannot, in my opinion, prevent bank notes which under the Acts of 1833 and 1928 are made legal tender from being legal tender. . . . A contract that a debt shall be discharged by payment in gold coins (being one form of legal tender) cannot abrogate the enactment by the legislature that the debt may be discharged by payment in bank notes (being another form of legal tender).'

A similar view was expressed by Romer L.J.,[7] who said that under s. 6 a contract

'must be treated as providing for payment "according" to the coins

[1] [1934] A.C. 161. [2] [1934] A.C. 161, 172 per Lord Russell.
[3] [1933] Ch. 684, 687–93; see also the Australian case of *Jolley* v. *Mainka* (1933), 49 C.L.R. 242. [4] At p. 688.
[5] The text is given above, p. 28. [6] p. 705. [7] p. 710.

which are current and legal tender in pursuance of the Act, and not otherwise. This seems to render illegal a contract to exclude the provisions of the Acts as to legal tender. It would be strange if it were not so, for these provisions are an essential feature of our currency law, and great confusion and public inconvenience and loss might be occasioned if they were to be disregarded.'

He then dealt with the position of silver in 1919 and 1920 and, basing himself on s. 6, arrived at the result, not that the whole contract was unenforceable, but that the words which provided for payment in one form of legal tender only and which created the illegality, must be treated as 'excluded'.

These opinions do not sufficiently distinguish between the three entirely different lines of thought which govern the problem.

In the first place, it is necessary to examine whether a gold coin clause is invalidated by the provisions of s. 4, Coinage Act, 1870, according to which bronze coins shall be legal tender for an amount not exceeding 1*s.*, silver coins for an amount not exceeding 40*s.*, and gold coins for any amount. The answer should be in the negative. Those provisions provide for the usual and regular method of discharging money obligations, but they do not contain a single word which would prohibit or which even refers to an agreement stipulating for payment in one kind of legal tender only. As regards sums exceeding 41*s.*, payment in gold coins is the method envisaged by the Act itself. If the parties stipulated for the payment of amounts of less than 41*s.* in gold coins (which are legal tender for 'any amount') or for the payment of amounts exceeding 41*s.* in silver coins, there is nothing in s. 4 which would invalidate such an agreement.

Secondly, s. 6, Coinage Act, 1870, must be considered. The positive meaning which, it is submitted, should be attributed to this 'obscure' section, has been explained above.[1] It remains to be shown that it cannot be understood in the sense asserted by Lawrence and Romer L.JJ. If the gold coin clause is added to the promise to pay an amount exceeding 41*s.*, the clause does not only not violate s. 6, but is fully in accordance with it; for the payment in gold coins is exactly what s. 4 and s. 6 ('. . . in pursuance of *this* Act . . .') envisage in respect of such amounts,

[1] pp. 28 sqq.

and the omission of silver and bronze coins which Lawrence L.J. vaguely suggested as a 'substantial departure from the provisions of s. 6', is also irreproachable, because according to s. 4 such coins are legal tender only for an amount 'not exceeding one shilling (and/or 40 shillings) but for no greater amount', i.e. as Lawrence L.J. himself said, they are 'legal tender for an *aggregate* amount of 41*s*.'. On the other hand, the exclusion of bank notes in respect of the payment of an amount exceeding 41*s*. cannot be invalidated by s. 6, not only because s. 4 envisages the tender of gold coins, but especially because s. 6 itself refers to *coins* only: '. . . according to the coins which are current and legal tender in pursuance of this Act. . . .' This wording of s. 6 makes it abundantly clear that the section neither demands the use of bank notes nor prohibits their exclusion. Even if s. 6 had any bearing on the point, which was denied above,[1] it is impossible to accept the above-mentioned words of Romer L.J. that s. 6 'seems to render illegal a contract to exclude the provisions of the Act as to legal tender'; by referring to nothing but coins s. 6 does not prohibit the exclusion of bank notes, and by referring to payment 'according to the coins which are current and legal tender in pursuance of *this* Act' it even envisages payment in gold coins. If a silver coin clause is added to the promise to pay an amount exceeding 41*s*., or if a gold clause is added to the promise to pay an amount of less than 41*s*., it becomes a matter of greater difficulty to assess the true effect of s. 6. According to the wording of the provision, it is true, such clauses might be invalid; but they are valid, if the view is accepted that s. 6 restricts the parties' freedom of contract only in so far as it excludes payment in coins which the Act of 1870 does not recognize as current.

Thirdly, the inquiry must be directed to the question whether the provisions of the Acts of 1833 and 1928, making bank notes legal tender for any amount, invalidate gold coin clauses. These provisions have the same character as s. 4, Coinage Act, 1870, and they do not in any way deal with the validity of gold coin clauses. Moreover, in so far as the Act of 1833 is concerned, it ought to be remembered that its foundation was free convertibility, and it would therefore have been absurd to legislate against gold coin clauses. As regards the Act of 1928 (18 & 19

[1] p. 29.

Geo. V, ch. 13) it merely made notes legal tender for the payment of any amount. But it does not follow therefrom that the parties cannot provide for payment in another form of legal tender, especially as the Gold Standard Act, 1925, did not altogether abolish convertibility.[1]

3. The question whether the issue of *inconvertible paper money*, i.e. the introduction of fiat money or compulsory tender,[2] renders gold and similar clauses invalid, has repeatedly caused great difficulties in various countries.

Before the decision of the Supreme Court of the United States in *Bronson* v. *Rodes*[3] and *Butler* v. *Horwitz*[4] enforcing the gold clause by way of judgments for gold and silver coins, its invalidity was in fact asserted by an imposing number of American State courts, which regarded the gold clause as invalidated by implication, inasmuch as the legislation of Congress had made the inconvertible greenbacks legal tender.[5] The contrary decisions of the Supreme Court were at the time 'a real innovation'.[6]

Shortly after these decisions upholding the gold clause, the French Cour de Cassation, falling into line with the arguments of the American State courts, inaugurated an uninterrupted line of decisions to the effect that a supervenient *cours forcé* introduced in France in August 1870, and then again in August 1914, invalidated all gold (coin or value) and other protective clauses referring to gold or foreign exchange, the reason being that the monetary laws in question were 'd'ordre public' and that consequently 'le créancier ne peut légalement se refuser à recevoir en paiement un papier de crédit auquel la loi a attribué une valeur obligatoirement équivalente à celle des espèces métalliques'.[7] The very wide meaning thus given to the 'force libératoire de la monnaie-papier', which is due to an isolated

[1] Above, p. 30. [2] On these terms see above, p. 31.

[3] (1868) 7 Wall. (74 U.S.) 229. [4] Ibid. 258.

[5] See the references in Dawson, 'Gold Clause Decisions', 33 (1935) *Mich. L.R.* 647, 674, n. 54; Sedgwick, *On Damages*, 9th ed. (1912), i, s. 270.

[6] Dawson, l.c., p. 675.

[7] Cass. Civ. 11 Feb. 1873, S. 1873, 1. 97. See on this question the discussion and the material collected by Mater, *Rev. dr. banc.* 1923, 193, 289; Planiol–Ripert–Esmein, vii, Nos. 1165 sqq.; Degand, *Rép. dr. int.* iii (1929), 'Change', Nos. 33 sqq.; André–Prudhomme, Clunet, 1931, 5. This principle comprises all protective clauses except commodity clauses, which are valid whether they are modality or value clauses: Cass. Civ. 18 Feb. and 19 March 1929, S. 1930, 1. 1; Cass. Req. 1 Aug. 1929, S. 1930, 1. 97.

doctrine peculiar to France, has been restricted by the admission of one exception only, viz. that in so far as the gold or guarantee clause is attached to a 'paiement international', it is valid and not affected by the *cours forcé*, because clauses attached to such payments are reconcilable with the object of the legislation, namely 'l'ordre public, exclusivement fondé sur un intérêt national, n'étant intéressé au cours forcé qu'en ce qui concerne les paiements en France par les Français'.[1] The Belgian Cour de Cassation did not entirely accept these views: though the gold coin clause is invalid under a *cours forcé*,[2] the gold value clause is not affected thereby.[3]

In view of the decision of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Électricité*[4] it cannot be doubted that in English law (gold) value clauses are not affected by the issue of inconvertible paper money initiated by the Gold Standard (Amendment) Act, 1931. Commenting on the decision of the House of Lords in *Feist*'s case, Professor Gutteridge,[5]

[1] Cass. Req. 7 June 1920, S. 1920, 1. 193 (Compagnie d'Assurance La New York *v.* Deschamps). On the meaning of the term 'paiement international' there exists an extensive line of later decisions collected and discussed by the authors mentioned in the preceding note. An excellent survey is also given by Mestre, *Quelques Aspects juridiques des paiements internationaux* (Cahiers de droit étranger, No. 5, 1934), pp. 9–38. It seems to be *communis opinio* in France that the best definition of a 'paiement international' is that given by the Attorney-General Paul Matter in his argument in the case resulting in the decision of the Cour de Cassation of 17 May 1927, D.P. 1928, 1. 25, when he said that 'il faut que le contrat produise, comme un mouvement de flux et de reflux au-dessus des frontières, des conséquences réciproques dans un pays et dans un autre'. This definition underlies Art. 6 of the Statute of 1 Oct. 1936 repealed by Art. 1 of the Statute of 18 Feb. 1937 ('impliquant double transfert de fonds de pays à pays'). Recently the Cour de Cassation seems to prefer the following formula: 'le caractère international d'une opération ne dépend pas du lieu stipulé pour son règlement, mais de sa nature et des divers éléments qui entrent en ligne de compte, quel que soit le domicile des contractants, pour imprimer aux mouvements de fonds qu'elle comporte un caractère dépassant le cadre de l'économie interne' (Cass. Civ. 14 Feb. 1934, D.P. 1934, 1. 78, *re* Banque hypothécaire franco-argentine). The principle that in case of 'paiements internationaux' gold and similar clauses are valid, has been put on a statutory basis by the Acts of 25 June 1928 and 18 Feb. 1937.

[2] Cass. 27 April 1933, Clunet, 1933, 739. In *Czechoslovakia* the devaluation of the Czechoslovakian kroner did not affect the validity of gold clauses: Supreme Court, 10 Dec. 1936, *Zeitschrift für osteuropäisches Recht*, 4 (1937), 54, and the same view is held in *Switzerland*: Guisan, *Zeitschrift für schweizerisches Recht*, 56 (1937), 295a sqq.

[3] Cass. 12 May, 1932, mentioned by Piret, p. 244.

[4] [1934] A.C. 161.

[5] 51 (1935) *L.Q.R.* 115.

it is true, pointed out that the clause had been upheld 'notwithstanding the provisions of the Currency and Bank Notes Act, 1928', and that the decision 'is silent on the question whether such clauses are contrary to public policy or not, but it is significant that this issue was not raised either by counsel for the defendants or by the Court'. But although the decision is silent on the point, silence in this case is affirmation, because the gold value clause was in fact enforced.

It is submitted that the conclusion could not be different and, moreover, that enforceability should be extended to gold coin clauses. It has been shown above that there is nowhere any statutory provision prohibiting gold (coin) clauses. The process of drawing implications from the purpose of an Act of Parliament (such as that of 1928 or 1931), which was applied in France and in the American States and which underlies some statements in the opinions of Lawrence and Romer L.JJ. above referred to,[1] is wholly foreign to the English method of interpreting legislative measures.

As regards public policy, it is difficult to see what rule of public policy could have any bearing on the validity of these clauses. That nominalism itself is not a rule of public policy and does not invalidate protective measures has been mentioned above.[2]

4. There thus remains only one possibility of invalidating gold and other clauses, and that is special and express *legislation*. Indeed, this method has been resorted to whenever it was desired in this country to ensure the strictest observation of the nominalistic principle, and this is further proof, if such be needed, of the validity of gold clauses under present conditions.

It is interesting to note that as early as 1352 the statute 25 Edw. III, ch. 12, prohibited the making of any profit on exchanging coined gold for coined silver or coined silver for

[1] See especially Lawrence L.J.'s words: 'A contract that a contract shall be discharged by payment in gold coins (being one form of legal tender) cannot abrogate the enactment by the legislature that the debt may be discharged by payment in bank notes (being another form of legal tender).' But by enacting that a debt '*may*' be discharged by the payment of bank notes, the legislature has not enacted that it *must* be so discharged.

[2] p. 103. The view that gold coin clauses are not invalid, together with the fact that their performance is not impossible, provides the basis for the suggestion that in this country it is irrelevant to examine whether gold clauses are coin or value clauses: see above, p. 56, n. 5.

coined gold, and this provision was re-enacted by the Statute 5 & 6 Edw. VI, ch. 19, which provided

'that if any person or persons after the 1st April next shall exchange any coined gold, coined silver or money, giving receiving or paying any more in value benefit profit or advantage for it than the same is or shall be declared by the King's Majesty his proclamation to be current for, within this his Realm and other dominions',

the money was forfeited and the wrongdoer was liable to imprisonment. It was this Act which, during the Bank Restriction period, prevented people from quoting openly two prices for commodities, one for payment in guineas and the other for payment in paper, but the practice existed in secret and it was also usual to buy guineas for paper at more than face value.[1] Two obscure men were prosecuted, but after the case had given rise to considerable public excitement,[2] the accused were acquitted.[3] The effect of this decision was, however, promptly remedied by Parliament,[4] and by Lord Liverpool's Act of 1816[5] it was provided (s. 13)

'that from and after the passing of this Act no person shall by any means, device, shift or contrivance whatsoever receive or pay for any gold coin lawfully current within the United Kingdom of Great Britain and Ireland any more or less in value, benefit, profit, or advantage than the true lawful value which such gold coin does or shall by its denomination import'.

This provision as well as the earlier enactments have long ago been repealed.[6] Although in the course of the recent monetary disturbances many countries felt compelled to invalidate gold clauses by legislative measures,[7] no such steps were taken in

[1] Feavearyear, pp. 187, 193.

[2] Lord King published a pamphlet on it, and see the debates in the House of Commons on 5 April and 9 July 1811 in Hansard, xix. 723 and xx. 881 sqq.

[3] *De Yonge's case* (1811), 14 East 403; Feavearyear, p. 193, suggests that the reason was that there had been no paper money in the reign of Edward VI. But this is not mentioned by the reporter.

[4] 51 Geo. III, ch. 127 (24 July 1811); see 52 Geo. III, ch. 50.

[5] 56 Geo. III, ch. 68.

[6] By 2 & 3 Will. IV, ch. 34, s. 1; Coinage Act, 1870 (33 & 34 Vict., ch. 10), s. 20; and by Statute Law Revision Act, 1873.

[7] A great number of enactments are collected by Nussbaum, 44 (1935) *Yale L.J.* 53, 61 and by Reiss, *Portée internationale des lois interdisant la clause-or. Brazil*, Statute of 27 Nov. 1933 in *B.I.J.I.* 30 (1934) 261; *Denmark* Statute of 27 Nov. 1936, *RabelsZ.* 1937, 275; *Canada*, 1 Geo. VI, ch. 33, 10 April 1937, in 37 (1937) *B.I.J.I.* at p. 109. In some countries the abrogation of the

this country. Where such statutes are enacted it often becomes a difficult question of construction (not of private international law) to define the territorial limits of their application. As a general rule it may be a workable suggestion that they do not affect gold clauses attached to promises to pay another money than that of the legislating State. This rule has been repeatedly applied,[1] especially in connexion with the interpretation of the American Joint Resolution of Congress of 5 June 1933.[2] But otherwise no hard-and-fast rule can be laid down, and as regards the Joint Resolution, various attempts to exclude its application were bound to fail, because its wording leaves no doubt that it applies irrespective of whether creditor or debtor is a national of or residing or domiciled in the United States,[3] or whether the place of payment or collection is or is not situated within the United States.[4, 5]

gold clause was confined to certain specified contracts, especially leases: *Belgium*, 11 April 1935, see Piret, pp. 264 sqq.; *Holland*, 24 May 1937, *RabelsZ.* 1937, 275. It should perhaps be mentioned that it has been suggested in *Germany* that gold and similar clauses are irreconcilable with the principles of the National Socialist State: Juergensen, *JW.* 1937, 2947, with further references, and see Meyer-Collings, *JW.* 1937, 3281. The decree made in *Egypt* on 2 May 1935 (Clunet, 1935, 1103) is due to the interesting fact that the Court of Appeal of the Mixed Tribunal adopted the French doctrine that gold clauses are valid in connexion with 'paiements internationaux', although they are invalid in respect of internal payments in view of a decree of 2 Aug. 1914; see the judgments in *Gazette des Tribunaux Mixtes*, 23 (1933) 262, 282, 286, and Clunet, 1933, 1058, 1061; 1934, 1009; 1935, 1076.

[1] See, e.g., Supreme Court of Rumania, 29 Sept. 1925, *Zeitschrift für Ostrecht*, 1925, 600.

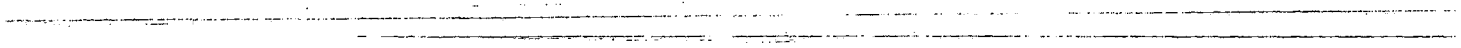
[2] See the cases below, p. 136, n. 5. The wording of the Resolution makes it quite clear that only dollar obligations are comprised therein.

[3] *Compania de Inversiones* v. *Industrial Mortgage Bank of Finland* (1935), 269 N.Y. 22, 198 N.E. 617, cert. den. (1936) 297 U.S. 705; Swedish Supreme Court, 30 Jan. 1937, *British Year Book of International Law*, 1937, 215, 217, and *B.I.J.I.* 36 (1937), 327; German Supreme Court, 28 May 1936, *JW.* 1936, 2058, 2060, and Plesch, *The Gold Clause*, ii. 30; Cologne Court of Appeal, 13 Sept. 1935, *JW.* 1936, 203; Düsseldorf Court of Appeal, 29 June 1934, *IPRspr.* 1934, 300, 301; Brussels Court of Appeal, 4 Feb. 1936, S. 1937, 4. 1, with note by Mestre.

[4] See German Supreme Court, 28 May 1936, *ubi supra*. This point, which is more doubtful, is also discussed by Nussbaum, 44 (1934) *Yale L.J.* 53, at p. 81; Rabel, *RabelsZ.* 10 (1936), 492, 507; Wolff, *IPR.* p. 100.

[5] Problems of the character discussed in the text arise in connexion with numerous statutes other than those relating to the abrogation of gold clauses. Thus it was held that the American legislation restricting dealings in gold are valid also against foreign owners of gold: *Übersee Finanz Corporation A.-G.* v. *Rosen*, 83 F. (2d) 225 (C.C.A. 2d. 1936) and *B.I.J.I.* 35 (1936), 314, cert. den. (1936) 298 U.S. 679; the Privy Council held that the Victorian Financial

Emergency Acts, reducing the amount of interest payable, did not affect debentures governed by New Zealand law and charging land situate in New Zealand, though the place of payment was in Victoria: *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*, [1938] A.C. 224. The extra-territorial effects of such a statute must be considered under the head of two entirely different questions. If the foreign law is applicable, the first question is whether and to what extent it attributes to itself any such effects; if it claims to have extra-territorial effects, the second question arises whether the private international law of the forum refuses to recognize them. (On this point see below, pp. 229 sqq.) The Privy Council in the above-mentioned case arrived at the correct conclusion on the basis of the Victorian legislation, though the point should have been settled by the mere fact that Victorian law was not applicable. But in the decision of the German Supreme Court of 28 May 1936 (see above, p. 112, n. 3) the problem was treated as a question of German private international law, not as a question relating to the construction of the American legislation under discussion.



PART II

FOREIGN MONEY OBLIGATIONS

INTRODUCTION

FOREIGN CURRENCY AND ITS GENERAL RELATIONS WITH MUNICIPAL AND PRIVATE INTERNATIONAL LAW

I

THE first part of this book has been devoted to the legal position of a domestic currency within the sphere of its domestic law (e.g. English money in England under English law). The second part, on which we are now entering, deals with the position of a currency other than that of a given country, within the sphere of that country's domestic private international and municipal law (e.g. French currency in England). But the case of a sum of English money payable under an obligation governed by a foreign law (e.g. pounds sterling under a French contract) is nowhere treated in the present work. This has been found unnecessary, since in respect of the purely monetary problems raised by such a case no difficulty will be found in adapting to it the rules which have already been and which will in the following part be evolved in connexion with the other combinations just mentioned.

II

There is probably no department of the law where the intrinsic connexion between private international law and municipal law is more apparent and more difficult than that relating to foreign currency.

Wherever foreign currency comes into play, three legal systems may have to be considered: the law of the obligation or the proper law or the *lex causae*;[1] the law of the currency, i.e. the law of the country whose currency is stipulated to be payable; and the *lex fori*, i.e. English law.

The necessity of having regard to these three legal systems is most evident where under a foreign obligation there arises

[1] These terms are here and throughout used in their widest sense, covering all cases where a foreign money obligation arises, whether it be under a contract, will, tort, &c., and denoting that law which in the respective case applies, whether it be the proper law of the contract, the law of the testator's domicil, the law governing the tort, and so forth.

the duty to pay a sum of foreign money, whether it be the money of the country whose law governs the obligation, or of a third country: e.g. where under a contract governed by French law the debtor is obliged to pay French francs or Chilean pesos. Here it falls to English private international law to ascertain the proper law of the obligation and the law of the currency, and to decide how far the former applies and which questions are to be answered by the latter. The province of the law of the obligation and of the law of the currency thus having been determined by the rules of English private international law, all further questions are to be answered by the respective municipal laws, a comparative survey of which, in so far as monetary problems are concerned, will be found in the first part.

But the three systems mentioned above must also be considered in the other case where a conflict of laws of a more limited nature is involved. If an obligation governed by English law results in a duty to pay a sum of foreign money (e.g. a business man in London makes a loan of 100 U.S.A. dollars to a Liverpool merchant), it is clear that foreign law, namely American law, cannot have any influence except for the fact that U.S.A. dollars are stipulated to be payable. Though the law of the obligation and of the forum is English, the law of the currency may thus have to be considered. The question might be raised whether the necessity of having regard to American law is due to the fact that American law is referred to as the 'proper law' in respect of the particular questions connected with currency, or to the fact that the law is merely incorporated to that extent in an obligation entirely governed by English law (*materiellrechtliche Verweisung*).[1] A dictum of Warrington L.J. in *Re Chesterman's Trusts*[2] must probably be understood in the latter sense. The case related to the conversion of a sum of German money payable under trust instruments governed by English[3] law. Dealing with the method of applying German law in such circumstances, Warrington L.J. (as he then was) said[4]

[1] See *British Year Book of International Law*, 1937, 101. [2] [1923] 2 Ch. 466.

[3] At pp. 481, 482 per Warrington L.J., at p. 486 per Younger L.J.

[4] At p. 483. Similarly the Swiss Federal Tribunal said: 'If the parties express a debt in foreign currency, it must prima facie be assumed that in that respect they refer to the law of the currency of the respective country as *lex contractus*' (3 June 1925, *BGE.* 51, ii. 303, also *JW.* 1925, 1818, and Clunet, 1926, 1118).

that 'the nature of that [German] currency must necessarily be regulated by German law which thus becomes for this purpose a part of the "proper law" of the contract—to use the term adopted by Professor Dicey'. It would, however, appear that, apart perhaps from questions relating to the method of interpreting statutory provisions, the distinction between reference to and incorporation of a foreign law, however important it may be in other connexions, is of no practical importance for currency problems, and notwithstanding its academic interest, it will therefore not be further pursued.

The *lex fori*, the third legal system to be considered, will prove to be of less general relevance. It will have to be taken into account under the head of English public policy and in connexion with the effects of the institution of legal proceedings. But rules of public policy are not often involved in currency problems. Moreover, all problems, divested of all procedural aspects, will be treated herein on the basis of pure substantive law, the influence of the law of procedure being considered in one comprehensive chapter only.[1] Therefore English law in the capacity of *lex fori*, as distinct from applicable municipal law, will not require much attention.

A more systematic treatment of the subject would have required the division of the second part of this book into two separate sections, the first dealing with foreign money obligations under a given municipal law (dollars under English law, pounds sterling under French law), the second being devoted to the problems of private international law. But in view of a number of circumstances, especially of the fact that this separation between two distinct groups of problems has hitherto not been observed in English case law, its adoption here has not been found practicable.

III

Unless problems of a purely monetary character are involved, the general principles of English private international law will not form one of the subjects treated in this book. We shall speak of the law governing the interpretation of a contract or a will, the discharge of a promise to pay, or of a legacy, and so forth, but as a rule a detailed discussion of the law applicable

[1] Below, pp. 278 sqq.

in the one or the other case will be regarded as outside the scope of this treatise. It is only in a few connexions that certain general questions of private international law will unavoidably require a more extensive discussion.

IV

The arrangement of the second part of this book becomes clear if the following hypothetical case is considered. Suppose a San Francisco merchant and a Montreal merchant meet in Vancouver, where they enter into a contract under which the Canadian undertakes to pay 100 dollars in London. The subject-matter of this obligation being dollars, it first becomes necessary to review the general aspects of a foreign money obligation in English law (Chapter V). The next step of the inquiry is to ascertain the money which is promised, i.e. whether Canadian or American dollars are the subject-matter of the obligation (Chapter VI). Thereafter the quantum of the debt, which in case of an intermittent fluctuation of value may be doubtful, must be determined (Chapter VII). When the extent of the debt is thus ascertained the question arises whether the debtor must tender dollars or pounds in order to discharge his debt at the stipulated place of payment (Chapter VIII). If he fails to keep his promise and the creditor is driven to institute legal proceedings in this country, the last problem arises, to assess the influence of the institution of legal proceedings upon foreign money obligations (Chapter IX).

Though it will appear that many further matters will have to be dealt with in addition to those directly raised by this hypothetical case, the above affords a rough indication of the head under which they will fall.

CHAPTER V

THE GENERAL POSITION OF FOREIGN MONEY AND FOREIGN MONEY OBLIGATIONS IN ENGLISH LAW

I. Definition of foreign money. II. Foreign money as money or commodity. III. Foreign money obligations as contracts to pay money or as contracts to deliver a commodity. IV. The legality of foreign money obligations. V. Money of account and money of payment. VI. Foreign currency clauses: (1) '£100 payable in dollars at the rate of exchange of $5 to £1'; (2) '£100 payable at the rate of exchange of $5 to £1'; (3) '£100, £1 = $5'. VII. Option of payment, option of place, option of collection. VIII. The place of payment: (1) its definition in municipal law; (2) its meaning in private international law; (3) the law of the place of performance and its effect in private international law.

I

THE question what money is to be regarded as foreign money cannot be so easily answered as might be supposed. It appears to be thought by some that foreign money is such money as is not that of the currency system of the country whose law governs the obligation. Another author[1] considers that money is foreign money if it is owed as a result of private agreement as opposed to public law. A view more widely held is that such money is foreign as is not the currency of the place of payment,[2] and this solution has been accepted by Article 41 of the Uniform Law on Bills and Notes, 1930, and by Article 36 of the Uniform Law on Cheques, 1931, which laws, in pursuance of the Convention made under the auspices of the League of Nations, have been put into force in a number of countries.[3] According to s. 72 (4), Bills of Exchange Act, 1882, foreign money is such money as is not the currency of the United Kingdom[4] and, in the absence of any other indicative material, this definition is

[1] Mayer, *Die Valutaschuld nach deutschem Recht* (1934), p. 1.

[2] Béquignon, *La Dette de monnaie étrangère* (1925), p. 5; Falconbridge, *The Law of Banks and Banking* (1929), p. 498.

[3] The text of the Articles will be found below, p. 228, n. 3, where a list of the countries which have adopted the laws is also given.

[4] 'Where . . . the sum payable is not expressed in the currency of the United Kingdom . . .'. Similarly Guisan, *Zeitschrift für schweizerisches Recht*, 56 (1937), 279a, regards that money as foreign which is not that of the country of the forum.

probably the only one which is capable of exercising universal authority in this country.

On the basis of this view the further question arises whether English money can in England under any circumstances be regarded as foreign money. Having regard to what is believed to be the general trend of ideas prevailing in this country as shown by s. 72 (4), Bills of Exchange Act, 1882, the answer, which can only be put forward with considerable diffidence, is that probably English money is never foreign money. If a Dutch debtor promised to pay his Swiss creditors pounds sterling in Vienna, this would probably not be regarded in England as a foreign currency transaction; if an Englishman exchanged francs against pounds sterling in Calais, English courts would not classify the transaction as a sale of English, but as a sale of French money, the purchase price being expressed in English currency, although at Calais the transaction was certainly regarded as a sale of English money; and if an Englishman exchanged pounds sterling against French francs in Amsterdam, this would be a sale of French francs, while in Amsterdam, where the contract was made, it would be regarded as barter.

If this is the view taken by English law, it differs from that of the German Supreme Court, which once decided that German money could be *bought* as foreign exchange, e.g. if francs were given for marks by a German in Luxemburg, the *ratio decidendi* apparently being that the marks were regarded as foreign exchange at the place where the contract was made.[1]

II

The mere fact that something has been found to be the money of a particular State in the sense discussed above,[2] neither necessitates nor permits the conclusion that such foreign money has the character of money in other countries too. On the contrary, the problem whether foreign money is money or a commodity[3] is everywhere a subject of discussion.

[1] 3 Jan. 1925, *JW.* 1925, 1986.

[2] pp. 7 sqq.

[3] The comparative material and the arguments on each side are collected and discussed by Neumeyer, pp. 128 sqq. The commodity theory is widely accepted in France: see, e.g., Planiol–Ripert, vii, No. 1172; Mater, No. 162 (for whom this is, however, a consequence of his view that even domestic money is a commodity, see above, p. 17); in the United States of America foreign money has in innumerable cases been described as a commodity, mostly as an argu-

This problem, the great importance of which will appear in many connexions, does not admit of a rigid solution. In the same way as the meaning of money may vary, and as a thing which usually is money may sometimes be a commodity,[1] so the question whether foreign money is to be treated as a commodity or money depends on the circumstances of the case, on the import of the words of a statute or an agreement, or on the legal nature of the individual transaction. Foreign money may be money, but it is not always money. Commodity is not a legal, but an economic concept; a commodity is that which is an object of commercial intercourse. But the conception of a commodity has a relative character; it cannot be absolutely attributed to any particular thing. Thus foreign money is dealt in and quoted on the foreign exchange market, and is there a commodity. On the other hand, foreign money very often serves the same functions as domestic money; it serves as a medium of exchange and is used for the purpose of the other functions fulfilled by the domestic currency which have been described as consecutive functions.[2] This view that no hard-and-fast rule exists and that foreign money is a commodity where it is, or is referred to as, an object of commercial intercourse, and that it is money where it serves monetary functions,[3] makes it necessary to examine each individual case and to refrain from overrating the importance of state-

ment for the view that in case of legal proceedings instituted to recover a sum of foreign money the conversion into dollars must be effected at the rate of exchange at the date of breach. But there are also cases where the commodity theory was rejected: see, e.g., *Matter of Lendle* (1929), 250 N.Y. Supp. 502, 166 N.E. 182.

[1] See above, p. 19. [2] Above, p. 5.

[3] This is the view which of late has begun to prevail in Germany. It is accepted by M. Wolff, *Ehrenbergs Handbuch*, iv (1), p. 634; Neumeyer, l.c.; Mayer, p. 5; Geiler in Düringer–Hachenburg, i. 163, and also by Nussbaum, *Geld*, p. 42, although he also says that prima facie foreign money is a commodity. The present problem is in no way influenced by the State theory of money which does not concern the question whether the legal system of one State treats the money which has once been created by another State as money or as a commodity; in this sense Werner in Staudinger's *Kommentar zum bürgerlichen Gesetzbuch*, ii (1), p. 97, and Mayer, l.c., pp. 7 sqq., whose reasoning has been adopted in the text. But see Gerber, *Geld und Staat* (1926), pp. 83 sqq., and German Supreme Court, 25 Sept. 1919, *RGZ.* 96, 262, 265, where the State theory is used as an argument for regarding foreign money as a commodity. As to further German decisions see below, p. 124, n. 1; p. 133, nn. 2, 3; p. 134, n. 2.

ments made or conclusions arrived at in the one or the other connexion.[1,2]

Where these principles lead to foreign money being regarded as money, the conclusion is in no way affected by the established rule that foreign money is not legal tender except as a result of the King's Proclamation.[3] For not all money is legal tender, but all legal tender is money.[4] Legal tender is such money as is 'current coin of the realm'.[5] This means that where foreign money has been made legal tender here and thereby adopted as part of the English currency system the creditor is bound to accept it in discharge of a debt expressed in pounds sterling; thus it was held in *Wade*'s case[6] that where a debtor promised to pay £250 'legalis monet Angliae', the debt could be dis-

[1] Thus it was held in France and Germany that foreign money, namely in both cases Russian roubles, was covered by a statute prohibiting the importation of foreign 'goods': Paris Court of Appeal, 30 May 1921, S. 1921, 2. 89; Reichswirtschaftsgericht, 19 March 1921, *JW.* 1921, 650. In the former judgment it is said 'que l'expression marchandises embrasse toutes les choses qui se vendent et s'achètent, et que les billets de banque et les billets d'État de provenance étrangère ont bien ce caractère, puisqu'ils font ou ont fait l'objet de transactions commerciales suivies'. But see German Supreme Court, 12 Aug. 1921, *JW.* 1921, 1459. See also German Supreme Court, 19 Feb. 1924, *JW.* 1926, 2847: during the inflation the plaintiff pledged with the defendant a 10-dollar note as security for a mark debt. The court applied the rules relating to liens on movables, not on money (as to the latter see M. Wolff, *Sachenrecht*, 9th ed., p. 653).

[2] The currency regulations recently set up in many countries have sometimes led to the establishment of mere 'internal currencies', it being forbidden to export coins or notes out of or to import them into the country. This is the position for instance in Russia and Germany. In such circumstances the serious problem arises whether rouble and mark notes, situate outside Russia or Germany, can be used in discharge of rouble or mark debts owed to creditors not residing in Russia or Germany. The question ought to be answered in the affirmative, because the Russian and German notes have not been deprived of the character of money, not having been called in, although in respect of certain transactions subject to Russian or German law they cannot be made use of. The opposite view is taken by Mayer, *Die Valutaschuld*, pp. 13 sqq. See also the decisions of the Berlin District Labour Court, 25 Nov. 1932, and of the Supreme Labour Court, 10 Dec. 1932, *Zeitschrift für Ostrecht*, 1933, 527, 529, with note by Melchior. See also German Supreme Court, 16 Dec. 1922, *RGZ.* 106, 77, 78, where it is suggested that a debt to pay Swiss francs would not have been a monetary obligation, unless the Swiss currency had been current and officially quoted in Germany.

[3] *Wade*'s case (1601), 5 Co. Rep. 114a; Blackstone, i. 278; Halsbury (Hailsham), vi. 462, n. *t*. The right is now put on a statutory basis by s. 11 (7), Coinage Act, 1870, 33 Vict., ch. 10.

[4] Above, p. 26, n. 7.

[5] Chitty, *On Contracts* (19th ed.), p. 209 and others.

[6] (1601) 5 Co. Rep. 114a, 114b.

charged by the payment of a certain amount of Spanish silver or of French crowns, both made lawful money of England by proclamation. On the other hand, the fact that foreign money has not been made current coin of the realm does not mean more than that it cannot be tendered in discharge of a debt to pay pounds sterling, but it does not touch the question of the manner of discharging in England a debt expressed in foreign money,[1] and even if it should appear later that the promise to pay foreign money in England is to be fulfilled by the payment of pounds sterling, it would be impossible to conclude that in the particular transaction foreign money was a commodity.

Nor is the money character of foreign money impaired by the fact that foreign money is not necessarily negotiable in England. This is a consequence not of foreign money being treated as a commodity, but of the rule that in order to be negotiable here a foreign instrument, whether it is foreign money or anything else, must be negotiable under *English* law or custom.[2] It was in support of this principle that in the case of *Picker* v. *London & County Banking Co.*[2] where the negotiability of Prussian State Bonds was negatived, Bowen L.J. said:[3]

'Then is evidence that an instrument or piece of money forms part of the mercantile currency of another country any evidence that it forms part of the mercantile currency in this country? Such a proposition is obviously absurd, for if it were true, there could be no such thing as a national currency. For the same reason, as it appears to me, that a German dollar is not the same thing as its equivalent in English money for this purpose, and that the barbarous tokens of some savage tribe, such as cowries, are not part of the English currency, evidence that the instrument would pass in Prussia as a negotiable instrument does not shew that it is a negotiable instrument here.'

It is clear that these observations, which were in substance approved of by Lindley L.J. in *Williams* v. *Colonial Bank*,[4] are neither meant nor able to prove more than that foreign money is not current in England and therefore does not possess one of the essential prerequisites of a negotiable instrument. But the fact that, as regards negotiability, foreign

[1] As to this question see below, pp. 245 sqq.

[2] *Picker* v. *London & County Banking Co.* (1887), 18 Q.B. 515; see Dicey, pp. 716 sqq.

[3] At p. 520; similarly Fry L.J. at p. 520.

[4] (1888) 38 Ch.D. 388, 404; affirmed (1890) 15 A.C. 267.

money is not on the same level as English money,[1] does not render it permissible to conclude that this is so in other respects too.

While the fact that foreign money is generally not legal tender or negotiable therefore does not support the commodity theory, many instances can be adduced where foreign money has been treated as money. As regards the payment of stamp duties, s. 122, Stamp Act, 1891,[2] expressly provides 'that the expression "money" includes all sums expressed in British or in any foreign or colonial currency'. For the purpose of criminal liability in cases of imitation of currency foreign money has also expressly been put on an equal footing with English money.[3] The case of *Harington* v. *MacMorris*[4] concerned an action brought under the old system of pleading to recover a sum of money which had been lent in India in pagodas. It was held that 'upon an allegation of a loan of lawful money of Great Britain, it is no variance that the loan is proved to have been of foreign coins, as pagodas', Gibbs J. adding[5] that 'as to the foreign money, the doctrine contended for has been exploded these 30 years'. The case of *Ehrensperger* v. *Anderson*[6] dealt with an action for money had and received brought to recover the proceeds of a sale received in rupees. The objection that the proceeds were not received in money was overruled. Baron Parke,[7] relying on *Harington* v. *MacMorris*,[8] held that

[1] The soundness of the rule that prima facie foreign money is not negotiable here, and that therefore the bona-fide purchaser from a thief does not acquire a good title, is open to much doubt. The words of Bowen L.J. quoted above were only *obiter dicta* and do not necessarily bar the way to the better solution which prevailed in New York: *Brown* v. *Perera*, 182 App. Div. 922, 176 N.Y. Supp. 215 (Supreme Court of New York, App. Div., 1st Dept. 1918). That foreign money is regarded as 'money' within the meaning of the provisions relating to the bona-fide acquisition of a good title to stolen money is well recognized in Germany (Breit in Düringer–Hachenburg, *Kommentar zum Handelsgesetzbuch*, iv. 1000) and in France (Lyon–Caen et Renault, *Traité de droit commercial* (1925), iv, No. 764). [2] 54 & 55 Vict., ch. 39.

[3] S. 18 (1), Forgery Act, 1913, 3 & 4 Geo. V, ch. 27; s. 38 (4), Criminal Justice Act, 1925, 15 & 16 Geo. V, ch. 86; s. 1 (1) and (2), Counterfeit Currency (Convention) Act, 1935, 25 & 26 Geo. V, ch. 25; by the Schedule of this Act foreign money is equiparated to British money for the purpose of the Coinage Offences Act, 1861, 24 & 25 Vict., ch. 99; Counterfeit Medal Act, 1883, 46 & 47 Vict., ch. 45; s. 2, Revenue Act, 1889, 52 & 53 Vict., ch. 42.—The international practice of punishing the falsification of foreign money is old. See the interesting decision of the U.S.A. Supreme Court in *United States* v. *Arjona* (1887), 120 U.S. 479. [4] (1813) 5 Taunt 228. [5] At p. 230.

[6] (1848) 3 Exch. 148. [7] At p. 155. [8] See above, n. 4.

'the real meaning of such a count is that the defendant is indebted for money of such a value or amount in English money. However the objection appears to have been listened to, perhaps more than it ought to have been, in a subsequent case of *McLachlan* v. *Evans*,[1] but the Court of Exchequer held that an action for money had and received for English money would not lie, unless there had been a reasonable time after the receipt of the foreign money to convert it into English. Possibly that case cannot be received as very satisfactory; at all events, we do not decide this case against the plaintiff on this ground.'

These words would suggest that for the purpose of an action for money had and received foreign money is always to be regarded as money.[2]

The most recent case on the subject is *Rhokana Corporation Limited* v. *Inland Revenue Commissioners*.[3] According to the terms of a trust deed, interest due in respect of debentures issued by the appellant company was payable in London in pounds sterling, or in New York in U.S.A. dollars at the fixed rate of exchange of $4.86 to the pound, or in Amsterdam in Dutch florins at the fixed rate of exchange of 12.11 Dutch florins to the pound. On 31 December 1931 the company duly posted warrants to registered holders which set out the amounts payable in sterling after deduction of income tax and, with regard to the net sterling amount, also contained the options as to currency and place of payment, the specific rates for conversion into dollars or guilders being added. The company deducted income tax at the rate of 5*s*. in the £ upon the sterling amount of the interest. Certain warrants were cashed in New York in dollars at the fixed rate of exchange, the rate of exchange ruling on 31 December 1931 being only $3.39 to the £, and the revenue authorities therefore contended that a larger sum should have been deducted by the company for British income tax, such sum being arrived at by converting the total amount of interest paid into dollars at $4.86 to the £, deducting income tax in dollars at the rate of 5*s*. to the £, and reconverting the balance into sterling at the rate of $3.39 to the £. The decision *inter alia* depended on the question whether the facts of the case involved a 'payment of any interest of money'

[1] 1 Y. & J. 380.

[2] See also above, p. 4, n. 1.

[3] [1938] A.C. 380.

within the meaning of Income Tax Act, 1918, All Schedules Rules, r. 21. Lawrence J. held[1] that foreign money was a commodity and that such a commodity is not interest of money within rule 21. The decision was reversed in the Court of Appeal. Lord Wright, who read the judgment of the Court, did not enter into a discussion whether foreign money is or is not a commodity, but preferred to rest the decision on the ground[2] that in the Income Tax Act 'foreign money is clearly included, or, at least, is clearly not excluded', and that

'the truth is that the words "payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D", read in connection with the machinery for "deduction" provided for in r. 21, are, in the context of the Income Tax Act, wide enough to cover not merely transactions effected in what is legal tender in the United Kingdom but also everything which is in a commercial sense a "payment" upon the making of which the statutory "deduction" can be made'.

The House of Lords, however, restored the order of Lawrence J.[3] Lord Atkin's *ratio decidendi* was that 'for income tax purposes the company pay the interest in sterling and perform their obligation to the revenue by deducting the correct amount in sterling'. Lord Thankerton concurred and added that the time when the warrant is drawn is the period of distribution with reference to which tax is to be deducted. Lord Maugham also relied on the fact that payment and deduction are concurrent, and that, as interest is paid at the date of posting the warrant, the deduction ought to be made then. Lord Russell delivered a dissenting opinion, while Lord Macmillan agreed with the majority. The reasoning of the law lords is based on highly technical grounds and on machinery provisions of the Finance Acts and is therefore of small interest for the present purposes. It is, however, remarkable that Lord Atkin found it difficult to apply the terms of rule 21 to a payment and deduction of tax in a foreign currency; he did not see 'how one can deduct income tax, which is a tax in sterling, from dollars' and he, therefore, 'should have found great difficulty in supporting this assessment had the obligation been a direct obligation confined to payment in dollars'. In the result, though these are *obiter dicta*,

[1] [1936] 2 All E.R. 678; see p. 131, n. 5, below.
[2] [1937] 1 K.B. 788, 807, 808.
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it would appear to be rather doubtful whether, so far as concerns the payment of income tax, it does not sometimes make a material difference whether sterling or foreign money is paid.

Although in the majority of these cases foreign money was clearly treated as money, and although there does not appear any case where the decision was based on the ground that foreign money was a commodity, it would be rash to generalize. The only conclusion which can be drawn with safety is this, that the working principle stated above must be adhered to: foreign money is money where it functions as such; it is a commodity where it is an object of commercial intercourse. And where the words 'money' on the one hand and 'goods', 'commodity', 'merchandize' on the other hand appear in a statute, it is a matter of interpretation whether or not foreign money is referred to.

III

This principle will also provide a basis for answering the question whether the obligation to pay a sum expressed in foreign money is a money obligation or a contract to provide a commodity.

Here the same differentiation is called for. Where the payment of a sum of foreign money is promised, a monetary obligation exists, because the foreign money functions as money, the legal character of the obligation being inherently identical with that of an obligation to pay a sum of domestic money.[1] Only where foreign money is the object of commercial intercourse may it according to the nature of the transaction be regarded as a commodity.

Although this distinction between the obligation to pay a sum of foreign money and the obligation to deliver foreign money is not unquestioned, and although the legal character of the former obligation is often put on the same level as that of the latter, a consideration both of practical requirements and of the legal aspects of individual cases will, the present writer thinks, support it.[2] It should, however, be observed, in order to make

[1] Above, pp. 54, 74.

[2] In addition to the following cases attention must be drawn to the fact that the principle of nominalism applies to obligations to pay foreign money (below, pp. 192 sqq.), which rule presupposes the monetary character of such an obligation.

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[3] [1938] A.C. 380.

it would appear to be rather doubtful whether, so far as concerns the payment of income tax, it does not sometimes make a material difference whether sterling or foreign money is paid.

Although in the majority of these cases foreign money was clearly treated as money, and although there does not appear any case where the decision was based on the ground that foreign money was a commodity, it would be rash to generalize. The only conclusion which can be drawn with safety is this, that the working principle stated above must be adhered to: foreign money is money where it functions as such; it is a commodity where it is an object of commercial intercourse. And where the words 'money' on the one hand and 'goods', 'commodity', 'merchandize' on the other hand appear in a statute, it is a matter of interpretation whether or not foreign money is referred to.

III

This principle will also provide a basis for answering the question whether the obligation to pay a sum expressed in foreign money is a money obligation or a contract to provide a commodity.

Here the same differentiation is called for. Where the payment of a sum of foreign money is promised, a monetary obligation exists, because the foreign money functions as money, the legal character of the obligation being inherently identical with that of an obligation to pay a sum of domestic money.[1] Only where foreign money is the object of commercial intercourse may it according to the nature of the transaction be regarded as a commodity.

Although this distinction between the obligation to pay a sum of foreign money and the obligation to deliver foreign money is not unquestioned, and although the legal character of the former obligation is often put on the same level as that of the latter, a consideration both of practical requirements and of the legal aspects of individual cases will, the present writer thinks, support it.[2] It should, however, be observed, in order to make

[1] Above, pp. 54, 74.

[2] In addition to the following cases attention must be drawn to the fact that the principle of nominalism applies to obligations to pay foreign money (below, pp. 192 sqq.), which rule presupposes the monetary character of such an obligation.

the problem clear at the outset, that the monetary character of an obligation to pay a sum of foreign money is in no way impaired by the fact that it is doubtful whether such an obligation is a debt in the technical sense of English law. The concept of debt originates from the law of procedure. It is a rule of the English law of procedure that 'the Courts of this country have no jurisdiction to order payment of money except in the currency of this country',[1] and that therefore for the purpose of legal proceedings in this country the promised sum of foreign money must be converted into English pounds, it being uncertain whether the resulting action to recover pounds sterling is an action for damages or an action for debt.[2] But although no action lies to recover a sum of foreign money as such, whether it be an action for debt or any other action, it is clear that, apart from any procedural aspect, the obligation to pay a sum of foreign money may still be an obligation to pay money, not to deliver a commodity, and it is without any regard to the influences of the law of procedure that the problem is treated in this connexion.

If a Londoner exchanges a pound sterling note against 175 French francs at Cook's in London, or if he requests his banker to convert a sum of pounds sterling into 1,000 U.S.A. dollars or to pay dollars to his American creditor,[3] nobody will hesitate to draw the natural inference that this customer buys francs and dollars as a commodity and that the delivery of the foreign money is the subject-matter of a sale.[4]

[1] See below, p. 288.

[2] See below, pp. 298 sqq.

[3] In the U.S.A. it was repeatedly held that if the defendant has sold foreign money against dollars and undertakes to deliver it at a certain place abroad, his failure to do so makes him liable to repay the dollars received, not the value of the foreign money promised: *Chemical National Bank* v. *Equitable Trust Co.* (1922), 201 App. Div. 485, 194 N.Y. Supp. 177; *Safian* v. *Irwing National Bank* (1922), 202 App. Div. 459, N.Y. Supp. 141, aff'd (1923) 142 N.E. 264; *Buckman* v. *American Express Co.* (1928), 262 Mass. 299, 159 N.E. 629; *American Union Bank* v. *Swiss Bank Corp.*, 40 F. (2d) 446 (C.C.A., 2d, 1930).

[4] Though not necessarily within the meaning of the Sale of Goods Act, 1893, since s. 62 (1) defines 'goods' as 'all chattels personal other than things in action and money'. In the instant case the foreign money may not be 'money' within the meaning of that section; but if bank notes were sold they are 'things in action'. As coins are probably not things in action, they may in proper cases perhaps be regarded as goods. An example of a case where foreign money was the object of commercial intercourse and therefore a commodity is to be found *In re British American Continental Bank Ltd., Goldzieher & Penso's Claim*, [1922] 2 Ch. 575; *Lisser & Rosenkranz's Claim*, [1923] 1 Ch. 276.

But if the same banker gives the same customer a loan of 100 U.S.A. dollars, nobody will doubt that this is not a bailment, but a contract of loan of money differing from bailment in that the actual money lent is not to be re-delivered by the lender, but an equivalent sum is subsequently to be repaid.[1] If it were not so, the general rule that, in the absence of an express or implied agreement, interest is payable according to banker's usage,[2] could not apply, as interest is payable on money obligations only. Again, if a London firm enters into a contract with a Liverpool firm by which the latter undertakes to deliver a quantity of timber for a certain amount of Swedish kroners, it seems to be equally obvious that this is not a barter, but a sale of goods, and that the kroners are 'a money consideration called the price'.[3] Otherwise the contract would be a barter and the Sale of Goods Act, 1893, would not necessarily apply.[4]

It has, however, been said 'that a contract to pay in a foreign currency is a contract to provide a commodity',[5] and in other cases likewise the promise to pay foreign currency has been quite generally and categorically described as a promise to deliver a commodity.[6] With one exception[7] these statements were *obiter dicta* made with reference to the question of the date at which sums of foreign money were to be converted into pounds sterling;[8] and whatever might be said about their validity and importance in that connexion, they are not entitled to any general authority, and it is submitted that, as a matter of principle, they cannot be supported.

Moreover, it has been doubted whether an inland[9] bill of

[1] Chitty, *On Contracts*, 19th ed., p. 630; Goodeve, *Personal Property*, 8th ed., p. 55. [2] Halsbury (Hailsham), xxiii. 174 sqq.; i. 854, 855.

[3] Sale of Goods Act, 1893, s. 1 (1). [4] See above, p. 3.

[5] *In re British American Continental Bank Ltd. Crédit Général Liégeois' Claim*, [1922] 2 Ch. 589, 591 per P.O. Lawrence J.; *Rhokana Corporation Ltd.* v. *Inland Revenue Commissioners*, [1936] 2 All E.R. 678, 681 per Lawrence J., affirmed on other grounds by the House of Lords, [1938] A.C. 380.

[6] *Lloyd Royal Belge* v. *Louis Dreyfus & Co.* (1927), 27 Ll. L.R. 288, 294 per Romer J., where he said: 'I cannot myself see that there can be any difference between the contract for the delivery of foreign currency and a contract for the delivery of any other commodity'; *Manners* v. *Pearson*, [1898] 1 Ch. 581, 592 per Vaughan Williams L.J.; *The Baarn* (No. 1), [1933] P. 251, 272 per Romer L.J.; see also *The Volturno*, [1921] 2 A.C. 544, 562, 563 per Lord Wrenbury.

[7] In the *Rhokana Corporation*'s case, on which see above, p. 127.

[8] On this question see below, p. 289.

[9] Within the meaning of s. 4, Bills of Exchange Act, 1882. Foreign bills or notes may undoubtedly be expressed in foreign money because they are

exchange or note requesting the payee to pay a sum of foreign money is a bill of exchange or a note within the meaning of ss. 3, 83, Bills of Exchange Act, 1882. The words of s. 3 (1), Bills of Exchange Act, 1882, that a bill must stipulate 'a sum certain in money', are understood by Chalmers[1] as referring to legal tender and, although Chalmers does not expressly mention foreign money, Lorenzen[2] draws the conclusion that instruments which are expressed in a foreign currency are not bills or notes, and the same view has sometimes been taken in the United States.[3] But for the reasons given above it cannot be admitted that the meaning of 'money' is identical with that of legal tender or that foreign money promised to be paid in a bill or note is a commodity; the business community would rightly regard it as a legal subtlety to deprive on such grounds bills and notes of their essential qualities. The view propounded here derives a certain amount of support from the case of *Cohn* v. *Boulken*.[4] It concerned an action brought by the plaintiff as indorsee of a cheque 'for 7,680 francs (Paris)' which had been drawn in London by the defendant and which was payable at

envisaged to be so expressed by s. 72 (4) of the Act providing for a method to convert the sums payable in a foreign currency into pounds sterling.

[1] p. 12; but the example given on p. 32 suggests that an inland bill expressed in foreign money is regarded as valid by the learned author. See also Halsbury (Hailsham), ii. 614, n. *d*.

[2] *The Conflict of Laws relating to Bills and Notes* (1919), p. 21. In view of the words 'in money' appearing in s. 17 (1) Canadian Bills of Exchange Act (Revised Statutes of Canada, 1927, ch. 27) Falconbridge, *The Law of Banks and Banking* (1929), p. 498, also asserts that a negotiable instrument must be payable 'in legal tender', but he does not mean to refer thereby to Canadian legal tender, but to 'legal tender in payment of debts at the place of payment'. He therefore does not object to an instrument being expressed in a foreign currency 'provided it does not say that it may or must be paid in any currency which is not legal tender at the place of payment'. He believes that while an instrument for 1,000 francs drawn in Paris and payable in Canada would be negotiable, it could not be expressed to be 'payable in French money' in Canada. It seems that *inter alia* this view is due to a failure to distinguish between money of account and money of payment (below, pp. 138 sqq.).

[3] See Oliphant, 'The Theory of Money in the Law of Commercial Instruments', 29 (1920) *Yale L.J.* 606, 619, 620, with further references. This view is apparently not taken by the Canadian Courts: *St. Stephen Branch Rly. Co.* v. *Black* (1870), 2 Han. 139; *Third National Bank of Chicago* v. *Cosley* (1877), 41 U.C.R. 402; *Wallace* v. *Souther* (1888–9), 16 S.C.R. 71, nor does it prevail in New York: *Brown* v. *Perera*, 182 App. Div. 922, 176 N.Y. Supp. 215 (New York Supreme Court, Appellate Division, 1st Dept., 1918); see also *Incitti* v. *Ferrante*, 175 A. 908 (Court of Common Pleas, Bergen County, 1933).

[4] (1920) 36 T.L.R. 767.

a London bank. At the hearing of the action by which the plaintiff sought to recover the money, the preliminary objection was taken that the instrument was not negotiable, it being alleged that it was not for a 'sum certain in money', because it did not indicate the rate of exchange alleged to be required according to s. 9 (1) (d), Bills of Exchange Act, 1882. Acton J. overruled the objection, taking the view that s. 9 (1) (d) did not require the indication of a rate of exchange, but merely permitted it by providing that, if such rate was indicated, the instrument is nevertheless for a sum certain within the meaning of the Act. But it does not appear to have been doubted that, apart from the entirely distinct question whether the stipulated amount of French francs was a 'sum certain', it was a sum 'in money'. Moreover, the provision of s. 9 (1) (d) relating to the certainty of the sum strongly supports the view that a sum of foreign currency is a sum 'in money'. For the Act says the certainty of the sum is not impaired by the fact that it is required to be paid according to a rate of exchange. As there is no reason to assume that this merely refers to cases where the amount is primarily stated to be payable in pounds sterling, it follows that this provision is also applicable to cases where the amount is stated to be payable in foreign currency. This rule as to the certainty of the sum thus implies the monetary character of the promise to pay foreign currency.

The view that the obligation to pay a sum of foreign money is a money obligation is almost generally recognized on the Continent,[1] but it has been most consistently upheld in Germany.[2] In Germany interest is payable on outstanding debts even if their subject-matter is a sum of foreign money.[3] That a bill of exchange does not lose its character if it provides for payment in a foreign currency is undoubted. The following case is of particular interest. In December 1914 the defendant owed the plaintiff a sum of 56,000 odd Dutch florins. As the defendant did not pay, the plaintiff brought an action for 104,000 odd marks, i.e. the equivalent of the amount of Dutch money at

[1] See the authors quoted above, p. 122, n. 3.

[2] See generally Werner in Staudinger's *Kommentar zum bürgerlichen Gesetzbuch*, s. 244, n. 1, and, e.g., Supreme Court, 24 Jan. 1921, *RGZ.* 101, 312, 313.

[3] Staub (–Gadow) *Kommentar zum Handelsgesetzbuch*, s. 353. 2; Werner in Düringer–Hachenburg's *Kommentar zum Handelsgesetzbuch*, s. 353. 2; but see Hamburg Court of Appeal, *Rechtsprechung der Oberlandesgerichte*, 44, 245.

the rate of exchange of the day. He obtained judgment, but when the mark amount was paid, the mark had depreciated and the plaintiff could not obtain the promised amount of Dutch florins in exchange for the sum recovered. He therefore brought a further action claiming 56,000 florins less the marks which he had received.[1] The defendant contended that foreign money was a commodity the value of which the plaintiff had received by the first judgment so that the principle of *res judicata* stopped the plaintiff from recovering again. The plaintiff replied that he was entitled to claim payment of a sum of money, not delivery of a commodity, and that therefore his claim did not involve a repetition, but an extension of his claim which had hitherto only partly been pursued, and this was upheld by the Supreme Court on these grounds:[2]

'Undoubtedly foreign coins may in individual transactions assume the character of and be dealt in as commodities. As a matter of principle, however, they are not only in their own country but also for the purpose of international transactions, i.e. in foreign countries, means of payment, just as much as the coins of the domestic currency. The fact that there they do not always have the same value and the same purchasing power as in their country, but that they may be affected by fluctuations in the rate of exchange, does not deprive them of their character as means of payment. If the appellant were right, the exchange of goods against foreign money would not be a sale, but a barter. Such a view would, however, be irreconcilable with that of the trade, especially the international trade. The vendor who stipulates for payment in foreign money, does not regard himself as a creditor of goods, but of money, and he is indeed justified in doing so. . . . The plaintiff, too, does not claim goods, but payment of his debt in the stipulated currency.'

It is submitted that this reasoning is unanswerable.

IV

The question whether and how far parties are at liberty to provide in their contract for the payment of a sum of foreign money calls for a few observations only.

The nominalistic principle, concerning the quantum of money to be paid, obviously does not affect the question whether a foreign currency may be chosen, and has in fact never been

[1] The questions relating to the necessity and manner of conversion are dealt with below, pp. 280 sqq.

[2] *JW.* 1921, 22.

understood to do so. Nor is a stipulation to pay in foreign money in any way irreconcilable with ordinary legal tender legislation.[1] This is so even in France[2] and certainly in this country, although we must note a scarcely comprehensible slip by Romer L.J. (as he then was) in *Société Intercommunale Belge d'Électricité* v. *Feist*.[3] The learned Lord Justice there quoted s. 6, Coinage Act, 1870, which requires a money obligation to be made 'according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state',[4] and he then went on to say:

'Now it is clear from this section that a contract to pay a sum of money must be treated as a contract to pay it in coins of the United Kingdom and not otherwise though such a contract may be discharged in paper currency that is legal tender. Such a contract cannot, therefore, for instance, provide for payment in American dollars. . . .'

Whatever may be said about the real meaning of s. 6, Coinage Act, 1870, and however obscure this meaning may be, the only point which, in view of the proviso, is not open to any doubt is that s. 6 does not prevent parties from providing for payment in foreign money.

In France, however, such stipulations have been held to have been rendered invalid by the issue of inconvertible paper money. This point of view, falling in line with the unique French doctrine which we have already had occasion to notice,[5] is based on the statutes exempting the Banque de France from converting their notes into gold; thus the Cour de Cassation said in the leading judgment:[6]

'ce texte a pour objet de garantir à ces billets, dans la circulation monétaire intérieure, leur pleine valeur de monnaie équivalente à

[1] Above, pp. 26 sqq.

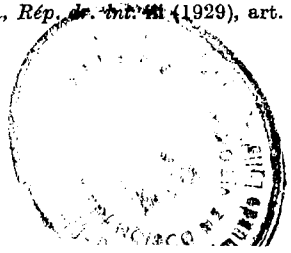
[2] Cass. Req. 18 Nov. 1895, S. 1899, 1. 270; Degand, *Rép. droit int.* iii (1929), art. 'Change', No. 28.

[3] [1933] Ch. 684, 710, reversed on other grounds [1934] A.C. 161.

[4] The full text is given above, p. 28, where the meaning of this section is discussed.

[5] Above, p. 108.

