Michigan Law Review

Volume 54 | Issue 3

1956

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MICHIGAN LAW REVIEW

Vol. 54 JANUARY 1956 No. 3

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I. Introduction

Since the end of the two great wars the world has been experiencing enormous fluctuations of foreign exchanges. Their unprecedented scale and rapidity range prominently among the novel causes endangering the regular flow of international trade. The court decisions abound with frightening examples of maladjustments resulting therefrom. Whether it is the obligation or its discharge that are to be measured in a currency foreign to one of the parties the appreciation or depreciation of the foreign exchange in terms of another money may substantially increase, reduce or even wipe out the equivalent received by the creditor or expended by the debtor in their respective domestic money.[1] As foreign exchange is almost inevitably involved in all international transactions, the importance of the problem is self-evident.

Usually, the parties are willing to assume such risks up to the maturity of the obligation. Frequently they may protect themselves by buying or selling the foreign exchange forward at a price fixed in their own national currency.[2] However, such protection

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1 In Transamerica General Corp. v. Zunino, 82 N.Y.S. (2d) 595 (1948), the court held that an obligation of 2,526,791 lire worth $207,196 at the time of the commencement of action was discharged by payment in depreciated lire worth only $6,500 at the subsequent time of payment. In De Sayve v. De La Valdene, 124 N.Y.S. (2d) 143 (1953), affd. without opinion, 283 App. Div. 918, 130 N.Y.S. (2d) 865 (1954), the same judge decided that an obligation of $58,000 and £ (U.K.) 5,000 payable in France, worth at maturity (inclusive of interest) 3,200,000 French francs was to be measured at the pre-depreciation value of the francs of $123,000, presently worth 41,000,000 francs. A valuation at the present (depreciated) rate of exchange of the franc would have given plaintiff only about $9,000, the present equivalent of 3,200,000 francs. Other examples are discussed throughout this paper.

2 Crump, The ABC of Foreign Exchanges, 11th ed., 71, 84, 94 (1951). But see art. V, §3, subdiv. (b) of International Monetary Fund Agreement [United Nations Monetary and Financial Conference, Final Act and Related Documents, Conference Series 55, Publication 2187, U.S. Dept. of State (1944)] providing that "(b) a member shall not be entitled without the permission of the Fund to use the Fund's resources to acquire currency to hold against forward exchange transactions." For these and other reasons such "cover" may be frequently unavailable.

becomes unavailing in the event of a default in payment. Here the date of the future discharge is unknown. Yet it is the unpredictable rate of exchange prevailing on such future date that may affect the economic benefits or burdens of the outcome. As of what date then should the fluctuating value of a foreign money obligation be measured in such instances?

Another element of uncertainty arises from the fact that these fluctuations are erratic, rather than orderly and proportionate. The depreciation of the rate of exchange need not be a corollary of a decline in the domestic purchasing power of money.[3] At times it may be difficult to ascertain whether there was any real depreciation of the foreign currency, or whether the fluctuation of the rate of exchange was due to the appreciation of another money in which the value of the former is measured, or to other causes. Fluctuations of the external value of money may result from governmental manipulations of the rate of exchange. Such interference may be motivated by the expectation that the reduction of the (external) value of the domestic money in terms of another currency will not result in a proportionate increase of the (export) prices in terms of domestic money. Devaluations are frequently resorted to in order to improve the devaluating country's competitive ability in foreign markets, its domestic employment situation and balance of payments.[4] Consequently, measured in terms of its purchasing power, rather than another currency, there may be no loss at all, or if any, its extent may not be commensurate with the devaluation.[5]