[6] 17 May 1927, S. 1927, 1. 289. See also Cass. Req. 31 Dec. 1928, S. 1930, 1. 41; 27 March 1929, S. 1929, 1. 174; 27 March 1930, Clunet, 1930, 395; Planiol–Ripert, vii, No. 1172; Degand, *Rép. dr. int.* iii (1929), art. 'Change', No. 41 bis.



l'or et de frapper d'une nullité d'ordre public toute stipulation obligeant le débiteur résidant en France ou en Algérie à s'acquitter en France ou en Algérie soit en or, soit en une monnaie autre que celle ayant cours forcé dans le pays; d'où il suit qu'en condamnant les consorts Pélissier du Besset résidant en France, à payer en monnaie anglaise à Londres ou à Alger, au choix de l'Algiers Land and Warehouse Company Limited, les termes de loyer qui leur étaient réclamés, l'arrêt attaqué a violé le texte ci-dessus visé . . .'

Here again, only one exception is allowed, namely in case of a 'paiement international'.[1] As in the case of protective clauses mentioned above, this doctrine has remained an isolated one.[2]

The only method of invalidating stipulations providing for payment in a foreign currency is express legislation. Statutes relating to foreign exchange restrictions[3] often prohibit parties from incurring liabilities expressed in a foreign currency, and sometimes even provide for a compulsory conversion of foreign money obligations into domestic currency.[4] But although the stipulation of a foreign money obligation and the stipulation of a gold or similar clause aiming at protection against fluctuations of the domestic currency are often due to the same motives, the invalidity of a gold or similar clause does not necessarily involve the invalidity of foreign money obligations, or of protective clauses added to such foreign money obligations. Apart from questions relating to conflict of laws, it depends on the interpretation of the individual enactment whether the abolition of the gold clause involves the invalidity of a promise to pay foreign money.[5]

[1] Planiol–Ripert, vii, No. 1179; Degand, l.c., Nos. 89 sqq.

[2] It has not been adopted in Belgium: Cass. 30 May 1929, S. 1930, 4. 22 and Clunet, 1931, 1192, nor in Italy or Greece; see Clunet, 1921, 999; 1926, 1087, 1089.

[3] See above, p. 53.

[4] This has, e.g., been done in Greece, where a Statute of 26 April 1932 provides for the conversion of all foreign currency obligations into drachmas: see Ténékidès, Clunet, 1933, 555, and the decisions in Clunet, 1936, 684 sqq., 1019 sqq.

[5] In the United States of America the question was ventilated whether the Joint Resolution of Congress of 5 June 1933 providing that 'every obligation . . . shall be discharged upon payment, dollar for dollar, of any coin or currency which at the time of payment is legal tender for public and private debts' involved the invalidity of promises to pay foreign money, if such promises, by way of multiple currency clauses, were added to the promise to pay gold dollars. A correct view of the legal character of alternative promises (on which see below, p. 147) clearly ought to have resulted in a negative answer (see Nuss-

While it thus appears that, in the absence of special legislation, parties are free to enter into contracts providing for payment in foreign money, it must be pointed out that in particular connexions the use of domestic currency is very often required. In the United States of America it was enacted in 1792 that 'the money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths, and mills or thousandths . . . and all proceedings in the courts shall be kept and had in conformity to this regulation'.[1] Similarly the Canadian Currency Act, 1910,[2] provides that 'all public accounts throughout Canada shall be kept in the currency of Canada, and in any statement as to money or money value, in any indictment or legal proceeding, the same shall be stated in such currency'. In other countries the use of the domestic currency is prescribed in a less general way. Thus it is sometimes provided that entries in the land register,[3] notarial acts,[4] shares and capital of a limited company,[5] balance

baum, *Pennsylvania L.R.* 84 (1935), 569). This result was in fact reached by the federal courts: *McAdoo* v. *Southern Pacific Co.* (Federal Court of San Francisco), 10 F. Suppl. 953 and Plesch, *The Gold Clause*, ii. 4, reversed on other grounds 82 F. (2d) 121; *Anglo-Continentale Treuhand A.G.* v. *St. Louis Southwestern R.R. Co.* (United States Circuit Court of Appeals), 81 F. (2d) 11, also in 35 (1936) *B.I.J.I.* 141 and Plesch, l.c. ii. 1, certiorari denied 298 U.S. 655. But the New York courts strongly tend to take the opposite view, at least where the holder is an American citizen or where he is an alien who did not acquire the bonds or coupons bona fide, but with the intent of evading the effects of the Joint Resolution: *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.* (1935), 244 App. Div. 634, 280 N.Y. Supp. 494 and Plesch, l.c. i. 56; *Nederlandsche Middenstandsbank* v. *Bethlehem Steel Co.*, New York Law Journal, 13 June 1936 and Plesch, l.c. ii. 57; *Anglo-Continentale Treuhand A.G.* v. *Southern Pacific Co.* (1936), 299 N.Y. Supp. 859, aff'd 251 App. Div. 803, 298 N.Y. Supp. 181; *Zürich General Accident and Liability Insurance Co.* v. *Lackawanna Steel Co.* (1937), 164 Misc. 498, 299 N.Y. Supp. 862. The view expressed in New York is most unsatisfactory and illogical, as it would necessitate the conclusion, apparently not drawn by the courts, that all foreign money obligations have become void.

[1] Revised Statutes, s. 3563, U.S.C.A. s. 371; Act of 2 April 1792, ch. 16, s. 20, 1 Statutes at Large, p. 250.

[2] Revised Statutes of Canada, 1927, ch. 40, s. 15 (1).

[3] *Germany*: Grundbuchordnung, s. 28; *Switzerland*: ss. 783, 794, Zivilgesetzbuch; *France*: Planiol-Ripert, xii, No. 740.

[4] *Belgium*: Art. 3 of the Statute of 30 Dec. 1885, on which see Piret, No. 22. *France*: Art. 5 of the Statute of 4 July 1837; Art. 17 of the Statute of 16 March 1803, on which see Hubrecht, p. 288; Béquignon, pp. 92 sqq.

[5] *Germany*: ss. 7, 8, Companies Act of 30 Jan. 1937; also in *Austria, Esthonia, Sweden, Argentine*: see Hallstein, *Die Aktiengesetze der Gegenwart*, pp. 83, 86. It cannot be doubted that, though there does not exist a statutory provision,

sheets,[1] must be expressed in the domestic currency, but it is remarkable that there does not seem to exist any such statutory provision in this country.

V

Wherever an obligation is validly expressed in a foreign currency, it becomes necessary to have regard to a distinction of fundamental importance, viz. that between the *money of account*[2] and the *money of payment*. Its source is that fertile contrast between the substance of the obligation and the mode of performance which is generally recognized in connexion with protective (especially gold) clauses,[3] and another aspect of which will here again provide a useful guiding principle.[4]

The money of account is that currency in which an obligation is expressed, while the money of payment is the currency with which the obligation is to be discharged.

If foreign money is the subject-matter of an obligation, the proper method of discharging it will prima facie be by paying to the creditor that foreign money which has been promised.

the capital of a company incorporated in *England* must be expressed in pounds sterling, and if authority is needed, it is supplied by the dictum of Lord Wright in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 150: 'As the appellant company was registered in England, it is clear that its capital must be fixed in British sterling.'

[1] *Germany*: s. 40, Commercial Code (this applies even where the books are kept in a foreign currency: Supreme Finance Court, 30 March 1927, *JW.* 1927, 2325). In the *Adelaide* case Lord Wright added to the words quoted in the preceding note that 'similarly, all the returns and accounts required by the Companies Act must have been rendered and kept according to the same currency'.

[2] Expression of Lord Tomlin in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 146.

[3] Above, pp. 98 sqq.

[4] In connexion with foreign money obligations the distinction between 'monnaie de compte' or 'monnaie de contrat' and 'monnaie de paiement' has with particular force been evolved in *France*, where it has repeatedly been recognized by the Cour de Cassation; see, e.g., Cass. Civ. 14 Jan. 1931 (Ville de Tokio), Clunet, 1931, 126 with the speech of the Attorney-General Paul Matter; Cass. Civ. 5 June 1934 (Est Lumière), Clunet, 1935, 90; Planiol–Ripert, vii, Nos. 1190, 1191, 1193. Cass. Civ. 21 July 1936, Clunet, 1937, 299 (Papeteries Bergès) speaks of 'monnaie de base'. See also Hubert's note to Cass. Req. 25 Jan. 1928, S. 1928, 1. 161. In *Germany* it is also usual to differentiate between 'Schuldwährung' and 'Zahlungswährung': Nussbaum, *Geld*, p. 187; Mayer, *Valutaschuld*, p. 78; but see Neumeyer, p. 182. The distinction is also recognized in *Switzerland*: Federal Tribunal, 23 May 1928, Clunet, 1929, 497 (Crédit Foncier Franco-Canadien).

In other words, the money of account will also be the money of payment. But this is not always and everywhere so.

If goods are bought for '1000 U.S.A. dollars, payable in pounds sterling', it is obvious that, while foreign money is the money of account and thus determines the measure of value or the scale of payment, the mode of payment is by handing to the creditor pounds sterling. This may be so even in the absence of an express provision requiring or allowing the debtor to effect the actual payment in pounds sterling.[1]

Conversely, although pounds sterling are the money of account, foreign money may be the instrument of payment: '£100 payable in U.S.A. dollars' or '£100 payable in U.S.A. dollars at the fixed rate of $5 per £1'. In this case the obligation, though referring to the domestic currency as money of account, is really a foreign money obligation in disguise.[2]

It follows that two questions must be distinguished: the first concerns the determination of the money of account, i.e. of the subject-matter of the obligation or, to use the Latin phrase, of that money which is *in obligatione* (below, Chapter VI); secondly, it is necessary to ascertain the money of payment, i.e. the proper mode or instrument of payment or that money which is *in solutione* (below, Chapter VIII). If this distinction is not strictly adhered to, it may easily happen that a wrong decision is arrived at in an individual case. It may suffice to point out that according to the rules of private international law each question may be governed by a different law,[3] and that the quantum of the obligation is determined by the money of account, not by the money of payments. Thus a contract made in Geneva in 1936 (when 5 French francs were equal to 1 Swiss franc) may provide for the payment of 1,000 'francs' in Paris in 1938 (when the rate of exchange is 8:1); the decision of the question whether at maturity the creditor is entitled to 1,000 or to 8,000 French francs depends on a clear separation of the stipulated money of account, which determines the quantum of the debt, from the money of payment, which is merely the instrument of payment.

[1] Below, pp. 245 sqq.

[2] See below, p. 140, n. 2.

[3] See below, pp. 169 sqq., 249 sqq.

VI

The distinction between the money of account and the money of payment will also afford a useful guide in our discussion of the problem raised by foreign currency clauses. The forms of such clauses vary so much that it is difficult to find a way through the mass of factual material and judicial decisions. Moreover, the meaning of such clauses may greatly differ in individual cases, and it is therefore impossible to lay down rules of universal application. It must suffice to state the governing considerations in a somewhat cursory manner.[1]

1. It has already been explained in the preceding section that the simple promise to pay £100 (domestic money obligation) or to pay 100 U.S.A. dollars (foreign money obligation) may become more complicated by a separation of money of account and money of payment. If the promise reads 'to pay £100 payable in dollars' or 'to pay $100 in pounds sterling' the money of account, determining the quantum of the debt, and the money of the payment, determining the mode of payment, are different; the creditor is entitled to be paid in dollars or pounds only, but the amount depends on the value of the stipulated money of account.

This uncertainty as to the amount eventually payable is avoided if the parties not only agree upon a separation of money of account and money of payment, but also stipulate a rate of exchange on the basis of which the former is to be converted into the latter: '£100 payable in dollars, at the rate of exchange of $5 to £1' or '$500 payable in pounds sterling at the rate of exchange of £1 to $5'. In these cases it is clear that it is in fact an amount of $500 or, in the second case, of £100 which is exclusively payable, and there exists therefore either a foreign money or a domestic money obligation in disguise.[2]

[1] It is clear that in the case of a conflict of laws the construction of such clauses depends on the proper law of the obligation.

[2] See above, pp. 138, 139. That under such circumstances there exists a foreign money obligation was repeatedly decided by the *German* Supreme Court in connexion with mark loans stated to be repayable in Swiss francs or Dutch guilders at a fixed rate: 27 June 1923, *JW.* 1924, 173; 25 May 1927, *JW.* 1927, 1829; 2 Feb. 1928, *JW.* 1928, 1385; 4 July 1929, *JW.* 1929, 2709. The Supreme Court even held that a mark loan which was stated to be repayable at the rate of 123 Swiss francs per 100 reichsmark, but which was not stated to be repayable *in* Swiss francs, was an obligation to pay Swiss money: 29 Nov. 1920, *JW.* 1921, 231. Though the decision has been approved, e.g. by

2. The legal position becomes less clear, if the promise does not contain the words 'in dollars', but simply reads '£100 payable at the rate of exchange of $5 to £1'. The absence of the words 'in dollars' cannot be entirely overlooked. As a general rule one should be reluctant to treat the obligation as a mere foreign money obligation in disguise, i.e. as a mere promise to pay $500, although the parties have abstained from expressing their intention to make dollars both the money of account and the money of payment; it is preferable to assimilate the clause to the type of clause to be discussed in the following paragraph (3). On the other hand, there may be cases where it can fairly be assumed that a payment 'in dollars' was within the contemplation of the parties and that they therefore agreed upon the payment of a fixed sum of $500, not of a variable sum of pounds sterling. Such circumstances existed in a case decided by the Supreme Court of Pennsylvania.[1] A bill of lading provided for a specified freight to be payable in pounds sterling, but contained the clause 'freight, if payable at destination [Philadelphia], to be at the rate of exchange of $4.866'. In view of the fact that payment in Philadelphia was envisaged, the court held that the freight was payable in dollars, the amount of which was to be ascertained by the agreed, not the current, rate of exchange.

3. This last case suggests the great difficulties raised by the necessity of distinguishing a domestic or foreign money obligation in disguise from another group of cases in which the promise reads,[2] to pay £100 '£1 being equal to $5' or '£1 = $5'. Conversely, the promise may be to pay $500, '$5 being equal to £1', and so forth. In such circumstances the question arises

Nussbaum, *Geld*, p. 206 and Breit in Düringer–Hachenburg, *Kommentar zum Handelsgesetzbuch*, iv. 765, it is submitted that there did not exist a foreign money obligation, but a foreign currency clause added to the promise to pay mark, and that the case belonged to the group presently to be discussed in the text.

[1] *Pennsylvania Railway Co.* v. *Cameron* (1924), 280 Pa. 458, 124 A. 638.

[2] In very exceptional circumstances it may be possible to read such a clause into a contract: Thus it was held in Belgium that a clause '1,25 frs. for 1 mark' was to be read into the borrower's promise to repay a mark loan (Cass. 26 Feb. 1925, Clunet, 1926, 505 = Pasicrisie Belge, 1925, 1. 157). See also French Cass. Req. 10 March 1925, Clunet, 1926, 70 (Banque Internationale de Luxembourg c. Ville de Sedan). But the German Supreme Court declined to read the clause '4,20 RM. being equal to $1' into a promise to pay dollars: 15 March 1937, *RGZ.* 154, 187; similarly 7 Feb. 1938, *JW.* 1938, 1109.

whether there exists a separation of money of account and money of payment or whether the fixed sum of pounds or dollars is both the money of account and the money of payment, the clause having merely the effect of providing for a measurement of value or a measuring rod. If the former view is right, these clauses would really belong to the first group of cases. The debtor who has promised to pay '£100, £1 being equal to $5', would have to pay $500 and would have contracted a foreign money obligation in disguise.[1] If the latter alternative is to be adopted, the debtor would have to pay pounds sterling, but so many pounds sterling as correspond to the fixed relation indicated by the clause. Thus, if the pound sterling, as a result, for instance, of its removal from the gold standard, went down to a rate of £1 to $4, or if, owing to an increase of the gold content of the dollar, the rate of exchange of the dollar went up to £1 to $4, the creditor would contend that the clause justified him in demanding so many pounds as correspond to the fixed relation of £1 to $5 or as would enable him to buy $500, and he would claim payment of £125, while the debtor would rely on the fact that his debt was fixed at £100. On the other hand, if it is assumed that the pound sterling appreciates or the dollar depreciates to a rate of £1 to $6, the debtor would put forward the construction that the dollar was used as a measure of value and that his liability was confined to £83 6*s*. 8*d*.

In most cases, it is submitted, it is clearly impossible to put these clauses on the same level as the entirely different clause to pay '£100 in dollars at the rate of exchange $5 to £1'. Where there is not only a rate of exchange fixed by the parties, but also the expressed term that the obligation is to be actually paid 'in dollars', it is clear that in truth the subject-matter of the obligation is the simple promise to pay $500, and there is consequently no ambiguity and, therefore, no room for construction. But if the clause reads '£1 being equal to $5', it would appear that the parties have agreed upon a definition clause, though it remains uncertain what it was that they in-

[1] The following discussion will disregard the converse case of a promise 'to pay $100, $5 being equal to £1'. In this case the question arises whether there exists a foreign money obligation or a domestic money obligation in disguise. Its solution depends on the same considerations as those applying to the case discussed in the text.

tended to define. They cannot be said to have agreed upon the payment of a liquidated sum of dollars, there being no indication that the money of payment was to be dollars. Nor can they be said to have agreed upon the payment of a liquidated sum of £100, for, if they had, the clause would be superfluous. It is therefore submitted that the clause '£1 = $5' or '£1 being equal to $5' is different from the clause 'payable *in dollars* at the rate of exchange of $5 to £1'.

Where it thus appears that the foreign currency clause serves merely as a measure of value and does not affect the money of account or the money of payment, the question remains whether it has the character of an absolute or a relative measure of value. If it is an absolute measure of value, the solutions given in the examples mentioned above are right. Sometimes the debtor would have to pay £125, sometimes he would have to pay £83 6*s*. 8*d*., and the stipulated sum of £100 would only be payable if the exchange ratio between the two currencies remained stable. In most cases, however, such a view will not do justice to the properly interpreted intention of the parties. The principles applicable to the construction of a gold clause should not be lost sight of in the present connexion: it is essential to determine the real purpose of the clause[1] and to have in mind the rule that 'it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous'.[2] It would appear that in most cases the purpose of these clauses will be the same as that aimed at by gold clauses, namely, 'to protect one of the contracting parties against a depreciation of the currency'.[3] If parties add the words '£1 being equal to $5' to a promise to pay £100, this will generally be due to the fear that the pound sterling will depreciate, and, accordingly, to the wish to protect the creditor against the effects of such depreciation. This being so, the clause, unless it is in fact meant as an absolute measure of value, should not affect the quantum of the

[1] See *Feist* v. *Société Intercommunale Belge d'Électricité*, [1934] A.C. 161, 172 per Lord Russell. See also the Canadian case mentioned below, p. 149, n. 3, and the dictum on pp. 149, 150.

[2] Permanent Court of International Justice, Case of Serbian Loans, Collection of Judgments 1928–30, Judgment No. 14, p. 32, as approved of in *Feist*'s case (above, n. 1).

[3] *The King* v. *International Trustee for the Protection of Bondholders A.G.*, [1937] A.C. 500, at p. 556 per Lord Russell.

obligation if, owing to an increase of the gold content of the dollar, the rate of exchange of the dollar should go up to £1 to $4; for if the clause was applied to such a case, not expected by the parties, it would mean that the creditor would receive more in 'real value' than he had contracted for. Nor should the clause come into operation if it is the pound sterling which appreciates to a ratio of £1 to $6; the debtor will generally be unable to satisfy the creditor by the payment of £83 6*s.* 8*d.*, since the altered rate of exchange was contrary to the expectations of the parties and to the purpose of the clause, which usually is the protection of the creditor, not of the debtor, so that the insertion of the fixed sum of £100 has the character of a minimum figure. Finally, if it is the dollar which depreciates to a rate of £1 to $6, the quantum of the debt should not be affected; since the clause does not provide an absolute measure of value, but is intended as a protection to the creditor against a depreciation of the stipulated currency, i.e. pounds, the debtor should not be allowed to discharge his debt by a payment of less than £100. This construction has recently been favoured in continental countries. After the German inflation it became a widespread practice to secure a Reichs- or Goldmark debt by inserting the clause '1 Reichsmark (or 1 Goldmark) equal to $\frac{10}{42}$ U.S.A. dols.' The German Supreme Court held that, in view of the Germany currency experiences, it was the intention of the parties and the purpose of the clause to protect the creditor against a depreciation of the sum of German money promised to be paid by the debtor, that the dollar was therefore not an absolute measure of value, and that it was the gold dollar, not the currency dollar, which was referred to when it was equiparated to a Goldmark which in fact did not exist, the result being that the debtor had to pay the fixed sum of German money as a minimum sum.[1] Similar cases arose in other countries and the same result has been arrived at in Sweden[2] and

[1] See particularly 22 Oct. 1936, *RGZ.* 152, 166 and the numerous decisions referred to therein, one of which is translated by Plesch, *The Gold Clause*, i. 97. In addition see: 14 Dec. 1933, *IPRspr.* 1934, No. 88; 24 Sept. 1934, *JW.* 1934, 3198; 23 Oct. 1934, *IPRspr.* 1934, No. 90. The principle is best explained in *RGZ.* 146, 1 sqq., 5 (14 Dec. 1934) and *RGZ.* 148, 42 sqq., 44 (5 July 1935) = Clunet, 1936, 412. On these decisions see Stoeber, *Niemeyers Zeitschrift für internationales Recht*, 52 (1938), 240, and the material there collected.

[2] Supreme Court, *B.I.J.I.* 33 (1935), p. 278 (27 April 1935).

(after some hesitation) in Belgium[1] and Czechoslovakia,[2] while in Italy[3] the dollar was regarded as an absolute measure of value.[4]

It thus appears that generally the clause will only have its full effect if the pound sterling depreciates to a rate of, say, £1 to $4. This is the case against which the parties must have primarily intended to protect the creditor. In the example given above the creditor should therefore be entitled to demand payment of £125. But, curiously enough, in these very circumstances English courts refused to give effect to the clause.[5] The decision of the House of Lords in *Howard Houlder & Partner Ltd.* v. *Union Marine Insurance Co.*[6] related to a case where the plaintiffs had effected on behalf of American principals a policy of marine insurance with the defendants in respect of cargo to be conveyed from the West Indies to Canada. The cargo was valued at $108,000 and was insured for an aggregate sum of £26,025. The policy contained the clause, added at the request of the plaintiffs after the conclusion of the contract: 'Claims if any to pay at the rate of 4.15 dols. to 1 pound sterling.' A total

[1] See Piret, pp. 256–64, with reference to the decisions. See also Dubois–Clavier Clunet 1933, 730; some of the decisions will be found in Clunet 1933, 722, 724, 728, and *Rev. dr. banc.* 1932, 377 and 453.

[2] Supreme Court, 22 Oct. 1937, *Zeitschrift für Osteuropäisches Recht*, 4 (1938), 467, with note by Hochberger; but see the earlier decision 27 Nov. 1936, *Zeitschrift für Osteuropäisches Recht*, 3 (1937), 654.

[3] Cass. 1 Jan. 1936, *Riv. dir. com.* 34 (1936), 386, with note by Grassetti; but see in the opposite sense Milan Court of Appeal, 19 July 1934, *Foro Lomb.* 1934, 660, discussed in *RabelsZ.* 1935, 201.

[4] In *Ottoman Bank* v. *Dascalopoulos*, [1934] A.C. 354, *Ottoman Bank* v. *Chakarian* (No. 2), [1938] A.C. 260, and *Sforza* v. *Ottoman Bank*, ibid., p. 282, the Privy Council dealt with the plaintiffs' contention that a gold clause was impliedly added to a promise to pay a sum of Turkish pounds. It has been stated above that the actions were misconceived; in truth, it was a foreign currency clause of the type described in the text ('110 Turkish pounds equal to 100 Cyprus pounds') which was attached to the promise to pay Turkish pounds. See pp. 95 sqq.

[5] Where bonds contained the clause 1,000 mark = 1,240 frs. the German Supreme Court originally held that German holders could only claim the stipulated sums of marks: 21 Dec. 1925, *JW.* 1926, 1320. But in a subsequent decision it was held that even German holders could claim payment in Swiss francs or their equivalent in reichsmarks: 1 July 1926, *JW.* 1926, 2675. For the reasons mentioned in the text the result reached in the later decision is correct; but the reason propounded by Nussbaum in a note to the previous decision and accepted by the Supreme Court that there existed an 'option de change' can hardly find approval. See below, p. 149, n. 2.

[6] (1922), 10 Ll. L.R. 627.

loss having occurred and the pound sterling having depreciated, the plaintiffs claimed £2,886 in excess of £26,025 to enable them to obtain $108,000. Bailhache J. dismissed the action,[1] and his order was confirmed by a majority of the Court of Appeal (Bankes and Warrington L.JJ.), Atkin L.J. dissenting,[2] and by a unanimous House of Lords (Lords Buckmaster, Dunedin, Atkinson, Sumner, and Parmoor). The opinions delivered rest on two grounds: in the first place, it was considered that if the plaintiffs' claim was dismissed, i.e. if the clause was disregarded in connexion with the claim for the principal sum of £26,025 due in respect of a total loss, the clause would nevertheless not be deprived of all meaning, since certain cases could be imagined in which claims for damages expressed in dollars would arise which would have to be converted into pounds sterling at the stipulated rate. Secondly, it was emphasized that 'this is a sterling policy and it appears to me impossible to give to these latter words a meaning which would produce the effect of changing the whole nature of the policy by converting it into a dollar policy'.[3] As in the circumstances the insertion of the clause was probably due to the desire to protect the plaintiffs' principals against a depreciation of the pound sterling, the decision is not entirely satisfactory and one may well understand the fact that Atkin L.J. (as he then was) dissented and that the decision of the House of Lords was not followed in the United States.[4] The decision cannot be regarded as laying down any general rule, because, since *Feist*'s case was decided in 1934,[5] greater emphasis has to be placed on the purpose of the clause, and also because the decision rested to a considerable extent on the fact that in the particular case it was possible to disregard the clause without rendering it thereby devoid of any meaning at all. Two similar cases[6]

[1] (1920), 5 Ll. L.R. 48. [2] (1921), 6 Ll. L.R. 551.

[3] At p. 628 per Lord Atkinson.

[4] *Marine Insurance Co.* v. *J. Craig McLanahan* (1923), 290 F. 685; 1923 American Maritime Cases 754 and in *Rev. du droit maritime comparé*, 4 (1923), 269 (Appeal Court, 4th Circuit), affirming 283 F. 240 (1922).

[5] [1934] A.C. 161.

[6] *Poulsen & Carr* v. *Massey* (1919), 1 Ll. L.R. 497, where a charterer of a ship had to pay a monthly hire of £4,068 15*s*., there being later in the charter-party the clause: 'rate of exchange not being below 17 kroners to the £'. Bailhache J. held that this clause did not affect the amounts of British money owed in respect of hire, apparently because it was held to refer to other claims under the contract. See also *Royal Commission on Wheat Supplies* v. *Bulloch*

which have come before the English courts do not throw much fresh light on the problem.[1]

VII

A foreign money obligation may also take the form of an alternative promise ('option de change', option of payment):[2] '£100 or 500 U.S.A. dols.', '10,000 French francs or 500 U.S.A. dols.'. The promise to pay dollars in the first case and both promises in the second case are foreign money obligations of a kind which is often to be found in international transactions, especially in loan agreements, where it is intended to safeguard one of the parties against fluctuations of monetary value by giving an option of choosing between two or more currencies. Such alternative promises are often coupled with the stipulation of corresponding alternative places of payment: '£100 in London or 500 U.S.A. dols. in New York or 10,000 French

Bros. (1922), 13 Ll. L.R. 418 (C.A.): 'rate of exchange . . . fixed at sh. 1/5½ to the rupee; fluctuations being at buyers' account.'

[1] Reference should be made to two interesting *French* cases: The Cour de Bordeaux, 23 March 1921, Clunet, 1921, 567, dealt with a case where invoices were expressed in French francs, but contained clauses to the effect that payment was to be made in sterling at the rate of 25 frs. por £. It was contended by the plaintiffs 'que C. (defendant) doit leur remettre à Londres autant de fois une livre sterling que les factures contiennent de fois 25 frs. tandis que C. prétend qu'il lui suffit de remettre à Marsden & Hunter autant de fois 25 frs. qu'il leur devra de livres sterling, ou bien la somme correspondante de francs en livres au cours du jour'. The court gave judgment for the plaintiffs for £2,589 3*s.* 4*d.*, but it explained that if at the time of the payment the rate of exchange for pounds was less than 25 frs., the profit would have been the defendant's. The second case is a decision of Cass. Civ. 2 Nov. 1932, Clunet, 1933, 1197 (Société des Music-Halls Parisiens *v.* Victoria Palace Ltd.). The subscriber of bonds denominated in francs was promised that his money would be repaid at the rate of 25 frs. per pound sterling. The French franc fell in terms of pound sterling, but the debtor was held liable to repay 'autant de livres sterling par obligation de 5,000 francs qu'il y a de fois 25 frs. dans 5,000 frs. c'est à dire 200 livres'. See also Cass. Civ. 5 Dec. 1927, S. 1928, 1. 138. The Court of Appeal of the Mixed Tribunal in *Egypt* had to deal with a case where a borrower had promised to repay '67401,16 Frs. soit P.T. 260,000, au cours du change de Paris'. It was held that he was bound to repay not French francs, but 'le franc, vingtième partie du louis d'or tel qu'il a été tarifé en Égypte et adopté par les Codes Mixtes, soit P.T. 3.8575, puisque c'est sur cette base que, dans l'Acte même, les francs ont été convertis en piastres'; 19 May 1927, Clunet, 1928, 765 (*re* Marquis de la Celle).

[2] See generally Nussbaum, 'Multiple Currency and Index Clauses', *Pennsylvania L.R.* 84 (1935), 569; Seignol, *L'Option de change et l'option de place* (Paris, 1936).

francs in Paris'.[1] The essential feature of such promises lies in the fact that the subject-matter of the obligation, i.e. the money of account, itself varies. The alternative promises, whether or not they are coupled with alternative places of payment, are 'entirely independent; each provides for the payment of a particular sum in a particular place in a particular way'.[2] The optional currencies are 'on the same level', and none of them is merely superadded; there is also 'only one payment, single and indivisible, which takes place, once for all, at the place and in the currency selected'.[3]

The alternative character of an option of payment usually relates to the stipulation of several moneys of account. But sometimes alternative moneys of payment are promised.[4] An example

[1] Very often the promise reads '£100 in London or in New York at the fixed rate of exchange of $5 to £1 or in Paris at the fixed rate of 100 French francs to £1'. In this case there also exists an option of payment and not only an option of place, on which see below, p. 150. For the stipulation of a fixed rate of exchange has the effect that in New York or Paris the debtor owes a fixed sum of dollars or francs so that the amount payable in these places is independent of the rate of exchange for sterling current at the date of payment. There thus exist dollar or franc debts in disguise in the sense mentioned above, p. 139. The following discussion in the text shows that there exists no 'option de change' if the promise simply reads '£100 in London or in New York in dollars' or '£100 in London or in New York at the current rate of exchange'.

[2] *International Trustee for the Protection of Bondholders A.G.* v. *The King*, [1936] 3 All E.R. 407, 431 per Lord Wright.

[3] *Rhokana Corporation Ltd.* v. *Inland Revenue Commissioners*, [1937] 1 K.B. 788, 806 per Lord Wright. The House of Lords reversed the decision: [1938] A.C. 380. But the opinions delivered rest on grounds which do not affect the correctness of Lord Wright's words relating to the character of multiple currency clauses. Lords Atkin and Thankerton, it is true, spoke of the 'primary obligation' to pay in sterling (pp. 389, 391), but this remark was clearly confined to the particular question of the law of income tax with which they were concerned and which was discussed above, p. 128. It follows from the view expressed in the text that the alternative promises are not interchangeable, each currency can only be demanded at the designated place in the respective country. In the same sense see, e.g., Danish Supreme Court, 17 Dec. 1925, *JW.* 1926, 2030.

[4] In continental law this case is called a *facultas alternativa*. See German Supreme Court, 17 March 1932, *RGZ.* 136, 127. While in the case of an option of payment in the usual technical sense there exist two or more moneys of account, in the case of a *facultas alternativa* there exists only one money of account, but more than one money of payment. As regards the distinction in general, see Werner in Staudinger's *Kommentar zum bürgerlichen Gesetzbuch*, ii (1), p. 190; Planiol–Ripert, vii, Nos. 1052, 1053. Probably the remarkable decision of the German Supreme Court of 28 Nov. 1928, *IPRspr.* 1929, No. 107, is to be explained by the distinction between option of payment and *facultas alternativa*.

is to be found in the American case of *Booth & Co.* v. *Canadian Government*[1] where a bill of lading contained the clause:

'Freight for the said goods to be paid in cash at the rate of sh. 85/- per ton payable in port of delivery, in British sterling or equivalent, rate of exchange to be calculated on current rate at date of steamer's arrival at loading port.'

Here there was one money of account, namely sterling, but there were alternative moneys of payment, namely sterling or dollars, and it was held that the consignee had the option of paying in dollars or sterling and that the amount of sterling payable after England had gone off the gold standard need not equal in value the dollars which would have been payable had the consignee elected to pay dollars.

Whether there exist independent alternative promises in the sense mentioned above is sometimes doubtful.[2] Some of the difficulties are well exemplified by two Canadian cases. In *Brown* v. *Alberta & Great Waterways Railway Co.*[3] bonds issued by the defendant company contained the words 'to pay the sum of $1,000 of lawful money of Canada at the Counting House of J. P. Morgan & Co. in the City of London, England; the principal and interest shall be payable there at the fixed rate of exchange of $4.86⅔ for the pound sterling'. The coupons repeated these words, although there was no amount specified in the text of the coupons; but on the margin there was the clause: '$25 or £5 2*s.* 9*d.*'. The question arose whether the holder was entitled to demand for each coupon 25 Canadian dollars in London or whether the defendant company could satisfy each coupon by the payment of £5 2*s.* 9*d.* which at the time were less than 25 Canadian dollars. The court rejected the idea that there was an option of payment and upheld the defendants' point of view, since otherwise the provisions relating to the fixed rate of exchange would have been disregarded; the court added:

'The lenders were the ones to impose the terms on borrowers. They . . . desired to protect themselves against any change to their

[1] [1933] A.M.C. 399 (C.C.A. 2d. 1933).

[2] The promise to pay at the rate of '£1 = $5' contains a foreign currency clause in the sense discussed above, pp. 141 sqq., but there exists no option of payment.

[3] (1921) 59 D.L.R. 520 (Alberta Supreme Court App. Div.).

detriment by providing that they should receive back exactly as many pounds sterling as they advanced and that in the meantime they should receive in their own currency exactly 5% interest.'

In *Royal Trust Co.* v. *Oak Bay*[1] there was a promise to pay '$500 of lawful money of the Dominion of Canada or £102 14*s.* 10*d.*, its sterling equivalent, at the rate of $4.86\frac{2}{3}$ to the one pound sterling'. The plaintiff demanded payment of £102 14*s.* 10*d.* which at the time had a greater value than $500, but the court held that the defendants' liability was confined to $500. The judgments are not very satisfactory, but the case was a difficult one, since the addition of a fixed rate of exchange to the promise to pay a fixed sum of sterling made it doubtful whether there was an option of payment.

The mutual independence of alternative promises each of which provides for the payment of a fixed sum of money is the feature which distinguishes an option of payment from the case where it is not the promise of payment, but merely the place of payment which is alternative ('option de place', option of place): '£100 payable in London, New York, or Paris'. While in the former case there exist alternative promises to pay fixed sums in the respective currencies, in an option of place there exists only one promise to pay one sum expressed in one particular currency, but dischargeable in various places; in the absence of a stipulation fixing the rate of conversion, the amount of the money of payment which may be claimed at each designated place of payment depends on the value, as determined by the rate of exchange, of that single money of account.[2]

The distinction is thus clear and simple and should be strictly adhered to. But it is comprehensible that bondholders have sometimes attempted to transform an option of place into an option of payment. Such an attempt was rejected by the

[1] (1934) 4 D.L.R. 697 (British Columbia Supreme Court).

[2] The essence of an option of place was well explained by the Permanent Court of International Justice at The Hague in the case of the Serbian Loans (Judgment No. 14, Collection of Judgments 1928–30, at p. 35) when it was said: 'The mere provision for payment in the places named at the rate of exchange on Paris cannot affect the amount due: it must in fact be construed in the light of the principal stipulation which is for payment at gold value. That provision is plainly, not for the purpose of altering the amount agreed to be paid, but for the placing of the equivalent of that amount according to banking practice at the command of the bondholder in the foreign money in the designated cities.'

Ontario Supreme Court.[1] A coupon contained the promise to pay 12·50 francs in Paris, Brussels, or Toronto as interest on bonds issued by the defendant company. The bonds were headed by the words '3·5 million pounds = 88,060,000 francs', but the court refused to construe this clause 'as a representation or promise that the holders of the French bonds (or detached coupons) should have the option of being paid in pounds'.[2] Similar attempts were made in France, where the courts at one time took a rather liberal view, but where now the stricter tendency begins to prevail.[3,4]

From the option of place there must be distinguished the option of collection:[5] '£100 payable in London and collectible

[1] *Derwa* v. *Rio de Janeiro Tramway & Power Co.* (1928) 4 D.L.R. 542.

[2] pp. 554 sqq., 560.

[3] The starting-point of the modern development is the case concerning the bonds issued by the Banco El Hogar Argentine (Cass. Civ. 17 July 1929, Clunet, 1929, 1075) where there obviously was an 'option de change'. A remarkable extension is to be found in the next case, concerning the bonds of the Crédit Foncier Franco-Canadien: Cass. Civ. 3 June 1930, Clunet 1931, 103, with the important arguments of the Attorney-General Paul Matter: a bond expressed in francs, but payable in Paris in francs, in Geneva in francs, in London and other places at the current rate of exchange, was held to give the holder an 'option de change' in Geneva. But later decisions on very similar facts take a much stricter view: Cass. Civ. 21 Dec. 1932, Clunet, 1933, 1201 (Chemin de fer de Rosario à Puerto-Belgrano); Cass. Civ. 5 June 1934, Clunet, 1935, 90 (Est Lumière); Cass. Civ. 17 July 1935, Clunet, 1936, 880 (Brasseries Sochaux); Cass. Civ. 21 July 1936, Clunet, 1937, 299 (Papeteries Bergès); Cass. Req. 24 Feb. 1937, Gaz. Pal. 1937, 1. 860 = Clunet, 1937, 765 (Crédit Foncier Franco-Canadien). Reference should be made to Planiol–Ripert, vii, no. 1194, where it is well said: 'Mais l'option de place n'entraîne pas par elle-même option de change. Si l'instrument monétaire offert au prêteur varie dans son genre suivant le lieu de paiement, il ne varie pas quant à la valeur réelle qui lui est remise: le montant du versement demeure identique en tous lieux, son expression seule diffère.' If there does not exist an 'option de change', but merely an obligation stipulated in francs and payable in France and Switzerland a further and different problem arises, namely, to determine whether the money of account was French or Swiss; as to this question and the decisions relating thereto see below, pp. 162 sqq. The Court of Appeal of the Mixed Tribunal in *Egypt* declined to regard as an 'option de change' the promise to pay francs 'payable à Paris en monnaie française, ainsi qu'en Égypte, à Londres, Bâle, Genève, Amsterdam et Bruxelles, au cours du change à vue sur Paris': 29 Dec. 1927, Clunet 1928, 769 (*re* Land Bank of Egypt).

[4] For a *Dutch* case where the plaintiff, a Belgian subject, sold to the defendant, a Dutch subject, real estate situate in Holland for '32500 frs. or 15,600 guilders in Dutch money', and where the court disregarded the alternative promise, see Court of Appeal at The Hague, 8 June 1931, Weekblad 12338 and Nederlandsche Jurisprudentie, 1931, 1499.

[5] For such cases see Nussbaum, 44 (1934) *Yale L.J.* 53; Rabel, *RabelsZ.* 10 (1936), 492, 498; Hamel, *Nouvelle Revue de droit international privé*, 1937, 499.

in Amsterdam, Paris, or New York'. In this case there exists only one place of payment which is in London, but in order to facilitate a recovery, places in foreign countries are appointed where payment may be demanded.[1] The legal importance of the distinction between an option of payment and an option of collection is slight. In neither case is the creditor entitled to anything other than the fixed sum of the money of account, e.g. £100, and in both cases the amount of local money which is to be paid to him, for example in Paris, depends on the rate of exchange between the two currencies.

Whether there exists an option of payment or an option of place or an option of collection, in most cases it is the creditor's protection or convenience which the parties had in view when they stipulated the option, and it will therefore generally be the creditor's right to exercise it. This is well recognized on the Continent,[2] and cannot be different in this country. Where the creditor has to take the first step by presenting his dividend warrant or bond, the principle that prima facie the election is in the person who has to do the first act[3] will apply without difficulties. Even where no such presentation is required, the purpose of the option will usually indicate that it is to be exercised by the creditor.[4]

[1] As to the distinction between 'place of payment' and 'place of collection' in general, see below, p. 153.

[2] This was achieved although the codes contain prima facie rules to the effect that the debtor has the right of election: Art. 1190, French Code Civil; s. 262, German Civil Code; Art. 72, Swiss Obligationenrecht. As to *France* see, e.g., Cass. Req. 17 July 1929, Clunet, 1929, 1075 (Banco el Hogar Argentino); Planiol-Ripert, vii, No. 1192; Degand, *Rép. dr. international*, iii (1929), 'Change', Nos. 129 sqq.; X (1931), Paiement, Nos. 67, 68. As to *Germany*, see already Supreme Court, 19 Feb. 1887, *RGZ.* 19, 48 relating to one of the 'Coupons Actions' on which see below, p. 194; also 1 July 1926, *JW.* 1926, 2675; 14 Nov. 1929, *RGZ.* 126, 196; 5 Oct. 1936, *RGZ.* 152, 213, 218. In the 'Coupons Actions' and also in later cases the *Austrian* courts rejected the assertion of an 'option de change', but regarded the promises to pay non-Austrian currency as being added merely *informationis causa*; see Walker, *Internationales Privatrecht*, pp. 408 sqq.

[3] See Halsbury (Hailsham), vii. 189.

[4] *In Rhokana Corporation Ltd.* v. *Inland Revenue Commissioners*, [1937] 1 K.B. 788, 804 Lord Wright said: 'We think that the option is the holder's option given to him for his benefit, and is exercisable by him.' But although counsel's argument that it was the debtor's option was thus rejected, the value of the dictum is somewhat reduced by the fact that the warrant expressly gave the option to the holder.

VIII

In view of the very wide importance which, in connexion with foreign money obligations, is to be attached to the place of payment and its law, it seems advisable to offer a few observations on its meaning and ambit.

1. The place of payment is very often fixed by the parties, either expressly or impliedly. But if, in the absence of such determination, it becomes necessary to ascertain the place of payment, resort must be had to the general rules relating to the determination of the place of performance. In this country[1] as well as in the United States,[2] Switzerland,[3] and Hungary[4] the place of performance prima facie is the place where the creditor resides. In France,[5] Belgium,[6] Holland,[7] Italy,[8] and Germany[9] it is the place where the debtor resides.

Although only the German Civil Code has put the distinction on a statutory basis,[10] it is sometimes necessary to differentiate between the place of payment and the place of collection. The former term denotes the place where the debtor is bound to pay, the latter term is employed to designate the place where the creditor is entitled to receive the money. If, for instance, an international loan provides for *payment* in London and entitles the bondholder to *collect* the money in Amsterdam, Paris, or New York, there exists an option of collection, not an option of place or, still less, an option of payment.[11] Even if it should appear in the course of the following discussion that importance is to be attached to the law of the place of payment which is not identical with the proper law of the contract, no such effect could be given to the law of the place of collection.

[1] Halsbury (Hailsham), vii, No. 275, p. 195. But a judgment creditor, though residing abroad, has only a right to be paid in this country: *In re A Debtor*, [1912] 1 K.B. 53.

[2] *Corpus Juris*, 48 (1929), p. 592.

[3] Art. 74, Obligationenrecht.

[4] Art. 324, Commercial Code.

[5] Art. 1247, Code Civil.

[6] Art. 1247, Code Civil.

[7] Art. 1429, Wetboek.

[8] Art. 1249, Codice Civile.

[9] S. 269, Civil Code, where the commendable rule is laid down that the place of the residence of the debtor at the time of the conclusion of the contract is the place of performance. The rule, for instance, prevailing in France (see Planiol–Ripert, vii, No. 1186) that the residence at the time of payment decides is less felicitous.

[10] Art. 269 provides that the place of the debtor's residence is usually the place of payment or performance. But according to Art. 270 the debtor must send the money at his risk and expense to the place where the creditor resides.

[11] See above, pp. 147, 150, 151.

2. The place of performance or payment may be of importance in connexion with a rule of private international or of municipal law. If an English rule of private international law refers to the law of the place of payment, this term 'place of payment' must, in the absence of any indication by the parties, be understood in the English sense, i.e. as the place where the creditor resides. Only after the application of English private international law has led to the application of another municipal law as the governing law can that law's conception of the meaning of 'place of payment' be considered. This inherent difference between private international law and municipal law[1] may be elucidated by an example. It is a rule of English private international law that the construction of a contract is governed by the proper law. Let us assume that the determination of the money of account, if it is doubtful, is a matter of construction and therefore governed by the proper law.[2] If under a contract the proper law of which is German a Danzig merchant owes guilders to an Amsterdam merchant, and if, in the absence of other indications, it is doubtful whether Danzig or Dutch guilders were meant, English private international law refers to German law as the proper law, and it thus becomes necessary and permissible to apply the rule of German municipal law that prima facie the money of account is that which circulates at the place of performance.[3] It is obvious that the meaning of the words 'place of performance', when they occur in German municipal law duly found to be applicable, must be ascertained according to German law, which refers to the debtor's residence. Thus it appears that Danzig guilders are owed.[4] On the basis of English (private international or municipal) law the result would have been that Dutch guilders were owed.

3. It is a matter of some difficulty to determine the influence of the law of the place of performance in English private international law. The law of the place of performance may be the proper law of the contract, and in the absence of other circumstances this inference will often have to be drawn where the place of performance is intended to be in a country other than

[1] *British Year Book of International Law*, 1937, pp. 100, 101.
[2] See below, pp. 169 sqq. [3] S. 361, Commercial Code.
[4] That this is not a problem of classification was shown in the article quoted above, n. 1.

that in which the contract was made.[1] These are rules relating to the selection of the proper law and they are of no particular interest in connexion with monetary questions.

But there remains the question of defining the weight attached to the law of the place of payment, if it is not identical with the proper law of the contract. No doubt 'in English law a transaction may be regulated in general by the law of one country although as to parts of that transaction which are to be performed in another country the law of that other country may be the law applicable'.[2] But under what circumstances is it possible to apply the law of the place of payment to a transaction the proper law of which is different?

In the first place, the law of the place of performance may apply as regards the mode or method of performance. The existence of this rule in English private international law,[3] and also in other legal systems,[4] cannot be doubted. But it is not easy to define the matters falling under the head of 'mode' of performance. Though the distinction between the substance of an obligation and the mode of performance is well known in many respects,[5] the interconnexion between both parts of an obligation is so great that very careful consideration is required. This is especially so when the distinction serves as a basis for a rule of private international law which involves the submission of one contract to two different legal systems. Thus Lord Wright recently said[6] that 'that principle (i.e. that the mode

[1] *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B.D. 79, 82, 83 per Lord Esher as understood, e.g., by Lord Hanworth in *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 373, 397. *Chatenay*'s case has often been misunderstood. It is submitted that the only principle expressed by the decision is the proposition stated in the text.

[2] Lord Roche in *International Trustee for the Protection of Bondholders A.G.* v. *The King*, [1937] A.C. 500, 574.

[3] *Lloyd* v. *Guibert* (1865), L.R. 1 Q.B. 115, 126 per Willes J. delivering the opinion of the Court; *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589, 604 per Bowen L.J.; *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 373, 397 per Lord Hanworth; *Auckland City Council* v. *Alliance Assurance Co.*, [1937] A.C. 587, 606 per Lord Wright; Dicey, p. 672.

[4] Beale, *Conflict of Laws*, s. 361; Lorenzen, 'Droit international privé des États Unis d'Amérique', *Rép. du droit int.* vi (1930), No. 184; Niboyet, *Rec.* 16 (1929), i. 83; Reiss, *Portée internationale des lois interdisant la clause-or*, p. 99; Nussbaum, *Internationales Privatrecht*, p. 240; Court of Appeal of the Mixed Tribunal in Egypt, 18 Feb. 1936, Clunet, 1936, 1004.

[5] Above, p. 138.

[6] *Auckland City Council* v. *Alliance Assurance Co.*, [1937] A.C. 587, 606; and

of performance is governed by the law of the place of performance), no doubt, is limited to matters which can fairly be described as being the mode or method of performance and is not to be extended so as to change the substantive or essential conditions of the contract'.

Secondly, the law of the place of performance is said to be of importance as regards the validity of the contract. It is said that a contract, whether lawful by its proper law or not, is invalid in so far as the performance is unlawful by the *lex loci solutionis*. The present writer has attempted to show that these and similar statements require a great deal of limitation and cannot be accepted at their face value.[1]

Thirdly, a separation of proper law and law of the place of performance may result from the application of the dictum of Lord Wright[2] that:

'*prima facie*, whatever is the proper law of the contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract.'

This dictum is certainly too widely formulated, inasmuch as it does not restrict the application of the *lex loci solutionis* to those cases where the place of performance is expressly fixed, and as it comprises 'any particular obligation', i.e. even the whole of the substance of the debt.[3] Though this wide principle cannot be accepted and seems to have been disregarded by the Court of Appeal in at least one case,[4] and though its importance is greatly restricted by a later decision of the Privy Council in which Lord Wright delivered the judgment of the Board,[5] its kernel

see *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society Limited*, [1938] A.C. 224, 241, 242, where Lord Wright also qualified his statement in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 151.

[1] *British Year Book of International Law*, 1937, pp. 107 sqq.

[2] *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 151.

[3] See the paper quoted, above, n. 1.

[4] See, on the one hand, *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.*, [1937] 3 All E.R. 349 at p. 352 per Greer L.J., at p. 354 per Slesser L.J. The dicta are quoted in full below, p. 220. But it is suggested that in that case which was governed by Chilean law, the only place of performance was in Chile and that the clause 'or remit to Europe' at best referred to a place of collection. On the other hand, see *British & French Trust Corporation* v. *New Brunswick Railway Co.*, [1937] 4 All E.R. 516 which is discussed below, pp. 224 sqq.

[5] *Mount Albert Borough Council* v. *Australasian Temperance & General*

has enabled a learned writer to suggest the general rule that when a contract creates an obligation to pay a debt in country X in the currency of country X 'the law of country X must be regarded at least as the proper law of that part of the contract which relates to payment in country X, even though in the case of other parts of the contract the proper law is another law'.[1]

This formula expresses an idea which will have to be noted in more than one connexion,[2] and which, incidentally, is to a certain extent not unknown in foreign countries. An Italian statute which provided that bonds issued by an Italian company and containing an 'option de change' could be discharged by the payment in Italy of lire of the nominal amount with an additional sum of 25 per cent. thereof, was held in France not to prevent bondholders from recovering in France French francs promised in the 'option de change'.[3] In another case the Cour de Paris held that a Polish company which had issued bonds with an 'option de change' for various European currencies could not rely on a Polish statute reducing the amount due to one-third of its denomination and could not prevent the bondholder from demanding payment of the stipulated amount of

Mutual Life Insurance Society Ltd., [1938] A.C. 224, 241 per Lord Wright: 'Mr. O'Shea relied on certain expressions used in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122 as indicating that the House of Lords there laid down that the law of the place of performance applied for all purposes relating to performance, even to the extent of changing the substance of the obligation expressed or embodied in the contract, with the result in the present case that the amount of the interest was reduced by the effect of the Financial Emergency Acts. Their Lordships cannot accept this reading of the *Adelaide* case. The House of Lords was not concerned there with any such general questions, or with questions of the substance of the obligation, which, in general, is fixed by the proper law of the contract under which the obligation is created. The House of Lords was concerned only with performance of that obligation with regard to the particular matter of the currency in which payment was to be made. There was no question such as a reduction in the amount of the debt or liability, or other change in the contractual obligation. The House of Lords had no intention of questioning the distinction emphasized in *Jacobs* v. *Crédit Lyonnais* (12 Q.B.D. 589) between obligation and performance. . . .' This qualification of the *Adelaide* case is indeed very fortunate, though it is not quite correct that, on the basis adopted by Lord Wright in that case, a question of performance, not of substance, was involved: see below, pp. 174 sqq.

[1] *British Year Book of International Law*, 1937, pp. 218 sqq., 220, and see Cheshire, p. 257.

[2] See below, pp. 202, n. 2, 224 sqq.

[3] Trib. Civ. Seine, 18 Jan. 1928, Clunet, 1928, 669 (Société Italienne de Chemins de Fer Méridionaux). The value of the judgment is impaired by the fact that it was given by default.

Dutch guilders.[1] The point was also dealt with in an extremely interesting decision of the German Supreme Court.[2] The Municipality of Vienna in 1902 issued bonds entitling the holder to claim 500 kroners, equal to 425 marks, equal to 525 francs, equal to 20 pounds sterling 15 shillings, equal to 251.50 Dutch florins, equal to 100 U.S.A. gold dollars. The plaintiff demanded 525 Swiss francs per bond, but the defendants relied on an Austrian statute of 1922 which had authorized them to repay the bonds in Austrian kroners at their nominal value. Although the court held that on principle the bonds, especially as regards the formation and interpretation of the contract, were subject to Austrian law, it denied any effect to the law of 1922 and applied the law of the place of performance, i.e. Swiss law, at least so far as concerned subsequent encroachments by Austrian law on the extent of the obligation.

These cases afford a useful guide when an attempt is made to elucidate and formulate the correct principle. The discussion must start from the fact that the possibility of attaching importance to a law other than the proper law exclusively depends on the express or implied intention of the parties. A helpful working principle will be found if the province of the questions subject to the law of the place of performance is regarded as increased or reduced in proportion to the greater or smaller concentration of the transaction at the place of payment. The degree of such concentration is determined by the intensity of the parties' intention to localize the transaction at the place of payment.

[1] 19 April 1928, Clunet, 1928, 695 (Sté. de Charbonnages de Sosnovice), and see the judgment in the preceding action rendered by the Cour de Paris, 25 Nov. 1926, Clunet, 1927, 700. In the course of the later judgment the court said 'qu'en émettant ses obligations sur des places étrangères et en donnant à ses créanciers la faculté de toucher leurs coupons ainsi que le capital de leurs titres en pays étranger et en monnaie étrangère la société débitrice a entendu précisément les garantir contre toute dépréciation intérieure qui surgirait ou qui serait organisée dans la monnaie du pays auquel elle appartient par sa nationalité'.

[2] 14 Nov. 1929, *RGZ.* 126, 196. See also 23 June 1927, *RGZ.* 118, 370; 22 Dec. 1927, *IPRspr.* 1928, No. 66. Against these decisions Haudek, *Die Autonomie des Parteiwillens* (1931), p. 69, and Nussbaum, *Die Bilanz der Aufwertungstheorie* (1929), p. 37. A re-examination of the decisions of the Permanent Court of International Justice at The Hague in the cases of Serbian and Brazilian loans shows that these judgments have no bearing on the question dealt with in the text; for further details see below, p. 223.

Very often the place of payment is not fixed by the parties and thus entirely depends on the rule of law, which, though it is intended to give expression to the presumed intention of the parties, leads to the adoption of a somewhat fictitious or artificial place of performance. Nevertheless, the mode of performance may be subject to the law of the place of performance, but the determination of what is mode of performance as opposed to the substance of the obligation requires restrictive interpretation, and the law of the place of performance can only apply to those questions which strictly relate to the mode of performance.

Where the place of payment has been fixed by the parties, the influence of the law of the place of payment increases. From such an express stipulation the intention may fairly be inferred that a greater number of questions may fall under the head of 'method of performance'.

Though it may appear paradoxical, the importance of the law of the place of payment may be still greater, if there exist alternative promises (option of payment) coupled with alternative places of payment. For if an obligation is concentrated in a country not only by the stipulation of a place of payment therein, but also by the promise to pay a fixed amount of money of that country, it appears that it is much more than the mode of payment which has thus been localized. The localization extends to a considerable part of the substance of the obligation, which, by the stipulation to pay alternatively the currency of a given country in that country, is separated from other ingredients of the substance of the obligation and related to the law of the place of performance. Nevertheless, even in such circumstances, the reliance on the law of the place of payment rather than on the proper law of the contract must be adopted with great care and in no other cases than those in which a separation is indicated by the intention of the parties. It is submitted that the only rule which can be stated with any confidence is that in case of an option of payment, coupled with an option of place, the law of the place of payment should be applied so far as concerns the effects of statutes of the proper law of the contract involving a subsequent encroachment upon the payment of the debt.[1] When the parties stipulate that the

[1] The German Supreme Court in the decision quoted in the preceding note speaks of *Zahlungsgeschäft* (payment transaction).

debt can be discharged in fixed sums of alternative currencies in alternative places of payment, their intention is not merely to facilitate the recovery of the debt (this is the only purpose of an option of place or collection), but to protect the creditor by splitting the obligation into several independent parts, and thus to secure payment of the exact amount contracted for. This being so, a great deal of all that concerns payment must be taken to have been exempted from the operation of the proper law of the contract or to have been expatriated. The cases which may be affected by this rule will be noted in various connexions,[1] but it should be emphasized that the rule operates only where a subsequent encroachment is involved, and that it can never lead to the application of the law of the place of payment so far as concerns questions relating to the formation, interpretation, and general effects of the contract.

[1] See below, pp. 202, n. 2, 224 sqq. As to the general aspects of the question, see also M. Wolff, *Juridical Review*, 1937, 122.

CHAPTER VI

THE DETERMINATION OF THE MONEY OF ACCOUNT

I. The problem stated. II. The determination of the money of account in case of fixed indebtedness: (1) the rules of municipal law; (2) the problem of private international law; the *Adelaide* and the *Auckland Corporation* cases in particular. III. The determination of the money of account in case of unforeseen liability: (1) the rules of municipal law in general and in particular cases: (*a*) indication in the contract; (*b*) restitution of value; (*c*) conversion into the injured party's domestic currency; (2) the rule of private international law.

I

WHERE payments have been agreed or ordered to be made, as in contracts or wills, the currency whose units of account are the subject-matter of the obligation is in most cases clearly fixed. But this is not always so. Thus the parties may have omitted to determine the currency, or they may have chosen an equivocal denomination such as pound (English, Colonial, Turkish, Palestinian) or dollar (United States of America, Canada, Mexico, Straits Settlements) or francs (Switzerland, Belgium, France, Luxemburg).[1] In such cases the problem arises of determining which money is owed by the debtor. It may also happen that, although the money of account is prima facie fixed, a different money of account is in fact the subject-matter of the obligation. This may be due to a subsequent agreement between the parties to replace the originally stipulated money of account by another,[2] or to the fact that it appears on proper construction that the parties in fact meant to contract with reference to a money of account other than that stated by them. Thus, if a testator leaves to five of his children £12,000 each, and to two daughters 240,000 marks each, which at the time of the will were the equivalent of £12,000, he may have intended to give £12,000 to each of them.[3]

[1] As to the particular meaning attached in *Egypt* to the word 'franc', see above, p. 93, n. 3; p. 147, n. 1; as to 'gold francs' which are not the francs of a particular country, but those of the Latin Monetary Union, see p. 42, n. 4.

[2] As to these cases see p. 163, n. 1.

[3] See *Oppenheimer* v. *Public Trustee*, below, p. 320, at p. 324 per Lord Hanworth M.R., at p. 329 per Lawrence L.J. This group of cases is also exemplified by the *French* decision Cass. Civ. 17 Nov. 1924, S. 1925, 1. 113, with note by Niboyet: a marriage settlement provided for a marriage portion

The problems are perhaps still more difficult if the amount which is to be paid is in no way fixed by the parties, as in case of claims for unliquidated damages or indemnities.

This chapter is devoted to an investigation of both these groups of problems. It should be clearly understood that it deals only with the determination of that money which is the substance or the subject-matter of the obligation, i.e. the money of account. All questions relating to the mode or instrument of payment, i.e. to the determination of the money of payment, will be treated in another connexion.[1] Moreover, it is essential to remember throughout this chapter that the question what law governs the determination of the currency owed must be strictly separated from the fundamentally different question what currency is owed according to the legal system found to be applicable; in other words, a clear line of demarcation must be drawn between private international law and municipal law.

II

Turning now to those cases where the indebtedness is fixed, though the currency owed is doubtful, we shall first examine the municipal law and we shall then consider what municipal law governs the question in case of a conflict of laws.

1. It cannot be gainsaid that the determination of the money of account is a question of interpretation of the contract, and it is in fact so treated in all legal systems. As in connexion with all other problems of construction so it is here necessary to have regard to all the circumstances of the case and to deduce therefrom the true intention of the parties. The nature of the transaction, the nationality, residence, and domicile of the parties, the valuation of the respective currencies at the

of 50,000 French francs which were actually paid in piastres; it was held that on the dissolution of the marriage the husband had to repay piastres, not francs. A similar French decision is Cass. Civ. 14 Jan. 1931, Clunet, 1931, 126 (Ville de Tokio): The French part of a loan issued in London, Paris, and New York provided for French francs as money of account, but as the amount of the French part of the loan, namely 100,880,000 francs, was stated to be equal to £4,000,000, it was held that the money of account of the French part was in fact expressed in pounds. A very similar case was decided in a different sense by the Ontario Supreme Court: *Derwa* v. *Rio de Janeiro Tramway Light & Power Co.* (1928), 4 D.L.R. 542. A loan for '3,500,000 pounds = 88,060,000 francs' was held to be denominated in francs only, because the text of the bonds and coupons merely provided for francs.

[1] See below, pp. 245 sqq.

time when the contract was made, the place where the contract was made and where it was to be performed, the subsequent conduct of the parties—all these and similar facts will have to be looked at and weighed.[1] Sometimes the contract itself supplies an indication: thus, where a certain percentage is payable, e.g. in respect of commission, it may generally be assumed that units of account of that currency are owed in which the principal sum is expressed.[2] Stock exchange transactions will usually have to be settled in the currency circulating at the place of the stock exchange.[3] If the transaction relates to immovables, it will often be safe to assume that the parties intended to adopt

[1] With the exception of the subsequent conduct of the parties which may give valuable indications, the state of facts at the time of the contract is exclusively relevant. This was made clear in *Noel* v. *Rochford* (1836), 4 Cl. & Fin. 158, 201 and by Lord Wright in *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587, 603, where he used words which at the same time draw a clear distinction between the money of account and the money of payment: 'There are two dates which in a case of this sort may have to be considered as material dates. One is the date when the contract is made, and the other is the date at which the contract requires payment to be effected. It is at the latter date that the measure of value expressed by the word 'pound' in the contract will have to be ascertained, and that will depend on the precise state of the relevant currency at the particular date. But it is as at the date of the contract that it must be decided what currency is meant by the contract as the currency or measure of value in which the contract obligation is to be discharged.' Perhaps it would have been still clearer if the term 'expressed' instead of 'discharged' had been used. The *German* Supreme Court once held that in a life insurance policy Swiss francs had been substituted as the money of account for the originally stipulated French francs, because after the depreciation of the latter currency the premiums had been paid in Swiss francs: 9 May 1930, *IPRspr.* 1930, No. 100. The Supreme Court of *Canada* held that the capital payable on a life insurance policy in Indianapolis (U.S.A.) and expressed in 'dollars' could be paid in Canadian dollars, one of the decisive reasons being that the premiums were so paid: *Weiss* v. *State Life Insurance Co.*, Canada Law Reports (Supreme Court), 1935, 461.

[2] *Westralian Farmers* v. *King Line* (1932), 43 Ll. L.R. 378 (H.L.), at p. 383 per Lord Wright; see German Supreme Court, 7 Dec. 1921, *JW.* 1922, 711. In *Myers* v. *Union Natural Gas Co.* (1922), 53 Ontario L.R. 88, a payment of 1½ cents for each 1,000 cubic feet of gas produced on the premises was promised. As all parties knew that the gas was produced and sold in Canada and paid for in Canada in Canadian currency, it was held that the American lessors were entitled to Canadian and not to American money.

[3] German Supreme Court, 15 Dec. 1920, *RGZ.* 101, 122; 11 July 1923, *JW.* 1924, 181; but see 24 Oct. 1925, *RGZ.* 112, 27. If the balance due by either side is inserted in a current account based on a different currency and the parties agree to an account stated, the money of account may change. But whether this conclusion can be drawn from a mere insertion in a current account is doubtful. See notes by Nussbaum, *JW.* 1921, 891; 1922, 1721; 1924, 181.

the money of the country where the property is situated.[1] Where an insurance policy is taken out at the place of the company's head office and the premiums are paid in the money of that place, the policy will be taken to be denominated in that money;[2] but if the policy is taken out by a Frenchman in France with the French agency of a Swiss insurance company and the premiums are paid in French francs, the policy is payable in French francs, although there is an optional place of payment in Switzerland.[3,4] If a contract made in London provides for the payment in New Zealand of £700 'sterling', the money of account is English currency.[5] As general principles cannot be laid down, each case requiring an examination of its particular facts, it would be unwise to dwell on further examples or to enter into a discussion of the vast material which is supplied by the decisions of foreign courts, especially those of France.[6] It

[1] But see Story, s. 271a, and *Lansdowne* v. *Lansdowne* (1820), 2 Bli. 60, where there was, however, a clause 'lawful money of England'. See also Paris Court of Appeal, 12 Feb. 1925, Clunet, 1925, 745; Cass. Civ. 21 July 1936, Clunet, 1937, 299 (Papeteries Bergès); Cass. Civ. 21 July 1936, D.H. 1936, 473 (Papeteries de France), and particularly Cass. Civ. 19 July 1937, S. 1937, 1. 399 = Clunet, 1938, 76. In *Ehmka* v. *Border Cities Improvement Co.* (1922), 52 Ontario L.R. 193, it was held that, although the real property, the subject-matter of the transaction, and the place of payment were in Canada, American dollars were the money of account, as both parties were resident in the U.S.A., and as they had in fact shown by their subsequent attitude that American dollars were owed.

[2] Cass. Req. 21 March 1933, Clunet, 1934, 373 (Société Suisse d'Assurance Générale).

[3] Cass. Req. 28 Nov. 1932, Clunet, 1934, 133 (La Bâloise); see also Cass. Req. 1 March 1926, Clunet, 1926, 661 (Comptoir d'Escompte de Genève). On the effect of an option of place see below, p. 167, n. 4.

[4] As it is contrary to the nature of insurance contracts to involve the company in currency fluctuations or speculations, the company's domestic money will most frequently have been meant by the parties. Foreign insurance companies are often subject to certain statutes requiring them to keep reserve funds in the currency of the country where they are admitted. But this cannot have any influence on the determination of the money of account in an individual policy. As to Germany see Supreme Court, 6 July 1923, *RGZ.* 107, 111; 25 March 1924, *JW.* 1924, 1364; 17 June 1924, *JW.* 1924, 1366; see also 31 Jan. 1936, *RGZ.* 150, 153. As to France see the decisions quoted above nn. 2, 3, and Cass. Civ. 30 June 1931, S. 1931, 1. 348, and the literature referred to in the notes to these decisions. But see Supreme Court of Canada in *Weiss* v. *State Life Insurance*, Canada Law Reports (Supreme Court), 1935, 461: as the Ontario Insurance Act requires payments due to policy holders to be made in Canadian dollars, the presumption relating to the place of payment which was in U.S.A. was rebutted.

[5] *De Bueger* v. *J. Ballantyne & Co. Ltd.*, [1938] A.C. 452.

[6] It is collected by Degand, *Rép. dr. int.* iii (1929), 'Change', Nos. 111 sqq.;

may suffice to refer to the English decisions relating to contracts, where, the proper law being or being treated as English, the courts proceeded to construe the contracts according to English canons of construction in order to ascertain the money of account.[1]

But there still remains the question whether there is any rule of law which, in the absence of circumstances conclusively pointing in one or other direction, will provide a guide and perhaps turn the scale. It in fact appears that there exists a widely recognized principle according to which, in the absence of countervailing circumstances, there is a presumption in favour of the money of the place of payment being the money of account.[2] As regards the law of this country, the rule is already

x (1931), 'Paiement', Nos. 62 sqq. For significant examples see Cass. Req. 19 Nov. 1924, D.H. 1925, 6; Cass. Req. 15 April 1926, Clunet, 1926, 970; Cass. Req. 2 Aug. 1926, Clunet, 1927, 102; Cass. Civ. 19 June 1933, Clunet, 1934, 939 (Compagnie Électrique de la Loire et du Centre). As to Belgium see Piret, No. 27.

[1] *Lansdowne* v. *Lansdowne* (1820), 2 Bli. 60: Irish or English pounds; *Noel* v. *Rochford* (1836), 4 Cl. & Fin. 158: Irish or English pounds; *Young* v. *Lord Waterpark* (1842), 13 Sim. 199: Irish or English pounds; *Cope* v. *Cope* (1846), 15 Sim. 118: 'Sterling lawful money of Ireland'; *Macrae* v. *Goodman* (1846), 5 Moo. P.C.C. 315: Holland currency; *Bain* v. *Field* (1920), 5 Ll. L.R. 16 (C.A.): Canadian or American dollars; *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade*, No. 1, [1921] 2 A.C. 438: rouble or sterling; *Ivor An Christensen* v. *Furness Withy & Co.* (1922), 12 Ll. L.R. 288: kroner or sterling; *Ottoman Bank* v. *Jebara*, [1928] A.C. 269: piastres or sterling; *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122: English or Australian pounds; *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587: English or New Zealand pounds; *De Bueger* v. *J. Ballantyne & Co. Ltd.*, [1938] A.C. 452: English or New Zealand pounds. In view of remarks of Sankey J. in *Ivor An Christensen* v. *Furness Withy & Co.* (1922), 12 Ll. L.R. 288, of Lord Wright in *Westralian Farmers* v. *King Line* (1932), 43 Ll. L.R. 378, 383, and of Lord Tomlin in *Adelaide Electric Supply Co.* v.. *Prudential Assurance Co.*, [1934] A.C. 122, 145, it is necessary to emphasize that the question of determining the currency is not concluded 'by saying that the proper law . . . is the law of England, for though . . . in a contract of which the proper law is English the word "pound" prima facie means an English pound, it does not so necessarily; it is a question of construction' (per Romer L.J. in *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 373, 409).

[2] *United States*: Wharton (Parmele), s. 514. *Canada*: *Simms* v. *Cherenkoff* (1921), 62 D.L.R. 703 (Saskatchewan King's Bench, Maclean J.); *Weiss* v. *State Life Insurance*, Canada Law Reports (Supreme Court), 1935, 461. *Brazil*: Supreme Court, 22 May 1918, Clunet, 1921, 993. *Victoria*: *In re Tillam, Boehme & Tickle Pty. Ltd.* (1932), Vict. L.R. 146, 149, 150: whether English or Australian pounds are to be paid is a matter of construction, but the money of the place of payment is the last resort. *Austria*: Civil Code, ss. 905, 1420; Commercial Code, s. 336. *Germany*: s. 361, Commercial Code; see Supreme Court,

laid down in the case of *Gilbert* v. *Brett*;[1] while in *Taylor* v. *Booth*,[2] which concerned an action on a bill of exchange drawn in Ireland for £256 18*s*. Irish currency, and payable in England, where the equivalent was £232 4*s*., Best C.J. observed during the argument:[3] 'If a man draws a bill in Ireland upon England and states that it is for sterling money, it must be taken to mean sterling in that part of the United Kingdom where it is payable: common sense will tell us this.' Authority for this principle can also be found in some more recent cases.[4]

The rule that in case of doubt it is the money of the place of payment that is owed by the debtor deserves approval, since, in view of the fact that the money of the place of payment is usually the money of payment,[5] it leads to an identity of money of account and money of payment and thus to the avoidance of an exchange operation. Nevertheless, there are other aspects of the rule which make it necessary to apply it with care. While it is well justified if the place of payment is fixed by the parties,[6]

27 Jan. 1928, *RGZ.* 120, 76, 81. *Hungary*: s. 324, Commercial Code. *France*: Degand, quoted above, p. 164, n. 6; Planiol-Ripert, vii (1931), No. 1188; although there appear to be many decisions of lower courts which lay down the principle, the present writer has been unable to find any Cour de Cassation decision where it is expressed without reservation. The cases quoted below, p. 168, n. 1, seem to be rather hesitating, and in the decisions quoted below, p. 167, n. 4, greater importance is attached to the currency of the place where the contract was made. *Belgium*: the money of the place of payment is favoured, but there is no established principle; see Piret, No. 27. *Egypt*: Court of Appeal of the Mixed Tribunal, 9 March 1929, *Gazette des Tribunaux Mixtes*, 20, 108, No. 115. See now Art. 41 (4), Uniform Law on Bills and Notes, and Art. 36 (4), Uniform Law on Cheques: 'If the amount of the bill of exchange (cheque) is specified in a currency having the same denomination, but a different value in the country of issue and the country of payment, reference is deemed to be made to the currency of the place of payment.' On both laws see below, p. 238, n. 3.

[1] (1604), Davis's Rep. (Ireland) 18, 28. [2] (1824), 1 C. & P. 286.

[3] At p. 287. The decision itself concerned a point of pleading and so did *Kearney* v. *King* (1819), 2 Barn. & Ald. 301, and *Sprowle* v. *Legg* (1822), 1 Barn. & Cres. 16: if, contrary to the proof, the declaration did not state that the bill was drawn in Ireland, or if the instrument promised to pay Irish money, while according to the declaration it seemed to be English money, there was held to exist a fatal variance between declaration and proof.

[4] *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122; *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587; *De Bueger* v. *J. Ballantyne & Co. Ltd.*, [1938] A.C. 452. As to these cases see below, pp. 169 sqq. See also *Macrae* v. *Goodman* (1846), 5 Moo. P.C.C. 315.

[5] Below, pp. 245 sqq.

[6] It is noteworthy that the Swiss Federal Tribunal cautiously said: 'D'une façon générale on peut poser en principe que celui qui s'engage à payer dans

it involves danger in cases where the place of payment cannot be ascertained otherwise than by the application of a further presumption as to the place of payment,[1] because the doubling of presumptions as to the intention of the parties may easily falsify their real intention.[2] Moreover, the rule is of no avail where at the place of payment a currency circulates which differs from all those which the parties can be said to have had in view,[3] or where there exist two or more places of payment whose units of account bear the same name.[4]

un lieu déterminé (sic!) une somme déterminée, exprimée en la monnaie ayant cours dans ce lieu, s'oblige par là même à payer ladite somme en ladite monnaie.' (23 May 1928, Clunet, 1929, 497, *re* Crédit Foncier Franco-Canadien.) But in France not even the indication of a place of payment is necessarily decisive: see the cases below, p. 168, n. 1.

[1] Above, p. 153.

[2] Neumeyer, p. 175, therefore proposed to have regard not to the money of the place of payment, but to the money of the place of collection in the sense discussed above, p. 153.

[3] e.g. a Frenchman promises a Swiss firm to pay 'francs' in London.

[4] e.g. a Belgian promises to pay 'francs' in Paris or Zürich. In such cases the construction of the contract is particularly difficult, because there is a danger of an 'option de change' being substituted for an 'option de place', which alone was intended or stipulated by the parties (see on the distinction above, p. 151, n. 3). It was in these cases of a promise to pay 'francs' in France or Switzerland that the *French* Cour de Cassation said: 'Si en effet, à défaut de convention contraire, un paiement est présumé devoir être effectué dans la monnaie du lieu où il a été stipulé, cette présomption ne saurait avoir pour conséquence de créer au profit des créanciers une option de change en substituant une monnaie de compte à celle visée au contrat, de manière à modifier le montant des obligations incombant au débiteur' (Cass. Civ. 21 Dec. 1932, Clunet, 1933, 1201, *re* Chemin de Fer de Rosario à Puerto-Belgrano; Cass. Req. 6 Dec. 1933, Clunet, 1934, 946, and D.H. 1934, 34, *re* Société Internationale des Wagons-Lits; Cass. Civ. 5 June 1934, Clunet, 1935, 90, *re* Est Lumière; Cass. Civ. 21 July 1936, D.H. 1936, 473, *re* Papeteries de France). The danger of substituting an option of payment for an option of place was also avoided by the Appellate Division of the *New York* Supreme Court in *Levy* v. *Cleveland C.C. & St. L.R.R. Co.* (210 App. Div. 422, 206 N.Y. Supp. 261, 1st Dept., 1924). The defendant railway company had in 1910 issued bonds the entire issue of which was purchased by a banking house in France. The bonds, which were expressly stated to be subject to the law of the United States, were for a sum of '500 francs' each, principal and interest being payable to bearer at a designated banking house in Paris or, at the holder's option, at designated banks in Belgium and Switzerland. The plaintiff demanded payment in Switzerland in Swiss francs, but only depreciated French francs were offered. The company succeeded, the court saying *inter alia*: 'The obligation itself according to the denomination of the bond is to pay francs in Paris, France, and if the agreement is to be read without the options of place, construed in the sense in which it would be accepted by the ordinary mind, this place of payment would indicate that the currency of that country would be used in

The remedy against such difficulties lies in a clear realization of the fact that the rule is nothing but an easily rebuttable presumption, an emergency solution, or a last resort which may be displaced by even the slightest indication in the circumstances of the case. Thus a warning against overrating the weight of the rule was repeatedly uttered by the French Cour de Cassation:[1]

'en cas de doute sur la monnaie que les parties ont eue en vue lors de la convention, l'indication dans le contrat d'un lieu de paiement ne constitue à cet égard qu'une présomption de leur intention susceptible d'être combattue par toutes présomptions contraires résultant d'autres dispositions'.

The determination of the money of account has sometimes caused difficulties in connexion with legacies given by a will. In such cases, too, the intention of the testator must be ascertained from the circumstances of the case, but in the absence of any indication to the contrary it will generally be possible to presume that the testator intended to refer to the money of account of the place where the will was made.[2] It is, however,

the discharge of the obligation. The option to the holder to receive payment elsewhere relates entirely to the place of payment and does not mention the currency of the other countries as the means of payment. It would seem, if there were to be optional payments in the currency of other countries, that the language would have designated Swiss francs as the means of payment *in Switzerland, and Belgian francs in the statement of the place of payment in* Belgium.' In the course of its judgment the court referred to the decision of the Brussels Court of Appeal, 11 March 1921, *B.I.J.I.* vi. (1922), No. 1260 and *Pasicrisie Belge*, 1921, ii. 70 (Société d'Éclairage *v.* Magerman), on which see Piret, No. 27. It must be observed that in all these cases difficulties only arose when the Latin Monetary Union was dissolved and greater fluctuations in the value of the various currencies occurred. (See above, pp. 41 sqq.) In very similar circumstances the Judicial Committee of the Privy Council was less fortunate in avoiding a trap; see below, p. 179.

[1] Cass. Req. 13 June 1928, Clunet, 1929, 112 (La Bâloise). Literally corresponding: Cass. Req. 28 Nov. 1932, Clunet, 1934, 133 (La Bâloise); Cass. Req. 21 March 1933, Clunet, 1934, 373 (Société Suisse d'Assurance Générale); Cass. Civ. 17 July 1935, Clunet, 1936, 880 (Brasseries Sochaux). See also Cass. Req. 25 Jan. 1928, S. 1928, 1. 161. But the lower courts are not always so cautious. See e.g. Cour de Paris, 29 Jan. 1923, D.P. 1923, 2. 129 (Schwab *v.* S. Montagu & Co.): the defendants sold gold bars for the plaintiff. They realized a price of £2,423 4*s.* 6*d.* which they converted into French francs and remitted to Paris. The plaintiff refused acceptance and sued for pounds sterling. The action was dismissed on the ground that, in view of certain letters written by the plaintiff, the place of payment was Paris.

[2] *Wallis* v. *Brightwell* (1722), 2 P.Wms. 88; *Pierson* v. *Garnet* (1786), 2 Bro. C.C. 38; *Holmes* v. *Holmes* (1830), 1 Russ. & M. 660. See also *Saunders* v.

obvious that this principle may cause the same difficulties as the above-mentioned rule of the law of contracts.

2. As the problem of the determination of the money of account thus appears to be a problem of interpretation, it should not admit of any doubt that the question of private international law, namely, which law governs the determination of the money of account, must, like all other questions relating to interpretation, be answered by the *lex causae* or the proper law of the obligation, whether it be the proper law of the contract, the law of the testator's domicile,[1] or other law. But under no circumstances, not even in case of an 'option de change' or an express designation of a place of payment,[2] can it be said that the law of the place of payment should apply. For the determination of the money of account is nothing but a question of construction; it relates to the substance of the obligation, not to the mode of performance; it concerns the question what is owed, not how payment is to be effected.

However evident it may appear at first sight that it is the proper law of the obligation which governs the construction in general and the determination of the money of account in particular, this principle[3] must be more closely examined in the light of recent cases which may perhaps be understood in a different sense.

The most important of them is the decision of the House of Lords in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[4] In that case the shareholders of the appellant company,

Drake (1742), 2 Atk. 465 and *Malcolm* v. *Martin* (1790), 3 Bro. C.C. 50, although both these cases do not rest on the principle, but on the circumstances of the case. On the principle see also *Lansdowne* v. *Lansdowne* (1820), 2 Bli. 60, although the case itself does not relate to a will. None of those cases supports Dicey's (pp. 604, 818) or Westlake's (7th ed., p. 156) statement that the currency is normally that of the domicile.

[1] This is, however, no absolute rule, but 'merely a prima facie rule which is displaced if the testator has manifestly contemplated and intended that his will should be construed according to some other system of law': Cheshire, pp. 533 sqq., and Dicey, pp. 818 sqq., and the cases there cited.

[2] See above, p. 160.

[3] It has the support of Story, ss. 271, 271a, 272; though Story refers to the place where the contract was made, he really has in mind what is now understood to be the proper law of the contract. The principle is well recognized in Germany: Supreme Court, 14 Nov. 1929, *RGZ.* 126, 196, and Melchior, *Grundlagen*, pp. 277 sqq., who, however, quotes some decisions which have no bearing on the point; also in France: Planiol-Ripert, vii, No. 1189.

[4] [1934] A.C. 122.

which was incorporated under the laws of England and whose business was conducted from Australia, in 1921 passed a special resolution altering its articles to provide that all dividends, which had hitherto been declared and paid in England, should be declared at meetings to be held in Australasia and should be paid in and from Adelaide or elsewhere in Australasia. The respondents claimed that holders of certain preference shares of £1 each issued before 1921 were entitled to be paid their dividends in sterling in English legal tender for the full nominal amount thereof and not subject to deductions for Australian exchange. Reversing the order of Farwell J. and of the Court of Appeal, and overruling the latter's decision in *Broken Hill Proprietary Co.* v. *Latham*,[1] the House of Lords held that the company had discharged its obligations by paying in Australian currency that which was in Australia legal tender for the nominal amount of the dividend warrants. The decision was unanimous, but the opinions delivered show great variance. The much discussed question whether at the material times the Australian pound was different from the English pound has been treated above[2] and does not need to be discussed again.

It seems clear that the problem whether English or Australian pounds were owed was a question of construction.[3] It is equally clear that the contract between the company and its shareholders was governed by English law.[4] On this basis one would expect the following line of reasoning to be taken: the contract, the construction of which is governed by English law, originally envisaged English pounds as the money of account.[5] If the English and Australian currency are held to be identical, it is clear that the *money of account* could not have been altered by the special resolution of 1921; if they are held to be different currencies, it was a question of construction whether that resolution substituted the promise to pay Australian money for the

[1] [1933] Ch. 373. [2] pp. 43 sqq.

[3] This was particularly emphasized by Lords Warrington and Tomlin at pp. 136, 145.

[4] This is expressly made clear by Lords Warrington, Tomlin, Russell, and Wright at pp. 138, 145, 148, 156.

[5] That this was so is confirmed by Lord Wright in *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587, 603, 604, where he said: 'Up to that time [1921] while the place of payment was in London, there could be no question that the term "pound" used in the articles of association had reference to English or sterling currency.'

original promise to pay English money. In case it should appear either that the English and Australian currencies are identical or that the question of construction must be answered in the negative, a sum of English pounds would be owed by the appellant company and the substance of the obligation would not differ from the original promise. It would then be necessary to turn to the question, perhaps governed by Australian law,[1] of which *instrument* of payment had to be employed at the substituted place of payment, viz. in Australia, in order to discharge that obligation. If the Australian currency differs from the English, the answer would probably be that it must be discharged in Australia 'either in English legal tender of the amount expressed in English money of account or in Australian legal tender of such an amount expressed in the money of account of Australia as will buy in London the amount in English legal tender of the obligation expressed in the English money of account'.[2] If, however, the Australian and English currency are identical, the company would be entitled to pay either money of an amount expressed by the obligation.

The decision of the House of Lords differed in method but arrived at the latter result. As regards the opinions delivered by Lords Warrington, Tomlin, and Russell,[3] they started from the view that both countries had a common unit of account, although there was a 'difference in the . . . means whereby an obligation to pay so many of such units is to be discharged'.[4] On this basis it was not really material that they refrained from distinguishing between the substance of the obligation and the mode of payment or, in other words, between the money of account and the money of payment, but jumped to the further and different question relating to the discharge of the obliga-

[1] See below, p. 249. [2] Lord Tomlin at p. 146.

[3] We may disregard Lord Atkin's short opinion (pp. 134–5) because he said that 'agreeing as I do with much of his [Lord Wright's] reasoning, subject to the qualification I am about to express, I do not propose to discuss at length the question before the House'. He then added a few words on the topic whether there are or were two different 'pounds', the Australian and the English, the result being that he inclined to think they were at the present day not the same, but that at the material dates they were the same, in which case Australian money could be tendered. In case, however, they were different at the material dates, the learned Lord did not dissent from the construction that, as altered, the articles provided for payment in Australian pounds. But see p. 177, n. 3 below. [4] Lord Warrington at p. 138.

tion, because there was on that basis no difference between the money of account and the money of payment. As regards the discharge, it was held that it could be effected by payment of what was legal tender in Australia, and in view of the assumed identity of money of account and money of payment, it was also held that no additional payment was required in respect of the superior value of the English money of account. Thus Lord Warrington said:[1]

'The particular modification material in the present case was the change of the *locus solutionis* as regards dividends from England to Australia. The general rule, I think, is well settled—namely, that in such cases monetary obligations are effectually discharged by payment of that which is legal tender in the *locus solutionis* and, unless there is something in this case to take it out of the general rule, the question ought, in my opinion, to be decided in favour of the contention of the appellant company.'

Lord Tomlin said:[2]

'Now where in an English contract governed *prima facie* by English law there is a provision for performance in part in another country the *prima facie* presumption is that performance is to be in accordance with the local law, and I see no reason why this presumption does not apply in the present case. That must mean, applied to the facts of this case and upon the view I have expressed as to the pound, that the obligation to pay is an obligation to pay a sum of money expressed in a money of account common to the United Kingdom and Australia, and that when the payment under the terms of the obligation has to be discharged in Australia it has to be made in what is legal tender in Australia for the sum expressed in that common money of account. It cannot mean that it is an obligation to pay a sum of money expressed in money of account which is not Australian money of account and that therefore if payable in Australia it must be discharged there by payment either in English legal tender of the amount expressed in the English money of account or in Australian legal tender of such an amount expressed in the money of account of Australia as will buy in London the amount in English legal tender of the obligation expressed in the English money of account.'

And finally Lord Russell said:[3]

'If this be the correct view (namely that the English and Australian currency is identical) this problem would resolve itself into a case

[1] At pp. 138–9. [2] At pp. 145–6. [3] At p. 148.

of the company becoming indebted from time to time in amounts payable in Australia and expressed in terms of units of account common to Australia and England. The question then is, how can the company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable.'

On the basis of the obligation being expressed in terms of a unit of account common to Australia and England the result reached by the majority of the House of Lords was inevitable; there was one money of account and also one money of payment, common to both countries, and the company could therefore discharge its obligations by paying whatever was a 'pound'. It would have afforded clearer guidance for future cases if more attention had been paid to the distinction between the money of account and the money of payment, and to the presumption relating to the former[1] and that relating to the latter,[2] and also to the law applicable in either case, but this would not in any way have affected the result. In any case it cannot be doubted that the result was reached on the basis of the proper law of the contract, which was English.

It is on this point that Lord Wright's opinion is so difficult to understand and challenges criticism. Lord Wright started from the prima-facie rule[3] that 'whatever is the proper law of the contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract'. After stating his reasons for the view that the two currencies are and were different,[4] he reverted to the question[5] 'which currency is intended on the true construction of the special resolution', and in order to find an answer, he asked the further question[6]

'whether the proper law of the contract (which is English, because the appellant company is an English Company) or the law of the place of the declaration and the payment of dividends which is Australian, is to govern the meaning of the word "pound". In my opinion the latter is the true construction. The old cases I have cited show, as I think, that in determining what currency is intended, the

[1] Above, p. 165. [2] Below, p. 245. [3] At p. 151.

[4] See above, p. 45, where we ventured to express approval of this part of Lord Wright's opinion.

[5] p. 156. [6] Ibid.

general rule *prima facie* applies that the law of the place of performance is to govern.'

Lord Wright thus appears to leave the determination of the money of account and probably also that of the money of payment to the *lex loci solutionis*, while the other noble Lords treated the question as being subject to the proper law and stated a rule of English municipal law when they said that prima-facie payment must be effected in the currency circulating at the place of payment. But it is very difficult to follow the course adopted by Lord Wright.

In the first place it appears that from his point of view, according to which the Australian currency differs from that of England, it was vital to examine the question whether the resolution of 1921 involved an alteration of the *substance* of the obligation (not of the mode of performance) by substituting a promise to pay Australian currency for the promise to pay English money. In effect Lord Wright gave an affirmative answer[1] to this question, although in a later case[2] he said that there was no such alteration, and although in a still later case he stated that no question of substance but a question of performance was involved;[3] his reasoning, however, seems to relate to the money of *payment*. Secondly, although Lord Wright held Australian law to be applicable, it is doubtful whether in fact he did not proceed on the basis of English law; if so, the explana-

[1] pp. 156–7.

[2] See above, p. 170, n. 5.

[3] *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Insurance Society Limited*, [1937] A.C. 224, 241. His exact words are quoted above, p. 156, n. 5. But on the basis adopted by Lord Wright in the *Adelaide* case, namely, that Australian and English pounds are not identical, primarily a question of construction, i.e. of substance, arose, and only on the basis adopted by the majority of the House of Lords, was it, as has been shown in the text, possible to treat the case as involving a question of performance. Again, in *De Bueger* v. *J. Ballantyne & Co. Ltd.*, [1938] A.C. 452, 459, 460, Lord Wright said that 'it was just this difference in the "means" of discharging the obligation—that is, the actual currency—which was the essence of the case' and that 'under a contract like that in question what matters to the parties is the means—that is, the currency—in which the obligation is discharged'. *Sed quaere*. Parties do mind whether they pay or receive 100 London pounds or 100 Australian pounds, but the creditor of 100 London pounds does not mind whether he receives £100 London currency or £125 Australian currency. It is suggested once more that a clear realization of the essential difference between the money of account, determining the quantum, and the money of payment, determining the quid, solves all problems.

tion might be that in this case, as well as in a later case which we shall have to consider,[1] he did not sufficiently distinguish between the application of the law of the place of payment and the prima-facie rule of English municipal law that it is the money of the place of payment which, in case of doubt, must be taken to have been intended by the parties and which may be employed as an instrument of payment.

But even assuming that Lord Wright intended to and did apply Australian law, the question remains whether it is possible to accept this view, which, though it led to the same result, is certainly at variance with that of the majority of the House.

It is not necessary to discuss again his initial principle, formulated with extreme width, that the law of the place of performance should be applied in respect of any particular obligation performable in a country other than that of the proper law.[2] It suffices to scrutinize the somewhat narrower principle 'that in determining what currency is intended, the general rule prima facie applies that the law of the place of performance is to govern'.

The paramount argument militating against this principle is that the determination of the money of account is, as Lord Wright himself recognized, a matter of construction; it relates to the substance of the obligation, not to its performance, and therefore the law of the place of performance cannot govern it,[3] however important that law may be in connexion with the instrument of payment to be employed in discharge of an obligation construed according to the proper law.[4]

Lord Wright's opinion also blurs the distinction between a (national) private international law and a (national) substantive law.[5] This can be shown by an example given by Lord Wright himself:[6]

'It is natural and reasonable that the money he [the debtor] should be bound to have ready should be the legal money of that place [of performance], rather than that he should have a foreign currency, or should have an amount in his home currency which is not the agreed figure, but a different figure representing an exchange operation by which the agreed figure is converted (in this case) from sterling to

[1] *Auckland Corporation*'s case below, p. 177. [2] See above, p. 156.
[3] See *St. Pierre* v. *South American Stores Ltd.*, [1937] 3 All E.R. 349 (C.A.) at p. 352 C per Greer L.J., at p. 354 D per Slesser
[4] Below, p. 249. [5] See p. 154, [illegible] [6] p. 156.

currency.[1] Similarly, if a Frenchman and a Belgian were to agree that francs were to be paid by the one to the other in Brussels, it would naturally be inferred in the absence of express terms that the Belgian franc was intended.'

These words rather fortify the suggestion that Lord Wright did not really intend to state the rule of private international law which he in fact expressed, but the rule of English municipal law that the money of the place of payment prima facie is the intended money of account. But if his words are taken literally and the alleged rule of English private international law exists, the term 'place of performance', whatever theory of classification is advanced,[2] is a notion of English law to be defined by English law, which, in the absence of special circumstances, resorts to the place of the residence of the creditor.[3] According to this, the Frenchman who owes 'francs' to a Belgian would have to pay Belgian francs. But according to French as well as Belgian law he would have to pay French francs, since in both these laws the currency meant by the parties prima facie is that of the place of payment,[4] which in both laws is the place of the residence of the debtor.[5] If, on the other hand, English Law allowed an English judge to apply the proper law of the contract, French francs would be payable, whether the proper law were French or Belgian—a result which seems to be more appropriate. Differences of result may even ensue where the place of payment is fixed; if a merchant in Danzig, where German law is in force, sells goods to a Dutch firm, the price being expressed in guilders and payable in Danzig, an English judge, adopting Lord Wright's rule, would have to hold that Danzig guilders are to be paid, whereas German law, being the proper law, would probably say that Dutch guilders are owed.[6]

Lord Wright's statement is based on a dictum of Lord Eldon in *Cash* v. *Kennion*,[7] which has, however, no bearing on the

[1] But such exchange operations are of daily occurrence and in fact unavoidable.

[2] See p. 154, n. 4.

[3] Above, p. 153.

[4] Above, p. 165, n. 2.

[5] Above, p. 153.

[6] German Civil Code, ss. 269, 270; Commercial Code, s. 361; Staub (Heinichen), *Kommentar zum Handelsgesetzbuch*, iii. 568, 602; see Wolff, *IPR.*, p. 96 and above, p. 154.

[7] (1805), 11 Ves. 314, 316. Lord Eldon states the platitude that the debtor is bound to have the money ready at the appointed time and place of payment. The case dealt with the question by whom a commission due to the creditor's

issue, and on the old *Case de Mixt Moneys*,[1] which has already been discussed[2] and which does not state a rule of private international law, but a rule of English municipal law, when it lays down that prima facie it is the money of the place of payment which the parties had in view.

For all these reasons it is submitted that Lord Wright's dicta cannot impair the conclusion, supported by established principles and also by the majority opinions delivered in the *Adelaide* case, that it is the proper law of the contract which governs the determination of the currency owed.[3]

Unfortunately, however, the difficulties raised by the *Adelaide* case are increased by the later case of *Auckland Corporation* v. *Alliance Assurance Co.*,[4] where Lord Wright delivered the opinion of the Privy Council. In 1920 the City of Auckland issued debenture bonds providing for payment of a sum of 'pounds', payable in London, England, or Auckland, New Zealand, at the holder's option. On the assumption that the London option had been duly exercised, the question arose whether the holder was entitled to demand payment of the stipulated sum of English money or of the stipulated sum of New Zealand money converted into pounds sterling at the rate of exchange

Jamaica agent is payable, if the Jamaica debtor was to pay in London, but in fact paid to the agent.

[1] (1604) Davis's Rep. (Ireland) 18. [2] Above, p. 166.

[3] It may be added that it is doubtful whether the result reached by Lord Wright, on the basis of his view that the Australian pound is different in law from the English, and was so in 1921, is very felicitous. In view of the fact that the resolution of 1921 did not alter the money of account, but merely the *locus solutionis* (see above, p. 170, n. 5), it would probably have been better to hold that the company *owed* English pounds and had to *pay* in Australia so many Australian pounds as were equivalent to the promised sum of English pounds.

[4] [1937] A.C. 587. We have a further example of the confusion brought about by the statement that the determination of the money of account, being a matter relating to the mode of performance, is governed by the law of the place of performance, in the Manitoba case of *Johnson* v. *Pratt*, [1934] 2 D.L.R. 802. Even Professor Lorenzen (*The Conflict of Laws relating to Bills and Notes*, p. 163) did not escape the danger of confounding the law of the place of payment and the money of the place of payment when he said that 'unless the bill or note specifies a particular coin, the law of the place of payment will determine the kind of currency in which the instrument may be paid' and that this equally applies 'where the amount of a bill or note is indicated in a kind of money having the same designation in the country of issue and in the country where the payment is to be made, but having different values in the two countries'.

of the day. Lord Wright, apparently accepting the view of the New Zealand Court of Appeal that the proper law of the contract was New Zealand law, made it quite clear that the case involved a problem of construction. But he held that, apart from certain questions connected with the New Zealand Local Bodies Loan Act, 1913, which are immaterial for the present purposes, the case was governed by the *Adelaide* decision.[1] He did not discuss the question whether the New Zealand currency was the same as that of England, but he was content to rely on the *Adelaide* case, the effect of which he stated twice, but in different senses. He first said (pp. 604–5) that in that case

'it was held that in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated that payment was to be made was the currency meant.'

But later he said (p. 606) that the principle of the *Adelaide* case was that

'the House of Lords held that the true meaning of the word "pound" must be determined on the basis of a rule depending on a well known principle of the Conflict of Laws—namely that the mode of performance of a contract is to be governed by the law of the place of performance.'

Undoubtedly, it was the former principle which, on the basis that English law was the proper law, was in fact laid down by the majority of the House of Lords in the *Adelaide* case as a principle of English municipal law, but it is doubtful whether it is also a rule of New Zealand law, which governed the *Auckland* case. The latter principle, on the other hand, which, if it exists, states a rule of English private international law, is only to be found in Lord Wright's judgment in the *Adelaide* case. Nevertheless, in the *Auckland* case both these principles enabled Lord Wright to arrive at the result that the obligation was discharged by the payment of the stipulated amount of 'pounds' of English currency.

It is astonishing that the vital question of the relation between the currency systems of England and New Zealand was not discussed. If there existed in 1920 only one system common to both countries, the result is undoubtedly correct. But it is

[1] [1934] A.C. 122.

difficult to follow the decision if in 1920 the systems were different, as Lord Wright's remarks in the *Adelaide* case rather suggest and, it is submitted, rightly suggest.[1] The natural inference would then be that the money of account stipulated in 1920 was New Zealand currency. Since then nothing had happened which could have altered that stipulation. No doubt, as regards the London option, the money of payment was English money, but if the substance of the obligation was expressed in New Zealand currency, one would think that the appellants ought to have paid in London as much English money as corresponded to the promised amount of New Zealand currency in terms of pounds sterling. Nevertheless, as the holder was held to be entitled to demand one English pound for each New Zealand pound, the decision in effect substituted an option of payment, which was not stipulated by the parties, for a mere option of place—a result which, as we have seen,[2] the French Cour de Cassation and the Appellate Division of the New York Supreme Court were particularly anxious to avoid.

As regards the general importance of the *Auckland* case, it is not particularly great. The decision repeats the two conflicting principles expressed in the *Adelaide* case, thus intensifying rather than clarifying the difficulties presented by that case. It is suggested that they could be solved by adopting three principles which, it is submitted, are supported by the opinions delivered by the majority of the House of Lords in the *Adelaide* case:

1. A clear distinction must be drawn between the money of account, i.e. the substance of the obligation, and the money of payment, i.e. the instrument of payment.
2. The determination of the money of account, being a question of construction, should be governed by the proper law of the contract, not by the law of the place of payment.
3. It should be recognized that it is a rule of English (municipal) law, and indeed of most laws, that, in the absence of circumstances indicating a different intention of the parties, the money of the place of payment is the money of account meant by the parties.

[1] Above, p. 45.

[2] Above, p. 167, n. 4.

III

We now come to one of the most obscure chapters of the law concerning foreign money, that relating to the determination of the money of account in those cases where a liability arises which is not foreseen by the parties, and where therefore the money of account is not fixed.

The problems raised by these cases are of particular difficulty, not only because they have received little attention, but also because they are often interconnected or even confused with other questions which ought to be clearly distinguished. Thus the question 'which money is the money of account according to a given municipal law' must be differentiated from the question 'which law governs the determination of the money of account'. Furthermore, there are cases where a claim arises in a particular currency, but consists of certain items which are not expressed in the same currency; in such cases it is necessary to determine the currency in which the item is expressed and then to convert the ascertained sum of foreign money into the money in which the claim is expressed. The former of these tasks is discussed in the following paragraphs; the latter, which does not fall under the head of the determination of the money of account, but under that of conversion into the money of payment, will be dealt with later.[1] Finally, the rule that an English court has no jurisdiction over a claim not expressed in terms of sterling[2] must not overshadow the problem, all important in times of exchange fluctuations, of defining the money which is owed. It may appear that a claim must be translated into another currency, either for the purpose of adjusting it to the ascertained money of account or for the purpose of legal proceedings; but before this is done, the claim may 'have to be *assessed* in the currency of a foreign country' and the court may therefore 'have to arrive at a figure expressed in foreign currency'.[3]

[1] Below, pp. 251 sqq.

[2] Below, pp. 288 sqq.

[3] *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409, 415 per Scrutton L.J.; in *The Volturno*, [1921] 2 A.C. 544, 553, which concerned a claim for damages expressed in Italian lire and caused by the loss of hire owing to a collision in the Mediterranean, Lord Sumner, it is true, said: 'That compensation was not recoverable in any particular currency, and although for convenience of proof it would be severable into divers heads and items, it would be one gross sum, recoverable once for all. . . . The essential thing to remember,

A few examples may illustrate the importance of these distinctions. A German subject, domiciled in Germany, dies in the United States, leaving property in the United States and in England; he has made a will disinheriting his daughter; under German law the daughter is entitled to a legal portion of half of the value of the share to which she would have been entitled if no will had been made. For the purpose of dealing with this claim the English administrators must first decide which law governs the question of the currency in which this claim is expressed. If it is found that the matter relates to the distribution of the estate and is therefore governed by German law,[1] they must then ascertain in which currency the claim is expressed according to German law. Under German law it is perhaps expressed in German currency.[2] The administrators must then convert the estate into German money in order to ascertain the amount of the legal portion. The duly ascertained sum of German money must then be reconverted into English money. The two last operations have nothing to do with the determination of the money of account.

Again, suppose a Greek and a Swedish ship collide in French territorial waters. The Greek ship is repaired in Genoa and her owners pay for the repairs in Italian money which they remit from Athens, where they have bought it in exchange for Greek drachmas. They have an insurance policy with a British company which is denominated in pounds sterling. The first problem which arises is that of determining the law governing the question in which money the insured's loss is measured. On the basis of the applicable municipal law it must be found whether Italian or Greek money or perhaps French or Swedish money is owed. This sum must then be converted into pounds sterling in order to adjust the claim to the money of account referred to in the policy.

which the appellants somewhat ignored, is that the sum in question here is only an item in a general claim for damages for a wrong done at sea which was the subject of compensation just as naturally in British as in Italian currency.' This apparently means that a distinction must be made between the 'damages' and the 'items' of which the damages consist. But whatever might be said about the damages, Lord Sumner's words do not affect the necessity of determining the money of account in which the items are expressed. See also *The Huarn* (No. 1), [1933] P. 251, 272 per Romer L.J.

[1] See, e.g., Cheshire, pp. 512 sqq.

[2] See the authors quoted in p. 182, n. 2 below.

A last example: a German firm has sold goods to a French customer for a certain sum of French francs and undertaken to deliver them in Paris. Owing to the buyer's refusal to accept delivery the German firm suffers damage which amounts to either 200 reichsmarks or 1,200 francs, and in respect of which an action is brought here. Under English law the foreign money must be converted into pounds sterling at the rate of exchange ruling at the date of breach. While at the time when the contract was made, both 200 reichsmarks and 1,200 francs were equivalent to £16, the damages, if expressed in francs, amount at the date of breach to £12 only, because in the meantime the French currency has been devalued, though the sum of reichsmarks has at that date retained its value in terms of pounds. Before the conversion, necessary for the purpose of instituting proceedings here, can be made, it is therefore necessary to ascertain whether the damage is expressed in reichsmarks or francs. The first question, accordingly, is to find the law governing the determination of the money of account. If the *lex causae* is German, it may appear that under German municipal law the seller is entitled to measure his damage in reichsmarks[1] and thus to demand £16. Since under French law the result might be different, it is clear that the conversion into sterling presupposes the determination of the money of account.

1. Turning now to the rules of municipal law relating to the determination of the money of account in such cases, we are bound to admit at the outset that no general principle can be laid down with safety. Some authors, it is true, suggested a working rule to the effect that liability arises in the currency of that country whose law governs the obligation.[2] But a single example will show that this cannot be right: a French importer buys Brazilian coffee for a sum of milreis from an American exporter under an American contract which the seller fails to perform. The Frenchman has resold the goods to a Dutch firm for a sum of Dutch florins, but as he cannot perform his contract, he is made liable for a sum of Dutch florins which he purchases with French francs, and in respect of which he claims damages from the American exporter in England. It is clear

[1] See p. 183, n. 6 below.

[2] Pisco, *Lehrbuch des oesterreichischen Handelsrechts*, p. 155; Neumeyer, pp. 158 sqq.

that the liability may be measured either in milreis or in French francs or in Dutch florins, but American dollars, the currency of the *lex causae*, cannot possibly play any part. It is indeed a fact of frequent occurrence that liability arises in another currency than that of the *lex causae*. Another suggestion[1] is that, on principle, the determination of the money of account is a mere question of fact to be decided on the strength of the circumstances of the case. This is certainly not a very satisfactory emergency solution,[2] but in many cases it may be justified by an implied term in the contract[3] and, if recognized as being subject to the following extensive qualifications limiting its ambit, it may be adopted in those cases where no better rule is available. These qualifications are as follows:

(*a*) In some cases where the liability arises out of a contractual relation, it may be possible to find in the contract an indication of the money by which the liability is measured. Thus the wrongful dismissal of an employee salaried in foreign money involves a liability of the employer to pay damages expressed in the foreign money in which the salary was stipulated.[4] Similarly, if royalties payable in respect of the user of a patent are expressed in a certain currency, damages payable by the licensee for the breach of the licence agreement are to be calculated on the basis of the same currency.[5,6]

(*b*) In a second group of cases an indication as to the proper

[1] Nussbaum, *Geld*, p. 245.

[2] Though it is better than that proposed by Melchior (**ss. 193, 194**), who would resort to the *moneta fori*.

[3] See the cases p. 185, n. 1.

[4] Cf. *Ottoman Bank* v. *Chakarian*, [1930] A.C. 277, 284 (P.C.) as explained in *Ottoman Bank* v. *Dascalopoulos*, [1934] A.C. 354, 364 (P.C.).

[5] But see German Supreme Court, 4 June 1919, *RGZ.* 96, 121, where it was held that a sum of 21,000 kroner payable in respect of damages for breach of contract were only an 'item' in a claim for damages expressed in German money, so that the creditor was entitled to demand German money.

[6] But if goods are sold for a price expressed in a certain foreign currency, damages to which either of the parties may be entitled are not necessarily measured in the same currency. In this country the principle to be mentioned in the text under (*b*) seems to apply, although the case of *Bain* v. *Field* (1920), 5 Ll. L.R. 16 (C.A.) presents some difficulties: goods which were lying in New York were sold f.o.b. New York at a price which Bailhache J. ((1920) 3 Ll. L.R. 20) and the Court of Appeal held to be expressed in Canadian dollars. Damages due to the seller were assessed in Canadian dollars and then converted into pounds sterling, although New York was the place where the goods were to be delivered. In *Germany* it was held that a German buyer who claims damages from his seller for the latter's failure to deliver goods sold at a price expressed

money of account may be derived from the fact that, under the law applicable to the case, the defendant is under a duty to restore to the plaintiff the value of the injured article or interest. In such cases it may be a guiding principle that the liability is expressed in the currency of the place where, in the circumstances, the value is ascertained.[1] Thus it seems that under English municipal law[2] damages for non-delivery or non-acceptance of goods are measured not only by the market value[3] at but also in the currency[4] of the place where the goods ought to have been delivered or accepted.[5] Or if through the defendant's negligence a house in France is destroyed, the loss must be

in non-German currency must measure his damages in German money, unless he can show that in the course of his business he would at once have converted the goods into non-German currency: Supreme Court, 8 April 1921, *RGZ.* 102, 60; 7 Dec. 1923, *JW.* 1924, 672; 27 Feb. 1924, *JW.* 1925, 1477; see also 30 June 1925, *RGZ.* 111, 183. As to *France* see Cour de Paris, 26 Jan. 1929, Clunet, 1930, 380.

[1] Nussbaum, *Geld*, p. 247, and Mayer, *Valutaschuld*, p. 20, adopt the formula that the claim for the restitution of value is expressed in the same currency as that in which that value is ascertained. But this formulation contains a *petitio principii* which can only be avoided if reliance is placed on the *place* with reference to which the value is ascertained.

[2] It is necessary to emphasize that this is not a rule of private international law; other municipal laws, e.g. German law (see p. 183, n. 6) have adopted different rules. The conflict must be decided by the rules of private international law to be discussed under (2) below.

[3] See, e.g., *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67, 78 per Lindley L.J.; at p. 80 per Lopes L.J.; *Ströms Bruks Aktie Bolag* v. *Hutchinson*, [1905] A.C. 515; *The Arpad*, [1934] P. 189, especially at p. 222 per Maugham L.J.

[4] *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409, 414 per Scrutton L.J.; defendants converted goods which were to be carried from England to Milan, where they were to be delivered to an Italian consignee. The damages were assessed in Italian lire. As to the question whether the result would be different if the consignee was a French firm, see the text under (*c*). The action concerned a claim against carriers for conversion, while in *Bain* v. *Field* (1920), 5 Ll. L.R. 16 (C.A.), a claim was made against the buyers of goods and the damages were assessed in the currency in which the purchase price was held to be expressed, not in that obtaining in the place where the goods were to be delivered (see p. 183, n. 6, above). Although the words employed by Scrutton L.J. in *Di Ferdinando*'s case warrant the statement in the text, it is doubtful whether or not they must be limited to conversion cases and whether in cases of contracts of sale where the purchase price is expressed in a certain currency they are superseded by the decision in *Bain* v. *Field*, which was not discussed in *Di Ferdinando*'s case.

[5] Where German law refers to the market value (but see p. 183, n. 6) the principle is the same. But if the market value of goods in Hamburg must be restored and it appears that the goods are quoted there in pounds sterling, the liability is measured in pounds sterling: Supreme Court, 22 Nov. 1923, *RGZ.* 107, 212.

measured in French francs, because it is in such money that the value of the house is ascertained. There remain, however, many cases where the place with reference to which the value is to be ascertained is not fixed, and where, therefore, it is impossible to refer to the currency of that place. In such cases there exists no other alternative than to apply the emergency solution mentioned above.[1]

(*c*) In many cases a problem of more general importance arises which may be formulated as follows: is the currency in which the liability is to be measured the currency in which the loss as such is expressed, or the currency which, in the course of an exchange operation, the plaintiff finally employed in order to repair the loss? Again it seems convenient to consider an example. We have seen that if the promise to deliver goods to an Italian buyer in Milan has been broken, the damages must on principle be measured in Italian lire.[2] Suppose the goods were to be delivered at Milan to a French buyer. Would the damages then still be measured in Italian lire, or ought they to be measured in French francs, and would it matter whether, in order to fulfil his obligations or to compensate his Italian buyer, the Frenchman had bought goods against his seller or a sum

[1] It may be appropriate to give some examples showing how the currency is determined by nothing but the actual circumstances. If my agent defrays expenses, I am bound to repay to him that money which he had to spend; thus if a German forwarding agent pays Belgian francs for the consignor's account, the latter must repay to him Belgian francs: German Supreme Court, 22 Oct. 1924, *RGZ.* 109, 85; similarly 28 April 1924, *JW.* 1924, 1593, No. 9; 6 May 1933, *WarnRspr.* 1933, No. 112. But otherwise in Austria: Supreme Court, 3 Oct. 1933, *RabelsZ.* 1933, 741. As to Belgium see Piret, No. 25. If a consignment from Hamburg to Rotterdam is declared to contain hydrochlorates and in fact contains spirits, so that the master of the ship is made liable for a fine of 5,000 Dutch florins, the consignor's liability is measured in florins, not in German marks: German Supreme Court, 27 Feb. 1924, *JW.* 1925, 1477. But see the very doubtful decision of the German Supreme Court, 27 Jan. 1928, *RGZ.* 120, 76: in 1914 the plaintiffs had accepted accommodation bills for 180,000 French francs for the defendant; they paid the bills in 1916. The Court of Appeal ordered the defendant to indemnify the plaintiffs by the payment of 180,000 French francs together with damages in respect of the depreciation of the French currency since 20 Feb. 1925, when the defendant failed to comply with the plaintiffs' demand for payment. The Supreme Court, however, reversed this convincing judgment and held that the claim was expressed in reichsmarks (i.e. in the new currency replacing the mark currency and introduced only in 1924!) and that the defendant was liable to compensate the plaintiffs for the value of 180,000 French francs in 1916.

[2] See p. 184, n. 4.

of Italian lire, thus spending a certain amount of French francs ?[1]

In the present state of the authorities no definite answer can be given, but it seems to be the better view that the liability is expressed in that money which is eventually employed by the injured party and to which the damage is thus finally traced back.

The first authority to which reference must be made is a dictum by Lord Sumner in *The Volturno*.[2] The decision itself concerned the question of how a sum of Italian lire, due in respect of loss of hire caused by a collision with the defendant ship, was to be converted into pounds sterling. As regards other items of the damage, namely expenses incurred by the Italian owners in respect of repairs at Gibraltar and Newport News, the parties arrived at an agreement and this question was not before the courts. But as to these items Lord Sumner made the following observation:

'The cost of the temporary repairs incurred at Gibraltar would, I suppose, have been proved in sterling; if they had been done at Marseilles or Cadiz, they would have been proved in francs or in pesetas, just as the repairs at Newport News would have been proved in dollars. . . . The charter furnished very precise evidence of the then value of the ship in use. . . . The owners of the *Celia* would have been at liberty to challenge it, if they could, and if there had been no charter, the Italian owners might have shown what employment in Greece or in Norway could have been got, and so have measured their loss in drachmas or in kroner, instead of in lire.'

A similar view was expressed by the Court of Appeal in *The Canadian Transport*.[3] This was an action by French cargo-owners against a ship for damage caused, through a collision in the river Parana, to its cargo, namely logs bought in the Argentine and paid for in pesos. The cargo-owners converted the

[1] It may be mentioned that certain French writers have suggested the rule that liability is always expressed in the money of the injured party's nationality or domicile or place of residence; this, however, was not put forward as a general principle, but as referring to tortious liability only: Béquignon, *La Dette de monnaie étrangère*, pp. 24 sqq.; Degand, *Rép. du dr. int.* iii (1929), 'Change', No. 176; Arminjon, *Précis de droit international privé* (1934), ii. 365. As to the determination of the money of account in case of tortious liability under public international law see Nolde, *Rec. des Cours*, 1929 (27), 243, 270 sqq.

[2] [1921] 2 A.C. 544, 554.

[3] (1932) 43 Ll. L.R. 409.

purchase price paid by them into sterling, the sterling into French francs, and the French francs back into sterling, which procedure brought them a profit.[1] But Scrutton L.J. said[2] 'that the proper way was to find out the pesos' and that 'having got your loss in x pesos you convert into sterling'. To Greer L.J.[3] it did not seem

'to make any difference that the cargo-owners were French people who had had to obtain pesos to pay for the goods by converting francs into pesos. That does not seem to me to affect the question at all, because what the ship would have had to pay, if it had recognized its obligation at the right time, would have been in South America the number of pesos which would have enabled the appellants to procure a similar quantity of cargo in South America and ship it again.'

While these words clearly disentitle the victim from converting the loss into his domestic currency, Lord Sumner's dictum leaves it an open question whether the victim is compelled or merely allowed to measure the loss in the currency in which it actually arose.

On the other hand, there are two cases arising out of the liquidation of *British American Continental Bank, Ltd.* which must be considered in this connexion. In *Re Goldzieher & Penso's Claim*[4] the essential facts were shortly as follows. The applicants, Brussels bankers, had bought from the above-named bank 85,000 American dollars and 1,000,000 German marks which were to be delivered to the applicants' correspondents in America and elsewhere.[5] The account between the parties was kept in Belgian francs and the applicants duly paid 1,539,850 Belgian francs. But the bank failed to fulfil its part, and the applicants therefore purchased against the bank 85,000 American dollars and 1,000,000 marks for 1,587,340 Belgian francs. They measured their loss at 1,619,367 Belgian francs, and the decision of the court merely related to the proper date with reference to which that sum was to be converted into sterling; there was no reference to the question whether dollars and marks should have been the money of account and whether Belgian francs could be claimed only in so far as the difference

[1] This particular method was certainly wrong. It was only arguable that the pesos should have been converted into francs and the francs into sterling.

[2] p. 412. [3] p. 414. [4] [1922] 2 Ch. 575.

[5] At p. 576 and see *Lisser & Rosenkranz's Claim*, [1923] 1 Ch. 276, 287 per P. O. Lawrence J.

between the two sums of Belgian francs, namely 47,490 Belgian francs, was concerned.[1] In the next case, *Re Lisser & Rosenkranz's Claim*,[2] the facts were similar. The applicants, Hamburg bankers, bought from the bank 50,000 American dollars and £3,292 9*s*. 1*d*., for which the consideration was duly paid. The bank failed to deliver the two amounts and the applicants therefore purchased 50,000 American dollars and £3,292 9*s*. 1*d*. against the bank, for which they spent 4,339,919 German marks. The applicants claimed a sum of £20,000 odd, representing the value of this sum of marks. The decision primarily concerned the question of the proper rate of exchange to be adopted for the conversion into sterling, but P. O. Lawrence J. referred to the present problem in these words, not contradicted by the Court of Appeal:[3]

'The sole reason why the question of converting German marks into English money became relevant in the present case is that the applicants are resident and carry on business in Germany and *the Court has, therefore, in the first instance to assess the damages in German currency*.[4] The purchase by the applicants of the American and English currency against the bank happens in the present case to have fixed the amount of these damages.'

The last sentence was expressly approved of by Lord Sterndale M.R.[5] and Warrington L.J. (as he then was),[6] who, however, added:

'. . . all that the claimants did was to ascertain the amount of their damages by actually buying the dollars and the sterling in Germany. They need not have done that; they might have made a claim for the loss they had sustained by not having their dollars and sterling. Probably the amount would have been the same, but that does not matter.'

These two cases are certainly different from the two cases discussed above, inasmuch as there happened to be a purchase against the bank. But this cannot be material, and one would think that, if in the latter cases the claimants were entitled to measure their damage in Belgian francs and German marks, the French cargo-owners in the *Canadian Transport* case should have been entitled to measure their loss in French francs.

2. It remains to add a few words on the much neglected ques-

[1] But as the claim was for damages, not for a debt, the principle mentioned *supra*, p. 184, n. 4, could have been applicable. [2] [1923] 1 Ch. 276.
[3] At p. 285. [4] Italics ours. [5] At p. 291. [6] At p. 292.

tion of the law which, in case of a conflict of laws, governs the determination of the money of account. It seems clear that this task can be discharged by one legal system only, namely, by the proper law of the obligation.[1] Thus, if goods are sold from Germany to England, but not accepted here, the question whether the damages are measured in German or English currency falls to be decided by the proper law of the contract. If it is German, the damages are probably expressed in German currency;[2] if it is English, the rule of English municipal law applies that the damage consists of the market value at the place of delivery and is measured in the currency of that place.[3,4]

A particular difficulty, however, arises in tort cases. If the tort is committed on the high seas, English courts always apply English law,[5] and there is consequently no real conflict of laws involved.[6] But if the tort is committed on land, it is not easy to say which law governs the tort and, accordingly, the determination of the money of account. It is usually said[7] that a tort must be unjustifiable by the *lex loci delicti* and actionable by English law. As regards the effects and incidents of the tortious liability this formula is, however, capable of more than one construction, and this lack of lucidity is particularly evident in the present connexion. The term 'actionability' is either

[1] Frankenstein, *Internationales Privatrecht*, ii. 203, 204; Melchior, *Grundlagen*, pp. 277 sqq. The question of the law applicable to the determination of the currency in which liability is measured was not discussed in any of the cases dealt with under (1) above. But it is submitted that in all those cases the courts proceeded on the basis of English law, being the law of the obligation. This especially applies to *The Volturno*, [1921] 2 A.C. 544 and *The Canadian Transport* (1932), 43 Ll. L.R. 409, which concerned damages arising out of a collision on the high seas, in which case English law is always the governing law: see the text.

[2] See p. 183, n. 6.

[3] See p. 184, n. 4.

[4] The question has nothing to do with the measure of damages, because it does not relate to the quantification of damages in the usual sense.

[5] See, e.g., *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 537 per Brett L.J.; Dicey, pp. 778 sqq.; Cheshire, pp. 306 sqq. It is generally said that the tort is not governed by the common law of England, but by the general maritime law as administered in England. But this is a 'periphrasis' and it is in fact the law of England which is applied: *Lloyd* v. *Guibert* (1865), L.R. 1 Q.B. 115, 125 per Willes J. delivering the opinion of the court. The matter may be different, if torts are committed on board a ship: see Dicey and Cheshire, l.c.

[6] See above, n. 1.

[7] *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176, 182 per Lord Macnaghten; Dicey, pp. 770 sqq.; Cheshire, pp. 294 sqq.

understood in a very strict and limited sense, in which case it would not comprise the effects and incidents of the tort at all, but would refer merely to the remedy; it might then be permissible to say that the effects and incidents, especially the measure of damages and the currency in which they are expressed, are governed by the *lex loci delicti*. Or the term 'actionability' may be understood in the widest possible sense, in which case the principle would in effect be that tortious liability is governed by English law except in so far as the wrongful act must be unjustifiable by the *lex loci delicti*; in this case the money of account in which the damages are measured would always be determined by English municipal law. The present state of the authorities is rather in favour of the latter view, however unsatisfactory it may be.[1] It must suffice to refer to these uncertainties, since a more detailed discussion of the conflict of laws relating to torts would fall outside the range of these studies.