[3] See criticism of the purchasing power parity theory and the analysis of the external value of inconvertible paper money in KURIHARA, MONETARY THEORY AND PUBLIC POLICY 313 ff. (1950); CRUMP, note 2 supra, at 136-143; CHANDLER, THE ECONOMICS OF MONEY AND BANKING, rev. ed., 665 ff. (1953). See also Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952, n. 25, referring to the brief of the United States, showing the discrepancy between the post-devaluation rate of exchange of the pound in terms of dollars and the purchasing power of the two currencies. Transamerica General Corp. v. Zunino, 82 N.Y.S. (2d) 595 (1948), in which it was pointed out (at 605) that the loss of an Italian creditor from depreciation of its national currency payable in Italy, even if recoverable under Italian law, should not be measured "by the arbitrary rule of the relation of that currency to the value of the currency of some other country, but by the more rational rule of relating the currency in which the debt was expressed to the intrinsic value of its metal content, its legal value as legal tender, or its value as purchasing power in the country in which the debt and currency exist." See also note 5 infra.

[4] International Monetary Fund Annual Report of April 30, 1950, p. 5; International Monetary Fund Agreement, cited in note 2 supra, art. IV, §5.

[5] A comparison of the effect of the wave of devaluations that took place in the Fall of 1949 on the price structure of the respective countries published in the International Monetary Fund Annual Report of 1950, pp. 1-14 is illustrative. It points out that eighteen member-countries of the Fund and some nonmembers devalued their currencies mostly by about 30.5% in relation to the American dollar. These devaluations were based on the assumption that the export prices measured in the domestic money of the devaluating

A devaluation may cause different reactions in other countries. If countries *A* and *B* devaluate their respective national currencies in the same proportion there may be no substantial change in the value of one in terms of the other. However, *ceteris paribus,* there will be a substantial depreciation of the currencies of *A* and *B* if measured in the currency of *C,* a country which did not devaluate its currency.[6] Thus, if measured in the currency of *B,* the currency of *A* appears to have remained stable; if measured in the currency of *C,* it appears to have depreciated.

Hence, the determination of the currencies in which the original obligation is to be measured (money of contract, money of account), or the damages resulting from a default in payment are to be computed (money of damages), or the primary (original) or secondary obligation (damages) may or must be discharged (money of payment), or in which the award is to be expressed (money of judgment) become of utmost importance. In fact a proper choice of the applicable currency will decide whether any fluctuation may be taken into consideration at all, and if so, to what extent.[7]

The creditor may seek a valuation in a firmer currency. The debtor will prefer the softer money. If unsuccessful, the former may argue for the application of the pre-depreciation maturity-day rate of exchange, while the latter will favor a judgment-day valuation, which would reduce his obligation.

Sometimes the monies in which the obligation is to be measured or payment is to be made or even their respective rates of exchange may have been fixed by an express or implied term of the contract. This may be controlling up to maturity. But usually there is little indication as to the currency in which, or as to the time as of which, the loss from belated payment is to be measured where there was a default.

country would not rise in proportion to the extent of the devaluation. These expectations proved to be correct. According to the Report (p. 11), by April of 1950 the export prices increased in the respective domestic currencies in the United Kingdom by little more than 4%, in Norway only slightly more, and in the Netherlands by about 8%, while, measured in U.S. dollars, imports from the United Kingdom showed an average reduction of 20 to 25% in landed cost.

6 For the purposes of this analysis it may suffice to compare the so-called par values (or the official rates of exchange) in the summary published in the International Monetary Fund Annual Report of 1950 at pp. 88, 89. Note, e.g., the change in the rate of exchange between the pound sterling and the U.S. dollar: Pre-devaluation rate £ 1 to $4.03; post-devaluation rate £ 1 to $2.80.

7 See Part III-D, infra and particularly Richard v. American Union Bank (1st case), cited and examined therein; and note 3 supra.