[1] See, e.g., *The Halley* (1868), L.R. 2 P.C. 193, and see *Machado* v. *Fontes*, [1897] 2 Q.B. 231. There is no case where, apart from the question of justifiability, a rule of the *lex loci delicti* was applied to the effects and incidents of the wrongful act.

CHAPTER VII

THE NOMINALISTIC PRINCIPLE, ITS SCOPE, INCIDENTS, AND EFFECTS

I. The province of the law of the currency. II. The effect of territorial changes. III. The private international law governing revalorization. IV. The rules of municipal law relating to compensation in respect of depreciation of foreign money obligations: (1) the quantum of simple debts; (2) damages for non-payment; (3) determination of the amount of unliquidated damages; (4) equitable remedies. V. Protective clauses; gold clauses in particular. The law governing (1) the existence of a gold clause; (2) the construction of a gold clause; (3) the validity of a gold clause; (4) attempts made to avoid the abrogation of gold clauses under the proper law; (*a*) restrictive interpretation of the parties' reference to the proper law; (*b*) denial of extraterritorial effects; (*c*) incompatibility with public policy.

I

WHEN on the strength of the principles explained in the preceding chapter, the money of a certain currency has been found to be due by the debtor, the substance of the obligation is in general clearly fixed and no further comment is required: if it, for instance, appears that the debtor owes 10,000 French francs, it will generally be easy to determine what such 10,000 French francs are. But the matter may become more difficult if between the time when the contract was made and the time when performance becomes due the monetary system with reference to which the parties contracted, or its international estimation, suffers a change. It may then become necessary to scrutinize the question what is legal tender of that currency and how much of such legal tender the creditor is entitled to claim. For example, in September 1936 a British buyer of Belgian goods promises the French exporter to pay 10,000 francs in July 1937; it appears that the parties were contracting about French francs which at the time of the conclusion of the contract were equal to £130, but which, in view of the French franc's departure from the gold standard in June 1937, are worth only £80 at the date when payment is to be made, and only £58 in June 1938 when the action is tried. Or a loan of 10,000 marks, made by an Englishman in 1913, is to be repaid in 1925 when the mark currency is replaced by the reichsmark currency, one reichsmark

being equal to one billion of paper marks. In both cases the problem arises of determining both the quid and the quantum of the foreign money obligation and of defining what, and how much, it is that forms the subject-matter of the obligation.

In view of the universal recognition of the nominalistic principle in all its aspects,[1] the solution of this question cannot be open to much doubt. The units of account referred to in a monetary obligation are nowhere equiparated to a quantity of metal (metallism), but are generally to be defined by the 'recurrent link' rule set up by the State. Money, being a creature of the law, is regulated by the State, and more particularly, it is the State which decides which chattels are legal tender. Moreover, it is the State which determines the (nominal) value set upon such money. As each State exercises these sovereign powers over its own currency, and as there is no State which would legislate with reference to another country's currency, it must be the *law of the currency* which determines whether a thing is money and what nominal value is attributed to it.[2] What 10,000 French francs consist of is exclusively defined by French law; there is no other law in the world which would explain the meaning of that denomination and which would lay down whether certain chattels are French legal tender and for what nominal amount they are so. We therefore arrive at the rule that the law of the currency determines which things are legal tender of the currency referred to, to what extent they are legal tender, and how, in case of a currency alteration, sums expressed in the former currency are to be converted into the existing one, the metallic or inherent value of money always being immaterial.[3] The import of this rule is most obvious if

[1] See above, pp. 10, 33, 63 sqq.

[2] It is obvious that the question whether a distinct monetary system exists must also be answered by the law of the currency which is asserted to be a distinct one: see on this question above, pp. 40 sqq.

[3] This rule applies irrespective of whether the law of the obligation is identical with or different from the law of the currency. For even if the law of the obligation differs from that of the currency, the nature of the money of account which is the subject-matter of the obligation can be determined only by the law of the currency, and it is of no practical interest to decide whether the law of the currency applies by reference or by incorporation (see on this point above, p. 118) Theoretically it might be proper to say that, while the law of the currency decides whether, and for which nominal value, things are legal tender, the law of the obligation should govern the question whether or not the nominal value of money determines the quantum of the

the currency alteration is merely an intrinsic one:[1] the introduction of new kinds of coins or notes or the replacement of a gold specie standard by a fiduciary issue does not affect the denomination of the obligation whatever the real value of the new money may be; the promise to pay 10,000 French francs is satisfied by the payment of whatever are declared to be 10,000 French francs by French law. If the currency alteration is an extrinsic one,[2] and if in accordance with the modern practice a rate of conversion established by the law of the currency links the replaced currency to the present system, a debt expressed in the former money is translated into a debt expressed in so many units of account of the latter money as result from the rate of conversion: a debt expressed in pre-war Austrian kroners was until recently denominated in so many Austrian schillings as corresponded to the rate of conversion to be found in the Austrian legal tender acts and is expressed in reichmarks according to the rate of conversion established by the Germans.

Although some dissentient views have been expressed,[3] the

obligation (see Eckstein, *Geldschuld und Geldwert*, p. 104). But as all laws have adopted the nominalistic principle, such a distinction is unnecessary. This is a case where the rules of private international law can be dispensed with, as the law of the world has become uniform.

[1] In the sense mentioned above, p. 37.

[2] On which see above, p. 37.

[3] The literature is collected by Neumeyer, p. 269. The criticism is mostly expressed in the formula that the *cours forcé*, i.e. compulsory legal tender legislation (see above, p. 31), has no extraterritorial effect. In so far as such a statement refers to the influence of the issue of inconvertible paper money on gold and similar clauses, it will have to be dealt with below, pp. 229 sqq. But sometimes a more general statement is made which must be mentioned in this connexion. Thus it is said by Wharton (Parmele), s. 518, that 'legal tender acts [are] not extraterritorial', and similar statements can often be found in France and in Egypt (see, e.g., Court of Appeal of the Mixed Tribunal, 19 May 1927, Clunet, 1928, 765: Le cours forcé 'n'est évidemment pas appliquable en dehors des frontières de l'état français'). The meaning of such a rule would be that currency alterations are not recognized internationally. It will be shown in the text that no such rule exists and, moreover, it has been expressly rejected by the Privy Council in the recent case of *Ottoman Bank* v. *Chakarian* (No. 2), [1938] A.C. 260, 278 where Lord Wright said: 'A further point put forward by Sir William Jowitt was based on the construction of the Turkish statute which authorized the issue of currency notes and made them legal tender. These statutes were in terms limited to Turkish currency in Turkey. Sir William Jowitt has contended that outside Turkey pre-war currency law remained in effect, so that the legal tender outside Turkey remained the Turkish gold pound. Their Lordships are unable to accept this contention. The

majority of legal writers[1] and the courts adhere to this rule.[2] For the first time in modern history the problem gained prominence in Germany in connexion with the famous 'Coupons Actions'. Certain Austrian railway companies had issued bonds payable either in Austrian (silver) guilders or in thalers then circulating in Germany.[3] When after the establishment of the German Reich a uniform mark currency based on gold was adopted, it was provided by German law that debts expressed in thaler were to be converted into mark debts at the rate of 1 mark to $\frac{1}{3}$ thaler. In view of the adoption of the gold standard in Germany, silver and, in consequence, the Austrian silver currency heavily depreciated, and the debtors denied that they were liable in the new currency based on gold. But in Germany the Supreme Courts held that, if the thaler option was exercised, the companies had to pay the bonds and the coupons in mark

currency in any particular country must be determined by the law of that country, and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. There is no foundation in their Lordships' judgment for the argument that Turkish paper is only legal tender as equivalent to gold *sub modo*, that is, within the territorial limits of Turkish jurisdiction.' In *Dascalopoulos* v. *Ottoman Bank*, [1934] A.C. 354, 362, the Privy Council had regarded it as questionable whether the Turkish currency notes 'were ever made legal tender for any payment under a Turkish contract which by that contract had to be made outside of Turkey', and there indeed exist serious doubts on this question: see the references, p. 96, note 4.

[1] See e.g. Arminjon, *Précis*, pp. 367, 368; Sulkowski, *Rec.* 29 (1929), pp. 29 sqq.; Neumeyer, l.c.; Nussbaum, *Geld*, pp. 138 sqq.; Wolff, *Internationales Privatrecht*, pp. 97 sqq.

[2] It is noteworthy that such monetary changes and their effects are accepted everywhere without the question being raised whether a rule of public policy such as that laid down by Dicey, pp. 25 sqq., does not prevent their recognition. It is possible that ideas of public policy are at the back of those writers' minds who deny extraterritorial effect to legal tender legislation (see p. 193, n. 3) and that they influenced Holt C.J. in *Du Costa* v. *Cole* (see p. 196, n. 1). But these views are out of favour, and no principle of public policy is nowadays invoked in such cases. It was clearly an exception that a rate of conversion established in Poland for the purpose of converting mark debts incurred before the separation of certain eastern provinces from Germany was held by German courts to be irreconcilable with German public policy on the ground that the Polish statute was directly intended to injure German subjects: Berlin Court of Appeal, 25 Feb. 1922, 28 Oct. 1922, 2 Nov. 1928, *JW.* 1922, 398; 1923, 128; 1928, 1462.

[3] As to the question whether or not there existed an 'option de change' see above, p. 152, n. 2.

at the rate of conversion established by the German legal tender act, although the contracts themselves were governed by Austrian law.[1] In more recent times this view has been consistently upheld by the German Supreme Court[2] and also by the Supreme Courts of all other countries;[3] in fact, only on

[1] Reichsoberhandelsgericht, 19 Feb. 1878, *ROHG.* 23, 205; 8 April 1879, *ROHG.* 25, 41; Supreme Court, 12 Dec. 1879, *RGZ.* 1, 23; 1 March 1882, *RGZ.* 6, 126; 9 Feb. 1887, *RGZ.* 19, 48; see Hartmann, *Internationale Geldschulden* (1883); E. J. Bekker, *Couponsprozesse* (1881), and Walker, *Internationales Privatrecht*, pp. 408 sqq.

[2] There are innumerable decisions on the point and all the decisions mentioned in p. 203, n. 2; p. 212, nn. 1, 3, 4; p. 213, nn. 1, 2, 3, below are based on the principle.

[3] *France*: Cass. Civ. 23 Jan. 1924, S. 1925, 1. 257 (3e espèce) (marks); Cass. Civ. 25 Feb. 1929, Clunet, 1929, 1309 (roubles); Cour de Paris, 23 May 1931, Clunet, 1932, 441 (roubles); Trib. Civ. Seine, 28 Oct. 1925 and Cour de Paris, 18 Feb. 1926, Clunet, 1927, 1061; Trib. Civ. Seine, 23 Feb. 1931, Clunet, 1931, 396, all relating to roubles, as to which see also Degand, *Rép. dr. intern.* (1929), 'Change' No. 87. Cf. also the illuminating recent decision Cass. Req. 4 April 1938, S. 1938, 1. 188 (Pham-Thi-Hieu *v.* Banque de l'Indochine), relating to piastres which circulate in French Indo-China and which by virtue of the adoption of the gold standard in 1930 appreciated in value: 'le prêt d'une somme numérique de piastres contracté sous l'empire du décret du 8 juillet 1895, devait sous celui du 31 mai 1930 être remboursé par une somme numériquement égale de piastres, sans avoir égard à l'augmentation ou à la diminution de la valeur des espèces stipulées.' This decision is a good example for the often forgotten fact that nominalism does not always operate in favour of the debtor. *Italy*: Cass. 23 March 1925, Clunet, 1927, 496, and *Riv. diritto commerciale*, 1925, ii. 635 (roubles). *Hungary*: Supreme Court, 28 May 1929, Clunet, 1930, 514: a loan had been given of 217,920 'couronnes timbrées yougoslaves', i.e. Austro-Hungarian kroners of the old type provisionally used in Yugoslavia and stamped there; according to a later Yugoslavian legal tender act the kroners were converted into dinars at the rate of 4 to 1. Judgment was given for 54,480 dinars. In a number of recent cases relating to obligations to pay pounds sterling or dollars, the Hungarian Supreme Court disregarded the depreciation of these currencies, but ordered payment at the gold value: see Katinszky, *RabelsZ.* 1937, 683, and the decision of the Hungarian Supreme Court of 26 Sept. 1935 in Plesch, *The Gold Clause*, ii. 43. But it seems that these decisions did not involve a departure from the nominalistic principle, but are due to a reasoning similar to that of the German decisions discussed below, p. 212. *Greece*: Aréopage, Clunet, 1931, 1238. *Austria*: Supreme Court, 11 Nov. 1929, *JW.* 1929, 3519 (marks); 12 March 1930, Rechtsprechung, 1930, No. 234 and *JW.* 1930, 2480 (marks); 9 Oct. 1930, Rechtsprechung, 1931, 11, and Clunet, 1931, 716, and numerous other decisions; see generally Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, ii. 1 (1928), p. 26. *Switzerland*: see the decisions relating to marks which are quoted below, p. 203, n. 4; p. 209, n. 3, and the decision *re* Crédit Foncier Franco-Canadien, 23 May 1928, Clunet, 1929, 479, 506, 507, where the Federal Tribunal says that in the absence of a gold clause 'on ne saurait entendre par francs français autre chose que la monnaie effective qui a cours en France d'après la loi française et qui est la seule que l'on puisse se procurer tant en France qu'à l'étranger'. *Czechoslovakia*: see the decisions,

the basis of this view is it understandable that in connexion with foreign money obligations a revalorization doctrine was developed (see below, section III), and all decisions relating to such revalorization of foreign money obligations expressly or impliedly proceed upon the principle that purely monetary changes of a foreign currency are to be recognized and accepted everywhere.

In this country, as in others, the rule is firmly established. In *Du Costa* v. *Cole*,[1] it is true, a decision was given which is founded on a different view. The case concerned an action on a bill of exchange drawn in London on 6 August for 1,000 'Mille Rees', payable in Portugal thirty days after sight. On 14 August the King of Portugal reduced the value of the 'Mille Rees' by £20 per cent. Holt C.J. did not recognize this monetary change, but held that 'the bill ought to be paid according to the ancient value, for the King of Portugal may not alter the property of a subject of England'. *Gilbert* v. *Brett*[2] was distinguished on the ground that there it was British money which by the King's authority was changed. But though Holt C.J.'s decision does not appear to have ever been expressly overruled, it cannot be doubted that it has in fact been set aside by a number of modern cases which lay down the rule that, irrespective of the proper law of the obligation, the subject-matter of a foreign money obligation is whatever is by the law of the currency legal tender for the nominal amount of the obligation.[3] The creditor who

p. 203, n. 5. *United States*: *Dougherty* v. *Equitable Life Assurance Society* (Court of Appeals of New York, 1934), 266 N.Y. 71, 193 N.E. 897 (roubles); *Tillman* v. *Russo-Asiatic Bank*, 51 Fed. (2d) 1023 (Circuit Court of Appeals, 2d, 1931) (roubles); *Klocklow* v. *Petrogradski*, 268 N.Y. Supp. 433 (Supreme Court of New York, App. Div., 1st Dept., 1934) (roubles). As to roubles see also: *Matter of People*, (1931) 255 N.Y. 428, 175 N.E. 118, a case proceeding on wrong evidence; *Parker* v. *Hoppe*, (1931) 257 N.Y. 333, 178 N.E. 550; *Richard* v. *National City Bank of New York*, (1931) 231 App. Div. 559, 248 N.Y. Supp. 113. As to marks see *Matter of Illfelder*, (1931) 136 Misc. 430, 240 N.Y. Supp. 413, aff'd 249 N.Y. Supp. 903, and also the surprising decision of the Court of Appeals of New York in the *Matter of Lendle*, (1929) 250 N.Y. 502, 166 N.E. 182. On these two cases see more fully below, p. 210. A discussion of the whole problem will also be found in Sedgwick, *On Damages*, 9 ed., 1912, i. ss. 268, 269. As to the problem under discussion see also the awards of the Court of Arbitration of the International Chamber of Commerce, *Revue Critique de Droit International* 1934, 472 sqq.

[1] (1688) Skin 272.

[2] (1604) Davis's Rep. (Ireland) 18.

[3] Relating to roubles: *Lindsay Gracie & Co.* v. *Russian Bank for Foreign Trade* (1918), 34 T.L.R. 443; *British Bank for Foreign Trade* v. *Russian Com-*

abstains from providing for a gold clause or other protective clause must therefore suffer the loss resulting from a depreciation of the selected currency and it does not matter that he believes it to be unshakable or as good as gold.[1]

II

The application of this rule causes particular difficulties in case of currency alterations resulting from territorial changes.[2] After the cession or annexation of territories the successor State usually introduces a new currency into which debts expressed in the currency hitherto circulating are to be converted. Frequently the successor State specifies the debts to which the rate of conversion is intended to apply, and such rules of the law of the currency will have to be accepted by the courts of other countries so far as concerns obligations which, according to the law of the currency itself, are not meant to be affected.[3] The

mercial & Industrial Bank (No. 2) (1921), 38 T.L.R. 65; *Buerger* v. *New York Life Insurance* (1927), 43 T.L.R. 601 (C.A.); *Perry* v. *Equitable Life Assurance Society* (1929), 45 T.L.R. 468. Relating to marks: *In re Chesterman's Trusts*, [1923] 2 Ch. 466 (C.A.); *Anderson* v. *Equitable Life Assurance Society* (1926), 134 L.T. 557 (C.A.); *Franklin* v. *Westminster Bank*, below, p. 315. Relating to francs: *Hopkins* v. *Compagnie Internationale des Wagons-lits* below, p. 313; see also *Société des Hôtels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451, 461 per Scrutton, L.J. Relating to piastres: *Kricorian* v. *Ottoman Bank* (1932), 48 T.L.R. 247; *Ottoman Bank* v. *Chakarian* (No. 2), [1938] A.C. 260 (P.C.); *Sforza* v. *Ottoman Bank*, [1938] A.C. 282 (P.C.). It may be that a somewhat different principle applies in case of a claim for unliquidated damages: see *Pilkington* v. *Commissioners for Claims on France* (1821), 2 Knapp P.C. 7, 20 and the comments of Scrutton L.J. in *Société des Hôtels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451, 461, which will be discussed below, p. 216. Scrutton L.J.'s suggestion that the doctrine 'mobilia sequuntur personam' may apply is untenable; if that maxim existed and if it had any bearing on the point, the English creditor of German pre-war marks would not have to suffer the effects of the depreciation of the mark—a result which would be irreconcilable with the authorities above mentioned. Scrutton L.J.'s dictum, however, led to a surprising decision of the Appellate Division of the New York Supreme Court in *Orlik* v. *Wiener Bankverein* (1923), 204 App. Div. 432, 198 N.Y. Supp. 413, on which see below, p. 286.

[1] This particular point was decided in *British Bank for Foreign Trade* v. *Russian Commercial & Industrial Bank* (No. 2) (1921), 38 T.L.R. 65; *in re Chesterman's Trust*, [1923] 2 Ch. 466; *Ottoman Bank* v. *Chakarian* (No. 2), [1938] A.C. 260 (P.C.). See also the decisions of the German Supreme Court, 15 March 1937, *RGZ.* 154, 187; 28 May 1937, *RGZ.* 155, 133; 7 Feb. 1938, *JW.* 1938, 1109.

[2] See generally Neumeyer, pp. 259 sqq.; Nolde, *Rec.* 27 (1929), pp. 283 sqq.

[3] When after the Great War certain German provinces came under Polish sovereignty, *Poland* introduced the zloty currency, and statutory provision

question how obligations which are not exempted from the conversion by the self-imposed restrictions, if any, of the law of the currency, are affected by such territorial and monetary changes should be answered on the basis of the following distinction.

1. A transition to a new sovereign power, establishing a new currency standard, may be suffered by a territory which before the succession enjoyed an independent and distinct monetary system. An example is supplied by the development in the former protectorate in East Africa, the present Tanganyika Territories, where under German sovereignty the rupee currency circulated and where the English made the East African shilling the standard coin, providing for conversion at the rate of 1 rupee to 2 shillings.[1] The rupee currency, as a separate currency system, thus became extinct, and therefore the general rules apply according to which the rate of conversion linking an extinct currency to the existing one must be followed.[2]

2. Much more difficult questions are involved if in consequence of a territorial change a new currency is introduced in a country where before the succession there existed no independent monetary system, but where a currency circulated which was part of and identical with that of another country. Thus German currency circulated in the former German colonies in South-West Africa which, according to Art. 22 of the Treaty of Versailles, are now under the mandatory administration of

was made for the conversion of mark debts into zloty debts, German courts often held that the Polish Statute itself restricted its application to payments to be made in Poland: Supreme Court, 11 March 1922, *JW.* 1923, 123; 28 Nov. 1922, *JW.* 1922, 1122; 22 March 1928, *JW.* 1928, 3108; 27 June 1928, *RGZ.* 121, 337, 344; Berlin Court of Appeal, 9 March 1922, *JW.* 1922, 1135.—There exist numerous *French* decisions relating to the ambit of the rate of conversion introduced in Alsace-Lorraine: see, e.g., Cass. Civ. 26 May 1930, Clunet, 1931, 169; 8 Feb. 1932, Clunet, 1932, 1015; 29 Nov. 1932, Clunet, 1933, 686; Cass. Req. 25 Oct. 1932, Clunet, 1933, 689.

[1] 1921 Ordinances, Nos. 43 and 44; see *Journal of Comparative Legislation*, 9 (1922), *Review of Legislation*, p. 164.

[2] In the same sense Nussbaum, *Internationales Privatrecht*, p. 254; *Geld*, p. 161; Neumeyer, p. 275; Mayer, *Valutaschuld*, p. 45, n. 9. The German Supreme Court, however, held (3 June 1924, *RGZ.* 108, 303, 304) that after the territorial change the debt became expressed in marks, because the proper law of the obligation was and remained German. But this amounts to an unfortunate confusion between the law of the currency and that of the obligation and is due to a failure to distinguish the present case from that mentioned under paragraph (2); cf. also Supreme Court, 8 Dec. 1930, *RGZ.* 131, 42, 47.

the Union of South Africa; German currency also circulated in territories which now belong to France, Denmark, Poland, and other countries. The kroner of the former Austro-Hungarian Empire circulated in territories now belonging to Italy, Hungary, Poland, Czechoslovakia, and so forth. The new sovereign, it is true, everywhere established a rate of conversion for the purpose of converting sums expressed in marks or kroners into the new currency.[1] But in such circumstances the rule that the rate of conversion established by the law of the currency must be followed everywhere is of no avail, because it is doubtful which is the law of the currency which must be followed: if it is assumed that in 1914 an Englishman promised the Prague agency of a Vienna Bank to pay in 1934 a sum of kroners, which were of course Austro-Hungarian kroners, the question arises whether at the date of maturity the debt is converted into Austrian schillings of the then Austrian currency or into kroners of the present Czechoslovakian State.

It is obvious that this question, which up to a certain point relates to the determination of the currency, cannot be answered by saying that the law of the currency should be applied. It has been suggested that the debt should be translated into the present currency of that territory with which it is most closely connected or where it is localized or where it has its 'economic seat',[2] and in a similar way decisive importance has sometimes been attached to the currency now obtaining at the place of performance. This would amount to the adoption of the prima-facie rule helping to determine the currency where it is doubtful.[3] It should, however, not be overlooked that the two problems are not quite identical, inasmuch as in the present case the problem is whether the money of account which was once clearly fixed is still the same or a different one. Moreover, the suggested rule is of no avail if the place of performance or the economic seat is situate in a country where neither of the currencies

[1] As to legislation in the countries formerly belonging to the Austro-Hungarian monarchy see Steiner, *Die Währungsgesetzgebung der Sukzessionsstaaten Österreich-Ungarns* (Vienna, 1921).

[2] Czechoslovakian Supreme Court, 4 June 1925, *Ostrecht*, i (1927), 142 with note by Nussbaum; Austrian Supreme Court, 14 July 1926, *Ostrecht*, i (1927), 119; Brussels Court of Appeal, 24 May 1933, Clunet, 1934, 601; Nussbaum, *Internationales Privatrecht*, p. 254; Neumeyer, l.c., pp. 264 sqq.

[3] Above, pp. 165 sqq.

affected by the territorial change circulates. These difficulties are avoided by another solution, which is that of the German Supreme Court and which is based on the general principle of private international law that, once a legal relation has been created subject to the provisions of a certain law, this law remains authoritative and territorial changes are without influence, unless both parties submit themselves or are subject to the new law.[1] As the determination of the money of account, and also the alteration of the money of account once determined, are matters of the law governing the obligation, it follows from this principle that territorial changes and monetary changes caused thereby must remain without effect unless the monetary change is enforced by the proper law or unless both parties have submitted themselves or are subject to the new law. Thus the German Supreme Court held that a debt expressed in Austro-Hungarian kroners, which was contracted by a German with the Prague office of a Vienna bank and which was subject to German or Austrian law, is in the absence of a contractual or actual submission to Czechoslovakian law still expressed in the old currency or in what has replaced it by Austrian law, because neither German nor Austrian law provides for conversion into Czechoslovakian kroners.[2] Similarly the German Supreme Court held that mark debts contracted under German law in German South-West Africa were not affected by the Debts Settlement Proclamation of 15 December 1920 providing for conversion into pounds sterling at the rate of 20 marks to 1 pound sterling.[3]

III

It has been shown that a foreign country's legal tender legislation determining the composition, denomination, and, accordingly, the nominal value of the foreign money concerned must

[1] As to this principle see numerous decisions of the German Supreme Court, e.g., 22 March 1928, *JW.* 1928, 1447; 27 June 1928, *RGZ.* 121, 337, 344; 25 Oct. 1928, *JW.* 1928, 3108; 16 Jan. 1929, *RGZ.* 123, 130; 5 Dec. 1932, *RGZ.* 139, 76, 81. See also French Cass. Civ. 15 May 1935, Clunet, 1936, 601, and S. 1935, 1. 244: in 1914 a firm in Alsace-Lorraine had sold goods to a Paris firm under a German contract; the contract remained subject to German law, apparently even although both parties became subject to the laws of France.

[2] 13 July 1929, *IPRspr.* 1930, No. 30; 30 April 1931, *IPRspr.* 1931, No. 31.

[3] 8 Dec. 1930, *RGZ.* 131, 41; 31 July 1936, *RGZ.* 152, 53. For other questions connected with the cession of these territories see Mann, *Journal of Comparative Legislation* 16 (1934), 281.

be recognized everywhere, and that, as to such questions, the law of the currency applies; but this does not by any means imply the further rule that the disarrangement of the real or intrinsic value of money (i.e. the increase or reduction of its purchasing power caused by such foreign legal tender legislation) and its effect on the quantum of the obligation must also be viewed from the point of view of the law of the currency. It has already been explained in connexion with domestic money obligations that any qualification of the rigidity of the nominalistic principle cannot result from legal tender legislation, but only from the general principles of the law of obligations or from special legislation based on these principles. Legal tender legislation defines money and the nominal value of money, but it is outside its range to decide whether and under what circumstances redress against its effects may be obtained. So far as concerns private international law, the conclusion may be drawn from this universally accepted view, that the proper law of the obligation (not the law of the currency) governs all questions relating to any qualification of the prima-facie effect of foreign legal tender legislation on the quantum of the obligation.

Speaking generally, it is clearly recognized that this line of demarcation should be drawn between the province of the law of the currency and that of the law of the obligation. Whether in case of the non-payment of a debt damages may be claimed in respect of the depreciation of the foreign money concerned since the date of maturity;[1] how unliquidated damages are to be measured;[2] whether owing to a rise or fall in the purchasing power of money a contract may be rescinded;—these and similar questions should unhesitatingly be answered in accordance with the law governing the obligation.

The only question in this connexion is whether the revalorization of simple debts is governed by the law of the currency or by that of the obligation. Suppose 10,000 German marks were borrowed in 1914 under a contract governed by English law; the debt falls due in 1925, when, owing to the depreciation and

[1] That the proper law applies to this question was expressly held by Scrutton L.J. in *Société des Hôtels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451, 461. In the same sense German Supreme Court, 6 Nov. 1928, *IPRspr.* 1929, No. 113; 8 Jan. 1930, *IPRspr.* 1930, No. 48, and in the decisions quoted in p. 213, nn. 5, 6.

[2] See, however, Cheshire, pp. 660 sqq., who would appear to apply the *lex fori* to all questions of quantification.

collapse of the German mark and the subsequent introduction of the reichsmark currency effected by the adoption of a rate of conversion of one billion of marks to one reichsmark, the law of the currency gives the creditor nothing but an infinitesimal fraction of a reichsmark. German law, on the strength of the Revalorization Act or of certain principles of the law of contracts, would revalorize the debt to, say, 2,500 reichsmarks. The question whether these German rules can be applied depends on whether revalorization is governed by the law of the currency or by the law of the obligation. If the law of the currency governs, revalorization rules of that law would apply and apply only where sums expressed in that currency were owed, whatever the law of the obligation might be; if German marks were owed under an English contract, an English court would have to revalorize the debt, although English law as the proper law does not know of such revalorization; and if Russian roubles were owed under a German contract, an English court would have to refuse revalorization as being unknown to the law of Russia, although German law would allow revalorization. On the other hand, if the question is governed by the law of the obligation, revalorization rules of that law would have to be applied, whatever the law of the currency might be: if German marks were owed under an English contract, no revalorization would be possible, because it is unknown to English law; if Russian roubles were owed under a German contract, English courts would have to admit revalorization in accordance with the rules of German law.

This is a typical problem of classification[1] which in view of its inherent nature as explained above should be solved in favour of the law of the obligation.[2] This is indeed the view

[1] In the sense discussed, e.g., by Beckett, *British Year Book of International Law*, 1934, 46; Falconbridge, 53 (1937), *L.Q.R.* 235, 537 and the writers there quoted, or in the sense of primary classification as explained by Cheshire, pp. 30 sqq.

[2] Although the German Supreme Court decided differently (23 Jan. 1927, *RGZ.* 118, 370), it should not be doubted that the stipulation of an option of place does not allow revalorization to be regarded as governed by the law of the place of payment. On the other hand, it would seem that, if there is an 'option de change' coupled with an 'option de place', revalorization might be governed by the law of the place of payment (see above, p. 159): if in 1914 under an Austrian contract 1,000 marks in Berlin or 850 kroners in Vienna were promised, the connexion of the Berlin option with German law would seem to be so great that the application of German revalorization rules would appear to be justified.

taken by the majority of writers[1] and also by the courts of Germany,[2] Austria,[3] Switzerland,[4] and other countries,[5] and it is also the solution adopted by the English courts.

[1] Melchior, *Grundlagen*, pp. 294 sqq.; Frankenstein, ii. 222; Wolff, *Internationales Privatrecht*, p. 99; Mayer, *Valutaschuld*, p. 53, with further references; Degand, *Rép. dr. intern.* (1934), Supplément *sub* 'Valorization', No. 2; Sulkowski, *Rec.* 29 (1929), pp. 29 sqq.—The view that the question is governed by the law of the currency is held by Nussbaum, *Internationales Privatrecht*, p. 254; *Bilanz der Aufwertungstheorie* (1929), pp. 34 sqq., and by Neumeyer, pp. 368 sqq.

[2] See the material collected by Melchior and Mayer, l.c., and see Kahn, 14 (1932) *Journal of Comparative Legislation*, pp. 66, 73 sqq. The law of the obligation is applied in numerous decisions, especially: 14 Dec. 1927, *RGZ.* 119, 259, 264; 27 Jan. 1928, *RGZ.* 120, 70, 76; 27 June 1928, *RGZ.* 121, 337; 20 Sept. 1929, *JW.* 1930, 1587; 22 Oct. 1929, *IPRspr.* 1930, No. 32; 6 Feb. 1930, *Leipziger Zeitschrift*, 1930, 1052; 24 Feb. 1930, *Leipziger Zeitschrift*, 1931, 375; 2 June 1930, *Leipziger Zeitschrift*, 1931, 384; 14 Jan. 1931, *Seufferts Archiv*, 85, No. 57; 16 Dec. 1931, *JW.* 1932, 1049; 28 June 1934, *RGZ.* 145, 51, 55. But there are also some decisions which apply the law of the currency: see, e.g., 5 March 1928, *RGZ.* 120, 279; 9 Feb. 1931, *JW.* 1932, 583, and others. Applying the law of the obligation, the Supreme Court revalorized kroner debts under German law (decisions of 27 Jan. 1928; 2 June 1930; 14 Jan. 1931) and refused to revalorize mark debts under a foreign law (4 Jan. 1927).

[3] For a refusal to revalorize mark debts under Austrian law see Supreme Court 11 Sept. 1929, Rechtsprechung, 1929, No. 331, also *JW.* 1929, 3519, and Clunet, 1930, 750; 12 March 1930, Rechtsprechung, 1930, No. 234, also *JW.* 1930, 2480, and Clunet, 1931, 196. Revalorization of mark debts under German law: see, e.g., 24 April 1927, *JW.* 1927, 1899. In a number of Supreme Court decisions it was also held that the German revalorization rules, even in so far as they were retrospective, were not against Austrian public policy: 24 April 1927, l.c.; 27 March 1929, *JW.* 1929, 3522; 26 June 1930, *JW.* 1931, 635, and Clunet, 1931, 717; the opposite view was taken by the Supreme Court of *Hungary: RabelsZ.* 1937, 179.

[4] Revalorization of a mark debt under German law: 28 Feb. 1930, *JW.* 1930, 1900; 26 Feb. 1932, *JW.* 1932, 1163, and Clunet, 1932, 1163. In these decisions the Federal Tribunal also held that the German revalorization rules, even if retrospective, were not against Swiss public policy. As to revalorization of mark debts under Swiss law according to principles of the Swiss law of contracts see: 3 June 1925, *BGE.* 51, ii. 303, also *JW.* 1925, 1818, and Clunet, 1926, 1118; 17 Feb. 1927, *BGE.* 53, ii. 76, also *JW.* 1927, 2350; 3 July 1928, *JW.* 1928, 3145; 28 Feb. 1930, *JW.* 1930, 1900; 26 March 1931, Clunet, 1932, 227; 13 Nov. 1931, *JW.* 1932, 2337.

[5] *French* courts were not called upon to decide the question. There are only some French decisions which held the retrospective effect of German revalorization legislation and practice to be irreconcilable with French 'ordre public': Cass. Civ. 14 April 1934, S. 1935, 1. 201 (with note by Niboyet) and Clunet, 1935, 372; Trib. Civ. Seine, 9 April 1930, Clunet, 1930, 1012; Trib. Civ. Strasbourg, 15 July 1930, Clunet, 1931, 684; Trib. Civ. Strasbourg, 6 April 1932, Clunet, 1934, 929; Trib. Civ. Seine, 26 May 1936, *G.d.T.* 1936, No. 142 and *B.I.J.I.* 36 (1937), p. 71, No. 9820. As to the reconcilability of Polish revalorization legislation with French 'ordre public' see Witenberg, Clunet, 1929, 593. *Holland*: see the material collected in *RabelsZ.* 1932, 856,

This is clearly proved by the case of *Anderson* v. *Equitable Assurance Society of the United States*,[1] the facts of which were as follows. In 1887 the plaintiff's husband had taken out an insurance policy with the St. Petersburg sub-agent of the Hamburg branch of the defendants. The policy was denominated in German marks, but it expressly provided that the plaintiff's interest under it was governed by English law. After her husband's death in 1922 the plaintiff claimed the sums due under the policy, and, in order to avoid the inevitable consequence of the nominalistic principle as expressed, e.g., in *Re Chesterman's Trusts*,[2] relied on German decisions allowing revalorization. But the Court of Appeal (Bankes, Warrington, and Atkin L.JJ.) held these decisions to be irrelevant. The *ratio decidendi* was clearly that the German revalorization practice 'did not in any way affect or interfere with the fiscal law which gives what shall be the currency of the country',[3] but that it results from principles of the German law of obligations. This being so, Warrington L.J. arrived at the conclusion that the German decisions were irrelevant, because[4]

'this contract which we have to deal with is one which has to be carried out in accordance with English law, and the decision of the Court in Leipzig is not one which affects the performance of this contract which is an English contract to be performed according to English Law.'

Similarly Atkin L.J. commented on the German revalorization practice as follows:[5]

'It seems to me to be impossible to suppose and I think it is not proved that that law in any way affected the currency value of the

and Degand, l.c., No. 7; the Hooge Raad refused to revalorize a mark debt under Dutch law: 2 Jan. 1931, Weekblad van het Recht 12259, also in *Blätter für Internationales Privatrecht*, 1931, 213. *Czechoslovakia*: Supreme Court, 11 Nov. 1924, *JW.* 1925, 514; 19 Jan. and 6 Dec. 1934, *RabelsZ.* 1936, 172. As to *Poland* see Rost, 'Das internationale Aufwertungsrecht Polens', *Ostrecht*, iii (1929), 1301. *Egypt*: Reversing a judgment of the Mixed Tribunal at Cairo (17 Feb. 1930, Clunet, 1931, 467), the Court of Appeal of the Mixed Tribunal refused to apply German revalorization legislation, in so far as it has retrospective effects, the reason being that the defendant's 'droits acquis' had to be observed and that the later German legislation was not covered by the parties' submission to German law: 11 April 1935, Clunet, 1935, 1060 (three judgments *re* Adjouri).

[1] (1926) 134 L.T. 557 (C.A.). [2] [1923] 2 Ch. 466.
[3] At p. 565 per Warrington L.J. [4] At p. 565. [5] At p. 566.

mark, or indeed affected what we know as legal tender. It seems to me to be obvious that that is a law not affecting the currency, but affecting the particular contracts that come within the scope of it. . . . In other words, it is the debt that is valorized and not the currency; and if that is so, it is obvious that the German law cannot affect the operation of the rule of English law which is laid down in *Re Chesterman's Trusts*.'

These words, it is submitted, very strongly suggest that the non-application of the German revalorization rules resulted from the fact that the contract was governed by English law, which means that the Court of Appeal adopted the theory that the law of the obligation governed; had the view been taken that the question of revalorization was governed by the law of the currency, the result would needs have been different. On the other hand, the decision does not confirm the further consequence of the former theory that, if the contract had been governed by German law, the German revalorization rules would have been applied.[1]

This consequence of that theory was, it would appear, in fact drawn in the later case of *In re Schnapper*,[2] though it must be admitted that in that case the reasons for which German revalorization rules were applied, were not very clearly stated. In 1911 the testator executed a document in which he promised to pay to his niece on her attaining the age of 25 years the sum of 100,000 marks. The promise was governed by German law, under which it was unenforceable. In 1922, when the testator had become domiciled in England, he made an English will in which after reference to the promise of 1911 he declared: 'Now I hereby confirm such obligation and direct my trustees to fulfil such obligation should I die before it has been fulfilled.' The testator died in the latter part of 1922. The niece attained the age of 25 years in 1934, and the questions which now fell to be decided were whether the agreement of 1911 was valid or void and, if it was void, whether a sum of 100,000 marks became

[1] It may be noted that the question whether the German rules were part of the law of the currency or of the law of obligations was answered on the basis of German conceptions. The decision is therefore an example of a classification not proceeding from the conceptions of the *lex fori* which are usually held to determine classification. See on the subject the authors mentioned above, p. 202, n. 1.

[2] [1936] 1 All E.R. 322.

payable by virtue of the will, and if so, by how many pounds sterling this sum was now represented. Clauson J. had no difficulty in holding that the agreement of 1911 was invalid. He also held that by his will the testator did not give a bequest of 100,000 marks, but 'that the direction given to the executors is to make such payment by way of legacy if necessary—that is to say, if the document of 1911 is not legally enforceable, to make such payment by way of legacy as would give Edith Betty Schnapper a sum which he would have had to give her had it been so'. Evidence was given as to the German revalorization practice, and in view of the figures mentioned by German experts it was held that the niece was entitled to a decree 'as a legatee under the will in respect of a sum of £5000'.

In the absence of any discussion of the question it is difficult to understand how German revalorization law came to be applied. The German contract of 1911 was void. The obligation therefore arose under a domiciled Englishman's will which was governed by English law. As English law under which the obligation arose does not know of any revalorization, it might seem that the application of German revalorization rules was due to the mere fact that German marks were promised, which would mean the adoption of the theory, irreconcilable with *Anderson*'s case, that revalorization is governed by the law of the currency. Nevertheless, this is probably not the correct interpretation of the case. For it would seem that in effect the view taken by the learned judge was that the German agreement of 1911, though as such invalid, was confirmed by and incorporated into the English will of 1922 in such a manner that, at least according to the testator's intentions, the real basis of the niece's rights was to be found in that German agreement. That this is the true meaning of Clauson J.'s decision[1] is suggested by his statement[2] that on its true construction the will did not give a bequest of 100,000 marks to the niece, but directed the executors 'to make such payment by way of legacy if necessary—that is to say, if the document of 1911 is not legally enforceable, to make such payment by way of a legacy as would give E. B. Schnapper a sum which he would have had to give her had it been so'. Though this

[1] In the same sense Kahn-Freund, *Annual Survey*, 1936, p. 361.
[2] [1936] 1 All E.R. 322, 326.

explanation is not very satisfactory, it seems to be the only one by which the case can be reconciled with the decision of the Court of Appeal in *Anderson* v. *Equitable Assurance Society of the United States*.[1]

The most recent case on the subject is *Kornatzki* v. *Oppenheimer*,[2] the material facts of which were as follows. Under a contract made in 1905 to compromise an action brought in the German courts the defendant was bound to pay to the plaintiff during her lifetime an annual allowance of 8,000 marks. The present action concerned the question how this obligation was to be fulfilled after the mark currency had been replaced by the reichsmark currency. Farwell J. decided the question on the basis of German revalorization practice, and after having heard evidence thereon, he arrived at the result that the defendant had to pay an annuity of £500.[3] In this case the application of German law was warranted from the point of view of both the currency and the obligation theory, because marks were the money of account and the contract made in 1905 was, as the parties agreed, governed by German law. The application of German law was, however, not derived from the former, but solely from the latter fact,[4] and therefore the decision supports the view that revalorization is governed by the proper law of the obligation.

IV

The discussion up to this point has established the rule of private international law that, while the law of the currency applies to the definition of the money of account (section I above),

[1] (1926) 134 L.T. 557.

[2] [1937] 4 All E.R. 133.

[3] The plaintiff apparently did not ask for a declaration that the defendant was under liability to pay sterling, and if she had done so, her claim would have been unjustified, since the defendant was only bound to pay reichsmarks, i.e. the currency which had replaced the mark currency. It is therefore astonishing that the learned judge made a declaration to the effect that the defendant had to pay pounds. The serious consequences of this transformation of the money of account will be appreciated if it is supposed that the reichsmark or the sterling currency depreciates. The plaintiff will have to suffer from the latter, but not from the former development, although both the nominalistic principle and justice would require a converse solution. See also below, p. 289, n. 2.

[4] See p. 137, line G: 'There is no doubt whatever that the experts on both sides agree and the parties are agreed, that this is a matter wholly of German law, and ought to be decided according to the law of Germany.' But was the experts' agreement relevant?

all questions relating to the effect of the disarrangement of the purchasing power of foreign money on the obligation and its quantum are governed by the law of the obligation, the *lex causae*, or the proper law (section III above). We now come to the rules of municipal law which determine whether and how, under a given municipal law, such disarrangements of the intrinsic value and the international estimation of foreign money can influence the fate of foreign money obligations.

We have seen in another connexion[1] that, with the exception of certain rather extreme cases, the nominalistic principle, in so far as it relates to the position of the domestic currency within the sphere of its own law, has been carried into full effect and in no way interfered with, and that it has nowhere been more strictly adhered to than in this country. We have seen that the rule: pound is pound, dollar is dollar, franc is franc, does not only mean that an obligation can always be discharged pound for pound, dollar for dollar, franc for franc, but also that normally fluctuations in value of the domestic currency cannot even be taken into account as a mere fact for the purpose of measuring damages, obtaining rescission, and so forth.

The legal rules relating to the treatment of fluctuations of the purchasing power of foreign money are on principle identical. We shall see that in this respect, too, English law is particularly strict in giving effect to the nominalistic principle in all its aspects.[2]

1. As regards the *quantum of simple debts* expressed in foreign money, there is no rule in English law which enables a party to claim a reduction or an increase of the amounts of foreign money payable on the ground of a rise or fall in the international value of such money. If under an English contract 1,000 French francs are promised, the devaluation of the French currency does not enable the creditor to claim compensation. Even if under an English contract marks or roubles were promised which have become worthless, there is no possibility of helping the creditor by revalorizing the debt.[3]

[1] Above, pp. 76 sqq.

[2] For the general rules of the law of contracts and torts bearing upon the monetary questions involved see above, pp. 76 sqq.

[3] See *British Bank for Foreign Trade* v. *Russian Commercial and Industrial Bank* (No. 2) (1921), 38 T.L.R. 65. The case is discussed below, p. 217.

A somewhat greater liberality has been shown by the law of some other countries.[1] Thus revalorization of debts expressed in marks was allowed in *Switzerland* even if the contract was not governed by German law (in which case the application of German revalorization rules was a natural consequence of the applicable doctrine of private international law),[2] but by Swiss law. Although Swiss law had not developed any general revalorization doctrine, the fact that a foreign money had become completely worthless induced the courts to invoke certain equitable principles of the Swiss Civil Code in order to compensate the creditor for the loss which a strict application of the nominalistic principle would have involved.[3] But apart from such cases of a collapse of a currency no deviation from the leading principle was admitted. In *France* no revalorization in respect of debts of French francs was ever admitted, and although even with regard to the worthless mark and rouble currencies of Germany and Russia the law of the currency was generally followed, two decisions of a rather exceptional character must be noted where the circumstances were such as to make it difficult to abstain from assisting the creditor. In the first case[4] the defendants, a French company, had in 1911 promised to the manager of their Odessa works a pension of 2,400 roubles per annum. The court refused to regard the contract as discharged, but allowed revalorization, inasmuch as it gave judgment against the defendants for the pre-war value of the roubles in terms of francs, i.e. for 6,360 francs per annum, without, however, allowing any compensation in respect of the depreciation of the French franc. The court adopted 'une saine interprétation de la volonté des parties' and thus arrived at the result

'que la disparition du rouble comme monnaie de paiement n'a pu avoir pour conséquence de faire disparaître l'obligation contractée

[1] As a matter of interest it may be noted that the *Chinese* Supreme Court in Peking held that the loss caused by the depreciation of the rouble currency was to be equally divided between the creditor and debtor, the result being expressly based on the requirements of equity and justice; 5 May 1924 and 14 April 1926, D.P. 1928, 2. 93 sqq. (Bartashevitch *v.* Banque Russo-asiatique).

[2] Above, p. 203.

[3] See the decisions of 3 June 1925; 17 Feb. 1927; 3 July 1928; 28 Feb. 1930; 26 March 1931; 13 Nov. 1931 quoted above, p. 203, n. 4.

[4] Cour de Paris, 28 Nov. 1927, Clunet, 1928, 119. Similarly *Yugoslavia*: Cass. Zagreb, 21 June 1929, *Annuaire de l'Association Yougoslave de droit international*, 1931, 287.

par la Société d'assurer des moyens d'existence à son employé sa vie durant; qu'elle subsiste au contraire entièrement et que, pour déterminer la manière dont elle devra être acquittée, il convient de se référer comme l'ont très justement fait les premiers juges, à la valeur qui a été envisagée au jour de la convention, c'est-à-dire au rapport existant à cette époque entre la valeur du rouble et celle du franc.'

The second case[1] concerned a legacy of 60,000 marks given by the will of a testator who was domiciled in Strasbourg. As the testator died after 15 December 1918, the rate of conversion of 1·25 francs to 1 mark which the French had introduced after the cession of Alsace-Lorraine did not apply to the legacy, such conversion being restricted by French law to obligations created before that date. The Court of Appeal found on construction of the will that the testator intended to divide his estate in equal shares, and on this ground the legacy of 60,000 marks was revalorized to such a sum that the legatee received an amount of a value equal to that due to the other beneficiaries.

Similar cases came before *American* courts. The decision of the Court of Appeals in New York in *Matter of Lendle*[2] concerned a case where the testator, who was domiciled in and a citizen of the United States, by his will made in 1920 gave certain 'mark' legacies to various persons in Germany. After the testator's death in 1927 it fell to be decided how these legacies were to be paid. The court considered two alternatives, namely, whether the testator intended to make the legacies payable only in depreciated paper marks, or in whatever passed as German marks at the time of his death. It was held that to the testator's mind 'the normal mark must at all times have been the mark as he knew it before the World War. . . . The legacies are payable in marks, not in dollars, and in marks which pass as such in the market at the time the legacies are paid.' Accordingly the mark legacies were equiparated to reichsmark legacies and the legatees, who were given by the will more than 400,000 'marks', received the corresponding amount of 'reichs' marks, reichs-

[1] Cass. Civ. 19 Nov. 1930, Clunet, 1931, 691.

[2] (1929), 250 N.Y. 502, 166 N.E. 182; a translation of the decision in *JW.* 1929, 3526. A decision of the District Court of the Northern District of California, which the present writer has been unable to find in any American report, was also published in Germany, where it attracted much attention and obviously caused much misunderstanding: *JW.* 1928, 2884 and the comments in *JW.* 1929, 469 and 1620.

mark for mark, or $113,000 odd.[1] In a later case,[2] where the mark legacy had already been satisfied in February 1924 by the payment of the nominal amount of marks, the court declined to reopen the transaction on the basis of *Lendle*'s case, which was distinguished on the ground that there the testator had not died until 1927 and that the legacies had not been paid.

The *German* practice in so far as it relates to the revalorization of foreign money obligations is less remarkable. There existed in German law an elaborate body of revalorization rules, and in view of the adoption of the theory that revalorization is governed by the law of the obligation[3] there was nothing unusual in their application to foreign money obligations.[4] The only question, which was often ventilated, related to the conditions under which by German municipal law foreign money could be regarded as so greatly depreciated that revalorization was called for. The Supreme Court established the rule that a 'catastrophical depreciation' was required. On this ground debts expressed in roubles or Austrian kroners were revalorized,[5] but with regard to other currencies which suffered a smaller degree

[1] The decision may perhaps be justified on the ground that in view of the circumstances of the case an intention of the testator to equiparate marks to reichsmarks could be ascertained, though it must be said that the material before the court rather suggested the opposite view. Unless this explanation helps, the decision gives rise to criticism. The case was governed by American law, which has accepted the nominalistic principle (above, p. 195, n. 3). Under this principle, which is based on the presumed intention of the parties (above, p. 64) and which is therefore a direct answer to the two alternatives envisaged by the court and mentioned in the text, German law had to be applied in so far, and only in so far, as the definition of the unit of account is concerned. According to the relevant German law, however, one billion of marks is equal to one reichsmark (above, pp. 34, 191). Revalorization would only have been possible under the law of the obligation, i.e. American law which does not know of any such remedy (above, p. 67, n. 4). Even from the point of view of the doctrine which subjects revalorization to the law of the currency (above, p. 202), the decision would be unjustifiable, since the pertinent legislation of the law of the currency was in fact not applied and since, even if it had been applied, a very different result would have followed.

[2] *Matter of Illfelder* (1931), 136 Misc. 430, 240 N.Y. Supp. 413, aff'd. 249 N.Y. Supp. 903.

[3] Above, p. 203.

[4] Difficulties arose in connexion with the application of certain statutory provisions which were primarily intended to apply to mark debts. See, e.g., the decisions mentioned in the following note.

[5] 27 Jan. 1928, *RZG.* 120, 70, 76 (Austrian kroners); 16 Dec. 1931, *JW.* 1932, 1048 (Austrian kroners) and numerous other cases.

of depreciation the application of the doctrine was refused.[1] In such cases, however, a different principle has of late been developed which, although it did not lead to revalorization in the technical sense, sometimes enabled the creditor to claim payment of an amount exceeding the nominal amount of the debt. The basis of this development is the rule of German law[2] that in case of an unforeseen change of relevant statutory provisions a construction of the contract may not only lead to its discharge, but to its revision in the sense that the party injured by the fundamental change of the basis of the contract is allowed compensation in respect of the displacement of the equilibrium between concurrent obligations. The leading case in which this principle was applied to foreign money obligations concerns a contract for the sale of yarn made between a German importer and a German manufacturer in June and July 1931; the purchase price, which was expressed in pounds sterling, was due and paid after England had gone off the gold standard, the buyer paying in reichsmarks calculated at the current rate of the paper pound.[3] As it was held that the stability of the pound sterling was a basic fact inducing the parties to adopt the pound sterling as money of account, revision was allowed on the above principle; but the additional amount due to the seller was not simply the difference between the value of the gold pound and that of the paper pound, but depended on an investigation into the facts of the case showing whether and how far the depreciation of the pound sterling meant a loss or a profit to both parties' financial position regarded as a whole. These rules have been considered in a number of later cases arising out of the depreciation of the pound sterling and the dollar,[4] but it should be emphasized that their application requires great care, no

[1] *French francs*: 6 April 1925, *JW.* 1925, 1986, No. 2; 25 Feb. 1926, *JW.* 1926, 1323; 22 Feb. 1928, *RGZ.* 120, 193, 197. *Dutch florins*: 3 March 192[illegible] Warneyer, Rechtsprechung, 1925, No. 134. *Pound sterling*: 6 May 193[illegible] Warneyer, Rechtsprechung, 1933, No. 112; 21 June 1933, *RGZ.* 141, 21[illegible] 28 June 1934, *RGZ.* 145, 51, 55. *U.S.A. dollars*: 13 May 1935, *RGZ.* 147, 37[illegible] 15 March 1937, *RGZ.* 154, 187, 192.

[2] See, e.g., 15 Jan. 1931, *RGZ.* 131, 158, 177.

[3] Supreme Court, 21 June 1933, *RGZ.* 141, 212.

[4] See especially Supreme Court, 2 April 1935, *RGZ.* 147, 286; 28 May 19[illegible] *JW.* 1937, 2823; 28 May 1937, *RGZ.* 155, 133. But see 15 March 1937, *RG[illegible]* 154, 187; 7 Feb. 1938, *JW.* 1938, 1109. As to the Hungarian practice whi[illegible] apparently rests on similar grounds see above, p. 195, n. 3.

only in view of the necessity of reviewing all the facts of the case, but also because of the strong emphasis laid on the prerequisite of a disturbance of the intended equilibrium between the mutual performances. This principle prevented the application of the rule in case of a loan,[1] or in cases where both parties had already fulfilled their obligations and where the consideration depreciated in the hands of the creditor,[2] or if the parties had envisaged a depreciation of the dollar or pound sterling.[3]

2. If the international value of the foreign money of account depreciates between the date of maturity and the date of payment, the question arises whether the creditor is entitled to claim damages for the loss suffered.

As in *Germany* damages due to the delayed payment of a debt are on principle not limited to interest, and as under German law the creditor of a mark debt, whether he be German or non-German, may in certain circumstances claim damages in respect of the depreciation of the German mark,[4] it was a natural consequence to hold that a German creditor of foreign money may claim damages in respect of the depreciation of the foreign currency concerned;[5] but in the absence of special circumstances it must be strictly proved that the creditor would have avoided the loss, if the debtor had paid at maturity.[6] Similarly in *Austria*[7] and *Switzerland*[8] it was held that, if the payment of a pound sterling debt was delayed until after the depreciation of the sterling in 1931, an Austrian or Swiss creditor was entitled to damages, as his contention that he would have avoided the loss by converting the pounds sterling into Austrian

[1] Supreme Court, 28 June 1934, *RGZ.* 145, 51, 56.

[2] Supreme Court, 13 Oct. 1933, *RGZ.* 142, 23, 34, 35.

[3] Supreme Court, 9 July 1935, *RGZ.* 148, 33, 41, 42; Danzig, 27 June 1934, *JW.* 1934, 2074.

[4] Above, p. 78.

[5] Supreme Court, 25 Feb. 1926, *JW.* 1926, 1323 (francs); 22 Feb. 1928, *RGZ.* 120, 193, 197 (francs); 13 May 1935, *RGZ.* 147, 377 (dollar), and many further decisions.

[6] See especially the decision of 22 Feb. 1928. If a French creditor of French francs claims damages in respect of the depreciation of the French currency proof of damage must be particularly strict: Supreme Court, 25 Feb. 1926, *JW.* 1926, 1323; 4 Jan. 1938, *JW.* 1938, 946.

[7] Austrian Supreme Court, 18 March 1932, *JW.* 1932, 2839 and Clunet, 1932, 1082; 28 Nov. 1934, Clunet, 1936, 191.

[8] Federal Tribunal, 10 Oct. 1934, *BGE.* 60, ii. 340, and Clunet, 1935, 1100. See generally Henggeler and Guisan, *Zeitschrift für schweizerisches Recht,* 56 (1937), pp. 227a sqq., 336a sqq.

or Swiss currency was accepted. In *France* and the countries influenced by the French Civil Code it is very doubtful whether the rule[1] that damages for late payment of a debt are restricted to interest applies to such debts only as are denominated in the domestic currency, or applies also to foreign money obligations, thus preventing a claim for damages in respect of the depreciation of the foreign money.[2]

In this country it is not open to doubt that such larger damages cannot be claimed.[3] Thus Scrutton L.J. said:[4]

'It occurred to me it might possibly be that subsequent variation in the exchange could be included in the damages in the nature of interest. I have been unable to find that interest by way of damages has ever been allowed to cover alteration in the exchange, and Counsel have also been unable to find any such case. I think the reason is the one I have already given—namely, that those damages are too remote. The variation of exchange is not sufficiently connected with the breach as to be within the contemplation of the parties.'

It should, however, be noted that this rule does not apply where foreign money is not promised to be paid as money, but is promised to be delivered as the object of a commercial transaction of purchase and sale.[5] If in consideration of a payment of £50 my banker undertakes to deliver to me in New York 1,000 Swiss francs, he fulfils his contract by delivering in New York at the due date whatever are 1,000 Swiss francs; but if he delays delivery until a date when the Swiss franc has depreciated, the general principle applies that damages for late delivery may be claimed, such damages consisting of the difference between the value of the goods at the date fixed for

[1] Above, p. 78.

[2] *France*: see Planiol–Ripert, vii, Nos. 880, 1161. *Belgium*: Piret, pp. 101 sqq., with numerous references. *Italy*: see Anzilotti, *Riv. di diritto commerciale*, 1930, i. 379; damages are allowed by Cass. 13 Sept. 1924, *Riv. di diritto commerciale*, 1925, ii. 22, also Clunet, 1925, 485; but see Cass. 15 Jan. 1934, *Foro Ital.* 1934, i. 394 and *B.I.J.I.* 33 (1935), No. 9001.

[3] *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409, 416 per Scrutton L.J.; see *Manners* v. *Pearson*, [1898] 1 Ch. 581; *Société des Hôtels le Touquet* v. *Cummings*, [1922] 1 K.B. 451, 460, 461 per Scrutton L.J.; *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544, 560 per Lord Parmoor, at pp. 567, 568 per Lord Carson.

[4] *Di Ferdinando*'s case, *ubi supra*.

[5] As to this distinction see above, p. 129.

delivery and their value when delivered.[1] This was so held in the interesting New York case of *Richard* v. *American Union Bank*.[2] The plaintiff, a foreign exchange dealer in New York, contracted with the defendants, a New York bank, to establish on 17 November 1919 a credit of 2,000,000 lei in the plaintiff's favour in a bank in Rumania. The plaintiff paid $72,755, but when the credit was established, in August 1921, the market value of the lei had depreciated to $24,440. The plaintiff claimed damages amounting to $48,315. It was held that, as both parties understood the lei to be purchased for resale as a commodity in New York rather than for use as a medium of exchange, the buyer was entitled to damages equivalent to the difference between their market value at the stipulated time of delivery and the actual date of performance.

3. When we come to the determination of the *amount of unliquidated damages* measured in a foreign currency, we find that here too the possibility of taking account of a rise or fall in the international value of the foreign currency concerned depends on the rules of substantive law relating to the measurement of the loss suffered.[3]

In view of the general rule of English law that damages are measured by the value of the loss at the time when it was suffered, there cannot be any doubt that it is at that time that the amount of damages payable to the victim crystallizes. Thus if under an English contract goods are to be delivered by the seller to the buyer in Hamburg, the seller's failure to deliver the goods involves his liability to pay the market price of the goods in the currency of the place of delivery[4] and at the time of delivery, and if it appears that that value was 1,000 reichsmarks, this sum represents the amount of damage to which the buyer is entitled. The international value of the German currency may rise or fall, but English municipal law, if it is applicable to the case, will disregard any such fluctuation.

Two dicta must be mentioned in this connexion which cause certain difficulties in cases where the value of the foreign money has changed since the date of breach or wrong, although the

[1] On this principle see Benjamin, *On Sale*, p. 1018; *Wertheim* v. *Chicoutini*, [1911] A.C. 301 (P.C.); *Elbinger A.G.* v. *Armstrong*, [1874] L.R. 8 Q.B. 313.

[2] (1930) 253 N.Y. 166, 170 N.E. 532.

[3] They have been explained above, pp. 79 sqq., where comparative material will be found.

[4] Above, p. 184.

explanation of the dicta requires the anticipation of matters which will have to be discussed in greater detail below.[1] In *Pilkington* v. *Commissioners for Claims on France*[2] the Privy Council *obiter* expressed the opinion that the confiscation by the French Government of assignats of English claimants was a wrong done by the French Government which must be completely undone, and if the wrongdoer 'has received the assignats at the value of 50 d, he does not make compensation by returning an assignat which is only worth 20 d; he must make up the difference between the value of the assignats at the different dates'. In *Société des Hôtels Le Touquet* v. *Cummings*[3] Scrutton L.J. commented on this dictum by saying that 'as personal property follows the domicil it may be that he (i.e. the English claimant) was entitled to such an amount in English money as represented the value to him in England of the property confiscated at the time of confiscation'. Although it is very doubtful whether the rule that personal property follows the domicil exists[4] and whether, if it exists, it has any bearing on the point under discussion,[5] it must be admitted that in effect the law is correctly stated by those dicta. This is due to a combination of two rules of English law; these are: (1) that for the purpose of legal proceedings in England, a claim expressed in foreign money must always be translated into pounds sterling at the rate of exchange of the day of breach or wrong,[6] and (2) that the rules relating to tender do not apply to claims for unliquidated damages governed by English law.[7] It follows, therefore, that the injured party may avoid the consequences of a depreciation of foreign money by refusing to arrive at an accord and satisfaction and by insisting on legal proceedings; he must, however, accept the consequences of a fall in the international value of English money. It will be shown later that the effect produced by these rules is that English law knows of a strangely one-sided nominalistic principle: depreciation of foreign money since the date of breach or wrong is remedied by

[1] pp. 288 sqq.

[2] (1821) 2 Knapp, P.C. 7, 20; Sir William Grant based himself on the dicta in *Gilbert* v. *Brett* which have been mentioned above, p. 86.

[3] [1922] 1 K.B. 451, 460, 461.

[4] See Dicey, p. 991; Cheshire, pp. 417 sqq.

[5] See above, p. 196, n. 3.

[6] Below, pp. 289 sqq.

[7] Below, pp. 254 sqq.

way of procedural rules, but the same rules compel a disregard of any depreciation of English money since that date.

4. The last question, whether so far as concerns *equitable remedies* fluctuations in the international value of foreign money may lead to an increase or a reduction of the quantum of the obligation, must be answered in the negative. The authority for this rule is to be found in the decision of Russell J. (as he then was) in *British Bank for Foreign Trade* v. *Russian Commercial and Industrial Bank*.[1] This was an action for redemption of a loan of 750,000 Russian roubles advanced to the plaintiffs against certain securities. The defendants were held liable to deliver the securities to the plaintiffs against payment of the stipulated amount of Russian roubles, which had become valueless. The defendants' argument that the plaintiffs in a redemption action sought equitable relief and must act equitably, was rejected. The learned judge said that the plaintiffs were entitled to redeem if they fulfilled their contract and that there was 'no authority and none had been cited that, because the mortgage contract from unexpected causes was alleged to operate harshly on the mortgagee, the Court could refuse redemption or vary the terms on which it would be granted'. The risk of depreciation or the benefit of appreciation was with the lender, and the defendants' request to throw the risk of fluctuation upon the plaintiffs could not be acceded to, as this 'would in effect be changing the loan from a paper rouble loan to a sterling loan'.

The conclusion to be drawn from these discussions is that in connexion with foreign money obligations English law gives full effect to the operation of the nominalistic principle at least in so far as fluctuations of the foreign currency before the date of breach or wrong are concerned, such fluctuations being entirely disregarded. As regards fluctuations since the date of breach or wrong, we shall see later that English law, though it disregards them, by this very fact may in effect lead to something approaching revalorization of foreign money obligations.[2]

V

It thus appears that the adoption of a foreign money of account, though it is very often due to the desire to protect the parties against fluctuations in monetary value, frequently fails

[1] (No. 2) (1921), 38 T.L.R. 65, 67.

[2] Below, pp. 309 sqq.

to produce the guarantee aimed at. For the preceding discussions have shown that, whatever justification there may have been at the time when the contract was made for placing confidence in the stability of the chosen foreign money, the international value of the currency concerned may suffer changes from which the parties can only escape for a very limited extent, even if their contract is governed by a law other than that of the currency.

Therefore it is not surprising that, in connexion with foreign money obligations no less than in connexion with domestic money obligations, methods have been devised which are intended to produce the protection not supplied by the stipulation of mere (domestic or foreign) money obligations. The principal means available for this purpose have already been noted. The stipulation of an option of payment[1] is a particularly valuable method, because the depreciation of one money of account is without any influence on the quantum of money owed under other alternative promises and, unless all the currencies concerned depreciate, the creditor may thus escape from any loss. The second method consists of coupling the foreign money with a currency clause, thus making a third currency the measurement of value: 100 U.S.A. dollars, 1 dollar being equal to 4.20 reichsmarks; here it appears that the amount of dollars owed by the debtor is linked to the reichsmark, which may mean that the fate of the dollar as such does not necessarily affect the quantum of the debt.[2] By far the most important and frequent protective method, however, is the stipulation of a gold clause.[3]

The nature of the protective clauses enumerated above having already been explained, it now remains to consider their position in private international law. For the sake of simplifying the following discussion it is proposed to concentrate on the problems connected with the *gold clause*,[4] especially its American

[1] On which see above, pp. 147 sqq.

[2] See above, pp. 141 sqq.

[3] Above, pp. 92 sqq.

[4] There exists a very great amount of literature on the problems of private international law connected with the gold clause. For a survey see Wortley, *British Year Book of International Law*, 17 (1936), 112. See also Cheshire, pp. 269 sqq. Foreign publications of particular value are Nussbaum, *Rec.* 1938 (43), 559; 44 (1934), *Yale L.J.* 53; Duden, *RabelsZ.* 9 (1935), 615, 891; Rabel,

type, which, in view of its abrogation by the Joint Resolution of Congress of 5 June 1933, has of late come so often before the courts. The problems of conflict of laws connected with the less usual types of protective clauses will not be treated separately, for they are to a great extent identical with those connected with the gold clause and the fundamental principle of the control of the proper law of the contract will always afford a safe guide.

1. The question whether or not a contract contains the stipulation of a gold clause so obviously concerns the construction of the contract (not of the gold clause) that there cannot be any doubt it must be governed by the proper law of the contract. This was indeed so held by the Court of Appeal in *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.*[1] The contract contained the promise of a rent of '93,500 pesos of 183,057 millionths of a gramme of fine gold monthly which shall be paid at the option of the owner either in Santiago de Chile . . . or remitted to Europe according to the instructions which the owner may give'. The question arose whether this provision was a gold clause or whether it merely was a transcription of the relevant article of the Chilean monetary statute. The latter view pre-

RabelsZ. 10 (1936), 492; Reiss, *Portée internationale des lois interdisant la clause-or* (Paris, 1936); Bagge, *Revue de droit international et de législation comparée*, 1937, 457 sqq., 786 sqq. Further material will be found in these publications and in numerous works by Plesch and Domke, though they often display the technique of advocacy rather than the true spirit of scientific research; see, e.g., Plesch–Domke, *Die österreichische Völkerbundsanleihe* (1936); Domke, *La Clause-or* (1935); Domke, *B.I.J.I.* 34 (1936), 198; Clunet, 1936, 574; *Nouvelle Revue de droit international privé*, 1936, 29; 1937, 3; Publications of the Grotius Society, 1937, 1 sqq.; *Revue de Science et de Législation financière* 34 (1936), 612; Mr. Plesch has also published two volumes of various judgments on the gold clause: *The Gold Clause*, i (1936); ii (Dec. 1936). The reader must, however, be warned against the belief that these collections convey a complete and reliable picture. It is particularly regrettable that, while there is published in the first volume a judgment of a court of first instance relating to a loan of the City of Antwerp (p. 106), the important judgment of the Brussels Court of Appeal of 4 Feb. 1936, relating to the same loan and published in *Gaz. Pal.* 1936, 1.513 (14 March 1936) is omitted, and that the Dutch Supreme Court's judgment of 13 March 1936 in the matter of the Bataafsche loan which is published in *B.I.J.I.* 34 (1936), 315 is not reported, though it involves an important qualification of the same court's judgment of the same day in the matter of the Royal Dutch Loan published by Plesch, ii. 8 (see below, p. 231, n. 2). See already Duden, *RabelsZ.* 9 (1935), 1001; 11 (1937), 335.

[1] [1937] 3 All E.R. 349; see also *In re Chesterman's Trusts*, [1923] 2 Ch. 466 (C.A.) at pp. 487, 488 per Younger L.J.

vailed, because it was held to be the view taken by Chilean law, which was the proper law of the contract. But the Court of Appeal also expressly held (contrary to the plaintiff's contention) that the exercise of the option to remit the money to Europe could not in any way affect the control of the proper law of the contract, and lead to the application of English law as the law of the place of performance.[1] Greer L.J. said:[2]

'I think that, this being a Chilean contract, the obligations of both parties having to be determined by the law of Chile, if the performance takes place in this country, the law to be applied as to the rights and liabilities under the contract is the law of Chile, and not the law of the place of performance, if that happens to be different from the law of Chile.'

Slesser L.J. observed:[3]

'What is here being debated is the construction of the contract. What has to be ascertained is the amount, be it in gold, in paper, or in other measurement of money, which has to be paid somewhere to the owner. That is a question of construction, and not a question of performance of the contract, the determination of that which has subsequently to be performed. That, by all views, must be taken to be a question of Chilean law, and not one of English law.'

2. The question whether a gold clause is to be construed as a gold coin or a gold value clause is also governed by the proper law of the contract. This rule which does not appear to have ever been doubted is confirmed by the decision of the Court of Appeal in *International Trustee for the Protection of Bondholders A.G.* v. *The King*,[4] where it was held that the contract was governed by English law and where, by applying the rules of construction laid down in *Feist* v. *Société Intercommunale Belge d'Électricité*,[5] the result was reached that a gold value clause

[1] The plaintiff relied on the dictum of Lord Roche in *The King* v. *International Trustee for the Protection of Bondholders A.G.*, [1937] A.C. 500, 574, on which see above, p. 155. The dictum of Lord Wright in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 151, would have been a stronger argument. But in *St. Pierre*'s case there was only one place of payment in the proper sense (see above, p. 156), namely Santiago di Chile, and as the proper law of the contract was also Chilean, the whole problem should not have arisen.

[2] At p. 352 C, D.

[3] At p. 354 D.

[4] [1936] 3 All E.R. 407; Lord Wright's judgment is also reported in [1937] A.C. 505 sqq.

[5] [1934] A.C. 161.

was intended. The House of Lords reversed[1] the decision on the ground that United States law applied, under which the clause had become invalid, so that the question of construction did not arise. Nevertheless, the construction arrived at by the Court of Appeal was *obiter* approved of, and this approval must be taken to mean that the application of the proper law of the contract to the question of construction was held to be correct.[2]

3. The proper law of the contract also governs all questions relating to the material validity of the contract, i.e. whether at the time when the contract was made the parties could validly stipulate a gold clause, or whether a gold clause, once validly created, is discharged or invalidated by subsequent legislation.

These and similar questions cannot be subject to the law of the currency to which the gold clause is attached; for though enactments abrogating the gold clause are due to reasons of monetary policy and therefore often described as monetary laws, their effect on the parties' rights and liabilities is purely a matter of contract. In three countries, it is true, statutes have been enacted which make all or some gold clauses subject to the law of the currency,[3] but they are isolated cases and do not

[1] [1937] A.C. 500.

[2] But see the remarks in *British Year Book of International Law*, 18 (1937), p. 219; but see also *British & French Trust Corporation* v. *New Brunswick Railway Co.*, [1937] 4 All E.R. 516 (C.A.): the plaintiff's contention in favour of a gold value clause was upheld on the two grounds that it was supported by a proper construction of the contract and that the defendants were estopped from alleging otherwise. As regards the former ground, the result was apparently reached on the basis of English law, although the proper law of the contract (which governs all questions of construction) was held to be Canadian law. But the validity of the gold clause was examined from the point of view of English law as the law governing performance. The case is more fully discussed, pp. 224 sqq.

[3] *Poland*: Art. 4 of the Statute of 12 June 1934 (see the comments by von Bossowski and von Wendorff and some pertinent decisions of the Polish Supreme Court in *Zeitschrift für osteuropäisches Recht*, i (1935), 499; ii (1936), 410 sqq. *Austria*: Statute of 4 April 1937, Clunet, 1937, 643, *RabelsZ.* 1937, 267 and *B.I.J.I.* 37 (1937) 108, comments by Koessler, Clunet, 1937, 496. *Germany*: Statute of 26 June 1936, *Reichsgesetzblatt*, 1936, i. 515, and Ordinance of 5 Dec. 1936, *Reichsgesetzblatt*, 1936, i. 1010; see the regulations issued by the Foreign Exchange Board, 27 Dec. 1937, *Reichssteuerblatt*, 1938, 6 and the articles by Hartenstein, *JW.* 1936, 2017; Domke, *B.I.J.I.* 36 (1937), 189; Duden, *RabelsZ.* 1937, 265; von Schelling, *Niemeyers Zeitschrift für Internationales Recht*, 52 (1938), 252. In a decision of 1 Feb. 1938, *BGE.* 64, ii. 88, the Swiss Federal Tribunal held the German Statute to be irreconcilable with Swiss public policy. The German statute, the application of which is extended to all cases of devaluation, but confined to bonds, is a direct consequence of the

impair the general rule that the proper law of the contract governs—a rule which is firmly established not only in the majority of foreign countries,[1] but also in England.[2]

There remains, however, the problem whether in case the proper law of the contract and the law of the place of payment[3] differ, the general rule of the control of the proper law should be allowed to prevail, or whether preference should be given to the law of the place of payment.

If the former view is adopted, a gold clause contained in an

fact that the German Supreme Court refused to give effect to the Joint Resolution of Congress of 5 June 1933 as being against public policy (see below, p. 231, n. 1). These statutes, which cannot be more closely considered here, raise very intricate questions of private international law, especially as they involve the difficulty of a *renvoi*.

[1] *Austria*: Supreme Court, 11 Sept. 1929, Rechtsprechung, No. 332; 8 July 1935, Rechtsprechung, No. 164; but see 12 March 1930, *JW.* 1930, 2480 and below, p. 226, n. 4. *Germany*: Supreme Court, 6 Oct. 1933, *JW.* 1933, 2583; 28 May 1936, *JW.* 1936, 2058, Clunet, 1936, 951 with note by K. Wolff; and Plesch, *Gold Clause*, ii. 30. *Sweden*: Supreme Court, 30 Jan. 1937, *B.I.J.I.* 36 (1937), 327 and *British Year Book of International Law* 18 (1937), 215. *Holland*: see the decisions quoted below, p. 231, n. 2. *Egypt*: Court of Appeal of the Mixed Tribunal at Alexandria, 18 Feb. 1936, D. 1936, 2.78 (Crédit Foncier Égyptien) where the notion of a 'contrat international' is exposed as meaningless. *Canada*: *Derwa* v. *Rio de Janeiro Tramway Light & Power Co.* (1928), 4 D.L.R. 542 (Ontario Supreme Court). In *France*, it appears, the distinction between 'paiement international' and 'paiement interne' is made even in cases where the contract is not subject to French law. This in effect means that French courts always apply French law: see Nolde, *Revue critique de droit international*, 32 (1937), 26 sqq., 35 sqq.; see also the same author, l.c., at pp. 443 sqq. Outside France the distinction between 'paiement international' and 'paiement interne' will have to be applied if French law governs the contract; it would not be permissible to disregard those French rules on the ground that they are derived from considerations of French public policy or that they are part of French private international law, not of French substantive law: see Trieste Court of Appeal, 25 Jan. 1934, *Recueil général de droit international*, ii (1935), 101 and *RabelsZ.* 10 (1936) 980. It is surprising to observe that André Prudhomme in his paper read before the International Law Association (1936 Report at pp. 143 sqq.) says of the gold clause that (p. 148) 'son efficacité et sa portée juridique dépendra de la loi monétaire à laquelle les parties contractantes se sont référées pour fixer les modalités de paiement, telles qu'elles étaient en vigueur au jour de la conclusion du contrat'. This statement is due to a confusion between the law of the currency, the law of the place of performance, and the proper law of the contract, and to a misunderstanding of the Hague decisions discussed in the text, and it was very properly corrected by Professor Ascarelli (p. 172).

[2] *The King* v. *International Trustee for the Protection of Bondholders A.G.*, [1937] A.C. 500 (see the comments in 46 (1937) *Yale L.J.* 891 and the note by Hamel in D. 1937, 2.73).

[3] In the sense mentioned above, p. 153.

English contract and providing for payment in New York could be enforced, because the Joint Resolution of Congress of 5 June 1933 would not apply directly, the proper law being English, nor would it apply indirectly under the head of the doctrine of supervenient impossibility of performance as laid down in *Ralli*'s case,[1] the law of the United States not making it illegal to fulfil the promise.[2] If the latter view was adopted, the gold clause, providing for payment in New York would be covered by the Joint Resolution and therefore void, although the proper law is English. But on the other hand a gold clause contained in a contract governed by the law of the United States and providing for payment in London would be enforceable.

The judgments of the Permanent Court of International Justice at The Hague in the cases of the *Serbian and Brazilian Loans*[3] are sometimes believed to warrant reliance on the law of the place of payment rather than on the proper law of the contract. The former of these cases[4] concerned bonds issued by the Serbian Government which were denominated in francs-or and made payable in various places (option of place); the holders demanded payment in Paris. The court in the first place proceeded to determine the law governing the obligations at the time they were entered into, and it arrived at the result that 'this law is Serbian law and not French law, at all events in so far as concerns the substance of the debt and the validity of the clause defining it' (p. 42). Under Serbian law, it appeared, 'the validity of the obligations set out in the said bonds is indisputable' (p. 42). The court then continued (p. 44):

'But the establishment of the fact that the obligations entered into do not provide for voluntary subjection to French law as regards the substance of the debt, does not prevent the currency in which payment must or may be made in France from being governed by French law. It is indeed a generally accepted principle that a State is entitled to regulate its own currency. The application of the laws of such State involves no difficulty so long as it does not affect the substance of the debt to be paid and does not conflict with the law

[1] [1920] 2 K.B. 287 (C.A.); see the comments in *British Year Book of International Law*, 18 (1937), 110.

[2] *International Trustee for the Protection of Bondholders A.G.* v. *The King*, [1936] 3 All E.R. 407 (C.A.).

[3] Collection of Judgments (1928–30), Series A, No. 14, No. 15.

[4] The latter is so similar that a separate discussion is unnecessary.

governing such debt. In the present case this situation need not be envisaged, for the contention of the Serbian Government to the effect that French law prevents the carrying out of the gold stipulation, as construed above, does not appear to be made out.'

This statement is certainly ambiguous and it has been rightly criticized;[1] for it is doubtful how it came about that the court, having held Serbian law to be the proper law of the contract, proceeded to examine French law. The conclusion that the court intended to apply French law as the law of the currency would be so unsound that something more would be required to establish it, and it is therefore not surprising that the conclusion does not appear ever to have been drawn. On the other hand, it has been asserted that the court applied French law because the mode of payment was governed by French law, the place where payment was demanded being in Paris, and the money there payable being French.[2] It is, however, believed that the proper construction is a different one. The court did not apply French law at all. It had held that Serbian law applied under which the validity of the contract was indisputable; but as the Serbian Government contended that French law applied, the court proceeded to show that the application of French law 'need not be envisaged, for the contention of the Serbian Government . . . does not appear to be made out'. Thus the court avoided, but did not solve, the problem under examination.

This problem was, however, dealt with in the recent decision of the Court of Appeal in *British & French Trust Corporation* v. *New Brunswick Railway Company*.[3] The defendants, a Canadian railway company, in 1884 had issued mortgage bonds of £100 each, the company promising to pay to the bearer '£100 sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in London, England, with interest thereon'. The bonds fell due in 1934, when the plaintiffs demanded payment on the basis of a gold value clause. Early in 1936 Hilbery J. dismissed the action.[4] In the Court

[1] See especially Nussbaum, 44 (1934) *Yale L.J.* 53.

[2] This is the view held, e.g., by the Brussels Court of Appeal, 4 Feb. 1936, *Gaz. Pal.* 1936, 1. 513 and S. 1937, 4. 1. with note by Mestre (Ville d'Anvers); Reiss (quoted p. 218, n. 4) at p. 120.

[3] [1937] 4 All E.R. 516.

[4] [1936] 1 All E.R. 13.

of Appeal the main question in issue was whether the abrogation of gold clauses by the Canadian Gold Clauses Act, 1937,[1] prevented the plaintiffs from succeeding. In the result the answer was in the negative. Greer L.J.[2] relied on the dictum of Lord Wright[3] that 'whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract', and thus he felt 'bound to hold that the measure of payment falls to be determined by the law of the place of performance which in the present case is the law of England'. In Slesser L.J.'s view[4] the Canadian legislation did not 'affect the substantial obligations between the parties which in the present case are clearly governed by Canadian law',[5] but only the 'mode and measure of discharge' which were governed by English law as the *lex loci solutionis*. In Scott L.J.'s judgment, too, the contract was governed by Canadian law, but as to 'the interpretation of the payment clause, and . . . its judicial enforcement in London', he applied the *lex loci solutionis*, i.e. English law.[6]

[1] It thus appears that the Act by which the gold clause was said to be invalidated came into force long after the action was heard in the first instance. The Court of Appeal allowed amendments of the pleadings, but in the course of his judgment Scott L.J. pointed out (p. 544) that if the Lords Justices thought, as they did, that Hilbery J. had wrongly decided the questions discussed before him, they ought to think of his judgment as if it had been for the plaintiffs instead of for the defendants, and that consequently the subsequent Canadian legislation should be disregarded altogether. On the basis of this view any discussion of the problem mentioned in the text became irrelevant, and one might even go a step farther back: the cause of action arose in 1934, when the defendants refused to pay on a gold value basis, and it was with reference to that date that the case should have been adjudged. But it is doubtful whether the point raised by Scott L.J. is not disposed of by the fact that in the exercise of its discretion the Court of Appeal had allowed an amendment of the pleadings.

[2] [1937] 4 All E.R. 526.

[3] In *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, 151. As to this dictum see above, pp. 156 sqq. The limitations placed upon it by Lord Wright when he delivered the judgment of the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224 (see above, p. 157), were held by Greer L.J. to be irreconcilable with the *Adelaide* case.

[4] p. 528.

[5] On this ground the learned Lord Justice distinguished the *Mount Albert Borough Council* case, *ubi supra*.

[6] pp. 540, 541. The reasons which produced this result are not quite clear. He seems to have been misled by the totally different principle that *for the*

None of these reasons is very convincing. Whether Lord Wright's dictum is right in principle and whether, if it is, its authority stands unimpaired;[1] whether it was right in the case then before the learned Lord and whether it was made *per curiam*,[2] all this, it is submitted, is somewhat doubtful. On the other hand, to say that the effect of the abrogation of a gold clause upon the obligation is a matter falling under the head of the mode of performance rather unexpectedly strains the meaning of that conception; one would have thought that the abrogation of a gold clause is a matter which affects, and very materially affects, the substance, namely the quantum, of the debt.[3]

The judgment of the Court of Appeal could, however, be supported by the adoption of the theory that the fact that the obligation provides for payment in country X in the currency of country X, is in itself sufficiently indicative of a submission of the 'payment transaction' to the law of the place of payment.[4]

It has, however, been stated in another connexion[5] that this fact is generally insufficient to warrant the submission to the *lex loci solutionis* of matters which relate to the substance of the debt and which are therefore governed by the proper law

purpose of ascertaining the proper law of a contract there is a presumption in favour of the *lex loci solutionis*, if there is a conflict between that legal system and the *lex loci contractus* (see above, p. 154). He also relied on the fact that the words of the clause 'the present standard of weight and fineness' pointed to an English statute. The *Mount Albert Borough Council* case, *ubi supra*, was distinguished on the ground that it related to the effect of subsequent legislation of the country where the place of payment is situate, not of the country the law of which was the proper law.

[1] On these points see above, pp. 156 sqq.

[2] See above, pp. 173 sqq., where, *inter alia*, it was suggested that Lord Wright's dictum was due to the failure to appreciate the difference between the rule of private international law relating to the law of the place of payment and the rule of municipal law relating to the money of the place of payment and its determination.

[3] See Lord Wright's warning mentioned above, pp. 155, 156.

[4] Note in *British Year Book of International Law*, 18 (1937), 220. Austrian Supreme Court, 26 Nov. 1935, 9 (1935) *RabelsZ.* 891, 897, as explained in the decisions of 20 May 1936, 10 (1936) *RabelsZ.* 680, and of 10 July 1936, Rechtsprechung, 1936, 194, also in 11 (1937) *RabelsZ.* 269 and Clunet, 1937, 334; see also Austrian Supreme Court, 1 June 1937, *B.I.J.I.* 37 (1937), 245, where it was said that, if there is a gold coin clause, the law of the place of payment decides whether or not the creditor is entitled to be paid in gold coin.

[5] Above, pp. 158 sqq.

of the contract. The question depends on the intention of the parties, more particularly on the intention to protect the creditor against subsequent encroachments upon the substance of the debt by withdrawing parts of the substance of the debt from the ambit of the general proper law of the contract. The existence or non-existence of such an intention is evidenced by the degree to which matters concerning performance are concentrated at the place of payment and thus separated from the country to whose law they would ordinarily be subject. It has been submitted above that sufficient indications can be found only in those cases where there exists an option of payment coupled with an option of place. That pounds sterling are the money of account; that the place of payment is in England; that reference is made to 'sterling gold coin of Great Britain of the present weight and fineness'—these facts are too weak to permit the submission of questions which relate to the quantum of the Canadian obligation to English law as the law of the place of payment. If they were sufficiently strong, the road to the goal reached by the House of Lords in the *International Trustee* case[1] would perhaps have been less difficult.

4. If it appears that the effects of the abrogation of the gold clause are dealt with by the law of the country[2] which has enacted the abrogation, that law governs all further questions. Thus it determines its own territorial and personal ambit,[3] it decides whether the gold clause has become void or illegal, and so forth.

A number of attempts have, however, been made to defeat the application of, e.g., the Joint Resolution of 5 June 1933, even on the basis of United States law being the governing law. These attempts were not considered by the House of Lords in the case of *International Trustee for the Protection of Bondholders A.G.* v. *The King*,[4] where the finding that American law applied immediately led to the dismissal of the suppliants' claim. But they had not even been put forward in argument, and since they are therefore not expressly disposed of so far as the law of this country is concerned, and also because they have acquired

[1] [1937] A.C. 500.

[2] The matter is of course different if the law of that country is not to be applied as the proper law, but is merely taken into account by another law as a factual incident: see p. 223, n. 1, and text thereto.

[3] See above, p. 112, n. 5.

[4] [1937] A.C. 500.

prominence on the Continent, a short investigation cannot be dispensed with, however obvious it may be that *a priori* their importance can only be slight.

(*a*) It has been said that the reference of the parties to United States law must be so construed as to be confined to the law of the United States existing at the time when the contract was made, and that consequently it does not comprise subsequent alterations such as the Joint Resolution, unforeseen and unforeseeable by the parties; it has also been said that the reference to United States law was not intended by the parties to include enactments of such extraordinary character as that resolution. In this connexion particular reliance is placed on the frequently occurring clauses by which the debtor waives any rights of relief granted by subsequent legislation.[1]

This contention touches a major problem of private international law, which does not arise only in connexion with the subsequent abrogation of gold clauses.[2] Its solution depends on the true construction of the intention of the parties as well as on the permissibility of a variable localization of a contract. It has been shown by Professor Rabel[3] that, apart from exceptional circumstances, the restrictive interpretation of the parties' intention which is contended for is arbitrary and impossible. But, moreover, it cannot be conceded that a contract's centre of gravity can be altered at will: 'So long as the seat of the obligation remains unchanged in fact, no alteration in the American law can change the country with which the contract has the most real connexion. . . . The submission of a contract to a particular law does not mean submission to certain individual provisions, but to a living and changing body of law.'[4]

Difficulties are, however, caused by the decision of Younger J. (as he then was) *In re Friedrich Krupp Aktiengesellschaft*.[5]

[1] Such clauses are usually valueless. For if United States law governs the contract, it will not give effect to them. If, on the other hand, United States law is not the governing law, they are superfluous: see Nussbaum, *Internationales Privatrecht*, p. 258; Rabel, quoted below, n. 3.

[2] It is, e.g., used by the Court of Appeal of the Mixed Tribunal at Alexandria in the three *Adjouri* judgments mentioned above, p. 203, n. 5.

[3] *RabelsZ.* 10 (1936), 492, 508 sqq.

[4] M. Wolff, *Juridical Review*, 1937, 110 sqq., 123, 124, who treats the problem with special reference to the gold clause abrogation. See also Nussbaum, *Internationales Privatrecht*, pp. 247, 248.

[5] [1917] 2 Ch. 188.

Under a German contract interest became payable to an English firm. But in consequence of the Great War a German statute was enacted in September 1914 according to which the payment of sums due to English firms was postponed until further notice, it being also provided that no interest could be claimed in respect of the period during which the postponement continued. The learned Judge refused to give effect to this provision, one of his reasons being that:[1]

'It may, I think, first of all be said that such an ordinance as this is no part of the general German law by which the parties to this contract alone agreed to be bound. And even if such an ordinance must be treated as part of that law, it may, I think, properly be held that no such essentially one-sided development of the system could have been within the contemplation of either party to the contract at the time when they entered into it and agreed that their rights thereunder were to be regulated by German law.'

This statement rests so much on the facts of the particular case that it cannot be regarded as a binding authority, especially as it is in conflict with remarks of Lord Sterndale M.R. and Warrington L.J. (as he then was) *in re Chesterman's Trusts*,[2] where it was emphasized that if a foreign law, e.g. German law, applies 'it must be the German law as it is from time to time'. It can therefore be stated without hesitation, and, incidentally, in accordance with the views held abroad,[3] that the application of the Joint Resolution of 5 June 1933, or of similar enactments cannot be excluded on the ground that it was not and could not be within the contemplation of the parties.

(*b*) Another heresy lies in the contention that, irrespective of the ambit claimed by themselves,[4] laws abrogating the gold clause cannot be recognized as having any extraterritorial effects. In France the dogma has been produced that monetary

[1] p. 193.

[2] [1923] 2 Ch. 466, 478, 484.

[3] *German* Supreme Court, 28 May 1936, *JW.* 1936, 2058, 2059; Clunet, 1936, 951 with note by K. Wolff; and Plesch, *Gold Clause*, ii. 30, 33; Düsseldorf Court of Appeal, 26 Sept. 1934, *IPRspr.* 1934, 300; Cologne Court of Appeal, 13 Sept. 1935, *JW.* 1936, 203. *Swedish* Supreme Court, 30 Jan. 1937, 36 (1937) *B.I.J.I.* 334 (Kreuger and Toll); *Brussels*, Court of Appeal, 4 Feb. 1936, *Gaz. Pal.* 1936, 1. 513 and S. 1937, 4. 1 with note by Mestre. Cf. *Compañia de Inversiones* v. *Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N.E. 617, 34 (1936) *B.I.J.I.* 84, cert. den. 297 U.S. 705 (1936).

[4] See above, p. 112.

laws have 'un effet strictement territorial',[1] and some French courts have indeed applied it to the abrogation of gold clauses.[2]

This doctrine results not only from conceptions of public policy, but also from the provision of Art. 3 French Civil Code according to which 'les lois de police et de sûreté obligent tous ceux qui habitent le territoire', a principle which served as a basis for the further proposition that foreign 'lois de police et de sûreté' have no effect except a strictly territorial one. This is not the place to expound all the arguments militating against this doctrine, but there cannot be any doubt that it has only a very limited importance for the law of this country. The underlying idea finds expression in the English rules of private international law that foreign penal[3] and revenue[4] statutes are not enforced and perhaps to a certain extent are even disregarded in this country. While these rules are obviously irrelevant as regards the abrogation of gold clauses, a further ramification of the same conception might have greater weight. Dicey[5] suggests that the 'trade laws' of a foreign country are to a certain extent of no relevancy from the point of view of English law. But as there is no judicial authority for this rule, as the province of its application is obscure, and as the term 'trade

[1] See Paris Court of Appeal, 19 April 1928, Clunet, 1928, 695 (Société de Charbonnages de Sosnowice); 26 Oct. 1933, Clunet, 1934, 943 (Travellers Bank); Trib. Civ. de la Seine, 27 March 1935, Clunet, 1936, 590, and 33 (1935) *B.I.J.I.* 103 (Bethlehem Steel Co.); see also the decisions quoted, p. 203, n. 5 above, and see p. 193, n. 3.

[2] Trib. Civ. de la Seine, 31 May 1933, and Paris Court of Appeal, 3 April 1936, D. 1936, 2. 88 (Crédit Foncier Égyptien; the former decision also in Clunet, 1934, 368): the abrogation of the gold clause is not recognized 'en matière de payement international réclamé hors du territoire égyptien'. Similarly, Trib. Civ. de la Seine, 23 July 1936, S. 1938, 2. 25 with note by Mestre, and Plesch, *Gold Clause*, ii. 76 (Siemens and Halske). In the same sense Court of Appeal of the Mixed Tribunal at Alexandria, 4 June 1925, Clunet, 1925, 1080 (Suez Canal); 18 Feb. 1936, D. 1936, 2. 78 (Crédit Foncier Égyptien), where it was *obiter* suggested (p. 83) that the Egyptian statute abrogating the gold clause would have been inapplicable, if 'la monnaie stipulée est une monnaie étrangère échappant de par sa nature à l'autorité strictement territoriale des lois de cours forcé'. The doctrine was expressly rejected by the Brussels Court of Appeal, 4 Feb. 1936, *Gaz. Pal.* 1936, 1. 513 and S. 1937, 4. 1, and by Düsseldorf Court of Appeal, 26 Sept. 1934, *IPRspr.* 1934, 300, 301.

[3] Dicey, pp. 212 sqq., with further references.

[4] Dicey, l.c. and p. 657; and *Emperor of Austria* v. *Day* (1861), 3 De G.F. & J. 217 at p. 242 per Lord Campbell; on this problem see Herzfeld, 'Probleme des internationalen Steuerrechts', *Vierteljahrsschrift für Steuer- und Finanzrecht*, 6 (1932), 422 sqq.

[5] p. 657.

law' is in no way defined, it is safe to say that laws abrogating the gold clause are not affected by the alleged principle.

(c) Greater weight has been accorded to the view that the encroachment upon the creditor's rights, brought about by the abrogation of the gold clause, is against the public policy of third countries and therefore unenforceable. This opinion found favour with the Supreme Courts of Germany[1] and, though with a far-reaching restriction, of Holland,[2] but it was expressly rejected in Austria,[3] Sweden,[4] and Belgium,[5] the opinion of jurists being mostly hostile to the application of public policy rules.[6]

[1] 28 May 1936, *JW.* 1936, 2058; Clunet, 1936, 951, with note by K. Wolff; and Plesch, ii. 30, 35 sqq. (with the qualification that at the time of the promulgation of the Joint Resolution the bonds must have been in German possession). *Contra*: Düsseldorf Court of Appeal, 26 Sept. 1934, *IPRspr.* 1934, 300, 302; Cologne Court of Appeal, 13 Sept. 1935, *JW.* 1936, 203, 204. To an unbiased mind the Supreme Court's reasoning will be wholly unconvincing; it has the characteristics of a political rather than a legal argument. An opinion which had been given by Professor Wahl and which apparently exercised a certain influence on the Supreme Court's decision is published in *Niemeyers Zeitschrift für Internationales Recht*, 52 (1938), 277.

[2] 13 March 1936, *B.I.J.I.* 34 (1936) 304, and Plesch, ii. 8 (Royal Dutch). The Joint Resolution was, however, applied in a second judgment rendered on the same day in the Bataafche case: 13 March 1936, *B.I.J.I.* 34 (1936), 315. The distinction between the two decisions lies in the fact that in the former case payment was to be made and was demanded in Amsterdam, while in the second case the sphere of Dutch conceptions was in no way touched, 'attendu . . . que la naissance, l'exécution et l'extinction du contrat d'emprunt de l'espèce se passent exclusivement dans les limites du territoire des États-Unis'. In a very similar third case relating to bonds which were subject to American law and provided for payment in New York, the application of Dutch public policy was also denied: Supreme Court, 11 Feb. 1938, *B.I.J.I.* 38 (1938), 282 (Vereeniging voor den Effectenhandel *v.* Mayor of Rotterdam), affirming the decision of the Court of Appeal at The Hague, 24 Dec. 1936, *B.I.J.I.* 36 (1937), 315. The detailed arguments advanced in the third decision are apt to increase the doubt one entertains in respect of the first decision.

[3] Supreme Court, 26 Nov. 1935, *RabelsZ.* 9 (1935), 891, 897; 10 July 1936, Rechtsprechung, 1936, p. 114.

[4] Supreme Court, 30 Jan. 1937, *B.I.J.I.* 36 (1937), 327 and *British Year Book of International Law*, 1937, 215, 217. It is to be observed that the question was considered worthy of examination only by reason of the fact that the existence of a certain though insufficient contact with Swedish law was undeniable.

[5] Brussels Court of Appeal, 4 Feb. 1936, *Gaz. Pal.* 1936, 1. 513 = S. 1937, 4. 1.

[6] Nussbaum, 44 (1934) *Yale L.J.* 53, 75 sqq., though on former occasions he was more doubtful. See *Internationales Privatrecht*, p. 258 and *Rec.* 43 (1933), 644, where he said: 'L'application d'une loi étrangère qui intervient dans les clauses-or existantes, se heurtera généralement aux nécessités de

Although the general problems connected with the concept and scope of public policy in private international law lie outside the range of the present discussion,[1] it can be said with safety that the abrogation of gold clauses does not violate English public policy. The decisive reason is to be found in the fact that legislative measures necessitated by the exigencies of monetary policy have become so general that they cannot nowadays be said to be immoral, however injurious they may be. Whether they amount to a simple devaluation or to the abolition of the gold standard to which this country was driven in 1931, and which, though it was not accompanied by the abolition of the gold clause, caused great loss to people both at home and abroad, or to the abrogation of gold clauses, they are always characterized by the causing of loss. Consequently no country is entitled to reject the application of another country's laws merely on this ground, particularly as these laws are likely to be identical with or similar to those enacted by the *lex fori* itself. The doctrine of *Du Costa* v. *Cole*,[2] advanced in 1688, has, as we have seen,[3] long since been exploded. It was therefore with complete justification that the Brussels Court of Appeal remarked:[4]

'Attendu, d'autre part, que la notion de l'ordre public varie non seulement dans l'espace, mais aussi dans le temps; qu'en Belgique elle a évolué de manière notable sous la pression des événements; que les nombreuses prescriptions d'une portée analogue, édictées dans le pays depuis la guerre, empêchent le juge belge d'admettre que la

l'ordre public.' Similarly M. Wolff, *Internationales Privatrecht*, p. 101: if the abrogation violates the rights of foreign creditors and if the debt is not localized within the abrogating country, the foreign law cannot be applied. The question is discussed by Domke, *Revue de science et de législation financière*, 35 (1937), 217 sqq.

[1] It may, however be pointed out that the theory that the application of rules of public policy requires a sufficient legal or factual connexion of the case with the forum and that the mere institution of proceedings does not provide such a connexion, since otherwise the forum would claim to impose a 'world law', is strengthened by the Dutch and Swedish decisions mentioned above, p. 231, nn. 2, 4, and also by the Swiss decision referred to below, p. 233, n. 1, which in many other respects also is a landmark in the development of the law of public policy. See on the question Cheshire, pp. 136 sqq., 138, who would appear to require a 'substantial connexion with England', and, e.g., Melchior, *Grundlagen des Internationalen Privatrechts*, pp. 341 sqq.; Frankenstein, i. 202 sqq.; see also Sichel, 45 (1936) *Yale L.J.* 1463, 1470.

[2] Skin. 272.

[3] Above, p. 196.

[4] 4 Feb. 1936, *Gaz. Pal.* 1936, 1. 513 = S. 1937, 4. 1 (Ville d'Anvers).

prohibition de clause-or, ou de clauses valeur-or, ou l'annulation rétroactive, en tout ou en partie, de conventions qui avaient été légalement formées, sont actuellement en opposition avec cette notion.'

The result may be different if the abrogation of the gold clause involves damage to foreign creditors exclusively.[1] But no such intention prevails in the case of the recent measures taken by many countries and it certainly does not prevail in the case of the Joint Resolution of Congress of 5 June 1933.[2,3]

[1] See the remarks of Nussbaum and M. Wolff quoted above, p. 231, n. 6, and see particularly the decision of the Swiss Federal Tribunal, 1 Feb. 1938, *BGE.* 64, ii. 88, which on such grounds rejected the application of the German statute referred to above, p. 221, n. 3.

[2] Nussbaum, 44 (1934) *Yale L.J.* 53, 75 sqq., regards the equal treatment of non-American debtors as well as creditors as the decisive reason for the non-application of public policy. But no doubt English public policy may well be violated by an individual measure of a foreign country, although the foreign country's own subjects are also affected thereby. While the unequal treatment of foreigners may demand the application of the public policy rules of the forum the equal treatment does not necessarily exclude it.

[3] While this book has been passing through the press a judgment of the Belgian Cour de Cassation of 24 February 1938 has come to the author's notice which affirms the decision of the Brussels Court of Appeal of 4 February 1936 repeatedly referred to in the preceding pages: see *Revue de droit international et de législation comparée* 19 (1938), pp. 323–5, and *B.I.J.I.* 39 (1938), 105.

CHAPTER VIII

THE PAYMENT OF FOREIGN MONEY OBLIGATIONS

I. The problems to be considered. II. The money of payment: (1) the problem and its solution in foreign laws; (2) the rules of English law; (3) the effective clause; (4) the rule of private international law. III. Conversion for the purpose of adjustment. IV. The discharge of foreign money obligations and the conflict of laws: (1) accord and satisfaction; (2) deposit. V. The hindrance of payment. Moratoriums. Currency restrictions: (1) where the case is governed by the law of the country which has enacted them; (2) where the case is governed by the law of a country other than that which has enacted them, and the place of payment (*a*) is within, or (*b*) is outside the country which has enacted them.

I

THE preceding chapters have been built up on questions raised by an imaginary case which has served as a guide to a logical and systematic exposition of the law of foreign money obligations. The case of a promise, made in Vancouver by a Montreal business man, to pay to a San Francisco firm '100 dollars' in London necessitated an investigation of the nature of foreign money obligations in general (Chapter V); it had then to be ascertained whether Canadian or United States of America dollars were the subject-matter of the obligation, and we thus came to a discussion of the problems surrounding the determination of the money of account in general (Chapter VI); finally we had to examine the various problems connected with the value of the foreign money of account and the quantum of the obligation (Chapter VII). No doubt the abundance of problems led us far away from the questions directly raised by the hypothetical case. But it served both as a starting-point and as a sign-post, and when we now return to it, we find that consistency requires us to investigate the rules relating to the performance of the debtor's promise. This involves two distinct matters: we must establish the mode of payment or the money of payment, i.e. the currency in which the promise to pay a certain sum of a foreign money of account is discharged; we must ascertain what it is that constitutes a payment, i.e. the concept of payment.

II

As regards the former of these matters no difficulties exist if the parties themselves have provided for a conversion into the money of payment and for the rate of exchange to be adopted for effecting it: 100 Canadian dollars payable in pounds sterling in the City of London at the rate of 5 dollars to 1 pound. It seemed expedient to treat this case in another connexion.[1]

The problem to be dealt with here is different. It can be stated in very simple terms: is the San Francisco firm which owes 100 Canadian dollars payable in the City of London bound to deliver to the creditor 100 Canadian dollars or is it entitled or even bound to deliver the equivalent of that sum in pounds sterling? In other, more technical, and also more general, language the problem is whether a certain instrument of payment can be substituted for the stipulated money of account in case there is a lack of identity between them[2] or, in other words, whether the mode of payment can be different from what appears to be determined by the substance of the obligation.

It has up to the present not been usual in this country to state the problem in the above way, the reason apparently being that under English law of procedure a foreign money obligation, if sued upon here, must be converted into English pounds, and, if judgment is given, it is transformed into a domestic money obligation which cannot be satisfied otherwise than by the payment of pounds sterling.[3] Therefrom the idea seems to have developed that every foreign money obligation, at least if payment is demanded in England, is to be discharged in pounds sterling.

But though the subject now under examination has undoubtedly been influenced by procedural rules, it should not be overlooked that two quite distinct problems are involved. The procedural rule has a much wider ambit inasmuch as it must be respected whenever a suit on a foreign money obligation is brought in this country, irrespective of whether or not according

[1] Above, p. 140.

[2] It is necessary to stress this ingredient. If the contract provides for the payment of French francs in France, a problem of conversion does not arise in England except in connexion with the institution of legal proceedings.

[3] Below, pp. 288 sqq.

to the contract the place of payment is situate here. In the present connexion, however, we deal with the problem whether a foreign money obligation which under the contract is payable here, can or must be discharged in the stipulated foreign money or whether it can or must be discharged in pounds sterling. This problem has no primary connexion with the law of procedure. If a lawyer's opinion is requested as to how a foreign money obligation is to be discharged it would no doubt be possible to advise the client that, if a writ is issued and if judgment is given, the debt must be paid in English money; but this would obviously be no answer to the question put by the client, who is probably unwilling to litigate. Moreover, there may be an 'effective clause',[1] and although this is swept away by the institution of legal proceedings, there certainly are rules of substantive law which relate to and explain it. Again, there are even cases in the courts where the true problem of substantive law is in no way overshadowed by procedural aspects: in actions for a declaration or for redemption no conversion is necessary,[2] and if, in such circumstances, a court has to decide whether, for instance, francs payable in London are to be paid in francs or in pounds, no procedural rule will help. The same position may arise in other connexions: if the San Francisco business man pays in London the equivalent of 100 Canadian dollars in pounds sterling, he may have adopted a certain rate of exchange which means a loss to the creditor, and if the latter sues for a balance, it might become necessary to ascertain whether or not payment in pounds sterling was permissible; or if a French debtor owes French francs to a Geneva creditor and tenders Swiss francs, an English court may have to decide whether or not there was a proper tender.

It thus becomes clear that the question how a foreign money obligation payable in England is to be discharged is independent of any procedural rule. It also becomes clear that the discussion of the money or mode of payment (quomodo) must follow upon the examination of the substance of the obligation, namely the determination of the money of account (quid) and of the extent of the debt (quantum), and cannot be treated under the head of the following chapter dealing with the law of procedure.

1. The substance of the debt, i.e. its subject-matter and

[1] Below, p. 249. [2] Below, p. 289.

extent being fixed, it is clear that the payment must be effected in such a mode as to ensure that neither the creditor nor the debtor receives or pays more or less than what he contracted for. The best way to reach this goal is to require payment of the stipulated sum *in natura*. If there is a promise to pay 100 Canadian dollars in London and if it is performed by the payment of 100 Canadian dollars, neither of the parties has any ground of complaint, whatever may be the value of the dollar or the pound at the time of payment. As the discussion on the nominalistic principle and its effects has shown, it is irrelevant that since the time when the contract was made or since the debt fell due the dollar has depreciated in terms of sterling, for under English law the creditor must bear the risks of currency depreciation and cannot even claim damages in respect of the depreciation of the foreign money of account during the debtor's default;[1] and if it is the pound sterling which has depreciated, the justification of the refusal to allow the debtor to benefit therefrom lies in the fact that pounds sterling are entirely outside the substance of the obligation. In both cases it is clear that the mode of payment is in accordance with what is determined by the substance of the debt, because money of account and money of payment are identical.

On the other hand, there are many cases where no injury to either creditor or debtor would be involved if, for the purpose of performing the contract, the money of account was converted into a different money of payment. This is so in times of monetary stability and sometimes even when monetary values fluctuate, especially if payment is made at the due date. But it must always be borne in mind that such a mode of payment cannot be allowed to interfere with the substance of the debt, by compelling creditor or debtor to accept or pay anything else than the exact equivalent of what is *in obligatione*.[2] To secure this aim it is in the first place necessary to remember that any conversion into the money of payment presupposes the determination of the money of account, fixing the substance of the debt, and thus the amount of the money of payment, and that, if the units of account of two currencies have the same name,

[1] Above, p. 214.

[2] See already the dictum of Paulus, *D.* 46. 3. 99: 'Creditorem non esse cogendum in aliam formam numos accipere si ex ea re damnum aliquid passurus sit.'

great injury may ensue from the omission to keep money of account and money of payment distinctly separate.[1] Secondly, it becomes necessary to ascertain clearly whether and for the benefit of whom the right of conversion exists; on the basis of what rate of exchange the conversion is to be effected; whether and how the right of conversion can be excluded; and which law, in case of a conflict of laws, governs the question.

The origins of the modern right of conversion lie in the law merchant of the Middle Ages. In connexion with bills of exchange it was conceived at an early date[2] that, from the point of view of both the parties and the State, it was convenient and advisable to avoid the recurrent remittance of moneys foreign to that of the place of payment by paying to the creditor the medium of exchange circulating in his own country. It is, therefore, not surprising that at the present time the right of conversion is most securely recognized in the law relating to bills of exchange.[3] Therefrom it found its way into the general law of many countries.[4]

[1] See also below, p. 247.

[2] See Endemann, *Studien in der romanisch-kanonistischen Wirtschaft und Rechtslehre bis gegen Ende des 17. Jahrhunderts* (Berlin, 1883), ii. 214 sqq., speaking of the fungibility of money.

[3] The text of Article 41 of the Uniform Law on Bills of Exchange and Notes (*League of Nations, Official Journal*, xi (1930), 993), with which Article 36 of the Uniform Law on Cheques (*League of Nations, Official Journal*, xii (1931), 802) is almost identical, is as follows:

> 'When a bill of exchange is drawn payable in a currency which is not that of the place of payment, the sum payable may be in the currency of the country, according to its value on the date of maturity. If the debtor is in default, the holder may at his option demand that the amount of the bill be paid in the currency of the country according to the rate on the day of maturity or the day of payment.
>
> 'The usages of the place of payment determine the value of foreign currency. Nevertheless the drawer may stipulate that the sum payable shall be calculated according to a rate expressed in the bill.
>
> 'The foregoing rules shall not apply to the case in which the drawer has stipulated that payment must be made in a certain specified currency (stipulation for effective payment in foreign currency).'

As to paragraph (4) of the Article see above, p. 165, n. 2. The two laws have been adopted by Belgium, Danzig, Denmark, Finland, France, Germany (including Austria, see Reichsgesetzblatt, 1938, 421, 422), Greece, Italy, Japan, Monaco, Netherlands, Norway, Poland, Portugal, Rumania, Sweden, Switzerland. See the compilation by Bloch, *RabelsZ.* 11 (1937), 308. As to the countries which have ratified the convention see also *Revue critique de droit international privé*, 1937, 211, 221.

[4] *Austria*: see Ehrenzweig, *Recht der Schuldverhältnisse* (1928), p. 24. *France*: see the cases mentioned below, p. 242, nn. 3, 4, 5; p. 243, nn. 1, 2, 3,

While there thus exists widespread agreement on the principle, a variety of answers have been given to the questions whether it is the creditor or the debtor who is entitled to convert, and on the basis of what rate of exchange the conversion is to be effected in the absence of arrangements by the parties. One cannot help feeling that in both connexions a certain influence is to be attributed to the development of the domestic currency and its relations with foreign currencies. If and so long as the creditor's domestic currency is stable and it is the foreign currency which depreciates, the conversion on the basis of the rate of exchange of the day of maturity appears to be more just, for by this method the creditor receives what he ought to receive and is not injured by any fall of the foreign money during the debtor's default; this is particularly evident if the right of conversion is given to the creditor, who is indeed fully protected against any fall in the value of the foreign money if he can convert the debt into his domestic currency at the rate of exchange of the day of maturity. On the other hand, a depreciation of the domestic currency leads to the adoption of the rate of exchange of the day of payment, because in such circumstances non-payment at the due date does not involve any loss to the creditor or any profit to the debtor. It is, however, obvious that both solutions, however easily they can be explained by the monetary history of a country, are based on a one-sided view of the problem. The first solution will lead to hardship if the tide turns and the creditor's domestic money depreciates after the day of maturity, because the conversion at the rate of exchange prevailing on the day of maturity puts the risk of further depreciation of the domestic currency on the creditor, not on the defaulting debtor. Conversely, the second

and Planiol–Ripert, vii, Nos. 1161, 1193; Degand, *Change*, *Rép. dr. int.* iii (1929), Nos. 143 sqq.; Paiement, *Rép. dr. int.* x (1931), Nos. 70 sqq; Hubrecht, *Variations monétaires*, pp. 317 sqq.; Mater, *Rev. dr. banc.*, 1926, 241; 1937, 298, 337. *Germany*: s. 244, Civil Code. *Hungary*: Art. 326, Commercial Code. *Italy*: Art. 39, Codice Commerciale. *Rumania*: Art. 41, Civil Code. *Lithuania*: see the decision of the Supreme Court, 14 June 1935, *Zeitschrift für osteuropäisches Recht*, 3 (1936), 127. *Poland*: Artt. 1 sqq. of the Ordinance of 12 June 1934 (see von Bossowski, *Zeitschrift für osteuropäisches Recht*, 1 (1935), 499, 501). *Switzerland*: Artt. 84, 756 Obligationenrecht. *Yugoslavia*: Cass. Zagreb, 28 Dec. 1923 and 3 Aug. 1928, *Annuaire de l'Association Yougoslave de droit international*, 1931, 281. *Egypt*: Court of Appeal of the Mixed Tribune at Alexandria, 9 April 1930, *Gazette des Tribunaux mixtes*, 21, 360, No. 400.

solution injures the creditor if his domestic currency remains stable, but the foreign money of account depreciates; in this case it would have been preferable, and would not have allowed the debtor to speculate at the creditor's cost, if the conversion could have taken place with reference to the day of maturity.

This Scylla and Charybdis[1] might be less harmful if from the outset the right of election were given to the creditor; but this would be an impracticable solution, since the debtor would often not know in time how he should pay. But otherwise it is impossible to find a proper solution in the adoption of either date of conversion. Both are dangerous: if the money of account depreciates, a conversion at the rate of exchange of the day of payment may be unjust; if the money of payment depreciates, the selection of the day of maturity may be improper. In both cases, apart from fluctuations in the money of account or the money of payment, much may depend on the stability of the currency of the creditor's home country in which he usually keeps his accounts, which may be different from both the above. In truth the crux of the matter lies in the fact that the selection of either date cannot replace the absence of a claim for damages in respect of currency depreciation during the debtor's default. Where such damages are allowed[2] the problem is of minor importance, though an unsatisfactory duplicity of proceedings may ensue. Where no such damages are allowed (as in this country), neither of the available solutions is satisfactory or always capable of compensating the creditor for the inadequacies of the law of damages.

In these circumstances the solution adopted by the two modern uniform statutes on Bills of Exchange and Notes, and on Cheques,[3] is a great and real improvement: the debtor may choose to pay in the currency of the place of payment at the rate of exchange of the day of maturity; but if he delays the payment, the creditor may select whether payment is to be made at the rate of that day or at that of the day of payment.

[1] It is not always appreciated by the advocates of the one or the other solution. Thus the Paris Court of Appeal once adopted the rate of exchange of the day of payment 'sinon son créancier serait exposé à recevoir plus ou moins suivant les variations qui seraient survenues': 15 July 1925, Clunet, 1926, 658.

[2] See above, pp. 213 sqq.

[3] See p. 238, n. 3.

Thus it is definitely secured that the debtor cannot profit from his delay and that the creditor always receives the full value promised by the substance of the debt.

But outside the sphere of those laws this happy solution has only very rarely been found.[1] In one group of countries it is an undoubted principle that it is the debtor who may elect whether to pay in the promised currency or in that of the place of payment, and that, if he adopts the latter alternative, the conversion is to be effected at the rate of exchange of the day of payment.[2] In other countries the debtor has the right of option, but the rate of exchange of the day of maturity is decisive.[3]

In *France*[4] a more flexible and subtle solution seems to have been arrived at, which is not very far from the ideal. It treats the question as a problem of construction. In the absence of special circumstances any payment to be made in France may be made in French francs. The right of option is generally

[1] It was foreshadowed by some *German* decisions (see Berlin Court of Appeal, 26 June 1920, *Rechtsprechung der Oberlandesgerichte*, 40, 307, and see *RGZ.* 101, 318, 319), which were, however, overruled by the decision of the Supreme Court mentioned below, n. 2, and in effect it has perhaps also found its way into *French* law, see p. 242, n. 5; p. 243, nn. 1, 2. It was formally adopted in *Poland* (see p. 238, n. 4) and by the Vienna Rules passed in 1926 by the International Law Association, where, however, the debtor's right to convert is not recognized except where payment in the stipulated foreign money is 'impossible' (see the report on the 34th Conference at p. 718 and the comments by Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928), pp. 65 sqq.).

[2] *Austria*: see Ehrenzweig, l.c.; *Germany*: Supreme Court (United Chambers) 24 Jan. 1921, *RGZ.* 101, 312. *Lithuania*: see p. 238, n. 4. But in these systems damages for depreciation during the time of the debtor's default are allowed, see above, p. 213.

[3] Switzerland, Hungary, Italy, Rumania, Yugoslavia, see p. 238, n. 4. In Switzerland it is, however, well established that the statutory provision does not relate to the quantum of the payment, but only to the quomodo, and that consequently the Swiss debtor who owes pounds sterling to his Swiss creditor, and who may undoubtedly pay in Swiss francs, cannot effect the conversion at the rate of exchange of the day of maturity if the pound sterling has depreciated; though the statute would appear to justify such a procedure, in such circumstances the rate of exchange at the date of payment is decisive: see Henggeler, *Zeitschrift für schweizerisches Recht*, 56 (1937), 228a. As to Hungary see the decision of the Supreme Court 29 May 1934, *Zeitschrift für osteuropäisches Recht*, 1 (1935), 496. As to Italy compare Cass., 28 June 1924, Clunet, 1925, 485 and Cass., 10 July 1934, Clunet, 1935, 1051. In Brazil the option is given to the creditor; he may demand payment in the foreign money or in Brazilian money at the rate of exchange of the day of maturity: Supreme Court, 22 May 1918, Clunet, 1921, 993.

[4] And probably in Switzerland: see the preceding note.

presumed to belong to the debtor,[1] and if he exercises it, the conversion is usually to be effected on the basis of the rate of exchange of the day of payment. But there may be cases (and, most significantly, they are cases where the foreign money of account depreciates in terms of francs) in which the creditor may demand payment in francs at the rate of exchange of the day of maturity. A decision of the Cour de Cassation relating to the latter group seems to be the starting-point of the recent development. The plaintiff, a Reval merchant, had a claim of 10,045 roubles against the defendant, a Paris merchant, which the latter failed to pay, but in respect of which, long after maturity, he tendered to the creditor Russian bank-notes which were refused. Judgment was given for the franc equivalent of the roubles at the day when the writ was issued.[2] The Cour de Cassation said:[3]

'Attendu . . . qu'avec raison la Cour a refusé de valider les offres réelles de Schreter, faites à Paris en monnaie étrangère; que la Cour constate, en effet, *par une interprétation souveraine des conventions*, que le paiement devait être effectué en France; qu'il est de principe que *tout paiement fait en France*, quelle qu'en soit la cause, *doit être effectué en monnaie française* et qu'il n'apparaît d'ailleurs en rien des circonstances retenues par les juges du fond que les parties aient entendu déroger à cette règle.'[4]

In a second case relating to roubles the conversion at the rate of exchange of the day of maturity was also approved of:[5]

'le prêteur n'a droit au remboursement de ces roubles que d'après leur valeur au jour où il a fait au débiteur sommation de les payer'.

[1] Degand, l.c., No. 143 and/or No. 70, says that on principle the right belongs to the creditor, while Planiol–Ripert, vii, No. 1161, give it to the debtor. It would appear that in the sense mentioned in the text both are right.

[2] Though it is recognized that the real choice lies between the day of maturity and the day of payment, this decision and some later ones have given rise to a discussion whether the rate of the 'jour de sommation' or of the 'jour de l'assignation' was, or might also be, considered; see the authors mentioned, p. 238, n. 4. But where the rate of these latter days was taken as a basis, this was done by the plaintiff, and as it was more favourable to the defendant, the courts were content to say that the rate of exchange of the day of payment was not to be adopted as of necessity.

[3] Req. 11 July 1917, S. 1918–19, 1. 215.

[4] Italics ours. Note that it is expressly emphasized that the payment was to be made in France.

[5] Cass. Civ. 25 Feb. 1929, Clunet, 1929, 1306; in the same sense, also relating to roubles Cour de Douai, 15 Dec. 1927, Clunet 1928, 675. See also the peculiar

Very recently the same rule was applied to a case where a French debtor, having failed to pay at the due date the promised sum of dollars to his French creditor, desired to pay in dollars at a time when, it may be guessed, the dollar had depreciated:[1]

'Mais attendu qu'après avoir constaté que les paiements devaient avoir lieu entre maisons françaises et sur territoire français, l'arrêt décide à bon droit que le règlement se réalisera par la remise d'un nombre de francs correspondant aux soldes débiteurs exprimés en dollars, ceux-ci étant convertis au cours du change à la date à laquelle le paiement aurait dû être effectué; qu'il est de principe, en effet, que tout paiement fait en France, quelle qu'en soit la cause, doit être effectué en monnaie française et que le solde d'un marché fixé en dollars doit être évalué selon le cours du dollar au jour où le débiteur devait payer.'

In a greater number of decisions (in most of them, as far as could be ascertained, it was the franc which had depreciated) the debtor was given the right to pay in francs at the rate of exchange of the day of payment,[2] the Cour de Cassation always emphasizing that the judges of fact were to decide the question of interpretation.[3]

decision Cass. Civ. 12 April 1927, Clunet, 1928, 414 and S. 1927, 1. 293: a German creditor of a sum of marks, payable in 1914, brought an action in 1921 and demanded the franc equivalent at the rate of exchange prevailing in 1914. The defendant was only prepared to pay the depreciated value of 1921. His view was upheld on the ground that the plaintiff had waited too long until he demanded payment.

[1] Cass. Req. 17 Feb. 1937, Clunet, 1937, 766 and D.H. 1937, 234. See also Trib. comm. du Havre, 21 June 1932, *Gaz. Pal.* 1933, 2. 30, relating to depreciated pounds.

[2] Cass. Req. 8 Nov. 1922, Clunet, 1923, 576, and S. 1923, 1. 149; Cass. Civ. 9 March 1925, D.H. 1925, 1329, and S. 1925, 1. 257 (5e espèce); Cass. Req. 16 June 1925, D.H. 1925, 498; Cass. Civ. 5 Dec. 1927, S. 1928, 1. 138; Cass. Req. 19 March 1930, Clunet, 1931, 1082; Cass. Civ. 8 July 1931, Clunet, 1932, 721; Cour de Lyon, 8 June 1920, Clunet, 1922, 997; Cour de Paris, 18 Oct. 1922, Clunet, 1924, 119; Cour de Rouen, 26 Nov. 1924, Clunet, 1925, 672; Cour de Paris, 15 July 1925, Clunet, 1926, 658; 3 May 1926, Clunet, 1927, 1087. But there are also decisions relating to the pound sterling before its depreciation where the day of maturity was adopted: Cass. Req. 16 July 1929, Clunet, 1931, 646 and D.H. 1929, 161 affirming Cour de Douai, 12 July 1928, Clunet, 1929, 688. See also Cass. Civ. 10 Nov. 1929, S. 1928, 1. 57. Commenting on the decision of 16 July 1929, Professor Perroud observes: 'Somme toute on choisit la date la moins favorable au débiteur en faute.'

[3] See the decisions of 9 March and 16 June 1925, 5 Dec. 1927, 19 March 1930. See also Cass. Req. 10 March 1925, Clunet, 1926, 70: 'qu'il appartenait aux juges du fond de déterminer, à raison des circonstances de la cause, la date à laquelle la dette de marks avait été convertie en dette de francs luxembourgeois.'

That the *Belgian* practice seems to be very similar to the French[1] is perhaps not so remarkable as the fact that in the *United States* also cognate ideas are discernible, although the position is by no means clear. The question whether the debtor of non-American money who pays at the due date may or must pay in dollars cannot be answered with certainty. It seems, however, that procedural rules have given rise to the idea that all payments are to be made in dollars. Thus in a case where freight expressed in pound sterling was payable at the place of destination within the United States it was said that payment was to be made 'of course in American money; our courts cannot give judgments in sterling currency'.[2] On the other hand, the effect of the debtor's default on a foreign money obligation has found a more secure solution. It was stated by Mr. Justice Holmes delivering the judgment of the Supreme Court of the United States in the famous case of *Hicks* v. *Guiness*.[3] On 31 December 1916 a German debtor owed to an American creditor a sum of 1,079.35 marks on an account stated; the creditor brought an action claiming the dollar equivalent at the rate of exchange prevailing on 31 December 1916. Mr. Justice Holmes said:[4]

'We are of opinion that the Courts below were right in holding that the plaintiffs were entitled to recover the value in dollars that the mark had when the account was stated. The debt was due to an American creditor *and was to be paid in the United States*. When the contract was broken by a failure to pay, the American firm had a claim here, *not for the debt, but, at its option, for damages in dollars*.

[1] See Piret, pp. 81–99, and the decisions there quoted. According to a decision of the Cour de Cassation (4 May 1922, *Bulletin de l'Institut belge de droit comparé*, 1923, 299) a question of construction is involved. Some decisions adopt the rate of exchange of the day of maturity, especially if the foreign money of account (mark, pound sterling) depreciates (Piret, p. 86). The majority, however, adopts that of the day of payment (Piret, pp. 87 sqq.), even in case of bills of exchange for which Art. 33 of the statute of 20 May 1872 provided for conversion 'au cours du change au jour de l'échéance' (Piret, pp. 91 sqq.). It is interesting to note that in Belgium an argument found expression which, in other countries too, was perhaps subconsciously used in favour of the rate of exchange of the day of maturity, namely, that the application of the rate of the day of payment would involve taking cognizance of the *moneta fori*, which would be contrary to an extreme nominalistic principle (see Piret, p. 87).

[2] *Pennsylvania Railway Co.* v. *Cameron*, 280 Pa. 458, 124 A. 638 (Supreme Court of Pennsylvania, 1924).

[3] (1925) 269 U.S. 71.

[4] p. 80; italics ours.

It no longer could be compelled to accept marks. It had a right to say to the debtors, You are too late to perform what you have promised and we want the dollars to which we have a right by the law here in force . . . The event has come to pass upon which your liability becomes absolute as fixed by law . . .'

As was made clear in a later case,[1] these remarks were based on the assumption that the obligation was subject to the law of the United States. The rule laid down by *Hicks* v. *Guiness* is therefore this: that, if American law applies, if the place of payment is in America, and if the debtor does not pay the owed sum of foreign money at the due date, the creditor acquires an optional right to payment in dollars calculated at the rate of exchange prevailing on the day of breach.[2]

2. As regards the law of *England* we find an express provision relating to foreign bills in s. 72 (4) Bills of Exchange Act, 1882, which reads as follows:

'Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.'

There is thus no optional right for either creditor or debtor, but payment in pounds sterling is a necessity in the sense that it is the drawee's duty to pay pounds and that the holder cannot demand anything but pounds. The exclusive adoption of the rate of exchange of the day of maturity gives vivid expression to the fact that, at least in 1882, a depreciation of the pound sterling was believed to be impossible.

Although there is no direct authority, it would appear that in practice the above provision is also applied to inland bills expressed in foreign money.[3]

As regards contracts other than bills of exchange and notes,

[1] *Deutsche Bank Filiale Nürnberg* v. *Humphreys* (1926), 272 U.S. 517 at p. 519 per Mr. Justice Holmes delivering the opinion of the majority of the Court. *Sutherland* v. *Mayer* (1926), 271 U.S. 272 was also distinguished on the ground that there American law applied.

[2] That the option to demand payment in the foreign money, which would be useful in case of a subsequent depreciation of the dollar, is of no real value, because an action can only be brought for dollars, will be shown below, pp. 282 sqq.

[3] See the expert evidence given in *Cohn* v. *Boulken* (1920), 36 T.L.R. 767.

the legal position is by no means clear. There is a dictum of Bankes L.J. in *Anderson* v. *Equitable Assurance Society of the United States*,[1] where he said:

'In my experience I have never heard the proposition challenged that in an ordinary commercial contract where a person has entered into a contract which is to be governed by English law and has undertaken an obligation to pay in foreign currency a certain sum in this country, that the true construction of that contract is that when the time comes for payment the amount having to be paid in this country will be paid in sterling, but at the rate of exchange of the day when payment is due, applicable to the particular currency to which the contract refers.'

These words amount to an extension of the Rule of s. 72 (4) Bills of Exchange Act, 1882, to the general law, and this result is supported by the cognate, though not identical rules obtaining in the law of procedure.[2]

As regards that part of the rule according to which conversion takes place, some authority can also be found in two or three further cases. The case of *Rhokana Corporation* v. *Inland Revenue Commissioners*[3] related to coupons containing an 'option de change', namely to pay a fixed sum of pounds sterling in London or of dollars in New York or guilders in Amsterdam; during the argument Lord Wright M.R. remarked:[4] 'If a sterling debt had to be paid in a foreign country, it would be paid in the currency of that country.' Support may perhaps also be derived from the cases of *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[5] and *Auckland Corporation* v. *Alliance Assurance Co.*[6] Both these decisions have been fully discussed in another connexion, where the relevant dicta are quoted.[7]

From these cases (and also from Lord Wright's observation in the *Rhokana* case) the general principle of English law may be deduced that a monetary obligation is to be discharged in the currency of the place of payment, or, in other words, that

[1] (1926) 134 L.T. 557, 562; see Dicey, p. 711.

[2] Below, pp. 289 sqq.; but see *British Bank for Foreign Trade Limited* v. *Russian Commercial and Industrial Bank* (1921), 38 T.L.R. 65, where Russell J. held in an action for redemption that a rouble loan could be repaid in London in roubles.

[3] [1934] 1 K.B. 788 (C.A.); the case was more fully dealt with above, p. 127.

[4] p. 797. [5] [1934] A.C. 122. [6] [1937] A.C. 587.

[7] Above, pp. 169 sqq.; the few remarks which follow should be read in the light of those observations.

the currency of the place of payment is the money of payment. But if it is assumed that the Australian and/or New Zealand currency system and the English currency system are not identical, these cases also make it clear that it is essential to distinguish between the money of account, determining the substance of the obligation, and the money of payment, determining merely the medium of payment. No doubt money of account and money of payment may be identical, and in certain circumstances there is even a presumption[1] in favour of such identity superseding any exchange operation or conversion. But, irrespective of an identity of names, the two moneys may be different, and in such cases, as we have seen, the neglect to distinguish between them may result in a substantial interference with the substance of the obligation. If New Zealand pounds and English pounds are different, and if 'pounds' are promised to be paid in London, it may well be that New Zealand pounds, being the money of account, are *in obligatione*, but that nevertheless this obligation may be discharged by the tender of English pounds, being the money of payment, the amount of which would depend on the rate of exchange between the two currency systems on the day of maturity.

There remains the question how legacies given by the will of a testator domiciled in England and expressed in a foreign currency are to be paid. This problem falls into two parts, namely whether it is necessary or permissible to effect a conversion, and, if so, at what rate of exchange the conversion is to be carried out. Strictly speaking, the English authorities on the subject relate only to the latter question, though they perhaps imply an affirmative answer to the former. The case of *Oppenheimer* v. *Public Trustee*[2] dealt with the direction of a testator that his trustees should out of the proceeds of the sale of the estate set apart two sums of marks as legacies, invest them in British securities and hold them on trust for the legatees and their issue; the trustees were given a very full power of postponement. The testator died in 1900, but it was not until 1924, when the mark had become valueless, that the trustees, having postponed the sale and conversion of the estate, were in a position to appropriate these legacies. They purported to appropriate them by setting apart a nominal sum of pounds

[1] Above, p. 166. [2] Below, p. 320.

sterling which at that date represented the value of the two sums of German marks. It was held both by Eve J. and the Court of Appeal that it was with reference to the last day of the 'executor's year' that the quantum of each of these legacies ought to have been ascertained and that it was immaterial that the trustees had a power of postponement. On the assumption that the legacies were, in fact, expressed in German marks, not in pounds sterling,[1] the *ratio decidendi* was derived from the rule that generally an executor need not satisfy a legacy until the expiration of one year after the testator's death.[2] Independently of this decision Eve J. arrived at the same result in the later case of *In re Eighmie, Colbourne* v. *Wilks*.[3] An American citizen domiciled in England had given a legacy of 25,000 dollars. The petition asked whether it ought to be satisfied by the payment of sums of the equivalent value in sterling calculated at the rate of exchange existing on the death of the testatrix, or at the expiration of one year thereafter, or on the day when the payment was made. Applying the rule that a legacy does not become payable until the expiration of one year after the testator's death, Eve J. decided in favour of the second alternative.[4] But the decision does not deal with the question whether there was any right or any necessity to convert the dollar sum into pounds sterling, the petition not having asked any question on this point, but apparently assuming the right or necessity to convert. That question may therefore be regarded as still an open one and it may be noted that the Court of Appeal of New York answered it in the negative.[5] So far as the English authorities go, however, they seem to lean towards the opposite (i.e. affirmative) answer, apparently on the ground that, while the date when legacies became payable determines the rate of exchange to be applied, the fact that they

[1] To some extent the decision also rested on the ground that the legacies were, in fact, expressed in sterling, in which case, of course, the problem now under discussion could not arise: see above, p. 161.

[2] s. 44, Administration of Estates Act, 1925; Halsbury (Hailsham), xiv. 339; Roper, *On Legacies* (4th edition, 1847), p. 863.

[3] [1935] Ch. 524.

[4] The learned judge referred to Roper, l.c., p. 862; but this seems to be due to an oversight, for the author there discusses the rule that, where conversion is necessary, the rate, not the par of exchange, must be applied, and the authority for that rule, *Cockerell* v. *Barber* (1810), 16 Ves. 461, on which see above, p. 47.

[5] *Matter of Lendle* (1929), 250 N.Y. 502, 166 N.E. 182.

become payable at a certain date involves a change of the money of account. It will not be easy to dispose of the objection that this is a *non sequitur*.

3. In all legal systems it is clear that the conversion of a foreign money obligation into the money of the place of payment may be excluded by the parties. It is, however, not always easy to define the circumstances under which such conversion is in fact excluded. The German Civil Code, e.g., requires an 'express' exclusion,[1] while in France it is said that conversion is excluded if the foreign money is regarded as a commodity.[2] The most usual method of excluding conversion is the so-called 'effective clause', which in commercial transactions is of so great an importance.[3]

In England, it would seem, a mere problem of construction is involved,[4] but there are no authorities relating to its solution or to the 'effective clause'. This is no doubt due to the fact that the institution of legal proceedings does away with any such promises, and they are therefore of a very limited value in law.

4. The problem of determining the money of payment causes particular difficulties in case of a conflict of laws. Suppose under an English contract 'pounds' are promised to be paid in Jerusalem.[5] English law would decide the question whether English or Palestinian pounds are the money of account.[6] Under English law, as the proper law of the contract, the promise to pay

[1] s. 244. There is an extensive line of Supreme Court decisions relating to the definition of the term 'express': see the collection by Staudinger-Werner, *Kommentar zum bürgerlichen Gesetzbuch*, ii. 1, pp. 98, 100, and see the two recent decisions 13 Oct. 1932, *RGZ.* 138, 52; 22 Feb. 1937, *RGZ.* 153, 384.

[2] Planiol–Ripert, vii, No. 1161.

[3] Its importance is most evident in connexion with bills of exchange. But, expressly or impliedly, it also occurs in other transactions. Thus, if an agent, particularly a banker, is instructed to collect a foreign money debt, it will usually be the proper interpretation of the agreement that it is the collected foreign money which must be paid over to the principal and that the agent is not entitled to convert the money into his or the principal's domestic currency: *French* Cass. Req. 9 March 1925, D.H. 1925, 237 (allowing, however, conversion of dollars collected by a London firm on behalf of a French firm into francs at the rate of exchange of the day of payment); *German* Supreme Court, 10 Jan. 1925, *RGZ.* 110, 48; *Belgium*: see Piret, No. 24.

[4] See s. 72 (4), Bills of Exchange Act, 1882, and the statement of Bankes L.J. (above, p. 246).

[5] Unlike the Australian and New Zealand pound, on which see above, pp. 43 sqq., there cannot be much doubt that the Palestinian pound is not identical with the English pound.

[6] See above, p. 179.

'pounds' in Jerusalem would be discharged by payment of the appropriate number of Palestinian pounds.[1] But should this latter question not be decided by the law of the place of payment? In other words, should the rule of English municipal law that a monetary obligation is discharged by tendering the *money* of the place of payment be extended to a rule of private international law that the determination of the money of payment (not of the money of account) falls to be decided by the *law* of the place of payment? The problem is the same in the simpler case where the two units of account do not bear the same name: if under an English contract pounds are payable in Paris, the problem arises whether it is the proper law of the contract or the law of the place of payment which decides whether pounds or francs are to be tendered in discharge of the debt.

At first sight it is very tempting to decide in favour of the law of the place of payment and thus to apply the principle[2] that the mode of performance is governed by the law of the place of performance. This view has indeed been advanced without qualification,[3] and in many cases there will in fact be much to commend it. But in numerous other cases or connexions the question may fairly be raised whether in truth it is not something more than the mere method of payment which is involved. It has been shown that the conversion into a different money of payment may deeply encroach upon the substance of the obligation. There would be no such encroachment if it was only a matter of determining whether conversion is necessary or permissible, and so far as this question is concerned there is no harm in applying the rule that the mode of performance is governed by the law of the place of performance. But there are further questions, particularly whether it is the creditor or debtor who has the right of option, or whether there is no option at all; whether the conversion is to be effected on the basis of the rate of exchange of the day of maturity or of the day of payment; whether conversion is excluded by the agreement of the parties; and so forth. These matters cannot possibly be described as relating merely to the mode of payment.[4] In

[1] See above, p. 246.

[2] Above, p. 155, n. 3.

[3] Nussbaum, *Internationales Privatrecht*, p. 259, apparently abandoning his view (*Geld*, p. 216) that the question is subject to the law of the currency.

[4] See Lord Wright's warning above, p. 155, n. 6.

so far as they are concerned, the law of the place of payment as such cannot therefore be applied. As it will often be impossible to separate them from the mere question whether or not conversion takes place, it will be safer to adopt the principle that, in the absence of special circumstances simplifying the problem and preventing the law of the place of payment from encroaching upon the substance of the obligation, the proper law of the contract governs.[1]

III

While in an earlier chapter the problems relating to the determination of the money of account were treated,[2] and while the preceding paragraph was devoted to the problems surrounding the money of payment and its determination, we now come to a group of cases where the money of payment, as well as the money of account, is fixed, but where for the purpose of discharging the obligation an item, expressed in a foreign currency, requires to be converted into the money of payment. If, for instance, under an insurance policy providing for an indemnity in pounds sterling, an indemnity is claimed in respect of a loss which has duly been ascertained to be expressed in a foreign currency, it is clear that a conversion into pounds sterling is required, because the policy gives a right to pounds sterling only. Or if an English banker who guaranteed the debt of a French importer towards an American exporter up to a sum of 100,000 French francs is made liable for a sum of U.S.A. dollars, he must translate that sum into French francs in order to recover his outlays. Similarly, if jewels, given as a security for a loan of French francs, are sold by auction in England for pounds sterling, it becomes necessary to reduce the amount due by the price obtained. In these cases, it appears, both the money of account and the money of payment are ascertained, but there is an item which for the purpose of adjusting it to the terms of the existing obligation must be converted into the currency envisaged thereby.[3]

[1] The view held by Professor Wolff is in effect not very different from that advanced in the text: see *Internationales Privatrecht*, p. 97. For a discussion of the problem with reference to German law see also Melchior, *Grundlagen des internationalen Privatrechts*, pp. 285 sqq., and Mayer, *Valutaschuld*, p. 101.

[2] pp. 161 sqq., pp. 180 sqq.

[3] Sometimes the necessity of conversion has been disregarded. Thus the German Supreme Court dealt with a case where the plaintiff, who had insured

As regards such cases, it seems that the rule has become fairly settled that the conversion must be effected on the basis of the rate of exchange of the day on which, according to the contract and the circumstances of the case, there arose the right to obtain payment and therefore the necessity to convert.[1] This rule, it is true, is not conspicuously illustrated by the decision of Rowlatt J. in *Noreuro Traders* v. *Hardy & Co.*[2] A claim for general average contribution arose in 1914, and according to the charter-party the general average was to be adjusted in Antwerp in Belgian francs, where, however, owing to the German occupation during the Great War, the adjustment could not be made. A provisional adjustment was effected in London and a number of payments in pounds sterling were made. In 1919 general average was adjusted in Antwerp in francs. It was held that the pound sterling payments were to be converted into francs 'at the rate of exchange which is applicable to the whole thing, and that is the rate of exchange at the date of the sacrifice, and all they were doing provisionally was meant to date back to that'. The learned Judge, however, expressly stated that the conversion might have been made at the rate of exchange of the date of payment, but he had no evidence as to what the rate at that moment was. But it might have been a still better solution to convert the payments at the rate of the date when the final adjustment was made, as it was then only that the claim for contribution arose.[3] On the other hand,

with the defendants goods sent from Hamburg to Bombay, advanced a sum of £2 1*s*. 4*d*. in respect of surveyor's costs incurred in Bombay in connexion with the determination of damage. Although the policy provided for an indemnity in marks, the Supreme Court allowed a claim for the amount of pounds: 17 March 1924, *JW*. 1924, 1590. But see the note thereon by Nussbaum, who rightly criticizes the decision. See also German Supreme Court, 28 April 1924, *JW*. 1924, 1593.

[1] See, e.g., French Cass. Civ. 3 Aug. 1936, Clunet, 1937, 302: real property of a French wife, forming part of the 'communauté des biens', was sold for pesos and piastres. It was held that conversion into francs was to be effected at the rate of exchange of the days when the payments were made by the purchasers.

[2] (1923) 16 Ll.L.R. 319.

[3] See German Supreme Court, 4 June 1924, *RGZ*. 107, 304: the plaintiff had paid £3 11*s*. as 'deposit on account of general average'. The adjustment showed that the plaintiffs had to pay only 299.41 marks. The Supreme Court held that this sum of marks was to be converted into pounds sterling at the rate according to which the conversion was effected in the adjustment, and was then to be deducted from the sterling amount already paid. See also Brussels Court of Appeal, 19 Oct. 1935, *Revue de droit maritime comparé*, 1936, ii. 160:

the principle is impressively exemplified by the decision of the Court of Appeal in *Versicherungs & Transport A.G. Daugava* v. *Henderson*.[1] The defendant, an English underwriter, had reinsured the plaintiffs, a Latvian insurance company, against their liability on a fire insurance policy on buildings in Riga. The insurer's liability towards the assured was ascertained by the Latvian courts in lats and the sum due was paid in January 1932, while the fire had occurred in April 1930. The question arose whether, as between insurer and reinsurer, the sum of lats was to be turned into sterling at the rate of exchange of the date of the fire or at that of the date of the settlement of the insurer's liability. Confirming the judgment of Roche J.[2] the court adopted the latter rate, the reason being that so long as the insurer's liability is not quantified and satisfied, there is no liability of the reinsurer.[3]

Finally attention must be drawn to the statutory provisions relating to the calculation of stamp duties in respect of instruments expressed in a foreign currency,[4] and also to the fact that in certain circumstances the famous case of the *S.S. Volturno*[5] might have to be considered in this connexion. It concerned a claim for damages in respect of a loss of hire caused by a collision in the Mediterranean. The damages, or at least the items of which the damages consisted, were expressed in Italian lire. If certain observations made by Lord Sumner which were mentioned above[6] must be understood as meaning that the damage was expressed 'just as naturally in British currency as in Italian currency', and that therefore the sums of Italian lire were only items to be converted into British currency for the purpose of adjusting them to the British money of account, the case would fall under the head of the present

if a shipbroker receives freight in Belgian francs and is bound to convert it into pounds sterling, he must effect the conversion at the rate of exchange of the day when the account is made up ('c'est en réalité à ce jour que se feront les compensations et jusque là les dettes et créances subsistent dans la monnaie dans laquelle elles ont été contractées').

[1] (1934) 49 Ll. L.R. 252.

[2] (1934) 48 Ll. L.R. 54.

[3] No decisive importance was attached to the peculiar clause in the contract between the parties: 'to follow the settlements of Daugava Insurance Company'.

[4] s. 6, Stamp Act, 1891, 54 & 55 Vict., ch. 39 (relating to Bills of Exchange and Notes); s. 12, Finance Act, 1899, 62 & 63 Vict., ch. 19 (relating to other instruments).

[5] [1921] 2 A.C. 544.

[6] p. 180, n. 3.

paragraph. If, however, the damage was really expressed in Italian currency, which had to be converted into British currency merely for the purpose of bringing legal proceedings in this country, the case should be considered in the following chapter. As the other opinions delivered in the House of Lords rather suggest the latter view, it may in this connexion suffice to indicate the doubts relating to the classification of that case.

IV

When we now come to the examination of the questions relating to the concept of payment, i.e. to what constitutes a payment, we find that the discussion can be confined to the Conflict of Laws. The municipal law relating to the discharge of obligations in general and to the discharge by payment in particular forms a substantial part of the law of contracts regarded as a whole. Most of the problems are not of a purely monetary character, and even where they arise out of monetary obligations, they are exhaustively treated in the usual textbooks on the law of contracts:[1] payment and tender, payment by bill of exchange, appropriation of payments, accord and satisfaction—to the existing treatment of these and similar matters nothing could usefully be added. On the other hand, in connexion with the performance of foreign money obligations so many important questions of private international law have arisen that a discussion of them cannot be dispensed with.

It seems to be a well-established principle of English private international law that the question whether a certain payment operates as a discharge of an obligation is governed by the proper law;[2] the only exception concerns the extinction of a debt by way of a set-off, which is exclusively governed by English law as the *lex fori*.[3] But however clear the principle

[1] See, e.g., Halsbury (Hailsham), vii, pp. 187, 238 sqq.

[2] Dicey, p. 678; Cheshire, p. 281; on pp. 660 sqq., however, Cheshire seems to take a different view with regard to cases where the payment is made after action has been brought in this country. He there states that, as the quantification of the amount payable is governed by the *lex fori*, that legal system must also decide 'whether in its view payment has in effect already been made'. But it is suggested that *The Baarn*, [1933] P. 251, which seems to have caused Dr. Cheshire to propound this view, does not necessitate such a conclusion, which would involve an unfortunate extension of the ambit of the *lex fori*: see below, pp. 257, 258.

[3] Dicey, p. 857; Cheshire, p. 654.

may be, it has caused difficulties in two groups of cases which require consideration.

1. It follows from the general rule that the question whether *accord and satisfaction* in the technical sense of English law is necessary or not depends on the proper law, and this has been expressly laid down in *Ralli* v. *Dennistoun*.[1] Accordingly, it depends on the proper law of the obligation whether, and with what effects, a tender may be made in respect of a claim for unliquidated damages, and it is irrelevant that under English law no tender, but only accord and satisfaction, is possible in respect of such a claim.[2]

This view is not shaken by a recent dictum of Maugham L.J. (as he then was), who said:[3]

'It is well settled that the procedure in any action brought in this Court must be governed by the *lex fori*, and it is settled, as a reference to Dicey's *Conflict of Laws*, 5th ed., p. 857 will show, that if the defendant tries to set up a set-off which is not allowed by English law, the set-off is not permitted. It is obvious that if the defendant is defending on the ground of accord and satisfaction he must prove accord and satisfaction according to our procedure. The same thing must be true as regards an alleged tender . . .'

It is fairly clear that Maugham L.J. was there referring only to the manner of proving accord and satisfaction or tender, in which case he was clearly right in emphasizing that that relates to procedure and is governed by English law. The question whether under the proper law accord and satisfaction is necessary or tender is possible, and whether certain facts, proved according to English law of procedure, amount to an accord and satisfaction or to tender, relates to substantive law and was not touched upon by the Lord Justice.[4]

2. Moreover, the proper law of the obligation should also govern the question whether the method of paying a debt by

[1] (1851) 6 Ex. 483.

[2] Above, p. 58; English law, of course, governs in so far as the manner of pleading is concerned.

[3] *The Baarn* (No. 2), [1934] P. 171, 185.

[4] In *Société des Hôtels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451 the reason why the question whether or not there was payment in discharge of the debt was considered from the point of view of English law was obviously that no evidence was led as to French law differing from English law. See at p. 467 per Atkin L.J. The case is more fully discussed below, pp. 292 sqq.

depositing the amount due with a court, which is known to many continental countries and their followers, is available in a given case and whether such deposit amounts to performance.[1] It is submitted that this is the reasoning on which the two difficult cases of *The Baarn*[2] were really decided.

Both cases arose out of a collision which took place, on what English law regards as the high seas, between a Chilean vessel, owned by a company domiciled in Chile, and a Dutch vessel, owned by the defendants, a Dutch firm. The defendants made a formal admission of liability, which under Order LII, Rule 23, had the effect of an Order of the Court without being equivalent to a judgment.[3] The plaintiffs instituted proceedings before the registrar to ascertain the amount of damages for expenses incurred by them in Chile in Chilean currency for the repair of the Chilean vessel. In the course of these proceedings the defendants deposited the amount of Chilean pesos spent by the plaintiffs with the proper court in Chile according to certain provisions of the Chilean Code. The question therefore arose whether their liability was thereby discharged.

The economic background of the ensuing litigation can only be understood if it is remembered that the Chilean currency is a 'frozen currency', that is to say that money cannot be freely transferred from the Chilean territory and that therefore the value of blocked accounts held within the territory is quoted abroad at a discount, although the official rate of exchange is unaltered and although, inside the territory, the money has an undiminished purchasing power.[4]

Langton J., after a careful review of the evidence as to Chilean law, which he assumed to be applicable, arrived at the result 'that this payment is good according to Chilean law'.

On appeal his judgment was reversed. Scrutton L.J., having considered the evidence, took the view 'that there is no final decision by the Chilean Courts that the payment in depreciated

[1] This was expressly so held by the Supreme Court of the United States in *Zimmermann* v. *Sutherland* (1927), 274 U.S. 253.

[2] (No. 1) [1933] P. 251; (No. 2) [1934] P. 171.

[3] (No. 1) [1933] P. 251 at pp. 266, 267 per Greer L.J.

[4] As far as the nominal plaintiffs were concerned it therefore did not really matter whether they got pounds sterling or pesos. It is noteworthy that counsel for the defendants felt compelled, and permitted, to warn the court that the case 'must not be looked at with any regard to English underwriters': (No. 1) [1933] P. 251, at p. 260.

pesos is sufficient while proceedings are pending in London'. Greer L.J. said that, though according to Chilean law a payment was made, it was not established that it had the effect of extinguishing the debt; therefore, in his judgment, 'treating what has happened in Chile as a payment on account, it will be the duty of the registrar to credit that payment by its equivalent value in sterling at the rate of exchange prevailing on the date when the payment was finally approved by the Chilean Judge'. Romer L.J.'s *ratio decidendi* was[1] that what happened in Chile could have the effect of a payment only in such cases 'where the relation of creditor and debtor prevails between the two parties to the transaction according to the law of Chile and could have no application to such a case as the present where no such relation exists or is claimed to exist'; he thought it quite conceivable that the decision would have been different 'had the defendants' liability to pay the plaintiffs' damages according to Chilean law been established'. Thus in the judgment of Scrutton L.J.[2] there was no payment by Chilean law, while in the judgment of Greer L.J. there was a payment by Chilean law which in England was to be treated as a payment on account. In Romer L.J.'s judgment, too, there was no payment, but his decision rests on the refusal to apply Chilean law at all, since the question fell to be decided by English law.

During further proceedings the question arose whether the order as drawn up by the Court of Appeal in *The Baarn* (No. 1)[3] expressed the judgments given, inasmuch as it was contended that the Court of Appeal did not intend to exclude the possibility of taking the Chilean payment into account *pro tanto*, and to order payment in this country. This contention was rejected both by Bateson J. and by the Court of Appeal.[4] Scrutton L.J. adhered to his view that there was no payment (apparently according to Chilean law); Greer L.J. dismissed the defendants' appeal on the ground of estoppel; Maugham L.J. emphasized that he was 'unable to see that Chilean law has anything to do with the matter before the Court'.[5]

In the result the decisions of the Court of Appeal must certainly find approval. As regards the second decision, Greer L.J.'s reasoning appears to be the most convincing. As regards the

[1] p. 273. [2] As explained *The Baarn* (No. 2), [1934] P. 171, 178.
[3] [1933] P. 251. [4] *The Baarn* (No. 2), [1934] P. 171. [5] p. 184.

more important first decision, the decisive factor appears to be that, the collision having occurred on the high seas and the obligation therefore being governed by English law,[1] the question whether and how the ensuing claim could be discharged was also governed by English law.[2] This was the reason, in fact, given by Romer and Maugham L.JJ., while Scrutton and Greer L.JJ.'s reference to Chilean law lacks justification.

V

The discussion of the law relating to the discharge of foreign money obligations would not be complete without due regard to the numerous problems created by foreign legislation hindering performance.

One type of such legislation has been known to international practice since, during the Franco-German War of 1870–1, France enacted what came to be known as *moratoriums*, i.e. statutory provisions postponing the date of payment. In so far as bills of exchange are concerned, the English courts have given effect to such moratoriums if the place of payment was within the country setting up such legislation.[3] Whether the law of the place of payment governs in cases other than those connected with bills of exchange is rather doubtful. An affirmative answer could be given if the matter related merely to the mode of payment, in which case the rule[4] would apply that the mode of performance is governed by the law of the place of performance. If the moratorium extends to a few days only, the question is indeed similar to certain others, viz. whether a day is to be disregarded as being a Bank Holiday and whether days of grace are allowed, and as in such circumstances it relates to the method of payment, the law of the place of payment can be

[1] Above, p. 189.

[2] If the view expressed by Lord Sumner in *The Volturno*, [1921] 2 A.C. 544, 553 (on which see above, p. 180, n. 3) was accepted, it could also have been said that there was no claim for Chilean pesos at all, but only for pounds sterling. This line of arguments seems to have weighed in Romer L.J.'s mind: (No. 1), [1933] P. 251, 271, 272. Dr. Cheshire, p. 661, explains the decision on the ground that the question under discussion related to the quantification of the amount payable and was therefore governed by the *lex fori*.

[3] *Rouquette* v. *Overmann* (1875), L.R. 10 Q.B. 525; *In re Franke & Rasch*, [1918] 1 Ch. 470; see also *Franklin* v. *Westminster Bank* below, p. 315 and s. 72 (5), Bills of Exchange Act, 1882.

[4] Above, p. 155.

applied.[1] But if the moratorium extends to a considerable period of time, it amounts to such an encroachment upon the substance of the debt that the application of the proper law is preferable.[2, 3]

Foreign currency restrictions, the other much more important type of legislation hindering performance, did not acquire prominence until comparatively recent times[4] and, though their international repercussions have been enormous, their legal intricacies have not yet found much elucidation.[5] One of the chief difficulties lies in the fact that the systems established in

[1] It is doubtful whether Dicey, p. 677, and Beale, p. 1270, intend to confine the application of the *lex loci solutionis* to such cases only.

[2] As to foreign views on moratoriums and their compatibility with the public policy of the forum see Frankenstein, ii. 239 sqq.; v. Bar, ii. 174 sqq.; Nussbaum, *Internationales Privatrecht*, pp. 248, 269, 329; Ghiron, 9 (1915) *Riv. di diritto internationale priv.*, p. 152; Ramel, *Le Moratorium de la lettre de change et son traitement en dr. int. privé* (1925); Lorenzen, 28 (1919) *Yale L.J.* 324. An example where a moratorium was held to be irreconcilable with the public policy of the forum is the decision of the Austrian Supreme Court, 9 Oct. 1930, Rechtsprechung 1931, 11, and Clunet, 1931, 716: it was directed against Austrian creditors. See also Swiss Federal Tribunal, 17 April 1916, Clunet, 1917, 306: application prevented by the laws of neutrality.

[3] As to the moratoriums enacted in various parts of the Commonwealth of Australia, which, however, went much farther than a mere postponement of the stipulated date of payment, and which provided for a reduction of the rate of interest, see *Mount Albert Borough* v. *Australasian Temperance & General Assurance Corp. Ltd.*, [1938] A.C. 224. It was held by the Privy Council that a promise to make a payment in Victoria was not affected by a Victoria moratorium, because the proper law of the contract was the law of New Zealand, for which reason the law of the place of payment was irrelevant, and because it was impossible 'to attribute to the Victorian legislature an intention to legislate with regard to matters lying outside its territorial jurisdiction, because the land charged under the debenture is in New Zealand'. This case, which is of great general importance (see above, pp. 156 sqq.), supports the view stated in the text that in case of moratoriums proper the proper law of the contract, not the law of the place of payment, governs. As to the Australian legislation see also *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (1932), 48 C.L.R. 391; *Wanganui Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (1934), 50 C.L.R. 581; *McClelland* v. *Trustees, Executors & Agency Co.* (1936), 55 C.L.R. 483; *Dennys Lascelles Ltd.* v. *Borchard* (1933), Victoria L.R. 46.

[4] See generally above, pp. 52 sqq., where the English statutes restricting the export of precious metals are mentioned.

[5] Reference may, however, be made to the anonymous note in 47 (1938) *Yale L.J.* 451, and to Bergmann, *B.I.J.I.* 35 (1936), 29; Cohn, 52 (1936), *L.Q.R.* 474; Domke, Clunet, 1937, 226, 990; *Revue de Science et de Législation financière*, 34 (1936), 612; 35 (1937), 217. See also Bendheim, *Das deutsche Devisenrecht und die Schweiz* (Berne, 1936), and as to Hungary, Szászcy, Clunet 1937, 738.

various countries and the international problems created by them show so great a variety that an exhaustive treatment is impossible. Some of the consequences have already been noted: the establishment of a managed currency may make it necessary to have regard to an unofficial rather than to the official rate of exchange;[1] the prohibition of the export of coins and notes and the ensuing withdrawal of such tokens from the international money market may perhaps deprive them of their monetary character;[2] the prohibition of entry into foreign money obligations, if enacted by the country the law of which governs, may invalidate a contract.[3] But many further types of question arise: smuggling, impossibility of performance, discharge by payment into a blocked account, employment of illegal methods of performance—these are only some of the cases which, as will appear from the necessarily cursory discussion which follows, may give rise to many intricate problems of private international law.

Where they arise, a well-established principle is available on the basis of which each individual case should be approached: the control of the proper law of the obligation.[4] This means that the proper law of the contract should be complied with, irrespective of whether it renders a transaction valid or invalid or whether the result is or is not reconcilable with a legal system other than that of the proper law. No doubt, in some carefully examined cases, the effects of the proper law will have to be swept aside by a permissive or prohibitive rule of public policy of the forum, but no general dogma tending either to *a priori* non-recognition or to the over-recognition of foreign currency restrictions should be accepted. The very fact that both extremes have, on grounds of public policy, found support emphasizes the necessity of abstaining from wide formulations and of abiding by the sound guidance of the proper law. This basis leads to two rules which may be stated at the outset and which will be elaborated in the following discussion. If the transaction is governed by the foreign law which has set up currency restrictions, the provisions of the proper law must be accepted and, save in one or two exceptional cases, cannot be refused

[1] Above, pp. 50 sqq. [2] Above, p. 124, n. 2. [3] Cf. above, pp. 134 sqq.
[4] That their application cannot be excluded by the theory that they were not included in the intention of the parties, was shown above, pp. 228 sqq.

recognition on the ground of public policy. If the transaction is governed by a legal system other than that which has set up currency restrictions, the proper law must again be accepted, and, save in one or two exceptional cases, it cannot be displaced or influenced by any rule relating to a foreign country's control of exchange transactions.

1. As regards the former of these statements, dealing with the case where the law of the country which has set up the currency restrictions is the proper law, it appears that the *Swiss* and perhaps the *French* courts take up a fundamentally different attitude, inasmuch as they decline to recognize the effect of foreign currency restrictions in any shape or form, even if they are part of the proper law. In one case[1] the Swiss Federal Tribunal had to deal with an action for the recovery of a debt due by a German to a Swiss firm which had assigned it to the plaintiff. The defendants contended that under German law the assignment, made without the Foreign Exchange Board's consent, was invalid and that any other method of performance than by payment into a blocked account with a German bank was impossible. Although German law governed both the assignment and the contract, the court refused to give effect to German currency regulations, because it held them to be irreconcilable with Swiss public order, as they violated the vested rights of the creditor. Similarly the Cour de Paris[2] held it to be irrelevant that a contract made between Russians in Russia violated the provisions of a Russian statute setting up a foreign exchange control and making the infringement a criminal offence, the reason being found in the familiar[3] dogma:

'que ces lois, plus spécialement celle du 25 juin 1917 qui prévoit des pénalités diverses suivant les infractions commises, constituent des textes d'une portée politique dont l'application ne peut par suite qu'être territoriale; que n'ayant d'autre objet que de protéger la monnaie nationale, elles demeurent sans effet devant une juridiction française, même en cas de contestation entre ressortissants russes'.

[1] 8 Oct. 1935, *BGE.* 61, ii. 242, also *B.I.J.I.* 34 (1936), 110; *JW.* 1935, 3503, and Plesch, *Gold Clause*, ii. 98. See also 18 Sept. 1934, *BGE.* 60, ii. 294 and *JW.* 1935, 239; 2 March 1937, *BGE.* 63, ii. 42.

[2] 30 June 1933, Clunet, 1933, 963.

[3] See already above, p. 229.

This is not, however, the view taken by the *German* Supreme Court, which on almost exactly the same facts held that the contract, being governed by Russian law, was void, and that such invalidity had to be recognized in Germany and could not be disregarded on any ground of German public policy.[1] The *Austrian* Supreme Court, too, refused to treat Hungarian currency restrictions as incompatible with Austrian public order.[2]

According to *English* law, likewise, the non-recognition of foreign currency restrictions *in toto* is not possible. There is no authority for any rule which would exclude foreign trade laws from recognition in England.[3] The principle, if it exists, that 'no country ever takes notice of the revenue law of another'[4] is of no avail, because a law restricting the dealings in and the transfer of foreign exchange is not a revenue law in the natural sense of the term. Moreover, the refusal to enforce foreign penal laws here[5] does not permit the conclusion that a foreign law, which *inter alia* imposes criminal liability, cannot be recognized even where its purely contractual effects are concerned.[6] Finally, it seems to be impossible to come to an unqualified refusal of the recognition of foreign currency restrictions by invoking the general rule[7] that an English court will not enforce a foreign law where it involves a violation of the policy of English law or moral rules or English judicial and political institutions. There is no authority for holding that where the law of a foreign country governs, such country's emergency legislation, which in most cases is necessitated by the economic situation and which, in its origin or application, is not directed and does not discriminate against foreign subjects

[1] 1 July 1930, *IPRspr.* 1930, No. 15.

[2] 25 Sept. 1934, Rechtsprechung, 1934, 206, and Clunet, 1935, 191. The contract was apparently governed by Hungarian law.

[3] See above, p. 230.

[4] *Holman* v. *Johnson* (1775), 1 Cowp. 341 per Lord Mansfield. For further cases see Dicey, p. 657, n. 9, and see above, p. 230, n. 4. The present force of the doctrine is doubtful. That foreign revenue laws cannot be enforced here is a different proposition, for which there exists ample authority: see Dicey, p. 212, n. q.

[5] Dicey, p. 212. Add *Banco de Vizcaya* v. *Don Alfonso de Borbon*, [1935] 1 K.B. 140.

[6] Nevertheless, it may happen that in the appropriate circumstances recognition of certain acts or claims may have to be refused on the ground of the penal character of the Statute.

[7] Dicey, pp. 25 sqq.; Cheshire, pp. 136 sqq.

in general or British subjects in particular,[1] however obnoxious it may be, is opposed to English public policy; there must be very exceptional circumstances, approaching a state of war, to prompt English public policy to validate a transaction invalidated by its proper law or to invalidate a transaction valid under its proper law.

It follows that, if the proper law prohibits agreements for the unauthorized export or the smuggling of currency, or permits repayment of a debt in a manner other than that envisaged by the contract,[2] or provides for particular methods of repayment, e.g. payment into an account with a Conversion Office,[3] these and similar consequences must be respected by an English court. This, indeed, appears to be the view on which are based two decisions of the House of Lords and the Court of Appeal respectively, and although the problem of public policy was not discussed either in argument or in the judgments, they have impliedly rejected the non-recognition theory so radically propounded by the Swiss Federal Tribunal. In *De Beéche* v. *South American Stores (Gath & Chaves) Limited*[4] the respondents, companies registered in England, but doing business in Chile, had promised to pay the rental for premises in Chile leased to them by the appellants' predecessors in title. The leases provided that 'payment shall be effected monthly in advance in Santiago de Chile . . . by first class bills on London'. The respondents alleged that Chilean foreign currency regulations rendered it impossible or illegal to acquire foreign exchange in Chile or to pay the rents by drafts on London, and they deposited in court in Chile the amount of the rents in Chilean pesos at the current rate of exchange, subject to a 20 per cent. deduction directed by Chilean law. The appellants did not accept this

[1] Therefore the matter is different in case of war: *Wolff* v. *Oxholm* (1817), 6 M. & S. 92; *In re Friedrich Krupp A.G.*, [1917] 2 Ch. 188.—In *Glynn* v. *United Steel Works* (1935), 160 Misc. 405, 289 N.Y. Supp. 1037, also Plesch, *Gold Clause*, ii. 72, Judge McLaughlin *obiter* said that the German currency restrictions 'discriminate against our American citizens'. But the German legislation does not differentiate between German and non-German subjects, but between residence within or outside the German territory: see Cohn, 52 (1936), *L.Q.R.* 475. In a very limited sense Cohn himself suggests a retaliation theory, for which there is, however, no authority.

[2] See e.g. the German statute of 27 May 1937, *Reichsgesetzblatt*, i. 600.

[3] See e.g. the German statute of 9 June 1933, *Reichsgesetzblatt*, i. 349.

[4] [1935] A.C. 148.

payment and sued for the agreed sums of pounds sterling. The action failed. The question what law governed the contract was not expressly dealt with by the House of Lords. If English law was applied, as is suggested by some observations of Lord Sankey[1] (which, however, would not seem to have been justified),[2] the case falls under the head of the following group,[3] where it will be necessary to examine some very widely formulated statements of Lord Sankey. If the contract was governed by Chilean law, and that, as has been observed, is the better view, Chilean currency regulations made the result inevitable, and the only remarkable point is that no question of a refusal to recognize Chilean legislation on grounds of English public policy was even raised. The second case of *St. Pierre* v. *South American Stores (Gath & Chaves) Limited*[4] is easier to follow, inasmuch as the Court of Appeal expressly proceeded on the basis of Chilean law governing the contract. The defendants had taken a lease of premises in Chile, which lease provided, in so far as material here, that the rent was to be paid 'either in Santiago de Chile at the residence or the office of the latter (owner) . . . or remitted to Europe according to instructions which the owner may give. . . .' The plaintiffs, *inter alia*, claimed a declaration as to the effect of this option and its position under Chilean currency legislation prohibiting the export of money. Branson J. held[5] that

'if the plaintiffs exercise validity qua the contract their option to call for such a remittance, they are asking for an impossibility which,

[1] pp. 156, 160.

[2] See the facts of the case: premises in Chile; plaintiff Chilean subject, though resident in Paris; defendants English companies doing business in Chile; leases executed before Chilean Consul at Buenos Aires. By the courtesy of Messrs. Smiles & Co., solicitors, to whom the author's thanks are due, he has been supplied with copies of the judgments in the courts below. It would appear to have been taken for granted throughout the case that the contract was governed by Chilean law, the applicability of which the defendants had pleaded in paragraph 5 of their defence, and Lawrence L.J. expressly said: 'The leases are couched in the Spanish language and deal with Chilean property. They are Chilean contracts to be performed in Chile and have to be construed and given effect to according to Chilean law.' See also the later case of *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.*, [1936] 1 K.B. 382 at p. 390 per Greer L.J., at p. 394 per Scott L.J. It is submitted that on this basis the decision loses much of its general importance.

[3] Below, pp. 272 sqq.

[4] [1937] 3 All E.R. 349.

[5] [1937] 1 All E.R. 206, 215.

as it has supervened by the operation of the law of the place of performance, excuses the defendants from performance. The only alternative is for the plaintiffs to appoint someone in Santiago to receive there the rents which the defendants are ready and willing to pay, and have in fact lodged in Court in default of any such appointment.'

The Court of Appeal affirmed the decision, but only Slesser L.J. expressly treated the question under discussion; he said:[1]

'when the option is exercised, it must be an option of remission to Europe from Chile, from which it would follow that, if there be laws in Chile excluding the possibility of remission from that country, this contract can have its obligations discharged in Chile, but not elsewhere.'

The relevancy of English public policy was nowhere suggested, but the effects of the proper law were adhered to without hesitation.

But though English law does not totally reject the recognition of foreign currency restrictions *a priori*, one or two special rules may in appropriate circumstances lead to non-recognition.

If, as both in *De Beéche's* and *St. Pierre's* case, the debtor in fact makes a payment which under the proper law of the contract operates as a discharge, there is nothing unusual in accepting the effects of the proper law: so long as the debtor performs his contract in compliance with the proper law, it does not even matter that that law encroaches upon the provisions of the contract by enabling the debtor to pay, say in Santiago de Chile, although he has promised to pay in London, or to pay in pesos, although he has agreed to pay pounds sterling. But would the same be true if the foreign currency regulations prevented the debtor from paying at all? Suppose a German firm owes to an English firm a sum of pounds sterling under a German contract which provides for payment in London and gives the English courts jurisdiction; when the debt falls due, the debtor unsuccessfully attempts to obtain pounds sterling from the Reichsbank; he thus cannot pay and the obligation remains in abeyance, the debtor being in default.[2] If the

[1] p. 356.

[2] German Supreme Court, 23 May 1936, *RGZ.* 151, 116. The statute quoted p. 263, n. 2, has now opened a possibility of putting an end to such suspense. If the rule in *Ralli's* case, on which see below, p. 270, really were a rule of

creditor brings an action in England, where the debtor has a large account with the Bank of England, of which, however, under German currency regulations the debtor cannot dispose without the Reichsbank's consent, would the latter really be allowed to plead that under the proper law of the contract he was prohibited from paying his creditor? Or should the mortgagor's reliance on German currency regulations deprive the owner of a mortgage on a German ship of his right to enforce his title by an action *in rem* brought against the ship while in England? Or, to take a still more absurd line of defence, should a debtor who was formerly residing in Germany but now lives in France, and who owes under a German contract a sum of pounds sterling to an Englishman, be heard to plead that under German currency regulations he is prevented from disposing of his funds situated outside Germany[1] even after he has left the country?

The negative answer to these questions, on the necessity of which there cannot be much doubt, must be founded on a broad principle.[2] If the debtor pays his creditor in accordance with the proper law, the creditor cannot complain; if the debtor is excused from paying by the proper law, and if the obligation is therefore discharged, the creditor again cannot complain. But if[3] the proper law itself upholds the debtor's obligation but deprives him of the means to perform it, the policy of English law is violated, because it must be deemed to be a fundamental principle of English law, and indeed of all laws, that a creditor may proceed against his defaulting debtor wherever he finds him. Put into more procedural language this means that, where under the appropriate substantive law there is a right, the remedy and its enforcement by levying execution on the debtor's property are a matter of procedure exclusively governed by

English private international law, the obligation would be 'invalid', although it is unchanged under German law as the proper law. But *Ralli*'s case turns on a rule of English substantive law: see the paper quoted, p. 270, n. 4.

[1] German Ordinance of 1 Dec. 1935, *Reichsgesetzblatt*, i. 1407.

[2] No difficulties would exist if it were a rule of English private international law that legality of performance is always governed by the law of the place of performance. But no such rule exists (see above, p. 156), and if it existed, it would be very dangerous in the converse case where an English or, say, Dutch contract is to be performed, say, in Germany.

[3] To avoid any misunderstanding it is necessary to emphasize this prerequisite.

English law.[1] The debtor's plea that, although the debt exists, he is prevented or prohibited from paying it would in effect amount to an interference with that principle, because, if accepted, it would make part of the debtor's property exempt from execution, which would be beyond the proper law's power. That a judgment thus given might compel the debtor to do an illegal act would not only be an irrelevant but also a wrong argument, because compulsory satisfaction of a claim can never expose the judgment debtor to criminal liability.[2]

It is therefore submitted that, if the currency regulations of the proper law prevent the debtor from paying his debt out of property situate abroad, such impossibility cannot be recognized by English law.

The same result might perhaps be derived from another principle which, if applicable, would warrant the non-recognition of foreign currency regulations, not only in connexion with the hindrance of performance, but also in many other respects.[3] It is a well-recognized rule of law that any extraterritorial effect must be denied to legislation of a confiscatory character in so far as it extends to movables or debts situate outside the territory of the confiscating power.[4] Foreign currency regulations frequently restrain the subject from disposing of such property without the authorities' consent, and they give the authorities power to demand that such property be assigned to them, or that any foreign exchange accruing through the realization of such property (including the repayment of debts) be surrendered to them.[5] The question whether such a position can be described as confiscation must be answered irrespective of whether any compensation is paid or payable in the domestic currency of the confiscating power; for the lack of compensation is not a prerequisite of the conception of confiscation.[6]

[1] Dicey, pp. 849 sqq.; as Dicey, p. 28, rightly points out, ideas of public policy are at the root of this principle.

[2] On this point see also below, p. 275.

[3] If under a German deed of assignment the claim of a German creditor against an English debtor, arising under a German contract, is assigned without the permission of the Foreign Exchange Board, the invalidity of the assignment under German law could be disregarded.

[4] See Dicey, p. 610, note *k*, with further references. Add *In re Russian Bank for Foreign Trade*, [1933] Ch. 745, 767.

[5] Such is in effect the result of the German currency restrictions.

[6] There does not appear to exist any English authority for this view except

Moreover, it does not matter that the appropriation by the foreign government does not comprise the substance of the right itself, but merely affects the power of disposal; this is a distinction which relates to the degree, but not to the principle. It is necessary to have regard to the essence of the restrictions placed upon the subject: the foreign State is pursuing its own interests by enlarging the amount of exchange available for the benefit of the nation regarded as a whole, not of the individual owner. This amounts to confiscation,[1] and in the result it is therefore submitted that whenever foreign currency restrictions result in a disability to dispose of property situate outside the territory of the State which has enacted them, such extraterritorial effect cannot be recognized here.

2. If the transaction is not governed by the law of the country which has set up currency restrictions, no effect can on principle be attributed to them. If under an English contract a loan of a sum of pounds sterling is made to an Englishman by a German merchant while in England, the debtor cannot resist the action for repayment on the ground that the loan was illegal under German law or that the money lent to the debtor was illegally procured; if Russians enter in Russia into a contract governed by German law which is illegal under Russian currency restrictions but valid under German law, a plea of illegality would be bad;[2] if under an English contract a Chilean debtor owes a sum of pounds sterling, the payment of a sum of pesos into a blocked account is no discharge.[3]

There are, however, cases where foreign currency regulations may influence a purely English contract.

They may give rise to the insertion of express or implied conditions in the contract. If German and English merchants

the negative one that definitions of confiscation do not require the absence of compensation: see the *Oxford English Dictionary* and Lord Ellenborough's statement quoted in the following note.

[1] See Lord Ellenborough in *Levin* v. *Allnutt* (1812), 15 East 269: 'Confiscation must be an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government, though the proceeds may not, strictly speaking, be brought into its treasury.'

[2] German Supreme Court, 3 Oct. 1923, *RGZ.* 108, 241. It is doubtful whether in that case the contract was rightly held to be governed by German law; but if it was, the decision was right. In England Dicey's rule 160, exception 2 (p. 655), must be considered; but it is submitted that no such rule exists: *British Year Book of International Law*, 1937, pp. 103 sqq.

[3] See *Seligman Bros.* v. *Brown Shipley & Co.* (1916), 32 T.L.R. 549.

enter into an English contract, they may make its operation dependent on the grant of a permission by the German Foreign Exchange Board. If I buy from my banker Chilean pesos to be paid to my creditor in Santiago de Chile, it will be an implied term of the contract that the payment will be effected in accordance with the laws of Chile so as to enable the creditor to accept and keep the money.[1]

A purely English contract may even be invalidated through the existence of foreign currency regulations; for it is against English public policy to enforce a contract, 'if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country'.[2] The operation of this rule, laid down in *Foster* v. *Driscoll*,[3] dealing with a contract for the smuggling of whisky into the United States during the period of prohibition, cannot be excluded by the rule (if it exists) that foreign revenue laws are disregarded; for currency restrictions cannot fairly be described as revenue laws.[4] The only qualification lies in the emphasis to be placed on the requirement that the illegality of purpose must be common to both parties.[5] Nevertheless, the view taken by English law is particularly strict.[6]

[1] This statement may derive some support from the dictum of Scrutton L.J. in *Ralli* v. *Compañia Naviere Sota y Aznar*, [1920] 2 K.B. 287, 304 quoted below, p. 270. [2] *Foster* v. *Driscoll*, [1929] 1 K.B. 470, 521 per Sankey L.J.

[3] [1929] 1 K.B. 470. [4] On that question see above, p. 262.

[5] It was on this point that Scrutton L.J. disagreed in *Foster* v. *Driscoll*, *ubi supra*.

[6] See generally Blas, 'Contrebande' in *Rép. dr. int.* 5 (1929), pp. 225 sqq.; Messinesi, *La Contrebande en droit international privé* (Paris, 1932). The *German* Supreme Court held that contracts the immediate subject-matter of which is smuggling into a friendly country are invalid under s. 138, German Civil Code; but the vendor's mere knowledge of the purchaser's intention to use the goods for the purposes of smuggling does not suffice: 9 Feb. 1926, *JW.* 1926, 2169 and Clunet, 1930, 430; 10 March 1927, *JW.* 1927, 2287 and Clunet, 1928, 1070; 17 Oct. 1930, *JW.* 1931, 928. It also seems that the violation of foreign statutes based on reasons of economic policy, not of sanitary policy (as in case of the prohibition of alcohol), does not invalidate a contract governed by German law: Supreme Court, 24 June 1927, *JW.* 1927, 2288 and Clunet, 1930, 428. This formula, being so much wider than that relating to mere revenue laws, would perhaps save from invalidity a German contract envisaging the smuggling of money out of or into a country. As to *Austria* see Austrian Supreme Court, 3 March 1931, Clunet, 1931, 1080. The *French* Cour de Cassation held that an insurance policy which to the knowledge of the company was intended to cover the illegal shipment of alcohol into the United

It is in connexion with a plea of impossibility or illegality of performance that the influence of foreign currency regulations on an English contract becomes a matter of particular difficulty. The effect of such a plea depends on whether the place of payment is within or outside the country which has established currency restrictions.

(*a*) If under an English contract payment is to be made within the country where, owing to the introduction of currency restrictions, payment has become illegal, the position must be viewed on the basis of the decision in *Ralli* v. *Compañia Naviera Sota y Aznar*.[1] A contract which was held to be an English contract[2] provided that a certain payment should be made in Barcelona where, however, when the time for payment arrived, a Spanish statute had made it illegal both[3] to pay and to receive the money. The action for the recovery of the deficiency was dismissed, the reason being stated by Scrutton L.J. in these words:[4]

'Where a contract requires an act to be done in a foreign country, it is in the absence of very special circumstances an implied term of

States was valid: Cass. Req. 28 March 1928, S. 1928, 1. 305, with note by Niboyet. As to smuggling of foreign currency out of Germany in particular see Cour de Colmar, 24 June 1932, S. 1934, 2. 73, with note by Niboyet and Clunet, 1933, 337; 16 Jan. 1937, Clunet, 1937, 784 (the plaintiff, who had undertaken to smuggle the defendant's money out of Germany, was found out and convicted in Germany; he successfully claimed compensation from the defendant in respect of the fine paid by him, the expenses for his defence, and the confiscation of his car). See also Cour de Paris, 26 March 1936, Clunet, 1936, 931; 8 Dec. 1936, *Chronique Hebdomadaire du Recueil Sirey*, 1937, No. 2. The former decision related to the following facts. The plaintiffs had paid to the defendants 282,000 French francs, requesting them to pay to the German creditor of a French firm 50,000 internal reichsmarks; it was an express term of the contract that it was subject to any difficulties of transfer and that the contract was performed if and when the defendants' correspondents had obtained a receipt for the payment. The money was in fact sent by a fictitious person in Germany by postal order. As the German creditor did not know the sender, he informed the authorities, who confiscated the money, since the payment was illegal. The action brought to recover 282,000 francs was successful. The judgment, it is true, admits that 'à aucun point de vue la Cour ne saurait avoir égard à une combinaison qui n'aurait d'autre objet que de permettre une fraude à la loi'. But this principle did not prevail, because the purchaser of the reichsmarks did not know of the violation of German currency regulations. The court also held that there was no payment, because nothing was done 'au nom et en l'acquit du débiteur'.

[1] [1920] 2 K.B. 287 (C.A.).

[2] At p. 290 per Lord Sterndale M.R.; at p. 293 per Warrington L.J.

[3] It is necessary to emphasize this point, see Benjamin, *On Sale*, p. 599, with further references.

[4] p. 304. That *Ralli*'s case states a rule of construction relating to impossibility

the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that state.'

Although the rule is perhaps not altogether satisfactory,[1] it must govern the case under discussion, but emphasis must be placed on one or two qualifications. In the first place, the effect of the rule in *Ralli*'s case is not to destroy the contract or to invoke the doctrine of frustration; it is merely a defence to an action on that portion of the contract providing for payment at the stipulated place of payment.[2] Secondly, the rule in *Ralli*'s case is a rule of construction giving rise to a presumption as to the intention of the parties, which, however, under proper circumstances may be displaced: if at a time when currency restrictions were already in force in Germany a German buyer gave an unqualified undertaking to his English seller to procure a German bank's guarantee, which could not be obtained owing to German currency restrictions, the obligations usually could not be regarded as discharged.[3] Thirdly, though Scrutton L.J. speaks of 'an implied term of the continuing validity of such a provision', and although supervenient illegality will indeed usually operate as a discharge, the application of the rule to monetary obligations the performance of which is affected by currency regulations requires this modification, that, unless the

of performance was shown in *British Year Book of International Law*, 1937, pp. 97, 110 sqq. The observations in the text proceed on the basis that legality of performance is governed by the proper law of the contract, not by the law of the place of performance. As to this point also see the above-mentioned paper.

[1] An unqualified promise, contained in an English contract, to pay a definite sum of money in Barcelona was held to have become inoperative, because the intention of the parties was taken to be that supervenient illegality according to Spanish law would excuse the debtor. But as the stipulation of a place of payment in connexion with monetary obligations is of comparatively minor importance, it may safely be assumed that, if supervenient illegality under the law of the place of payment was at all within the contemplation of the parties, they would have made London the place of payment rather than released the debtor from a debt freely contracted. Scrutton L.J. said (at p. 301): '"I will do it provided I can legally do so" seems to me infinitely preferable to and more likely than "I will do it though it is illegal".' But would the debtor not have said, 'I will do it there provided I can legally do so, but if I cannot legally do it there, I will do it here'? Under German law such shifting of the place of payment would have been the solution: Supreme Court, 5 Dec. 1922, *JW.* 1924, 1357, No. 3.

[2] *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*, [1925] 2 K.B. 172, 208 per Atkin L.J.

[3] In such a case the same result was reached by the French Cour de Cassation: Req. 4 Jan. 1927, S. 1927, I. 188.

contract is still executory, neither the contract as a whole nor the promise to pay is discharged, but the duty to pay is merely suspended until the restoration of a free money market. That supervenient illegality may merely operate as a suspension is well recognized.[1] The expiration of a considerable period of time will often turn suspension into discharge, but this cannot be so in case of monetary obligations arising under an executed contract. Currency regulations are not, or at least are not intended to be, of a permanent nature, and it is obvious that a release of the debtor would not be compatible with the intentions of the parties on which the question depends. Therefore suspension, rather than discharge of the duty to pay, should be the consequence of the introduction of currency regulations at the place of payment, irrespective of whether the law of the place of payment itself provides for suspension[2] or for a complete or partial discharge; for under English law, if it is the proper law governing interpretation, the foreign legislation is not to be applied, but is merely to be considered as a fact in so far as it makes the payment illegal, and the influence of this fact on an English contract must be determined by English law.

If the decision of the House of Lords in *De Beéche* v. *South American Stores Ltd.*[3] is understood as proceeding on the basis of English law governing the contract,[4] its effect must be considered in this connexion. English companies, operating in Chile, had promised to pay sums of pounds sterling, payment to be 'effected monthly in advance in Santiago de Chile . . . by first class bills on London'. The defendants relied on the fact that payment in the stipulated manner had become impossible and illegal through supervenient Chilean currency legislation, and they deposited in court in Chile the amount due in Chilean pesos at the current rate of exchange, subject to a 20 per cent. deduction directed by Chilean law. The action brought in this

[1] See Benjamin, *On Sale*, p. 592, and *Andrew Millar & Co.* v. *Taylor & Co.*, [1916] 1 K.B. 402 (C.A.) especially at p. 411 per Swinfen Eady L.J. See also *Bank Line* v. *Capel & Co.*, [1919] A.C. 435; *The Penelope*, [1928] P. 180.

[2] As in Germany, see above, p. 265, n. 2. To release the debtor on the strength of the rule in *Ralli's* case, even if the law of the country which has created the illegality does not provide for such discharge, would be particularly hard.

[3] [1935] A.C. 148.

[4] On this point see above, p. 264, n. 2.

country to recover the promised sums of pounds sterling was dismissed. Lord Sankey started from the principle that[1]

'the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do'.

He then proceeded to construe the above-mentioned clause of the contract and arrived at the result 'that it called for payment of the rent by bills on London drawn in Chile'.[2] Finally he considered the effect of the Chilean legislation, which was that without the foreign exchange committee's leave

'it would have been illegal, and as it appears to me on the evidence, impossible, to make the payment of the rent in the manner prescribed. In no other form was rent payable. By English law an act is illegal if it necessitates something which is illegal.'[3]

Similarly Lord Russell said[4] that it was in his opinion

'clear that it became impossible for the lessees to perform their contracts under the leases without committing breaches of the Chilean law and rendering themselves liable to the consequent penalties. This affords a defence to the action.'

If it had been made clear that the case was decided on the basis of Chilean law being the proper law of the contract, it would perhaps be less difficult to deprive these statements of some of their definiteness and comprehensiveness; for then they would have been merely *obiter dicta* without any binding force on cases governed by English law.

If, however, English law was applied, both the dicta and the decision itself give rise to very grave problems. The decision was apparently in no way influenced by the fact that the defendants had deposited in court in Chile the due amount in Chilean pesos at the current rate of exchange for pounds sterling less a deduction of 20 per cent. directed by Chilean legislation. If English law applied, this deposit was indeed irrelevant and could not be regarded as a payment,[5] because there is no rule of English law which would allow or compel a debtor who has promised to pay pounds sterling by first class bills on London to discharge his obligation by paying or depositing 80 per cent.

[1] p. 158.

[2] Lord Russell said still more explicitly: 'Upon the construction of those documents no other form of rent is, in my opinion, reserved or payable' (at p. 160).

[3] pp. 159, 160.

[4] p. 162.

[5] Above, p. 256.

of his debt in pesos. If English law was applied, the deposit of 80 per cent. in pesos was therefore rightly disregarded. But on this premiss the conclusion to be drawn from the decision is this: if a payment, stipulated in an English contract, cannot be made in the prescribed manner at the prescribed place owing to the introduction of currency regulations at that place, the debtor is exonerated from paying anything, although the debtor is an English company with a registered office in London and although the creditor resides in Paris. The decision would thus nullify the attempt to show that, in cases where owing to currency restrictions at a place of payment an obligation cannot be fulfilled, the debtor's duties are not discharged, but merely suspended. Such over-recognition of foreign currency restrictions would hardly be reconcilable with the intentions of the parties from which, as is shown by *Ralli*'s case, it originates, nor would it be demanded by English public policy. It may be avoided if *De Beéche*'s case is regarded as resting on the assumption that Chilean law governed the contract.

(*b*) While the case where currency regulations are introduced at the place of payment thus presents very considerable difficulties, the matter becomes much simpler if an action on an English contract providing for payment in England is defended on the ground that, owing to the introduction of currency regulations in the debtor's home country, payment has become impossible or illegal.

Such a plea is entirely irrelevant. It is not supported by the proper law of the contract nor by the law of the place of payment. It is derived from the law of the country where the debtor resides or is domiciled or to which he is subject by nationality; but where the law governing the contract (and the law of the place of payment) is English, none of these circumstances allows a regard to be had to foreign legislation.[1] The case cannot be considered otherwise than on the basis of English law. From the point of view of English law there is no illegality and no impossibility. The principle that 'a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of *Krell* v.

[1] *Furness Withy & Co.* v. *Rederaktiebolaget Banco*, [1917] 2 K.B. 873, 876 per Bailhache J.

Henry,[1] even though there has been so grave and unforeseen a change of circumstances as to render it impossible for the vendor to fulfil his bargain'[2] applies *a fortiori* to monetary obligations which in the fullest sense of the word are contracts for the delivery of unascertained chattels. If a German debtor owes pounds sterling or reichsmarks in London under an English contract, there is obviously no impossibility of obtaining sterling or reichsmarks in London. The debtor may be prevented by the legislation of his home country from transferring the money from Germany or from disposing of his funds held outside Germany. But the question whence or how the debtor will secure the money to discharge his obligation cannot be said to have been within the contemplation of the parties so as to give rise to an implied condition. This is a risk assumed and to be borne by the debtor. Moreover, any attempt to exempt funds held outside Germany from the creditor's right of access would be against either English public policy or English procedural rules relating to the remedy and its enforcement.[3]

This result is not negatived by the rule in *Ralli*'s case[4] or in *De Beéche*'s case,[5] because both cases and the above-mentioned dicta therein relate to illegality or impossibility at the place of payment. Not even Lord Sankey's dictum[6] that 'by English law an act is illegal if it necessitates something which is illegal' demands a different conclusion. Apart from the fact that it is too widely formulated, inasmuch as it disregards the law under which the illegality arises, it is in the case under discussion impossible to say that the enforcement of the English judgment 'necessitates' something which is illegal, because compulsory execution on the debtor's property outside his home country does not involve any illegal act committed by the debtor. Any different view would amount to an unwarranted over-recognition of foreign currency regulations, and, incidentally, it should not be entirely lost sight of that there exists an equally widely formulated but essentially sound dictum of Lord Wrenbury:[7]

[1] [1903] 2 K.B. 740.

[2] *Blackburn Bobbin Co.* v. *Allen & Sons*, [1918] 1 K.B. 540, 550 per McCardie J., affirmed [1918] 2 K.B. 467; see also *Produce Brokers Co.* v. *Weis & Co.*, [1918] L.J.K.B. 472.

[3] See above, p. 266.

[4] [1920] 2 K.B. 287.

[5] [1935] A.C. 148.

[6] S.C. p. 160.

[7] *British & Foreign Marine Insurance Co.* v. *Sanday & Co.*, [1916] 1 A.C. 650, 672.

'Illegality according to the law of another country does not affect the merchant.'

On the other hand, ample and interesting support for the view here propounded is afforded by the decisions of both continental and American courts.

In *Germany* the question arose whether, in the exercise of its statutory power, a court should allow the Hungarian mortgagor to repay a mortgage on real estate situate in Germany at a later date than that provided in the deed on the ground that Hungarian currency restrictions made a payment impossible. The Berlin Court of Appeal refused to do so:[1]

'it is the effect of the legislation of the foreign debtor's home country that the prohibition to transfer the capital in his possession to Germany exposes him to the danger of losing the property. To protect him against this effect is not the task of German legislation or Court practice. It is the matter of the foreign currency legislation to protect, by the admission of exceptions, those persons who are subject thereto from losing their German property by the non-payment of due debts. If this is not done, the foreign debtor must put up with the consequences of the legislation of his home country. The German creditor and German economy should not have to suffer thereby.'

Similarly the *Austrian* Supreme Court held[2] that if the contract was governed by Austrian law and the place of payment was in Austria, no regard was to be had to Yugoslavian currency restrictions preventing the Yugoslavian debtor from paying. Although there is no *Swiss* decision relating to the facts now under discussion, the above-mentioned[3] decisions strongly suggest that the result arrived at on the basis of German law being the proper law would not have been different if Swiss law had been applicable. In *Holland* it was held by the Amsterdam Tribunal of first instance[4] that a German debtor, who under a Dutch contract had promised to pay florins in Amsterdam, could not rely on German currency restrictions, the reason being that the German legislation was not *force majeure*, but

[1] 27 Oct. 1932, *JW.* 1932, 3773; see also District Court Berlin, 19 Feb. 1932, *JW.* 1932, 2306.

[2] 10 Dec. 1935, Rechtsprechung, 1936, 22, 23, also in *RabelsZ.* 10 (1936), 398 and Clunet, 1937, 333; see also Wahle, *RabelsZ.* 9 (1935), 779 sqq., who discusses the decision of 29 Sept. 1934, Clunet, 1935, 191.

[3] Above, p. 261, n. 1.

[4] 23 June 1936, *Nederlandsche Jurisprudentie*, 1937, No. 17, and *Revue Critique de Droit International*, 1937, 474; similarly 22 May 1935, *Neder-*

'une circonstance personnelle entièrement anormale et située chez le débiteur', and that 'le créancier ne doit pas être empêché de se satisfaire lui-même là où il peut faire cela sans la collaboration du débiteur comme en l'espèce où le créancier, muni d'un jugement condamnant le débiteur au paiement, peut se procurer un titre exécutoire ou bien chercher à obtenir le paiement de la part d'une caution'. The *Italian* Corte di Cassazione also held that German exchange restrictions could not operate as a discharge of the obligation of a German borrower to repay the loan in Italy.[1] It is, however, of particular interest that the same result was reached by *American* courts in a number of cases.[2] The most important of these cases led to a decision of Judge Paterson, sitting in the District Court, Southern District of New York, in *Central Hanover Bank and Trust Co.* v. *Siemens & Halske A.G.*,[3] which was affirmed by the United States Circuit Court of Appeals[4] and in respect of which a writ of certiorari was denied by the United States Supreme Court.[5] The judgment states that the case was governed by the law of the United States, and proceeds as follows:

'The impossibility, illegality or excuse relied on here is impossibility, illegality or excuse by German law. But as the contracts were made here and were to be performed here, the German law relative to the performance is of no legal significance in the courts of this country. By our law the bonds were valid when issued; by our law there is no impossibility, illegality or other excuse for non-performance beyond the fact that payment in gold coin is dispensed with.'

This broad but sound *ratio decidendi* deserves to be remembered in cases where, the contract being governed by English law and the place of payment being situate in England, the debtor relies on the currency restrictions of his home country to support a plea of impossibility.

landsche Jurisprudentie, 1935, 590, and *B.I.J.I.* 33 (1935), 115, and Plesch, *Gold Clause* i. 90.

[1] 30 July 1937, *Rivista del Diritto Commerciale* 1938, ii. 117.

[2] *Perry* v. *Norddeutscher Lloyd* (1934), 150 Misc. 73, 268 N.Y. Supp. 525; *Sheppard* v. *Hamburg-Amerikanische Paketfahrt A.G.*, *New York Law Journal*, 14 March 1935; *Marks* v. *United Steel Works Corporation* (1935), 160 Misc. 678, 289 N.Y. Supp. 525; *Glynn* v. *United Steel Works Corporation* (1935), 160 Misc. 405, 289 N.Y. Supp. 1037, and in Plesch, *Gold Clause*, ii. 72.

[3] (1936) 15 F. Supp. 927; also Clunet, 1936, 1129; *B.I.J.I.* 35 (1936), 136; Plesch, *Gold Clause*, ii. 67.

[4] 84 F (2d) 993 (2nd Dept., 1936).

[5] 299 U.S. 585.

CHAPTER IX

THE INSTITUTION OF LEGAL PROCEEDINGS AND ITS EFFECT UPON FOREIGN MONEY OBLIGATIONS

I. The problem stated. II. The institution of legal proceedings and its effects in foreign laws. III. The rules of English law: (1) necessity of conversion; (2) the rate of exchange to be applied in case of unliquidated damages; (3) the rate of exchange to be applied in case of debts; (4) the effect of conversion under the breach-date rule. IV. The merits of the English rules.

> 'One of the most significant themes in the study of legal history is the growth of the power to think of law apart from its procedure.'—PLUCKNETT.

I

PURSUING the rough scheme which has been adopted for the logical development of the law of foreign money obligations, we find that after determining the money of account (fixing the substance of the obligation), the quantum of the obligation, and the money of payment (fixing the mode of payment), there must now follow a discussion of the question whether and how, if payment must be enforced by action, legal proceedings affect the structure of foreign money obligations.[1]

At first sight it is tempting to answer that the institution of legal proceedings has no effect whatsoever on foreign money obligations. Indeed, it cannot be controverted that the object of legal proceedings is neither to create nor to nullify, but to enforce rights existing under the applicable substantive law. Consequently the law of procedure should not in any way alter the legal position of foreign money obligations produced by the rules of private international and substantive law which were explained in the preceding chapters.

Unfortunately, however, no such happy solution has been reached by English law. Under these circumstances it becomes particularly important to arrive at a clear statement of the

[1] This is the problem on which theoretical research of Anglo-American lawyers has hitherto concentrated. See McNair, 37 (1921), *L.Q.R.* 387; Negus, 40 (1924), *L.Q.R.* 149. See also Keeton, 19 (1934), *Iowa L.J.* 218; Gottschalk, *Journal of Comparative Legislation*, 17 (1935), 47. As to America see below, p. 282, n. 2.

problem involved. For although, as we have seen,[1] it is to a great extent difficult to distinguish between cause and effect, the law of procedure does not always interfere with the character of a foreign money obligation as formed by the rules of substantive law. No problem exists where, even indirectly, the claim is expressed in pounds sterling. If, for instance, 100 Canadian dollars are payable in the City of London and if the contract between the parties or the law governing the obligation provides for the conversion into pounds sterling at a certain rate of exchange,[2] and the plaintiff brings an action here and sues for a sum of pounds sterling, there is no departure from the position created by the rules of substantive law. Or if under an insurance policy, providing for an indemnity in pounds sterling, compensation is claimed in respect of a loss measured in Latvian lats,[3] the necessity of effecting a conversion of lats into pounds sterling does not arise under the law of procedure, but under substantive law. The peculiar problem created by the law of procedure appears only in cases where, outside the sphere of proceedings, pounds sterling are not the envisaged money of payment. If a sum of pounds sterling is payable in Paris in French francs at a certain rate of exchange; if Canadian dollars are payable in London with an effective clause; if reichsmarks are owed by a Hamburg debtor to a Berlin firm; if kroners are owed by a Swedish importer to an Amsterdam exporter—in such cases the issue of a writ in England and the ensuing necessity to claim pounds sterling create difficulties.

Even in such cases, however, it should always be remembered that a conversion into pounds sterling for the purpose of legal proceedings in this country presupposes the determination of that which is to be converted, and therefore it is clear that, quite apart from the limits imposed upon its ambit,[4] English law of procedure does not solve all problems. It may suffice to refer to one example. If 'dollars' are promised to be paid in Paris and action is brought here to recover them, it may become necessary (1) to ascertain the proper law of the obligation, (2) to determine, on the basis of the law found to be applicable, the money of account, i.e. whether Canadian or American dollars form the substance of the debt, (3) to determine whether, upon

[1] Above, p. 235.
[2] Above, pp. 140, 245.
[3] Above, p. 253.
[4] Below, p. 289.

the debtor's default, a sum of French francs became payable.[1] Unless regard is had to such questions arising under the applicable substantive law, it may happen that the amount of pounds sterling claimed in legal proceedings instituted here is wrongly calculated.

II

In 1898 Lord Lindley said[2] that

'if the defendants were within the jurisdiction of any other civilized State and were sued there, as they might be, the courts of that State would have to deal with precisely the same problem, and to express in the currency of that State the amount payable by the defendants instead of expressing it in Mexican dollars'.

But, at least at the present time, the idea that the issue of a writ renders it necessary to convert the sum of foreign currency claimed by the plaintiff into the *moneta fori* is by no means so general as to warrant that statement.

In the following countries it is established that writ as well as judgment may be for a sum of money foreign to the forum: Austria,[3] Egypt,[4] Germany,[5] Italy,[6] Norway,[7] Poland,[8] Switzerland.[9] In some of these countries it is emphasized that the creditor of a foreign money obligation cannot sue otherwise than by demanding the foreign money which is owed, that an action in which a sum of *moneta fori* is claimed may even be dismissed, and that it is within the discretion of the defendant to decide whether or not he wishes the judgment, if it is given against him, to provide for an option to pay the equivalent in the *moneta fori* at the rate of exchange of the day of payment.[10]

[1] See the French cases above, p. 242, n. 5.

[2] *Manners* v. *Pearson*, [1898] 1 Ch. 581, 587.

[3] Nussbaum, *Geld*, p. 196, Austrian Supreme Court, Rechtsprechung, 1934, No. 267 and *RabelsZ.* 10 (1936), 777.

[4] Court of Appeal of the Mixed Tribunal, 13 April 1932, *Gazette des Tribunaux Mixtes*, 23, 281, No. 288; 7 June 1934, ibid., 24, 347, No. 410.

[5] See below n. 10 and p. 280, n. 1.

[6] See Ascarelli, *RabelsZ.* 2 (1928), 793, 809.

[7] Frederiksen, *34th Report of the International Law Association* (1926), p. 559.

[8] This seems to follow from the remarks of von Wendorff, *Zeitschrift für osteuropäisches Recht*, ii (1935), 439, 442, and see Supreme Court, 4 Jan. 1937, ibid. iv (1938), 525.

[9] See p. 281, n. 3.

[10] This is so in Germany: Supreme Court, 4th June 1919, *RGZ.* 96, 121, 123; 29 Sept. 1919, *RGZ.* 96, 270; see also 24 Oct. 1923, *JW.* 1924, 1518 and compare Staudinger–Werner, *Kommentar zum Bürgerlichen Gesetzbuch*, ii (1), p. 99. If

The question how execution is to be issued on a judgment which does not provide for such an option is a matter of some difficulty in Germany;[1] but in Egypt it has been held that the judgment debtor may pay in Egyptian money at the rate of exchange of the day of payment,[2] and in Switzerland the point is settled by statute.[3]

In two countries, namely in France[4] and Belgium,[5] the judgment may or perhaps must be for such a sum of francs as is

the plaintiff first obtains a judgment for a sum of marks which does not suffice to satisfy the claim for a sum of foreign money, he may demand the balance in a second action, there being no estoppel: Supreme Court, *JW.* 1921, 22; as to the reasoning of the decision see above, p. 134.

[1] See Supreme Court, 16 Dec. 1922, *RGZ.* 106, 76 and Staub–Gadow, *Kommentar zum Handelsgesetzbuch*, iii. 274. But it seems that even if the judgment does not provide for the option mentioned in the text, the judgment debtor may pay in German money at the rate of exchange of the day of payment: Supreme Court, 15 Dec. 1924, *JW.* 1925, 467 at p. 469. In case of bankruptcy proceedings it becomes unavoidable to convert a debt for a sum of foreign money into the *moneta fori*, and conversion must be effected at the rate of exchange of the day the court makes the decree of bankruptcy: see s. 69, Konkursordnung, and Nussbaum, *Geld*, p. 197.

[2] See the decision quoted, p. 280, n. 4.

[3] See Art. 67, Schuldbeitreibungsgesetz of 11 April 1889, and the decisions of the Federal Tribunal of 12 Oct. 1917, *BGE.* 43, iii. 270; 1 Dec. 1920, *BGE.* 46, ii. 406; 10 June 1925, *BGE.* 51, iii. 180.

[4] Whether writ and judgment could be for a sum of foreign money only is doubtful; a negative answer is given by the Cour de Paris, 26 Jan. 1929, Clunet, 1930, 380, and *Revue de droit maritime comparé, Supplément*, 7 (1929), 157. The usual method is to sue for a sum of foreign money 'ou la contrevaleur en francs français au cours du jour de paiement'. See Cass. Req. 8 Nov. 1922, S. 1923, 1. 149, and Clunet, 1923, 576; 9 March 1925, S. 1925, 1. 257 (5e espèce), and Clunet, 1926, 103; 19 March 1930, Clunet, 1931, 1082; Cass. Civ. 8 July 1931, Clunet, 1932, 721; Cour de Lyon, 8 June 1920, Clunet, 1922, 997; Cour de Paris, 18 Oct. 1922, Clunet, 1924, 119; 3 May 1926, Clunet, 1927, 1087; 12 May 1928, Clunet, 1929, 111; 16 June 1933, Clunet, 1924, 938. See also Cass. Civ. 5 June 1934, Clunet, 1935, 90, from which it follows that the decision under appeal had given judgment 'à payer en francs suisses ou en sommes d'une valeur équivalente'. See also the anonymous note in Clunet, 1937, 53. In case of bankruptcy proceedings foreign money obligations are converted into francs at the rate of exchange of the day of the 'jugement déclaratif de faillite': Cour de Douai, 7 Dec. 1933, Clunet, 1934, 946; similarly in *Italy*: see Ascarelli, l.c., at p. 810.

[5] Art. 3 of a statute of 30 Dec. 1885 prevents a judge from giving judgment for a sum of foreign money; see Brussels Court of Appeal, 23 Dec. 1922, *Revue de droit bancaire*, 1 (1923), 534, and Piret, No. 28. But a judge may order a defendant to pay 'la somme nécessaire pour reconstituer à l'appelant au jour du payement l'équivalent de £1487': Cass. 17 Jan. 1929, *Revue de droit maritime comparé*, 21 (1930), 164 and 23 (1931), 91, and see Piret, Nos. 29 sqq., who enumerates a number of decisions applying the rate of exchange of the day of breach.

equivalent to the sum of foreign money at the rate of exchan of the day of payment. But in effect this amounts to a jud ment providing for a sum of foreign money.

In the United States it was enacted as early as 1792 th 'all proceedings in the courts shall be kept and had' in dollar But the question of the method of converting a sum of forei money into dollars for the purpose of legal proceedings was n definitely answered until comparatively recent times.[2]

The modern practice of the Federal courts which, after havi been anticipated in two decisions of Judge Augustus N. Hand was developed in some decisions of the Supreme Court of t United States, rests upon the following distinction. Where t breach or wrong occurred in a foreign country (especially b non-payment of money due there), the damages are measur in the currency of that country and the dollar equivalent c culated at the rate of exchange obtaining at the date of jud ment can be recovered; where the breach or wrong occurre in the United States (especially by non-payment of forei money due there), the damages, being measured in dollars, a to be converted at the rate of exchange of the day of brea or wrong.

The latter part of this statement is supported by *Hicks Guiness*,[4] which related to a debt of 1,079 odd marks owed by German debtor to an American creditor on 31 December 191 and where Mr. Justice Holmes delivered the opinion of unanimous court. The opinion rests on the ground that accor ing to American substantive law, which was held to be a plicable to the contract, the plaintiff, upon the defendant

[1] See above, p. 137, where a similar Canadian enactment is mentioned.

[2] The question is discussed by Gluck, 22 (1922), *Col. L.R.* 217; Drake, (1925), *Mich. L.R.* 696; 25 (1927), *Mich. L.R.* 860; 28 (1930), *Mich. L.R.* 2 Rifkind, 26 (1926), *Col. L.R.* 559; Maw (whose authorship is disclosed Professor Beale, *Conflict of Laws*, s. 424), 40 (1927), *Harv. L.R.* 619; Fraen 35 (1935), *Col. L.R.* 360.

[3] Sitting in the District Court, Southern District of New York. In *Verdi* (1920), 268 Fed. 908, he held that where owing to a collision of ship New York harbour a claim for damages arose, the damages being measured sterling, the rate of exchange of the day of wrong was to be applied, since t tort was committed in the United States. In *The Hurona* (1920), 268 Fed. 91 he held that an advance of 119,000 French francs made and repayable Marseilles was recoverable at the rate of exchange of the day of judgme See also *The Saigon Maru* (1920), 267 Fed. 881, District Court, District Oregon.

[4] (1925) 269 U.S. 71.

default, had acquired an optional right to be paid in dollars; the decision therefore merely applies a rule of American substantive law which was discussed in another connexion[1] and which prevents it from falling under the head of the problem now under examination.

The authority for the former part of the above statement is *Deutsche Bank Filiale Nürnberg* v. *Humphreys*.[2] The plaintiff, an American citizen, had deposited with the defendants in Germany a sum of marks payment of which he unsuccessfully demanded on 12 June 1915. The courts below held that the marks were to be translated into dollars at the rate of exchange of the day when the demand was made, i.e. the day of breach. A sharply divided Supreme Court reversed the judgments, Mr. Justice Holmes delivering the opinion of the majority:[3]

'In this case unlike *Hicks* v. *Guiness* at the date of the demand the German bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. It has incurred no additional or other one since. A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. We may assume that when the bank failed to pay on demand, its liability was fixed at a certain number of marks both by the terms of the contracts and by the German law—but we may also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See *Société des Hôtels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Obviously in fact a dollar or a mark may have different values at different times, but to the law that establishes it, it is always the same. If the debt had been due here and the value of the dollars had dropped before suit was brought, the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off.'

[1] Above, p. 244. [2] (1926) 272 U.S. 517. [3] p. 519.

And later he added:[1]

'Here we are lending our courts to enforce an obligation (as we should put it, to pay damages) arising from German law alone and ought to enforce no greater obligation than exists by that law at the moment when suit is brought.'

It is generally held that the concluding three words of Mr. Justice Holmes are due to an obvious error and that he meant to and did apply the rate of exchange prevailing at the date of judgment.[2] The distinction between *Hicks* v. *Guiness*, where the debt was held to be payable in New York and subject to American law, and *Deutsche Bank Filiale Nürnberg* v. *Humphreys*, where it was payable in and subject to the law of a foreign country, was again stressed by Mr. Justice Holmes in *Zimmerman* v. *Sutherland*.[3]

Though the doctrine thus propounded by the Supreme Court of the United States has since been followed in some decisions of Federal courts,[4] its details are not yet clearly established. In *Hicks* v. *Guiness* the obligation was both subject to American law and payable in America; in *Deutsche Bank Filiale Nürnberg* v. *Humphreys* it was both subject to German law and payable in Germany. The questions how the conversion is to be effected if the place of payment is in another country than that to whose laws the contract is subject, which law governs the determination of the situs of the place of payment, and how the money of account is to be ascertained, have not yet received a satisfactory answer; in the last connexion it is apparently assumed that, if an obligation 'arises' in a certain country, it is subject to the laws and payable in the money of that country.[5, 6] On

[1] (1926), 272 U.S. 517, 520.

[2] *Thornton* v. *National City Bank*, 45 F. (2d) 127, 130; *Tillmann* v. *Russo-Asiatic Bank* (1931), 51 F. (2d) 1023, 1025; *Royal Insurance Co.* v. *Compañia Transatlantica Española*, 57 F. (2d) 288, 292; *The Integritas*, [1933] A.M.C. 165 (District Court, District of Maryland, 1933); *The Macdonough*, [1934] A.M.C. 234 (District Court of New York); *The West Arrow*, [1936] A.M.C. 165 (U.S. Circuit Court of Appeal, 2d, 1936).

[3] (1927) 274 U.S. 253, at pp. 255, 257; see also *Sutherland* v. *Mayer* (1926), 271 U.S. 272.

[4] See above, n. 2, and see *Restatement of Conflict of Laws*, ss. 423, 424.

[5] Such a view becomes plausible if it is remembered that Professor Beale's territorial theory always exercised great influence on Mr. Justice Holmes's mind: see e.g. his opinion in *Slater* v. *Mexican National Railway Co.* (1904), 194 U.S. 120.

[6] In *The Verdi*, *ubi supra*, it was apparently believed that the mere fact that

the other hand, it appears that no distinction is made between a claim for damages and a claim for payment of a debt.[1]

It is, however, noteworthy that the doctrine of the Supreme Court of the United States was not followed by the New York Courts.[2] Already before that doctrine was formulated the New York courts had enunciated the principle, to which they have since adhered, that in the absence of special circumstances showing such rule to be inappropriate, a foreign money obligation the subject-matter of an action in New York must be converted into dollars at the rate of exchange prevailing on the date of breach or wrong.[3] It is not an exceptional circumstance within the meaning of this rule that the action is for a debt, not for damages,[4] or that the fluctuations of exchange went against the (American) plaintiff,[5] or that the obligation is

the tort was committed in New York meant that the damages were payable there. In *The West Arrow, ubi supra*, the court seems to have assumed that, as the breach was in Holland and the ensuing obligation was expressed in Dutch guilders, it was performable in Holland. In *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America*, 28 F. (2d) 449 (Southern District of New York 1928) aff'd 31 F. (2d) 658, cert. den. (1929), 280 U.S. 571, it was held that the right to contribution in general average 'crystallized upon the termination of the voyage, and since the voyage ended in an American port the owner became then and there entitled to receive contribution in dollars. This indebtedness arose in the United States, was payable in its currency and subject to its laws'. Therefore, the rate of exchange prevailing on the date of the termination of the voyage was applied. See also *Nevillon* v. *Demmer* (1920), 114 Misc. 1, 185 N.Y. Supp, 443, where francs which were promised in a note and were payable in Paris were converted into dollars at the rate of exchange prevailing at the commencement of the action, because the notes 'became payable in dollars (*sic*) upon plaintiff's demanding of defendant their payment in this state. The commencement of the action was equivalent to such a demand.'

[1] *The Integritas, ubi supra.*

[2] See generally the survey in the paper of Fraenkel, l.c.

[3] *Gross* v. *Mendel* (1918), 225 N.Y. 633, 121 N.E. 871; *Hoppe* v. *Russo-Asiatic Bank* (1923), 200 App. Div. 400, 193 N.Y. Supp. 250, aff'd 253 N.Y. 37, 138 N.E. 497; *Kantor* v. *Aristo Hosiery Co.* (1928), 222 App. Div. 502, 226 N.Y. Supp. 582, aff'd 248 N.Y. 630, 162 N.E. 553; *Sokoloff* v. *National City Bank* (1928), 250 N.Y. 69, 164 N.E. 745; *Richard* v. *National City Bank of New York* (1931), 231 App. Div. 559, 248 N.Y. Supp. 113, see 31 (1931), *Col. L.R.* 882; *Parker* v. *Hoppe* (1931), 257 N.Y. 333, 178 N.E. 550, see 45 (1932), *Harv. L.R.* 1119; *Sulka* v. *Brandt* (1935), 154 Misc. 534, 277 N.Y. Supp. 421: the rule was applied to the detriment of the American plaintiff, who had sold goods to France for French francs and who had to suffer loss owing to the depreciation of the dollar. See also *Marburg* v. *Marburg* (1866), 26 Md. 8; *Nickerson* v. *Soesman* (1867), 98 Mass. 364.

[4] *Kantor* v. *Aristo Hosiery Co., ubi supra.*

[5] *Sulka* v. *Brandt, ubi supra.*

subject to the laws of and payable in a foreign country.[1] The judgment-date, or rather the trial-date rule was, however, applied in *Sirie* v. *Godfrey*,[2] which related to a claim for 10,450 French francs made by a Paris ladies' dressmaker under a French contract in respect of goods sold to the defendant in 1914 in Paris. The plaintiff was not allowed to recover at the rate of exchange prevailing in 1914:

'This was a French contract for the sale in France of French goods for which the purchaser agreed to pay in French francs at Paris, France. At any time before suit was brought the defendant could have tendered the plaintiff at Paris, France, the 10450 francs in full payment of her claim, and plaintiff would have been compelled to accept same . . . The purchase price of the goods in question was not payable in American dollars, nor was it payable in German marks. It was payable in French francs, and by merely bringing action in this jurisdiction the plaintiff, I apprehend, acquired no right to a more favorable judgment than she could have obtained had action been brought in France.'

Although the result reached by this decision corresponds to the doctrine of the Supreme Court of the United States, it is not easy to reconcile it with other decisions of the New York courts.[3] On very similar facts it was, however, followed in *Metcalf* v. *Mayer*,[4] but it was distinguished in the startling decision of *Orlik* v. *Wiener Bankverein*,[5] where the facts were practically on all fours with *Deutsche Bank Filiale Nürnberg* v. *Humphreys*.[6] The plaintiff had 60,000 kroners on deposit with the defendants in Vienna for which in July 1919 he had paid $2,190. In September 1919 he demanded payment in Vienna, which was refused. On the authority of *Sirie* v. *Godfrey*[7] the defendants contended that the only obligation was to pay 60,000 kroners which at the time of trial had a value of $19·50. The court discussed the English cases of *Di Ferdinando* v. *Simon Smits & Co.*[8] and of *Société des Hôtels Le Touquet* v. *Cummings*[9]

[1] *Gross* v. *Mendel, Hoppe* v. *Russo-Asiatic Bank, Kantor* v. *Aristo Hosiery Co., ubi supra.* Therefore the breach-date rule is applied even where according to *Deutsche Bank Filiale Nürnberg* v. *Humphreys, ubi supra,* the judgment-date rule would apply.

[2] (1921), 196 App. Div. 529, 188 N.Y. Supp. 52.

[3] See the cases mentioned above, n. 1.

[4] (1925), 213 App. Div. 607, 211 N.Y. Supp. 53.

[5] (1923), 204 App. Div. 432, 198 N.Y. Supp. 413.

[6] (1926), 272 U.S. 517.

[7] Above, n. 2.

[8] [1920] 2 K.B. 704.

[9] [1922] 1 K.B. 451.

and, relying on Scrutton L.J.'s remarks[1] about *Pilkington* v. *Commissioners for Claims on France*[2] and about the rule that 'personal property follows the domicil', it arrived at this conclusion:

'In the case at bar, however, the plaintiff is not a resident of Austria. The delivery promised was to a foreigner, an American resident, of 60,000 kronen on demand. This contract was broken on 2nd September 1919, and within the authorities above cited plaintiff was entitled to the exchange value of such kronen at the time of breach.'

The importance of the plaintiff's nationality or residence cannot be readily appreciated.

In the result it seems that Mr. Fraenkel is justified in concluding[3] that the New York courts adhere to the breach-date rule, unless the transaction is 'wholly national in character',[4] in which case the judgment-date (or perhaps the trial-date) rule applies.

Where the contract is governed by American law and where the place of payment is in the United States, the application of the breach-date rule by the Federal and the New York courts is at least not exposed to the criticism that the mere institution of legal proceedings affects the quantum of the obligation; for under such circumstances the courts merely applied a rule of American substantive law,[5] the soundness or unsoundness of which does not matter in the present connexion. On the other hand, where the judgment-date rule was applied, the decisions deserve approval, because they prevented any benefit or detriment accruing from the mere fact that proceedings were brought in the United States. It is the lack of a satisfactory line of demarcation between the two groups and the predominant influence given in New York to the breach-date rule which is unsatisfactory. This will be explained in greater detail when the merits of the rule prevailing in this country are discussed.[6]

[1] At pp. 460, 461; they are discussed above, p. 193, n. 3, and p. 216.
[2] (1821), 2 Knapp P.C. 7.
[3] l.c., at p. 389.
[4] The exact meaning of this proviso is, however, by no means clear; the problematical cases are those mentioned on p. 286, nn. 1 and 5.
[5] See above, p. 244.
[6] Below, pp. 306 sqq.

III

Though English law seems to have exercised considerable influence on the development of the pertinent rules of American law, it will appear from what follows that in the present state of the authorities English law itself leaves many questions yet to be settled.

1. Some cases decided in the early seventeenth century, it is true, already indicate the practice, though perhaps not the necessity, of converting foreign money obligations into pounds sterling for the purpose of legal proceedings here.[1] But it was not until 1898 that it was said with precision and emphasis that 'the Courts of this country have no jurisdiction to order payment of money except in the currency of this country',[2] and since then similar statements have repeatedly been made.[3]

In the absence of statutory provisions such as exist in the United States and in Canada it is not easy to understand the reasons necessitating the rule or to explain it on rational grounds. Whether it is an outcome of those forms of actions which 'rule us from the grave',[4] or whether it follows from the fact that the claim is merged in the judgment[5] or that on principle specific performance cannot be asked for,[6] it is a dogma which, as the later discussion will show, leads to serious difficulties and regrettable results. It stands, however, firmly established, and as a rule of procedure must always be applied by an English court, if a judgment ordering the defendant to pay a sum of money is desired.[7]

[1] *Bagshaw* v. *Playn*, Cro. Eliz. 536; *Draper* v. *Rastal*, Cro. Jac. 88; *Rands* v. *Peck*, Cro. Jac. 618; *Ward* v. *Kidswin or Kedgwin* (1625), Latch 77, 84, Palmer 104; see also the cases p. 300, n. 2 below.

[2] *Manners* v. *Pearson*, [1898] 1 Ch. 581, 587 per Lindley M.R.

[3] *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409, 415 per Scrutton L.J.; *The Volturno*, [1921] 2 A.C. 544, 560 per Lord Parmoor; *In re Chesterman's Trust*, [1923] 2 Ch. 466, 490 per Younger L.J.

[4] Negus, l.c., pp. 159, 161.

[5] Van Praag, quoted by Nussbaum, *Geld*, p. 219.

[6] Nussbaum, *Geld*, p. 219; see *Lloyd Royal Belge* v. *Louis Dreyfus & Co.* (1927), 27 Ll.L.R. 288, 294. This explanation involves the proposition that an action for the recovery of a sum of foreign money is not an action in debt, which is doubtful; see below, pp. 298 sqq.

[7] There is no case where the plaintiff desisted from converting the debt and where, on this ground, the action was dismissed. It may be that the voluntarily adopted practice of converting the claim in course of time led to the conviction that jurisdiction depended on such conversion.

On the other hand, where this condition is not fulfilled, no conversion is necessary. Thus no conversion takes place in an action for redemption of a loan[1] or for a declaratory judgment,[2] and it would also appear that in proper circumstances a specific performance action can be brought to recover a sum of foreign money.[3]

2. The question what rate of exchange must be adopted as the basis for converting a sum of foreign money into pounds sterling has been definitely settled by the House of Lords in *The Volturno* with regard to damages in tort.[4] A collision having occurred in the Mediterranean, repairs to the ship became necessary and damages were claimed in respect of deductions made from the hire of the ship owing to its detention during the time the repairs were carried out. Hill J. decided[5] that the amounts of Italian lire representing the loss of hire were to be converted into English pounds at the rates of exchange ruling on the last days of the respective periods of detention, and this decision, which agrees with the judgment of the Privy Council in *Pilkington* v. *Commissioners for Claims on France*,[6] was affirmed by the Court of Appeal and the House of Lords. The decision is generally understood as meaning that the conversion must be effected as at the date of the breach or wrong.[7] But in *The*

[1] *British Bank for Foreign Trade* v. *Russian Commercial & Industrial Bank* (No. 2) (1921), 38 T.L.R. 65, 67. In Stiebel, *Company Law and Precedents*, 3rd ed., p. 467, it is said that 'where a mortgage is to secure foreign money, such money will in an action for redemption or foreclosure be converted into English money as at the date of the certificate'. Reliance is placed on *In re Chesterman's Trust*, [1923] 2 Ch. 466, which, however, dealt with a different question.

[2] In such a case there is no judgment or order for the payment of money within the meaning of the dicta in the cases quoted, p. 288, nn. 2, 3. But see *Kornatzki* v. *Oppenheimer*, [1937] 4 All E.R. 133, and the comments above, p. 207, n. 3.

[3] In *Lloyd Royal Belge* v. *Louis Dreyfus & Co.* (1927), 27 Ll. L.R. 288 (C.A.) 293, Romer J. said that such an action would not have been entertained in equity 'for this among other sufficient reasons that damages at common law would have been a perfectly sufficient and adequate remedy'. But in many cases the rules relating to the date with reference to which the conversion must be effected produce such results that a common law action is completely inadequate and unable to do justice.

[4] [1921] 2 A.C. 544; that it is doubtful whether the case falls under the head of the matter under discussion here, has been mentioned above, p. 253.

[5] [1920] P. 477.

[6] (1821), 2 Knapp 7.

[7] See, e.g., *In re British American Continental Bank, Goldzieher's and Penso's Claim*, [1922] 2 Ch. 575, 587 per Warrington L.J.; *Crédit Liégeois Claim*, [1922] 2 Ch. 589, 594 per P.O. Lawrence J.; *In re Chesterman's Trust*, [1923] 2 Ch. 466, 492 per Younger L.J.; *Ottoman Bank* v. *Chakarian* (No. 1), [1930] A.C. 277 (P.C.).

Volturno the basis in fact adopted was not the rate of exchange of the day on which the collision occurred, i.e. the day of wrong, which was 17 December 1917, but the rates of the last days of the periods of detention, which were 30 December 1917 and 18 February 1918. Though the learned Lords did not emphasize the distinction,[1] the usual formula is therefore perhaps not quite an accurate statement of the effect of the decision; but it is probably the better one, since in most cases damage really arises when the tort is committed.[2] The exact conclusion from *The Volturno* has apparently only been drawn by Romer L.J., when he said in *The Baarn* (No. 1)[3] that

'the damage sustained by the plaintiffs would be taken to be the value of that commodity (pesos) in sterling at the time that the plaintiffs transferred it to the repairers or were prevented from receiving it by reason of the vessel being laid up'.

In anticipation or on the strength of *The Volturno* the breach-date rule has also been applied with regard to damages for breach of contract by the Privy Council,[4] by the Court of Appeal,[5] by Bailhache J.,[6] by McCardie J.,[7] and by the High Court of Australia.[8] The interesting question whether breach of contract occurs at the date when the letter repudiating it is sent off, or at the date when that letter is received, was left undecided by the Court of Appeal in *Bain* v. *Field*.[9]

There is only one case where damages are to be converted into pounds sterling at the rate of exchange prevailing on the

[1] But see Lord Wrenbury at p. 563: 'at the date of tort'.

[2] But on facts which are virtually identical with those of *The Volturno* the Italian Corte di Cassazione held that pounds sterling spent for the repairs on a ship were to be converted into lire at the rate of exchange of the day when they were *spent*: 26 May 1931, *Revue de droit maritime comparé*, 2 (1931), 439.

[3] [1933] P. 251, 272.

[4] *Ottoman Bank* v. *Chakarian* (No. 1), [1930] A.C. 277.

[5] *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 2 K.B. 704 (overruling *Kirsch* v. *Allen Harding & Co.* (1920), 123 L.T. 105 and *Cohn* v. *Boulkon* (1920), 36 T.L.R. 767); *Bain* v. *Field* (1920), 5 Ll.L.R. 16; *In re British American Continental Bank Ltd., Goldzieher and Penso's Claim*, [1922] 2 Ch. 575; *Lissen & Rosencranz's Claim*, [1923] 1 Ch. 276.

[6] *Barry* v. *van den Hurk*, [1920] 2 K.B. 709.

[7] *Lebeaupin* v. *Crispin*, [1920] 2 K.B. 714.

[8] *McDonald* v. *Wells* (1931), 45 Commonwealth L.R. 506, dealing with the relations between New Zealand and Australian pounds.

[9] (1920), 5 Ll.L.R. 16.

day of judgment. This is so under s. 1 (5) of the Carriage by Air Act, 1932, 22 & 23 Geo. V, ch. 36, which provides that

'any sum in francs mentioned in Article 22 of the said first Schedule shall, for the purposes of any action against a carrier, be converted into sterling at the rate of exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the Court'.

3. As regard actions for debts the position is much less settled. It is true that not only text-book writers,[1] but also a number of judges of first instance,[2] have applied the breach-date rule in this respect also, and have accordingly held that the debt is to be converted into English money at the rate of exchange of the day when the debt fell due. This view also found favour with Maclean J., sitting in the Saskatchewan King's Bench,[3] and it was followed by Mann J. sitting in the Supreme Court of Victoria,[4] and in Scotland by the Court of Session (Outer House).[5] In an earlier English decision it was held that the conversion must be effected at the rate of exchange of the day when the balance due is ascertained by taking the whole account, not of the day when each payment became due;[6] and it has also been decided that the date for the conversion of foreign money to which mortgagees of reversionary interests in a fund are entitled on the distribution of the fund is the date of the Master's certificate, not the date when the fund falls in

[1] Dicey, p. 728; Westlake, *Private International Law*, 7th ed., pp. 314 sqq.; Chitty, *On Contracts*, 19th ed., p. 274.

[2] *In re British American Continental Bank, Crédit Général Liégeois Claim*, [1922] 2 Ch. 589 (P.O. Lawrence J.); *Uliendahl* v. *Pankhurst Wright & Co.* (1923), 39 T.L.R. 628 (Rowlatt J.); *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166 (Bailhache J.); on the decision of the Court of Appeal in *Lloyd Royal Belge* v. *Louis Dreyfus & Co.* (1927), 27 Ll. L.R. 288, see below, pp. 297 sqq. It is of course clear that if the rate is arranged by agreement between the litigants, this is binding on the court: *Manners* v. *Pearson*, [1898] 1 Ch. 581, 592 per Vaughan Williams L.J. But unless payment in England is envisaged, such cases will be rare.

[3] *Simms* v. *Cherrenkoff* (1921), 62 D.L.R. 703.

[4] *In re Tillam Boehme & Tickle Pty. Ltd.*, [1932] Vict. L.R. 146.

[5] *Macfie's Judicial Factor* v. *Macfie*, 1932 Sc.L.T.Rep. 460, where Lord Eldon said to apply the rate of exchange of the day of judgment would be 'absurd'.

[6] *Manners* v. *Pearson*, [1898] 1 Ch. 581 (C.A.). The dissenting judgment of Vaughan Williams L.J. has since so often been quoted with approval that it may be doubtful whether the view taken by the majority (Lindley M.R. and Rigby L.J.) would find favour with the House of Lords.

by the death of the tenant for life.[1] Finally, the Foreign Judgments (Reciprocal Enforcement) Act 1933, 23 Geo. V, ch. 13 provides in s. 2 (3) that

'Where the sum payable under a judgment which is to be registered is expressed in a currency other than the currency of the United Kingdom, the judgment shall be registered as if it were a judgment for such a sum in the currency of the United Kingdom as, on the basis of the rate of exchange prevailing at the date of the judgment of the original court, is equivalent to the sum so payable.'

However, the matter cannot be left here. For it appears that the application of the breach-date rule to actions for the recovery of a debt expressed in foreign money cannot be regarded as a settled principle of law. There is not only the Privy Council case of *Bertram* v. *Duhamel*,[2] which seems to favour the judgment-date rule[3] in certain cases, and there are not only a number of dicta of various members of the Court of Appeal which leave open the question of the proper date to be taken in connexion with actions for debt,[4] but there is also one decision of the Court of Appeal which virtually adopts the judgment-date rule. It thus becomes necessary to enter upon the discussion of a subject which raises the most involved and intricate questions.

The case on which it concentrates is *Société des Hôtels Le*

[1] *In re Chesterman's Trust*, [1923] 2 Ch. 466 (C.A.), Younger L.J. dissenting. See also *Ellis & Co.'s Trustee* v. *Dixon-Johnson*, [1924] 2 Ch. 451 (C.A.), Pollock M.R. dissenting.

[2] (1838) 2 Moo. P.C. 212.

[3] Sir Thomas Erskine said very clearly that the question whether the conversion must be effected at the rate of exchange of the day of breach or of the date of the day of judgment 'must depend upon the nature of the contract between the parties. If the money was received in Buenos Aires under a general authority, as agent, without any agreement express or implied as to the time or place of its repayment, the measure of damages to which the creditors would be entitled in Jersey would, according to the case of *Scott* v. *Bevan*, be the rate of exchange at the time the judgment is recorded. But if any specific time and place had been fixed by the contract of the parties for the repayment the rate of exchange at the time and place specified would be the measure of the amount to be recovered'. In *The Volturno*, [1921] 2 A.C. 544, 549, Lord Buckmaster dismissed this case on the ground that 'the point was not elaborately argued', which hardly does justice to it.

[4] *Société des Hôtels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451, 465 per Atkin L.J.; *In re British American Continental Bank Ltd., Lisser and Rosencranz's Claim*, [1923] 1 Ch. 276, at p. 291 per Lord Sterndale, at p. 292 per Warrington L.J.; *Lloyd Royal Belge* v. *Louis Dreyfus & Co.* (1927), 27 Ll. L.R. 288, at p. 291 per Bankes L.J., at p. 293 per Scrutton L.J.; on this case see below, pp. 297 sqq.

Touquet v. *Cummings*.[1] In 1914 the defendant had contracted in France a debt to the plaintiffs of 18,035 francs, which was to be paid before the end of that year. The defendant having failed to pay, the plaintiffs in 1919, when the value of francs had fallen heavily, commenced an action in this country claiming the amount of sterling which would have been the equivalent of the amount of francs at the end of 1914. While the action was pending the defendant went to France and handed 18,035 francs to the manager of the plaintiffs, who knew nothing about the transaction and who therefore signed a receipt 'as for money deposited with him'.[2] The defendant then pleaded satisfaction. Avory J. held[3] that the plaintiffs were entitled to the sum in English money which was equivalent to the sum of French francs on 31 December 1914 less the value of the amount paid calculated at the rate existing on the day of payment, since this amount was not intended by the plaintiffs to be accepted in discharge and satisfaction of their claim. The Court of Appeal reversed the decision.

Bankes L.J. said[4] that, as the manager had authority to receive the money, as he knew the debtor was paying it in discharge of a debt due to the company, and as the creditor knew all the facts and kept the money without protest, the plea of payment was made out, it being immaterial to consider whether the person to whom the money was paid knew what the amount of the debt was or whether or not an action had been commenced to recover it, and it being unnecessary to prove accord and satisfaction, since the claim was not one for damages, but for a debt which had been satisfied.

Scrutton L.J. adopted a different line of argument. He asked two questions:[5] '(1) Is such a payment, when retained by the plaintiffs, accord and satisfaction, so as to be a defence to the action? (2) Were the plaintiffs, who received in France the amount of their debt in francs in 1920, entitled to claim in addition such a sum of English money as made up their receipts to the value of that number of francs in English money in 1914 when it was due?' The learned Lord Justice held that there was here no accord and satisfaction.[6] He proceeded to

[1] [1922] 1 K.B. 451. [2] See p. 452.
[3] [1921] 3 K.B. 459. [4] p. 456. [5] p. 459.
[6] p. 460. The misunderstanding of P.O. Lawrence J. in the *Crédit Liégeois* case, [1922] 2 Ch. 589, 596, was corrected by Scrutton L.J. in *The Baarn* (No. 1), [1933] P. 251, 265.

consider the second question and arrived at the result[1] that 'the plaintiffs who were owed 18,035 francs payable in France, must be content with 18,035 francs paid in France'.

Atkin L.J. (as he then was) also held that there was no accord and satisfaction.[2] He rejected the suggestion that

'for the purposes of the English Court once a writ was issued the debt of francs payable in France became a debt of sterling at the rate of exchange of 31 December 1914, payable in England, and that such debt was not paid . . . If such were the effect of the transaction, it would follow that the defendant on 1 January 1915 incurred obligations to pay to the plaintiffs sums in the manifold currencies of the many countries in the world where she might eventually be sued. It appears to me that she was sued here for a French debt, and if you please for nominal damages, and that by paying the debt in France, she discharged the debt.'

Later he added:[3]

'For the purposes of this action I have not thought it necessary to decide at what date the exchange should be calculated had the plaintiffs succeeded. The same result follows though the exchange should be calculated as at the date when payment became due. But no case that I know of has yet decided what the position is when a foreign creditor, to whom a debt is due in his country in the currency of his country, comes to sue his debtor in the Courts of this country for the foreign debt. Much may be said for the proposition that the debtor's obligation is to pay, say, francs, and so continues until the debt is merged in the judgment which should give him the English equivalent at that date of those francs. It is a problem which seems to require very full consideration, and which I personally should desire to reserve.'

In effect all three Lord Justices agreed that, accord and satisfaction being unnecessary, a claim for 18,035 French francs was 'paid' and that therefore the action failed.

But this simple statement and the peculiar facts of the case should not overshadow the important problem which it involves.

The problem arises from this question: what would have been the result in the *Le Touquet* case if no payment had been made by the defendant? It is obvious that if a plaintiff accepts what is due to him, or if there is accord and satisfaction, no further difficulty ensues. But it is equally obvious that a defendant

[1] [1922] 1 K.B. 451, p. 461. [2] p. 464. [3] p. 465.

should never have to pay more or less than what is due to the plaintiff, whether he pays voluntarily or by order of the court. If a defendant can satisfy a debt of 18,035 francs in 1920 by paying that sum of francs, it would appear to be an inevitable consequence that the judgment of a court should not, and cannot, command him to pay any other sum. Atkin L.J., it is true, expressly said that the question of the date at which the exchange must be calculated did not require consideration, however strongly he was inclined to adopt the judgment-date rule; and Bankes and Scrutton L.JJ. did not allude to the question at all. Nevertheless, by implication and logical process, the *Le Touquet* case is an authority for the view that, where a debt expressed in foreign currency is the subject-matter of an action, the judgment-date rule prevails.

From this point of view it becomes at once obvious that, as Greer L.J. observed,[1] it is 'not easy to reconcile' the *Le Touquet* case with the decision in *The Volturno*,[2] and it also becomes understandable that, as Scrutton L.J. reports,[3] about the former case 'some doubt has been expressed in various quarters'.

Apart from the evident, but logically irrelevant fact that in the *Le Touquet* case there was payment, while in *The Volturno* there was none, two grounds are available on which a distinction can be based and support can be given to the decision of the Court of Appeal. One explanation is that in the *Le Touquet* case there 'was a French debt incurred in France payable in France in francs'[4] or that the contract 'was in every sense a French contract and the payment made in France was by French law a complete satisfaction'.[5] But the Court of Appeal did not rely on French law; on the contrary it was expressly said that 'there is no evidence as to French law differing from English

[1] *The Baarn* (No. 1), [1933] P. 251, 271.

[2] [1921] 2 A.C. 544.

[3] *Lloyd Royal Belge* v. *Louis Dreyfus & Co.* (1927), 27 Ll.L.R. 288, 293.

[4] S.C. p. 293 per Scrutton L.J. This distinction is also suggested in Chitty, *On Contracts*, 19th ed., p. 274, where it is added that, unless *In re British American Bank Ltd., Lisser and Rosencranz's Claim*, [1923] 1 Ch. 276 is understood as proceeding on the basis of English law, the decision is inconsistent with the *Le Touquet* case. But in *Lisser and Rosencranz*'s case the action clearly was for damages (see above, p. 130, n. 4; p. 188), and for the reasons given in the text this point affords the better distinction.

[5] *In re Chesterman's Trust*, [1923] 2 Ch. 466, 493 per Younger L.J.

law as to the legal consequences of such an obligation',[1] and in fact no evidence as to French law seems to have been led. Moreover, even if English law had been applicable, the result would have been the same, since English law would generally[2] allow a debt for 18,035 French francs to be satisfied by the payment of that sum of francs.[3] The other explanation is that the *Le Touquet* case related to an action for debt and not to an action for unliquidated damages.[4] This ground may be 'so highly technical as to appear almost frivolous',[5] and it may therefore not be sufficiently convincing to justify a result which has the disadvantage of creating a discrepancy between debt and damages. Nevertheless, it appears to be the only possible distinction in the present state of the law.

Whatever the proper method of distinguishing the two authorities may be, it is a further and different problem to define the province within which the judgment-date rule would have to be applied, if the above interpretation of the *Le Touquet* case is correct. It can be applied in case of a claim for a debt only; for otherwise, the principle of *The Volturno* and of *Di Ferdinando*'s case would bar the road. But can it be applied in all cases of a debt? To take this view would not be warranted. In the *Le Touquet* case the transaction was 'wholly national in character'.[6] As has been shown, it is not certain what this phrase employed by Mr. Fraenkel actually implies. But it would appear that, whatever may be said with regard to other cases, the condition is fulfilled at least in those cases where the debt was both contracted and payable in the country whose currency is the money of account. The result would thus correspond with the practice of the Supreme Court of the United States and with the majority of the New York decisions,[7] and though it would still be in conflict with the English cases decided by judges of first instance,[8] it would be supported by a decision of the Appellate Division of the Ontario Supreme Court,[9] which

[1] [1922] 1 K.B. 451, at p. 463 per Atkin L.J.

[2] Unless the place of payment was in England, in which case the rules above pp. 245 sqq. would apply.

[3] See above, pp. 196 sqq.

[4] *The Baarn* (No. 1), [1933] P. 251, 271 per Greer L.J.

[5] Negus, l.c., p. 149.

[6] Fraenkel quoted, p. 287, n. 3.

[7] See p. 286, nn. 2, 4. The *Le Touquet* case had great influence in America; see especially the quotation from the *Deutsche Bank* case above, p. 283.

[8] Mentioned, p. 291, n. 2.

[9] *Quartier* v. *Forat*, [1921] 64 D.L.R. 37.

held that a claim of 2,000 French francs due to a Paris advocate in respect of fees was to be converted into dollars 'according to the rate of exchange which prevailed when judgment was pronounced in the court below'. The result would not be incompatible with the rule that where English law applies and the place of payment is in England, conversion must probably be effected on the basis of the breach-date rule.[1]

But although it is the inevitable inference from the *Le Touquet* case that it proceeded on the basis of the judgment-date rule (whatever the province of that rule may be with regard to facts not exactly identical), and although it will be shown below[2] that that rule is the sounder of the two, it is very doubtful whether and how the *Le Touquet* case, as understood herein, can be reconciled with the later decision of the Court of Appeal in *Lloyd Royal Belge* v. *Louis Dreyfus & Co.*[3] The facts, in so far as they are material here, were that, by way of a settlement of an action pending in the French courts, the defendants in 1923 had promised to pay to the plaintiffs a sum of 18,000 French francs, the agreement being made in France between the French advocates of the litigants. An action was brought in the English courts to recover that sum. Roche J. held[4] that the conversion was to be effected at the rate of exchange on the day when the money ought to have been paid, i.e. on the date of breach. The Court of Appeal affirmed the decision. Bankes L.J. said:[5]

'In an action brought in England, as this is, the only cause of action . . . is an agreement to pay 18,000 francs and if you bring that action in England, it seems to follow that that must be an action for damages for breach of an agreement to pay 18,000 francs, because you cannot bring an action in debt in England for francs and there is no law or practice or anything else which entitles you to change the nature of your cause of action by a calculation on the back of the writ in which you say: 'My claim is 18,000 francs, and I convert it at such and such a rate of exchange into sterling and I claim that sterling as a debt' because the agreement was to pay so many francs. That being so, I think that the cause of action must be, technically speaking, a cause of action for damages for failure to pay that amount of francs. Now, if that is so, it puts an end to all this discussion as to whether there is a distinction between the rate of exchange applic-

[1] Above, pp. 245 sqq. [2] p. 312. [3] (1927) 27 Ll.L.R. 288.
[4] (1926) 26 Ll.L.R. 196. [5] p. 291.

able where the claim is for a debt proper, or for damages for breach of contract or for tort. It is not necessary to express, as part of my judgment, any view about that; it would be necessary to go through the authorities; but if it will help anybody, and I hope cause no hindrance in the future, my own view is that the strong balance of authority is in favour of the view that there is no distinction, and that also accords with my view of what is good sense.'

Scrutton L.J.[1] also stated that it was unnecessary to decide whether there was a distinction between a claim in debt and a claim for damages, and he refrained from 'expressing a final opinion on the question of the rate of exchange in the case of debt'. He said that with regard to damages the question was settled by *The Volturno* and *Di Ferdinando* cases, and that he adhered to the judgments given by him in the latter case and in the *Le Touquet* case. Romer J.'s remarks[2] are particularly interesting:

'When that agreement (to pay 18,000 francs) is sued upon in this Court, the only remedy which is open to the plaintiff is a remedy in damages. No action in the Courts in this country can be brought for delivery of 18,000 francs, unless the action is a specific performance action, in which case I suppose the plaintiff might claim delivery of 18,000 francs and damages for failure to deliver the francs at the proper time. But such an action as that would not have been entertained in equity, for this among other sufficient reasons, that damages at common law would have been a perfectly sufficient and adequate remedy . . . Now it has been settled by authority, binding as I think upon this Court, that where an action is brought in these Courts for damages for breach of contract to deliver a commodity, and it becomes necessary, for the purpose of giving judgment in this country, that foreign currency shall be translated into English sterling, the rate of exchange to be taken for that purpose is the rate prevailing at the time of the breach of contract which is the foundation of the action. I cannot myself see that there can be any difference between a contract for the delivery of foreign currency and a contract for the delivery of any other commodity.'

For more than one reason these observations make astonishing reading.

Romer J. expressly said that, as regards conversion of a sum of foreign money, there was no distinction between a claim in debt and a claim for damages; but his reasoning that this is so

[1] (1927), 27 Ll. L.R. 288 at p. 293. [2] p. 294.

because the contract to pay a sum of foreign money is on the same level as the contract to deliver a commodity is unsound.[1]

The question whether or not there is a distinction between a claim in debt and a claim for damages was left open by Bankes and Scrutton L.JJ., who proceeded on the basis of the view that the plaintiffs sued for damages. It is, however, obvious that in all essential points except the question of subsequent payment, which from a logical point of view is irrelevant, the facts of the case were on all fours with those of the *Le Touquet* case. In that case the three Lords Justices in effect agreed that the claim was in debt;[2] for otherwise they could not have arrived at the result that the payment, which was not made by way of an accord and satisfaction, operated as a discharge. If the mere payment was sufficient, the action must have been in debt; if the action was for damages, accord and satisfaction would have been necessary.[3]

It may be that an action on a promise to pay 18,000 francs is always an action for damages; if so, the *Le Touquet* case was wrongly decided. If the action to recover a promised sum of 18,000 francs is an action in debt and if, consequently, the *Le Touquet* case was correctly decided, it is impossible to understand how it came about that in the *Lloyd Royal Belge* case the same action was regarded as an action for damages and that the question, how the conversion is to be effected in case of a debt, was reserved for further consideration by two Lords Justices who had also delivered judgments in the *Le Touquet* case.

The two cases thus appear to be irreconcilable. Moreover, to the doubts arising from the fact that the application of the judgment-date rule is not the express basis of, but merely a logical inference from the *Le Touquet* case, there is now a further doubt to be added, inasmuch as one of the foundations on which that decision of the Court of Appeal is built is severely shaken by a later decision of a Court of Appeal two members of which were parties to the first decision.

There is one further point which must be noted. As in the *Lloyd Royal Belge* case Scrutton L.J. clearly refused to decide

[1] See above, p. 129; see also Chitty, *On Contracts*, 19th ed., p. 274.
[2] See Greer L.J. quoted p. 295, n. 1.
[3] See above, p. 58, n. 4.

the question how the conversion is to be effected in case of a debt, and as Bankes L.J. also refused to do so, however much he favoured the breach-date rule, both Lords Justices must have assumed that there may be cases where a foreign money obligation is the subject-matter of an action in debt. But can there ever be such a case, if the failure to perform such an obligation as that existing in the *Lloyd Royal Belge* case is held to give rise to an action for damages? If there was no action in debt in that case, where can there ever be any? From this point of view Romer J.'s judgment can be better understood; for he believes that an action to recover a sum of foreign money is always an action for damages.

This view, that the cause of action upon refusal to pay in a foreign currency is for damages and not for debt (which would shake the basis of the *Le Touquet* case and necessitate the all-round application of the breach-date rule), was also taken by Hill J. in *Richardson* v. *Richardson*,[1] where he decided that a foreign currency account kept by a judgment debtor with a bank could not be garnished, there being no debt within the meaning of Order XLV, r. 1, of the Rules of Supreme Court. Moreover, it must be admitted that the view in question is supported by a number of older cases (though the abolition of the rigid system of actions will prevent the modern lawyer from over-rating their importance)[2] and, surprisingly, by a very recent dictum of Lord Atkin: 'In my opinion, there can be no debt in this country of an amount in foreign currency.'[3]

[1] [1927] P. 228, 234 relying on *Di Ferdinando*'s and the *Lloyd Royal Belge* cases.

[2] Where the holder of a promissory note or a bill for a sum of foreign money had obtained a judgment by default, the Court of Common Pleas, it is true, was prepared to dispense with a writ of inquiry which would have come before a jury, and to refer the cause to a prothonotary to ascertain the damages and costs: *Rashleigh* v. *Salmon* (1789), 1 H.Bl. 253; *Andrews* v. *Blake* (1790), 1 H.Bl. 529; *Longman* v. *Fenn* (1791), 1 H.Bl. 529. Though the King's Bench followed that practice in *Shepherd* v. *Charter* (1791), 4 T.R. 275, the assessment of the damages was eventually left to the jury: see *Messin* v. *Lord Massareene* (1791), 4 T.R. 493, where action was brought on a French judgment, and *Maunsell* v. *Lord Massareene* (1792), 5 T.R. 87, where a judgment by default had been obtained in respect of a bill of exchange for 200 Irish pounds. See also *Cumings* v. *Monro* (1792), 5 T.R. 87, discussed below, p. 303 and *Pope* v. *St. Leiger* (1694), 5 Mod. 1, at p. 7, where Holt C.J. observed: 'Where you declare on a foreign coin you must declare in the *detinet* only and not in the debt.'

[3] *Rhokana Corporation* v. *Inland Revenue Commissioners*, [1938] A.C. 380, 388.

The matter must be left in this involved and unsatisfactory state, and it can only be hoped that the House of Lords will soon be given the opportunity to settle a question which in daily practice is of so great an importance. At the present time the two cases of *Le Touquet* and *Lloyd Royale Belge* create an even balance. Though both have considerable bearing on it, neither decides the question whether the judges of first instance who extended the breach-date rule to debts were right or whether the judgment-date rule ought to have been applied. There is a greater amount of authority for the former view, but it will appear below that the latter is sounder in principle.

4. There remains, however, the question whether, and at which point, the necessity to convert, for the purposes of legal proceedings here, a sum of foreign money into sterling has a novatory effect in the sense that foreign money is no longer the subject-matter of the obligation and only pounds sterling are to be paid by the debtor and to be accepted by the creditor. Of course, if there is an Order of the Court commanding the payment of an exact sum of sterling, there is a judgment in its proper sense into which the original claim is merged. There is then a Contract of Record, which is a contract governed exclusively by English law, and, the original cause of action having ceased to exist, no further problems connected with foreign currency can arise. On the other hand, an Order of the Court by which it is left to the Master, Referee, or Registrar to ascertain the precise amount due, is not a judgment, although it generally has the same effect, and therefore leaves the position as it was before the Order.[1]

Moreover, until a judgment in the technical sense has been given, no problem could arise if the conversion is to be effected on the basis of the rate of exchange prevailing at the date of judgment. In such circumstances it would be impossible to hold that between the issue of the writ and the judgment the foreign money obligation has changed its character and become a sterling obligation.

But if the foreign money is converted into pounds sterling at the rate of exchange of the day of breach or wrong and if, consequently, the writ already states a precise sum of sterling claimed by the plaintiff, the question arises whether there is

[1] *The Baarn* (No. 1), [1933] P. 251, at pp. 266, 267 per Greer L.J.

now only a sterling obligation which can no longer be satisfied by the payment of the original sum[1] of foreign money.

A decision on the point will only be necessary in those cases where the plaintiff accepts the payment only 'under reserve' or 'on account'; for if he accepts it in discharge, i.e. if there is accord and satisfaction, it becomes unnecessary to examine whether the plaintiff was entitled to anything in addition to or different from what he freely accepted.

Where, on the other hand, the payment is not accepted in discharge, it is important to remember that very often a problem of private international law is involved. The question whether or not an obligation is discharged is governed by the proper law.[2] The issue of a writ in England does not give the question a procedural aspect and does not supersede that rule and replace it by the relevant principles of the *lex fori*.

As regards actions brought to recover an English[3] debt expressed in foreign money, the Court of Appeal held in *Société des Hôtels Le Touquet* v. *Cummings*[4] that the subsequent payment of the owed sum of foreign money operated as a discharge although a writ had been issued here claiming a sum of sterling calculated at the rate of exchange of the date of breach. The facts and grounds of the decision have already been dealt with and do not require to be re-stated. It will be remembered that it was held that, as the action was in debt, accord and satisfaction, which was not proved, was unnecessary and that therefore a mere payment could operate as a discharge. On this basis which, however, is somewhat shaken by a later decision of the Court of Appeal also discussed above,[5] the result was inevitable; to hold otherwise would have been irreconcilable with the nominalistic principle.[6] The common-sense argument of Atkin L.J. (as he then was) is particularly attractive:[7] the defendant had incurred a franc obligation and it would therefore be monstrous to say that, when she failed to perform it,

[1] Here again it is necessary to remind the reader that it is assumed in the text that the obligation is not governed by English law and not performable in England.

[2] Above, p. 254.

[3] See Atkin L.J. in the *Le Touquet* case, *ubi infra*, at p. 463; but see Scrutton and Younger L.JJ. quoted on p. 295, nn. 4, 5.

[4] [1922] 1 K.B. 451; the decision was followed by Rowlatt J. in *Norsure Traders* v. *Hardy & Co.* (1923), 16 Ll.L.R. 319.

[5] pp. 297 sqq. [6] Above, pp. 192 sqq. [7] See above, p. 294.

she became liable to pay to the plaintiffs 'sums in the manifold currencies of the many countries in the world where she might eventually be sued'.

As the *Le Touquet* case thus enables a defendant to terminate an action for a debt by paying to the plaintiff what was due to him, irrespective of any intermittent depreciation of monetary value and of any conversion into sterling, it ought to follow that a defendant must be allowed to discharge his debt by paying into court[1] so many pounds as according to the rate of exchange of the day, correspond to the sum of foreign money the subject-matter of the action. If this conclusion were not drawn from the *Le Touquet* case, a plaintiff could refuse to accept payment in the foreign currency, and thus procure a judgment for a sum of sterling calculated according to the rate of the day of breach. Such a result would be incompatible both with the decision in and the spirit of the *Le Touquet* case,[2] though it would be in harmony with an older decision which has not been quoted in any of the modern cases. In *Cumings* v. *Monro*[3] an action was brought on a bond dated 13 July 1775 for a sum of £2,400 proclamation money of North Carolina. The defendants made an application to make absolute a rule calling on the plaintiff to show cause why they should not be at liberty to pay the sum of £2,400 proclamation money of North Carolina into court. The application was opposed on the ground that that money had now become 'waste paper'. Discharging the rule Buller J. said:[4]

'This proclamation money was of a certain value when the bond was given, and also when it was forfeited, but by change of time and circumstances it is now rendered of no value whatever; and therefore it seems to me that justice would not be done between the parties, if we were to determine that the defendants should be at liberty to pay that which is now of no value, but which, had

[1] See Order 22, Rules of Supreme Court.

[2] As Order 22 also applies to claims for damages, it is in this connexion irrelevant whether the above discussed basis of the *Le Touquet* case still holds good.

[3] (1792), 5 T.R. 87. It may be doubtful whether it is proper to regard the case as relating to 'foreign' money obligations. In 1792 proclamation money of North Carolina was probably regarded as foreign money; cf. Nussbaum, 37 (1937), *Col. L.R.* 1057, 1058, n. 5. If so, it would, however, remain notable that the payment of such foreign money into court was thought possible.

[4] p. 88.

he paid his debt when it became due, would have been of great value.'

Grose J. added (at p. 89): 'The jury are the proper judges of the value of this money.'

If the action is for damages which, having been sustained in a foreign currency, are converted into sterling at the rate of exchange of the date of wrong, it is more difficult to say what effect is to be attributed to the subsequent payment of the sum of foreign money claimed by the plaintiff. If English law applies to the obligation, accord and satisfaction is necessary,[1] which, if proved, would in any case put an end to the action; mere payment would not suffice. But if the obligation is governed by a foreign law, it may well be that under the proper law mere payment would be sufficient (at least in so far as special damages are claimed). Would proof of such payment result in the dismissal of the action? There are two conflicting dicta of Scrutton and Greer L.JJ. which relate to the question. Both of them were made in *The Baarn*,[2] which concerned an action for damages expressed in Chilean pesos.

Scrutton L.J. dealt with the point at some length[3] and *inter alia* he said:

'Now the damage to the *Bio Bio* was done in the waters of Ecuador, and repairing it would inflict damage on the owners, Chilean subjects domiciled in Chile. If these owners had sued in Chile, it is not clear that the question of depreciated pesos would assist the plaintiffs. . . . I have some difficulty in seeing how a domiciled Chilean, suffering damage measured in Chilean pesos, can rely on the depreciation of his own currency, by selecting a country to sue in whose currency is not subject to such depreciation. . . . It is not necessary to decide the point . . . but I mention it as I do not think the results of the decision in *The Volturno* have yet been thoroughly elucidated.'

On the other hand, there is the dictum of Greer L.J.:[4]

'Assuming for the sake of simplicity a claim is made in an English Court for damages for tort or breach of contract happening in France,

[1] See above, p. 58.

[2] (No. 1) [1933] P. 251. See also *In re British American Continental Bank Ltd., Lisser and Rosencranz's Claim*, [1923] 1 Ch. 276, where an action for damages (see above, p. 295, n. 4) was dealt with on the basis of English law being the proper law and where, therefore, the tender made, but not followed by a subsequent payment into court, was rightly disregarded. But see Chitty, *On Contracts*, 19th ed., p. 274.

[3] pp. 265, 266.

[4] pp. 270, 271.

say to the extent of 1,000 francs, and the damages were incurred when the exchange was 25 francs to the £, a judgment in accordance with the decision in *The Volturno* would necessarily be for £40. Proof by the defendant that he had paid to the plaintiff in France 1,000 francs at a time when they were depreciated and were only worth £8 could not be regarded by an English court as payment in full of the damages proved to have been sustained in accordance with the principles laid down by the House of Lords in *The Volturno*.'

To choose between these views is a matter of considerable difficulty, because they involve so many further questions to which a precise answer cannot be given. On principle it should be clear that, before the point discussed by Scrutton and Greer L.JJ. can be settled, regard must be had to two preceding questions: what law governs the obligation, and what is the money of account in which the liability is measured?

The Volturno[1] was a case which was shown to be subject to English law.[2] According to the view taken by Lord Sumner the money of account was sterling, the Italian lire being only an item in a general claim for damages measured in sterling.[3] On the basis of this view the lire were to be converted into sterling for the purpose of adjustment,[4] and there thus being no claim for lire, the defendants could not have satisfied the plaintiffs by paying lire. If, however, the claim was expressed in lire which were to be converted into sterling merely for the purpose of legal proceedings here, the obligation could have been discharged by the payment of lire; but as the claim was not in debt, accord and satisfaction would have been necessary. In the absence of accord and satisfaction, a payment into court of so many pounds sterling as correspond to the sum of lire at the rate of exchange of the day of payment ought to result in a judgment only for the amount paid into court, with costs up to the date of payment in, since the claim was not for sterling, but for lire, whatever their international value; for English law does not allow any departure from the nominalistic principle and its incidents.[5]

If, on the other hand, a claim for damages, measured in a

[1] [1921] 2 A.C. 544.
[2] Above, p. 189, n. 1.
[3] Above, p. 180, n. 3.
[4] Above, p. 253.
[5] Above, pp. 207 sqq.

foreign currency, is subject to a foreign law[1] which does not require accord and satisfaction, but allows discharge by mere payment, the principles of *The Volturno* case would not necessitate the non-recognition of such payment. The case can be distinguished on the ground that it was governed by English law and that there was no payment by the defendants. The mere fact that a claim for damages expressed in a foreign currency and governed by a foreign law becomes the subject-matter of an action here does not, before judgment is given, change the money of account.[2] It is submitted that the example given by Greer L.J. himself shows the absurdity of any different result and that the decision in *The Volturno* case must not be overstrained.[3] That an English judgment has the effect of transforming the money of account and departing from the nominalistic principle cannot be helped, however unfortunate it may be; but if there is an opportunity of avoiding such a result so long as judgment has not yet been pronounced, it should be taken.

IV

The preceding exposition of the English law as it at present stands has been deliberately freed from any discussion of the merits of the relevant rules. It now becomes necessary to embark upon a comprehensive survey of the question whether or not they are sound. It is perhaps convenient to state at the outset the conclusion to which the following pages will lead: the transformation of foreign money obligations through the institution of legal proceedings in this country is unfortunate; the root of the evil lies in the rule of English law of procedure that judgment cannot be pronounced by an English Court otherwise than in pounds sterling; as long as this rule exists, many, though not all, evils would be remedied by the application of

[1] Whether this can ever be so in case of a tort is doubtful: see above, p. 189. Foreign Law may be more readily applicable in case of damages for breach of contract; but in such cases it is necessary to have regard to the alleged principle that, perhaps even in case of special damage, the measure of damages is governed by English law *qua* law of procedure.

[2] See Atkin L.J. quoted above, p. 294, whose reasoning applies to claims for damages with undiminished force.

[3] [1921] 2 A.C. 544. That the reasoning on which the decision is based is not wholly convincing (see below, pp. 310 sqq.) is an additional ground for resisting any extension of its principles.

the judgment-date rule, the breach-date rule being particularly inadequate.[1]

Many of the doubts surrounding the justification of the existing English rules are impressively elucidated by three decisions of foreign Courts. The *German* Supreme Court had to decide the following case.[2] The plaintiff was the trustee in bankruptcy of a German firm which owned the German vessel *Hans Hemsoth*, and the defendants were mortgagees of the ship, which was sold by public auction in England. The defendants' mortgage was a security for a sum of 250,000 Dutch guilders, which for the purposes of a division of the proceeds of the English sale was converted by the Registrar into sterling at the rate of exchange of the day when the money fell due.[3] In this way the defendants received a sum of sterling which, after conversion into guilders, produced an amount of 269,000 guilders. Thereupon the plaintiff claimed from the defendants payment of 19,000 guilders received by the defendants in excess of the nominal amount of the debt. He relied on the provisions of the German Civil Code relating to 'unjustified enrichment'. The German courts regarded the English rules relating to the date of conversion as part of English substantive law, not of English law of procedure.[4] As English law was inapplicable to the contract between the defendants and the bankrupt firm, the courts recognized that the defendants had received the amounts in excess of their debt without justification (*sine causa*). That, nevertheless, the action was dismissed, is due to the fact that the unjustified enrichment of the defendants was not obtained 'at the cost of the plaintiff', but at the cost of the subsequent mortgagees. The Court of Appeals

[1] See p. 302, n. 1.

[2] *IPRspr.* 1930, No. 50 (15 May 1930), also in *Revue de droit maritime comparé*, 23 (1931) 77, affirming Hamburg Court of Appeal, 15 May 1929, *IPRspr.* 1929, No. 51.

[3] The German decision assumes that the conversion was effected at the rate of exchange prevailing on the date when the debt was created. But this is probably an erroneous construction of the English decree, which one would expect to have proceeded on the basis of the breach-date rule.

[4] The point was probably irrelevant. Otherwise it is doubtful whether the view taken by the German courts was correct. That view is supported by the fact that a rate of exchange between the parties is binding on an English court (see above, p. 291, n. 2). But as no English court has ever gone into the question of the rate of exchange which would prevail under the proper law of the obligation, the breach-date rule is probably part of English legal procedure.

of *New York*[1] had to deal with a case where the dispute arose out of the fact that a dollar obligation had been converted into francs for the purpose of legal proceedings in France. An American court had given judgment for a sum of dollars against a defendant who lived in France. Part of the judgment not having been satisfied, proceedings on the American judgment were brought in France for a sum of French francs. In due course the French judgment was obtained and satisfied in francs. But as the franc currency had depreciated, the creditors only received a portion of their claims in dollars. A new action was brought in New York, and it was held that the creditors were not entitled to recover the outstanding dollar balance, the payment in France having been a satisfaction in full. The court relied on the fact that according to the evidence given by French experts the determination of the date for translating the dollars into francs rested within the discretion of the French courts, and that it was at the request of the creditors that the conversion was made at the rate prevailing on the day when the exequatur was asked for in France. The creditors had therefore made their choice and could not go behind it. The exequatur ordered payment of francs at the rate contended for by the creditors and these francs were paid. The last case is a decision of the *Supreme Court of the United States*.[2] A cargo of barley shipped from Canada was lost owing to a collision in the river Hudson. The value of the cargo at the time and place[3] of shipment was 2,436 Canadian dollars. The Canadian currency was at the time equivalent to the gold coin of the United States. In the District Court judgment was given in the plaintiffs' favour for a sum of 2,436 U.S.A. dollars and a sum of 488·20 U.S.A. dollars in respect of interest. When the case came before the Circuit Court the American currency had so depreciated that 100 gold dollars were worth 201 dollars in notes. Consequently the Circuit Court converted the 2,436 Canadian dollars into American dollars at that rate and, in March 1870, gave judgment for 4,896·36 dollars with interest amounting to 1,618·64 U.S.A. dollars. Since then the American currency

[1] *Matter of James* (1928), 248 N.Y. 1, 161 N.E. 201.

[2] *The Vaughan and Telegraph* (1872), 14 Wall. (81 U.S.) 258.

[3] That the value at the time and place of shipment decides, not at the time and place of delivery, was expressly approved by the Supreme Court.

largely appreciated 'so that, while the libelants would, under the decree of the District Court, if it had been paid when rendered, have received much less than the estimated value of the barley, they will now, if the decree of the Circuit Court be affirmed, receive much more'.[1] By a majority the Supreme Court affirmed the decision, the reason being that the decree was right when it was rendered and, therefore, could not be interfered with and that the resulting hardship to the defendants was entirely due to their own delay in payment.

These cases exemplify the difficulties created by the fact that a foreign money obligation is converted into the *moneta fori*. They suggest that there is only one solution which is in every respect satisfactory: judgment ought to be given in the foreign money the subject-matter of the obligation, though the judgment debtor should be entitled to satisfy the judgment by the payment of so much of the *moneta fori* as, at the rate of exchange of the date of actual payment, corresponds to the amount decreed to be payable. This method would secure that a suit in England does not prejudice the plaintiff if the British currency depreciates. It would also mean that, in accordance with the nominalistic principle, the plaintiff must bear the risk arising from any fall in the foreign money of account; but if the proper law of the obligation allows damages for non-payment at the proper time, the plaintiff could bring a further action; if, however, the proper law does not allow such damages, the plaintiff would be prevented from recovering them merely because legal proceedings had been instituted in this country.

This ideal rule is, however, incapable of application. Though any other solution must needs be unsatisfactory, it becomes necessary to determine with reference to what date the conversion ought to be effected in order to enable the English judgment to be expressed in pounds sterling.

The choice lies between the date of breach or wrong and the date of judgment. Both views are supported by judicial authority, though the former has found a greater amount of favour. Both views have been adopted by the legislature, the breach-date rule being accepted by the Foreign Judgments Act 1933, the judgment-date rule being accepted by the Carriage by Air Act 1932.

[1] At p. 268 per Mr. Justice Swayne delivering the opinion of the majority of the court.

The breach-date rule has been based on three or perhaps four reasons.

The first is taken from the general law of damages, namely from the 'principle of insuring to the injured party, as far as possible, the full measure of compensation to which he is entitled'.[1] But this ground holds good only in case the stability of the English currency is presupposed.[2] In the cases which were before the courts it seems generally to have been the foreign currency which depreciated in terms of English money, and then the application of the breach-date rule has indeed provided more than a full measure of compensation. In fact, the sums of British money recovered were considerably higher than those which would have been allowed by the law of the obligation determining the quantum of the debt. Where the foreign money of account depreciates, the breach-date rule has the serious effect that English law solves a question which should be answered by the proper law: whereas if the depreciation of the foreign money occurs between the day of the conclusion of the contract and the day of maturity all problems arising out of the change of monetary systems or monetary value are allowed to be subject to the law of the obligation or the law of the currency,[3] English law encroaches upon the quantum of the debt in so far as the depreciation occurs after the breach. Thus, if 1,000 marks became payable in 1914, English law enables the plaintiff to recover £50, which now correspond to about 600 reichsmarks, though the proper law of the contract may deny such 'revalorization', just as English law would deny it, if the breach had occurred in 1924 when the marks had become an infinitesimal part of a reichsmark. Conversely, if 1,000 reichsmarks became payable in August 1931, and an action is brought in 1937, the plaintiff receives only £50, not the £80 he needs after the intermittent depreciation of the English currency in order to obtain 1,000 reichsmarks.[4] It therefore appears that the breach-date rule allows either more or less than the full

[1] *The Volturno*, [1921] 2 A.C. 544, 559 per Lord Parmoor.

[2] That this assumption and the consequent application of the breach-date rule may be due to an extreme and exaggerated view of the nominalistic principle, has already been suggested above, p. 244, n. 1.

[3] Above, Chapter VII.

[4] See *The Volturno*, *ubi supra*, at p. 567, per Lord Carson, whose dissenting opinion should not be overlooked.

measure of compensation and that it is arbitrary except in cases where the two currencies concerned have remained stable.

A second line of argument is derived from the 'true function and purpose of the judgment'. It is said that the measure of damage is the loss sustained at the time of breach or wrong and that consequently the plaintiff must receive such a sum as represents the market value of the loss at that time.[1] That this argument is beside the point has already been indicated by Lord Carson.[2] It relates to the determination of the money of account and of the quantum of the obligation,[3] but it has nothing to do with the question of conversion. At the stage when this question is reached, the loss suffered by the plaintiff is both expressed and measured in a certain currency. The function of the English court is not to evaluate or measure the loss,[4] but to translate the evaluated loss into terms of pounds sterling. The principle which should govern this translation is that the plaintiff should be given neither more nor less than he is entitled to in terms of the currency in which the loss has been measured—an object which cannot be attained otherwise than by application of nominalism as understood by the *lex causae* allowing or excluding damages for non-payment.

The third reason propounded in favour of the breach-date rule is that any other date would cause the amount ultimately awarded to depend on the accidents and the fortuitous character of legal proceedings and would encourage exchange speculations.[5] This argument, like the first, is based on the one-sided and unfounded assumption that British currency never depreciates. If it is recollected that since 1931 the pound sterling has depreciated by approximately 40 per cent., it is evident that the argument, instead of supporting the breach-date rule, may easily be turned against it.

As regards actions in debt in particular, it is often said that it is highly desirable that the same rule should prevail as in actions for damages.[6] Everybody will agree with this proposi-

[1] *The Volturno, ubi supra,* at p. 548 per Lord Buckmaster, p. 563 per Lord Wrenbury. [2] Ibid., p. 567. [3] Above, p. 184.

[4] This is done at a previous stage of the inquiry, on which see above, pp. 180 sqq.

[5] *Lebeaupin* v. *Crispin,* [1920] 2 K.B. 714, 723; *Uliendahl* v. *Pankhurst Wright & Co.* (1923), 39 T.L.R. 628.

[6] *Peyrae* v. *Wilkinson,* [1924] 2 K.B. 166.

tion. But if it appears that the rule applying to actions for damages is unsound, some will prefer to sacrifice uniformity in order to arrive at a better principle with regard at least to actions in debt.

It thus becomes evident that the breach-date rule is ill founded. The other alternative, i.e. the judgment-date rule, likewise has many disadvantages. It does not, it is true, involve an arbitrary revalorization of the claim in respect of any depreciation of the foreign money of account occurring before the date of judgment, nor does it prejudice the plaintiff if the pound sterling currency depreciates between the date of breach and the date of judgment. But it is unable to prevent arbitrary results arising from fluctuations of monetary value between the date of judgment and the date of payment. This is particularly so where, owing to appeals or other circumstances, there elapses a considerable period before the judgment is satisfied. Nevertheless, in the majority of cases such disadvantages will not be felt, since payment will generally be made soon after the judgment is rendered. On the whole, therefore, the judgment-date rule appears to be preferable.

That it does not afford the ideal solution has been explained above. The only ideal solution is that which in strict adherence to the nominalistic principle gives to the plaintiff the exact sum of foreign money to which he is entitled irrespective of its international valuation at the time of payment, and leaves it to the law governing the obligation whether or not damages for non-payment can be claimed in order to compensate the plaintiff for the intermittent depreciation. To attempt to solve the latter question by fixing a date with reference to which a conversion must be effected is both wrong in theory and abortive in practice.

APPENDIX I

HOPKINS *v.* COMPAGNIE INTERNATIONALE DES WAGONS-LITS[1]

(*King's Bench Division*—Mr. Justice Swift)

SIR ALBION RICHARDSON K.C. and OSBERT PEAKE for the plaintiff.

F. H. MAUGHAM K.C. and J. B. LINDON for the defendants.

The facts and arguments appear from the Judgment.

26 Jan. 1927. SWIFT J.: In the year 1913 the defendant company, which is a company providing sleeping-coaches for railways, restaurant-carriages, and so on, and whose head-quarters are in Belgium, issued bonds for the purpose of raising money to be used in their undertaking, and they issued some 30,000 bonds of 500 francs each. The bonds provided for the repayment of the moneys advanced according to drawings. The plaintiff, Mr. Walter Bernard Hopkins, has become possessed of two of those bonds, which were drawn for redemption on 6 November 1926, and he was entitled to receive £42 1*s.* 6*d.* in respect of the bonds, provided that the franc was at the same rate of exchange in November 1926 as it was in January 1913. When, however, he came to collect the money which he conceived to be due to him, he was offered only a sum of some £6 odd, and it was contended on behalf of the defendants that, the value of the franc having depreciated, he was not entitled to more. He brings this action claiming a declaration that he is entitled to receive, on the redemption of the two bonds which are in his possession, a sum of money which shall be equivalent to the value of 500 francs in January 1913. Sir Albion Richardson, in support of his contention, suggests that the bond which secures the repayment of 500 francs must be taken to mean that it is to secure the repayment of 500 gold francs, because he says that a number of countries had agreed upon the standard of the gold franc by various treaties from 1865 onwards, and that it must have been in the contemplation of the parties when the bargain which is contained in the bond was made that there should be repayment in that which he has from time to time lapsed into calling the international franc, but which he says he does not really mean to call the international franc. All that it is is a standard which the different countries have agreed

[1] By the courtesy of the defendants it has been possible to report the decision here.

upon between themselves which their franc shall attain, and on condition that it attains that standard it shall be freely interchangeable between the treasuries of the various high contracting parties. The substance of Sir Albion Richardson's contention is that the word 'franc' in this bond means a gold franc, that it means something for which he was entitled to have, when his bonds came to be redeemed, a certain quantity of gold. Quite apart from authority, I should have thought that that was wrong. I should have come to the conclusion that all that the bond gave him, being made in Belgium, and having, in my view, to be construed according to the laws of Belgium, was a right to receive 500 francs, or their equivalent in value, whatever their value might be when the date came for redemption, but I think that in this case there is very clear authority that Sir Albion Richardson's contention made on behalf of the plaintiff is wrong. I cannot distinguish this case from the case of *In re Chesterman's Trusts*[1] or from the case of *Anderson* v. *The Equitable Life Assurance Society of the United States*.[2] Those two cases seem to me to bind me. They certainly confirm me in the view which I had taken of this matter before Mr. Maugham called my attention to them. I therefore think that the plaintiff is not entitled to the declaration for which he asks, nor to the payment for which he asks, but on the other hand, the defendants are entitled to judgment, with costs.

Solicitors: Messrs. Parker & Hammond (for the plaintiff).
Messrs. Ashurst Morris Crisp & Co. (for the defendants).

[1] [1923] 2 Ch. 466.

[2] (1926) 42 T.L.R. 302.

APPENDIX II

FRANKLIN *v.* WESTMINSTER BANK[1]

(King's Bench Division and Court of Appeal)

The plaintiff appeared in person.

SIR PATRICK HASTINGS K.C., ERIC O'DONNELL, and ROGER WINN for the defendants.

The facts appear from the Judgments.

13 May 1931. MACKINNON J.: In this case the plaintiff sues the Westminster Bank on a cheque. I hope I am justified in believing that the plaintiff will not be able to complain that he has not been fully heard here and that I have not listened to everything he desired to advance; but I cannot help, notwithstanding that, expressing my regret that the time of the court should have been wasted for nearly a whole day in regard to a claim that is essentially absurd and ridiculous.

The plaintiff, or to be accurate a company called Webster Brothers Limited, on 27 September 1923 paid £15 to the defendant bank under its then name of the London County Westminster & Parrs Bank, and in exchange for that were given a cheque drawn upon the Darmstädter Bank, Berlin, for a sum in marks. At that time the mark in Germany was fantastically depreciated and accordingly the £15 that Messrs. Webster paid bought a cheque in exchange for which Messrs. Webster on presentation at the Darmstädter und Nationalbank, Berlin, at the proper time would have been entitled to receive 9,000,000,000 marks of the then depreciated currency. We have tried this case upon the assumption that for value this cheque was endorsed first to a brother of the plaintiff and then by that brother to himself and that he is the holder of it. In point of fact it was not presented in 1923 or until after 11 October 1924. On 11 October 1924 a law was passed in Germany by which the legal currency of the previously existing marks of the description of which this cheque entitled the holder to receive 9,000,000,000 marks was abolished, and a new form of mark was introduced; and it was provided that the new mark should be exchanged for the old marks which were thereby abolished at the rate of one billion of the old marks for one mark of the new currency. The effect of that law

[1] The publication of the judgment, a German translation of which appeared in *JW.* 1931, 3163, is due to the kind assistance rendered by the defendants' solicitors. Short reports were published in *The Times* newspaper of 14 May and 17 July 1931.

was as from 11 October 1924 that on presentation of this cheque dated 23 September 1923, subject to any other objection to its being cashed, the person who presented it would be entitled to receive 9/1000ths of a mark. The cheque was presented by Mr. Boehme on behalf of the plaintiff on 15 December 1926. The cashier, as I gather, viewed the document with some disfavour and intimated that he was not going to give anything for it. Mr. Boehme desired his refusal to be intimated in due form, whereupon the cashier wrote the contemptuous word 'wertlos' upon the cheque and stamped it with a stamp upon the back. It came back to the plaintiff. The plaintiff thereupon gave notice to the defendant bank, or I will assume that he gave notice to the defendant bank, that this cheque had been dishonoured, and on 26 September 1929, a date which may accidentally be one day less than six years from the date of the cheque but which may have some relation to another legislative provision of ours, by his writ of that date he claimed damages from the defendant for the dishonour of this cheque. The Statement of Claim alleges that the measure of those damages to which he is entitled is £459,000,000 sterling upon the basis that 9,000,000,000 sterling at the rate of exchange on 26 September 1929 were worth that sum in exchange. I will not discuss the matter at any length. I ventured to describe the claim as fantastic and ridiculous, but it is perhaps better to use less colourful epithets. As I have said, the only amount for which the holder of this cheque was entitled to be paid after 11 October 1924 was 9/1000ths of a mark, a sum which it is impossible to pay because there is no coin in the world which is small enough to provide it.

There is another defence open to the defendants which I need only mention and that is this. It is provided by the German cheque law of 1908 that cheques must be presented within a certain period of their being drawn. With regard to foreign cheques, that is cheques drawn abroad on a German bank and payable in Germany, they must be presented within such period as is fixed by the Federal Council, and by a Decree or notice or other appropriate form of 19 March 1908, the Federal Council appointed three weeks as the appropriate period for presentation of a foreign cheque. This cheque, of course, was not presented within the three weeks. It was presented some three years after it was drawn, namely, in December 1926. That also seems to me to be a sufficient defence, but the main and obvious defence is that there was no dishonour of this cheque. It was worthless when presented and, therefore, the cashier was quite right in saying he could not honour it because he had no coin small enough with which to pay it.

The result is that there must be judgment in this case for the defendants with costs.

The plaintiff appealed.

16 July 1931. LORD HANWORTH M.R.: This appeal fails, and indeed I am rather reluctant to say more than that the Court agrees with the decision reached by Mr. Justice Mackinnon and with the reasoning on which that conclusion has been come to. At the same time, as the plaintiff has appeared in person and has had a full opportunity of presenting his case, it is perhaps courteous to him to show that we have fully appreciated the point that he has put before us and, therefore, to give a somewhat more extended judgment than is really necessary.

The action is brought by the plaintiff, Mr. Leon Franklin, against the Westminster Bank Limited, and it is based upon the ground that the plaintiff claims to be the holder in due course of a bill or note which was issued to Messrs. Webster Brothers Limited, on 27 September 1923. The terms of the note must be carefully noticed: they are a direction to the Darmstädter und Nationalbank in Berlin to pay to Messrs. Webster Brothers Limited 9,000,000,000 marks. It is important to note that these are marks of that currency then existing: they are wholly different from reichsmarks and there must be no confusion between those two units. When this document or bill had been drawn it was apparently issued to a Company called Webster Limited; the Company called Webster Limited paid £15 into the defendant bank, whose name then was the London County and Westminster Bank, and in exchange for that were given a cheque drawn by the Darmstädter Bank in Berlin for these 9,000,000,000 marks. At that time the £15 that Messrs. Webster paid bought a cheque which meant that at the appropriate time the holder would have been entitled to receive these 9,000,000,000 marks of this depreciated currency. Mr. Justice Mackinnon said: 'We have tried this case upon the assumption that for value this cheque was endorsed first to a brother of the plaintiff and then by that brother to the plaintiff himself and that the plaintiff is the holder of it.' I pause there for a moment to note that that assumption is very favourable, perhaps too favourable, to the plaintiff. He tells us that he became the holder and received this bill from his brother, paying to his brother cash for it. No evidence was given of any entry in any book which proved or confirmed that statement, and the plaintiff's own statement to this court was that he paid the money to his brother out of cash in his hands at the time when he was carrying on a business. He says that it was a personal transaction with his brother, but I cannot help noting that on the plaintiff's own statement, there

are certain matters which would be all the better for being properly cleared up by some reference to an entry justifying the statement that the cash was the cash of the plaintiff and paid by him to his brother and was not in any way a part of the cash which was in the plaintiff's hands as cash in the business which he carried on.

I turn to section 72, sub-section 5, of the Bills of Exchange Act which says that where a bill is drawn in one country and payable in another the due date thereof is determined according to the law of the place where it is payable. There have been some cases decided upon that arising out of the War. Thus in a case where a bill was drawn in England and payable in Paris three months after the date on which it was drawn, but before it was due a moratorium law was passed in France in consequence of the War postponing the maturity, the maturity of the bill was for all purposes to be determined by French Law. So one has to look at the due date here of this payment to be received at the Darmstädter und Nationalbank by reference to the law of the country where that is to be received.

There was evidence before the learned judge of two relevant laws —foreign law being, of course, a question of fact. First of all, there was a Bank law which made a new constitution of Reichsbank, which is a bank with a standing equivalent to the Bank of England in this country, and it authorized the issue of reichsmarks and notes of reichsmarks—a different currency entirely from the currency in which this note was to be paid. Then there was a Mint law operating as from October 1924, under which the old currency was abolished as from then and the old currency was to remain legal tender only up to 11 October 1924, and no further; then from that date the new currency took its place. That provided also that the old currency should be exchanged on the basis of 1 million million marks—that is a billion marks—of the old denomination for one new mark.

Going back to the facts, this note was presented for payment on 15 December 1926. It will be noted, therefore, that it was presented after both the laws to which I have referred had come into full operation. Some comment is obviously required as to the delay between the date at which the note was drawn for payment and the date of presentation. Having regard to the uncertainty of the currency at the date of its being drawn and the various uncertainties through which the German currency went, one would have thought that this note drawn on 27 September 1923, would have been presented for payment sooner than that, after the lapse of three years and two months. However, let that pass. It is said that notice of dishonour was given on 28 September, but when the note was presented for payment it was marked as 'worthless'—the

fact being that under the operation of the two laws to which I have referred the 9,000,000,000 marks of the old currency had become worth 9/1000ths of a reichsmark, 9/1000ths of what was approximately equal to 1*s.* 0*d.*, 9/1000ths of 12 pence, if you work that out, comes to 27/250ths of a penny, something less than 1/10th of a penny. The word 'worthless' seems to be fully justified on that basis.

Mr. Justice Mackinnon in the course of his judgment has pointed out that the law to which I have referred reduced the value of this delayed cheque to this sum, of which the law would take no notice at all on the basis of the maxim which I quoted in argument. There was another difficulty in the way of the plaintiff, because there is a German Cheque law of 1908 under which certain dates can be fixed as the time limits within which cheques ought to be presented for payment. Evidence was given before the learned judge that by a Decree of the Federal Council of 19 March 1908 the Federal Council appointed three weeks as the appropriate period for presentation of a foreign cheque. That limit was not complied with. It was presented, as I have said, rather more than three years after it ought to have been presented; and, more than that, if it was in the hands of an endorsee there was a further limit giving, I think, three months to the endorsee in which to present it if in Europe. That limit was also exceeded. The result is that on the actual day of presenting the cheque the duty of presenting the cheque was not fulfilled according to the tenor of the law of the country where it was to be presented for payment. That also forms a good defence to the action.

What is now suggested is that under the Treaty of Peace or other clauses, which do not in any way deal with the matter that we have to consider, the plaintiff has some rights. We have followed his argument; we have looked at the Treaty of Peace; we have looked at the case which he cited, *In re Chesterman's Trusts*,[1] and, after giving attention to all the points that have been advanced, one comes back to the two defences which are fully dealt with by Mr. Justice Mackinnon and which fully and finally establish that the plaintiff has no right to sue in respect of this cheque. I am of opinion that the defendants were abundantly justified in their defence and that the judgment of the learned judge giving judgment for the defendants with costs was right, and equally that the appeal here must be dismissed with costs.

LAWRENCE L.J.: I agree, and have nothing to add.

ROMER L.J.: I agree.

Appeal dismissed.

Solicitors: Messrs. McMillan & Mott (for the defendants).

[1] [1923] 2 Ch. 466.

OPPENHEIMER *v.* THE PUBLIC TRUSTEE[1]

(Chancery Division and Court of Appeal)

Counsel for the plaintiffs: MR. C. A. BENNETT K.C., MR. H. B. VAISEY K.C., and MR. WILFRID LEWIS.

Counsel for the defendant: MR. GOVER K.C. and MR. J. H. STAMP.

The facts and arguments are set out in the Judgments.

4 Nov. 1926. EVE J.: I do not think I need trouble you, Mr. Gover.

The question involved in this summons is at what date the quantum of these two settled legacies expressed in German currency and bequeathed by the testator to two of his daughters, their issue and appointees, ought to be ascertained. The legacy is given in language which I will read. It is a direction that the trustees should out of the proceeds of the sale of his real and personal estate set apart sums, one of 240,000 marks and the other of 177,500 marks, and invest in the manner thereinbefore directed for the investment of the residuary estate and stand possessed thereafter, shortly on trust to pay the income of each legacy to one of his daughters with remainder to their children, and in default of children as they shall by will appoint. His will was made in 1892 and he died in 1900. At the date of the testator's death his property was largely represented by freehold and leasehold property and by two large mortgages and for many years after his death the property, or a large portion of the property existing at his death was retained in its then existing state of investment pursuant to a very full power of postponement conferred on the trustees by will, but ultimately in 1924, five years after the death of his widow who enjoyed an annuity of £3,000 a year, the Trustees were in a position to appropriate these legacies and they purported to have appropriated the legacies by a nominal sum which would at that date represent the cost of these two sums in German marks. In consequence of the unfortunate war between this country and Germany and the Peace Treaty which followed, the recipients, at any rate, of these legacies are not now able to receive their income, they are vested in the respondent to

[1] The author's thanks are due to Mr. Albert M. Oppenheimer and to Messrs. Cruesemann and Rouse, who supplied transcripts of the judgments of Eve J. and of the Court of Appeal respectively.

this summons, and the question which is raised is as between the trustees to the will, who happen also to be the residuary legatees, and the custodian, the assignee I might say of the interest of these ladies, whether the appropriation of this nominal sum satisfies the obligations of the trustees under the will or whether they must ascertain the value of the legacies at an earlier date, and the earlier date is the date at which the legacy ought or would properly have been appropriated if the condition of the estate had been such, and the executors in the exercise of their discretion had seen fit to realize the estate during the period which is generally spoken of as 'the executor's year', the twelve months immediately expiring after the testator's death. The respondent to the summons says: On 21 June 1901, at the expiry of that year, the legacy having vested, that was the moment of time at which the quantum of each of the legacies ought to have been ascertained, and I agree with him. I think at that point of time the fact that the condition of the estate was such that the bona-fide exercise of the trustee's discretion prevented them being able to realize the estate, is no answer to the claim of the legatee whose legacy was vested, and he was entitled to treat it as then set aside, although not appropriated in consequence of the condition of the estate preventing the trustees from making any proper appropriation on that date. That is a mere question of the condition of the estate, a mere election of the trustees, I have no doubt a very wise and prudent election, to leave the estate unconverted to a very much later date, but that cannot possibly, it seems to me, prejudice the right of the legatee to have the legacy ascertained at the date when, if the estate had been perfectly free and there had been no difficulty of administration, the legacies would have been properly set aside and invested. I must answer the questions that are put to me in the negative, and perhaps go on to say that the proper sums to be set aside are the amounts which, on 21 June 1901, would have been required to purchase in one case 240,000 marks, and in the other case 177,500 marks.

The plaintiffs appealed.

24 Feb. 1927. LORD HANWORTH M.R.: This is an appeal from a judgment of Mr. Justice Eve given on 4 November of last year upon a question raised by an Originating Summons as to the true construction to be placed upon the terms of a will which was made by Sir Charles Oppenheimer. The date of the will was 29 November 1892. The testator, Sir Charles Oppenheimer, died on 21 June 1900, and probate in this country was granted on 1 August 1900.

Now it appears that Sir Charles, who had been born in the Duchy of Nassau, afterwards incorporated in the German Empire, had

become many years ago, as far back as July 1871, naturalized as a British subject. When he died he was in fact living at Frankfurt, where I believe at the time he held the position of British Consul-General. I only refer to these facts (they do not appear to have any importance in regard to the question which we have to decide) because some question was raised as to whether or not the matter would have to be considered in the light of German law, or possibly by a German Court.

The point that we have to determine is what is the effect of the true interpretation of two legacies which were given to two of his daughters who are now Frau von Kornatzki and Frau von Tuercke. Sir Charles had two sons and five daughters, and he was at the time of his death possessed of valuable sites and properties in the City of London; he also had some property, a house in which he lived, at Frankfurt.

By the terms of his will the trustees are to sell and convert both the real and personal estate, and they are to stand possessed of the moneys to arise from the sale and conversion on the terms that after payment of his just debts there is to be an annuity paid to his wife, who is to be given the opportunity of living in the house at Frankfurt, and after the provision of the annuity to his wife there is to be a legacy to Frau Kornatzki and to his other daughters referred to, and particularly to the daughter Frau von Tuercke.

On looking into the terms of the will it appears that in the case of his daughter Emily, who had already been married at the time the will was drawn, he wished to complete his provision for her up to the sum of 240,000 marks which, if one takes the standard value of marks at or about that time, 20 marks to the £, would mean that he had made a provision for that daughter of £12,000. As the will recites, he had already under the contract of marriage made at the time when the wedding took place, made a provision of 62,500 marks. I ought to say that the marriage had taken place with a gentleman who was a captain in the German Army and had taken place in Germany. The provision in the will is that the sum passing to his daughter Emily under the will should be brought up to the full sum of 240,000 marks by providing the 177,500 marks which would be the balance of the 240,000 marks after taking into account the original payment on the marriage of the 62,500 marks.

I need not refer to the provisions or to the terms in which the daughter Helena and the daughter Minnie and the daughter Sascha are referred to, except to take note that in the case of these last two, Minnie and Sascha, their portion is in both cases to be also 240,000 marks. The particular case of the daughter Helena required separate

and different treatment for the reasons which he stated in his will. Also he refers to his second son, Albert Martin, to whom he gives a sum of £12,000.

Before one comes actually to the terms of the will, it would seem from the outstanding considerations which appear from the parts of it to which I have referred, that the provision he made for the daughters to whom I have referred, and to the son to whom I have referred, was a sum of £12,000 each, and one cannot overlook the fact that the 240,000 marks would be substantially, if not quite accurately, £12,000. He also gives a power to his trustees in their absolute discretion to postpone the sale of his property. He says this: 'It would be lawful for my trustees or trustee for the time being to postpone the sale and conversion of any part of my real and personal estate so long as they or he shall in their uncontrolled discretion think it expedient so to do.' As a matter of fact, the trustees in their discretion did postpone the sale and conversion of a large portion of the estate, particularly of the properties which the testator owned in the City. It was thus in fact not possible, or perhaps I ought to say not convenient, to pay all these pecuniary legacies at a time close to the testator's death, and the postponement was in the interests of nursing the estate as a whole.

On 11 November 1919 the testator's widow, Lady Oppenheimer, died. As we all know, the war between Germany and this country was declared on 4 August 1914. At that time, and up to that time, the trustees had postponed the sale and conversion of the property in this country. After the war had commenced, no such operation could be undertaken, and so it was not until after Lady Oppenheimer had died that the trustees were able to proceed with the sale and conversion, and they say that they were unable to appropriate a sum for the purpose of the payment of the two legacies in question, that is the balance due to Frau von Kornatzki and to Frau von Tuercke, until a date in July 1924. At that time they made an appropriation. We are told by Sir Francis Oppenheimer, in paragraph 6 of his Affidavit which is sworn on 15 October 1924, 'By the said Will it was expressly declared that it should be lawful for the trustees to postpone the sale and conversion of any part of the testator's real or personal estate so long as they in their sole discretion should think it expedient to do so. The said trustees in their discretion set aside or invested on or about 5 July 1924 such sums in sterling in 4½ per cent. Conversion Stock and 4 per cent. Funding Loan as were the equivalent at the current rate of exchange on the said date to the capital sums of 177,500 marks and 240,000 marks respectively referred to' in the affidavit, in respect of these two sums.

It so happens that at that date the mark was at its lowest point. In the report which has been before us it appears that at or about that date, and perhaps a little earlier or a little later (I am not quite sure) the mark had become of such low value that a billion marks went to a shilling; indeed the mark had become valueless. The result is that if that date, the date of the appropriation in July 1924, is to be taken as the date at which these legacies are to be quantified, the sum in sterling which represents in the first place Frau von Kornatzki's 177,500 marks, and in the second case Frau von Tuerke's 240,000 marks, is negligible. It is said on the part of the respondent to this appeal—that is the Public Trustee, for these sums would be charged under the Treaty of Peace Order—that that date, July 1924, is not the right date, and that the true date at which the value of these legacies is to be ascertained and their amount quantified is to be at the close of what is called the executor's year, namely, one year after the death of the testator, which in this case would make the date in question to be 21 June 1901. Mr. Justice Eve has held that that latter contention is right, and for my own part I should be prepared to say that I agree with the judgment of Mr. Justice Eve and the reasoning upon which it is based, except for the fact that the matter is of some importance and that we have had the advantage of the case being fully argued in this Court.

The argument of the appellants I think may be said to be this. Although in form there are these two legacies, each of them bringing the value of the legacy up to 240,000 marks, each legacy itself is a legacy of marks, intended to be a legacy of marks, and it is to be measured in marks; and if the trustees have, in accordance with their duty and their absolute discretion, postponed the sale and conversion of the estate, they are not to be held bound by any such rule as taking the legacy as vested and quantified at the close of the executor's year, but that their power to postpone the sale and conversion overrides any other direction, and thus the moment at which the amount of the legacy is to be ascertained is the date at which the trustees, in their uncontrolled discretion, find themselves able to appropriate a sum towards the payment of these marks.

I am unable to accept that view. I think that one must consider what was the intention of the testator. It appears to be clear from the terms of the will that his intention was to make provision for these two daughters just as he did for his sons and for the other daughters, by providing them with an amount of £12,000 sterling.

To pass to the more intricate terms of the will, the duty of the trustees was to provide that sum, in particular the 177,500 marks in this way: they were to set aside that sum, which was to be invested

in the manner thereinbefore directed for the residue of his trust estate, and then to apply the income for the advantage of his 'daughter. Now, those directions as to the investment that he gave, were for investment in British securities, British gilt-edged stock, British premier securities, railways, and the like; they were all British securities. For my part I think there is force in the argument that is presented to us by Mr. Gover, that there is ground for saying that the intention was to complete the legacy by an investment in British securities, and that the only purpose of the measurement given in marks is to give the standard by which you are to read, in the case of the lady already married to a German, the sum which will be equal to a total of £12,000. It appears to me, however, in any event, that the marks are merely the medium by which the provision is to be made for his daughter, and that it would be mistaking the intention of the testator altogether to say that his object and purpose was to provide his daughters with marks as marks, and not for the purpose of such an investment as might be obtained through the medium of those marks.

Now, if that be so, it appears that this legacy is general and not specific, and that there is in fact no definite time fixed for its payment. In the case of *Lord* v. *Lord*,[1] Lord Cairns, then Lord Justice, said this:[2] 'The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval.' Those words are explicit and definite. More than that, in the House of Lords in a comparatively recent case, the case of *Walford* v. *Walford*,[3] that rule which was laid down by Lord Cairns was accepted and adopted by Lord Haldane, then Lord Chancellor, and by the other Law Lords, including Lord Macnaghten, as the ordinary rule. Lord Haldane quotes those very words, and he says this:[4] 'The question I put to myself is, Is there to be found here a direction that the legacy is not to be paid till the fund falls in, which displaces what would be the ordinary principle of administration?' In the present case I can find no direction which displaces the ordinary principle of administration. The illustration of the applicability of that rule as laid down by Lord Cairns in *Walford* v. *Walford*[5] is a strong one, because there a testator who predeceased his father bequeathed to

[1] L.R. 2 Ch. 782. [2] Ibid., p. 789.
[3] [1912] A.C. 658. [4] Ibid., p. 665. [5] Ibid.

his sister a sum of £10,000 to be paid out of the estate and effects inherited by him from his mother, but as a matter of fact the testator was entitled in reversion expectant on the death of his father to a fund appointed to him under the will of his mother subject to his father's life interest therein. The result was that at the time of his death he had not, and would not get until his father died, the sum of £10,000 which he had bequeathed to his sister. On the death of the father later, the question was raised from what date the legacy of £10,000 carried interest, and it was held that the will contained no direction express or implied that the payment of the legacy was to be postponed until the falling in of the reversionary funds, and consequently that the legacy was payable at, and carried interest from, the expiration of one year from the testator's death. That is a strong case to show that unless you can find some direction in no uncertain terms to displace the ordinary principle of administration, the legacy is payable at and from the close of the executor's year and carried interest therefrom.

In the present case there appears to be no direction which could prevent that rule applying, because there is no time fixed for the payment of the legacy, and no explicit direction which contravenes or militates against the application of the rule. But it is said that that contrary effect is to be found in this will by reason of this fact that there is this power to postpone the sale and conversion to which I have already referred. It does not appear to me that that is effective for the purpose, and indeed the case of *In re Whiteley*[1] appears definitely to decide otherwise. In that case the testator 'gave his residuary real and personal estate to his general trustees upon trust for sale and conversion, with power to postpone such sale and conversion for such a period as they might think proper . . . and he declared that his general trustees should, as soon after his death as circumstances would permit, having regard to the amount of his residuary estate and the possibilities of sale and realization thereof, and having regard also to the directions thereinafter contained with respect to such sale and realization, set apart and appropriate out of the residue of the moneys to arise from such sale and realization a sum or sums . . . not exceeding the sum of £1,000,000 sterling' for a particular purpose. 'Owing to circumstances connected with the realization of the testator's estate, no part of the sum of £1,000,000 had been paid' by the date in question, which was 1909, the testator having died in 1907. It was held that the directions contained in the will in no way interfered with the application of the ordinary rule that a legacy carries interest from the expiration of twelve

[1] (1909) 101 L.T. 508.

months after the testator's death. It appears to me, therefore, that upon that decision, a decision of this Court, it is impossible to say that the power to postpone has the effect of abrogating the rule laid down by Lord Cairns.

The result in the present case is that the date at which the legacy became vested from which it carried interest is the year from the day of the testator's death, namely, 21 June 1901, and that is the date at which it must be estimated what is the sum due to the legatees, having regard to the value of the mark at that date; in other words, that the trustees have not a right to wait until they were minded to make an appropriation in their behalf, and to appropriate a sum which represents an insignificant value, because numerically it would buy, at that date of appropriation, a sufficient number of marks.

As I say, I should have been content to leave the matter where Mr. Justice Eve had left it, but in deference to the arguments that have been addressed to us I have thought it right to give reasons of my own. For the reasons given by Mr. Justice Eve and those which I have added I think the appeal must be dismissed with costs.

SARGANT L.J.: I am of the same opinion. I can appreciate, and to some extent feel some sympathy with the motives which probably have directed this appeal, because I quite appreciate the hardship which is sought to be cast upon the legatees by virtue of the charge in the Peace Treaty, but we have nothing to do with that; we have to deal with the case precisely as if the appeal were an appeal by the ordinary legatees against the trustees who took the residue, and it is impossible to give any greater or less right to the legatees because of the existence of this charge, which of course in many cases does work very great hardship.

Now, to my mind, the matter is perfectly clear and is absolutely concluded by authority over and over again. It is concluded directly, I think, by the *Whiteley Homes*[1] case. That case itself followed *Wood* v. *Penoyre*[2] and *Lord* v. *Lord*[3] and there has been the subsequent case in the House of Lords to which the Master of the Rolls has referred, *Walford* v. *Walford*.[4] Indeed, if this appeal were allowed it would upset the ordinary administration of a very very large proportion of estates, because this direction which we find in the present will to convert the real and personal estate and out of the real and personal estate pay legacies, followed by the ultimate discretion to defer the sale and conversion for the convenience of

[1] (1909) 101 L.T. 508.
[2] 13 Ves. 325.
[3] L.R. 2 Ch. 782.
[4] [1912] A.C. 658.

the estate, occurs over and over again in a very large proportion of wills. I should have thought that nobody, apart from this special circumstance and the circumstances as to the marks, would have contended to-day that the power to postpone could have any effect whatever upon the date at which the legacies were to become payable and to carry interest. If that is so (and I will not deal further with the matter except to say that in my opinion it is fully established that it is so), we have this that there is a direction to pay at a year from the death a sum of 177,500 marks in one case, and 240,000 marks in the other case, and to invest the sums so set aside in English securities. Mr. Gover argued very ingeniously that the mention of marks was only a means of indicating pounds sterling, and that really these were gifts of sums in pounds sterling. Without going as far as that, I think it is at least clear that the gift of the marks or the setting aside was to be followed immediately by a process of converting those marks into pounds sterling and of investing the pounds sterling in British securities. That would be the only practical way of giving effect to the directions in the will, and in that state of things we have this: one year after the death of the testator there was to be set aside those sums of marks to be turned into pounds and invested in British securities. That being so, it seems perfectly clear by the cases that have been decided with regard to the debts due in marks, that the sum of marks that has to be paid under a direction of that sort, constituting a debt due, is to be measured at the rate of exchange on the day upon which the sum is due to become payable. Mr. Justice Eve accordingly was in my opinion right in directing that those sums of marks in this case were to be ascertained at the rate on that day. I agree that the appeal should be dismissed with costs.

LAWRENCE L.J.: I agree. In my opinion, on the true construction of the will the two legacies in question are in substance and in fact legacies of sterling, whether you arrive at that in the way suggested by Mr. Gover or whether you arrive in the way of a notional purchase and sale. It appears to me that the testator was merely speaking in terms of marks in order to quantify the benefit in sterling which his daughters should take. This I think is made quite plain when he speaks of the legacy in terms of marks long after it has in accordance with his own directions in the will been converted into sterling and been invested.

The will itself, to my mind, gives a clue for that method of disposition, and it is this, that he had already pledged himself in marks to his daughters by covenant, had already paid sums in marks to his daughters or their trustees, and was desirous by his

will of equalizing those benefits, and to my mind he could have adopted no better method than to continue to speak of his benefits in terms of marks, meaning that they should be satisfied in pounds sterling.

If that be the true construction, I am of opinion that Mr. Gover's argument that the time for the payment or setting aside of these legacies is one year after the testator's death, is right, and that neither the power to postpone the conversion nor the exercise of that power, nor indeed the inability to realize within that period, has the slightest effect upon the well-established rule that in the contemplation of the law the legacy is payable at the expiration of one year from the testator's death. That rule of convenience is a very ancient rule and is past all cavil at the present time. It is clearly laid down by Sir William Grant in the case of *Wood* v. *Penoyre*[1] and it was reasserted in *Lord* v. *Lord*,[2] reaffirmed *In re Whiteley*[3] and again affirmed in *Walford* v. *Walford*.[4] It seems to me that it is hopeless now to contend the contrary to that rule.

Now, Mr. Bennett, in his forcible argument, has placed great reliance upon the case of *Byrchell* v. *Bradford*.[5] To my mind, that case has no application whatsoever to the facts in this case. In that case a sole trustee had, in gross breach of trust, retained a legacy of a beneficiary in his own hands uninvested, and had represented to her that the legacy had been invested. The direction in the will was to invest in public stocks. The beneficiary brought an action discovering that the sum had not been invested in order to claim from the trustee who had so committed a breach of trust the value of the rise in the stocks which would have accrued to her had the investment been made when it should in effect have been made, that is to say when he distributed the residuary estate. That was the sole claim made against the trustee for a gross breach of trust in that action. Sir John Leach, in giving judgment, says that at that time the practice of the Courts was, in administration actions, not to take any notice where there was a public stock legacy, of the price of the public funds at that period or at any other period, but merely to treat it as a cash legacy of the nominal amount of the funds. That rule does not happen to prevail now in our courts. Then he goes on to say that assuming the executor and the trustee were different persons, the executor would have handed over to the trustee when he had realized the estate, and the trustee would then have been liable from that time, and only from that time, for non-invest-

[1] 13 Ves. 325.
[2] L.R. 2 Ch. 782.
[3] (1909) 101 L.T. 508.
[4] [1912] A.C. 658,
[5] (1822) 6 Madd. 235.

ment. As a matter of fact, a rise there had taken place between the date when the estate was clear and the date when the action was brought and he applies that analogy in making the trustee make good the loss which the beneficiary has sustained by reason of his non-investment. It seems to me that the facts of that case only need to be stated to show how entirely different they are from the facts which have arisen here. In my opinion that case does not govern and has really no application to the facts of this case. In my judgment Mr. Justice Eve was perfectly right in applying the ordinary well-known rule, and I agree that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: Mr. Albert M. Oppenheimer (for the plaintiffs).
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