Additional difficulties will arise where the primary (original), or the secondary obligation (damages), are expressed in a money foreign to the forum, if an action is instituted in this country. In our courts judgments are to be expressed in dollars and cents.[8] Consequently, foreign money obligations must be converted into our national currency (money of judgment) in order to permit the court to render an award. The foreign litigant's domestic money equivalent will again vary in accordance with the selection of the valuation date.[9] Yet, the jurisdiction in this country may have been obtained by chance.[10] A valuation in dollars may not have been contemplated by the parties.[11] A breach-day valuation in the money of the United States, one of the firmest and most desirable currencies of the world, may improve the position of the creditor far beyond what he may have been entitled to under his contract.[12] In turn, potential foreign investors may be deterred from permitting their assets to reach a jurisdiction subjecting them to such risks in the event of an attachment.

The emergence of these difficult problems caught the courts unprepared. During the long period of the pre-world war stability these questions were of relatively little importance. Under what was considered the automatic mechanism of the classical gold stand-

[8] Coinage Act of April 2, 1792, c. 16, §20, 1 Stat. L. 250, 31 U.S.C. (1952) §371; 29 N.Y. Consol. Laws (McKinney, 1948) §27; Frontera Transportation Co. v. Abaunza, (5th Cir. 1921) 271 F. 199; Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952 at 954; Eder, "Legal Theories of Money," 20 CORN. L. Q. 52 at 63 (1934). With respect to England, see Manners v. Pearson & Son, [1898] 1 Ch. D. 581 at 587; Di Ferdinando v. Simon, Smits & Co., [1920] 3 K.B. 409 at 413; Celia v. Volturno, [1921] 2 A.C. 544 at 588; DICEY, CONFLICT OF LAWS, 6th ed., Rule 165, p. 744 (1949). With respect to Canada see 1 Rev. Stat., c. 40, §15 (1) (1927). However, in many countries judgments may be expressed in foreign money, see SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS, 3d ed., c. XII (1950); RAAPE, INTERNATIONALES PRIVATRECHT, 3d ed., 334 (1950); MANN, THE LEGAL ASPECT OF MONEY, 2d ed., 307-309 (1953).

[9] Compare Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 (1921) (sum of francs owing to a French creditor measured in dollars at the post-depreciation judgment-day rate of exchange gave plaintiff the dollar equivalent of the identical amount of francs actually owed as of the time of judgment) with Comptoir Commercial D'Importation v. Zabriskie, 127 Misc. 461, 216 N.Y.S. 473 (1926) (sum of francs owing to a French plaintiff measured in dollars at the pre-depreciation breach-day rate of exchange gave plaintiff a greater amount of francs than the numerical sum actually owed), and with Page v. Levenson, 281 F. 555 (1922) [sum of francs measured in dollars at the maturity (breach)-day rate of exchange gave plaintiff a lesser amount of francs than the numerical sum originally owing to him, where the franc appreciated in terms of dollars after maturity].

[10] De Sayve v. De La Valdene, 124 N.Y.S. (2d) 143; and the cases cited in note 11 infra.

[11] Parker v. Hoppe, 257 N.Y. 333, 178 N.E. 550 (1931), analyzed in note 48 infra; Taubenfeld v. Taubenfeld, 198 Misc. 108, 97 N.Y.S. (2d) 158 (1950); Perutz v. Bohemian Discount Bank, 279 App. Div. 386, 110 N.Y.S. (2d) 446 (1952), revd. on other grounds, 304 N.Y. 533, 110 N.E. (2d) 6 (1953); Sulyok v. Penzintezeti Kozpont Budapest, 279 App. Div. 528, 111 N.Y.S. (2d) 75 (1952), affd. as mod. 304 N.Y. 704, 107 N.E. (2d) 604 (1952).

[12] But see Page v. Levenson, 281 F. 555 (1922), mentioned in note 9 supra.

ard fluctuations of rates of exchange were limited to the narrow margins between the gold points.[13] As long as currencies were linked to gold by a firm ratio it mattered little whether the obligation was measured or discharged in one currency or another. Under the changed conditions of our times this matter became of primary, and as it appears, permanent importance. In this era, monetary stability in most countries appears to have been subordinated to other economic aims. It is not so much the law as the objectives of monetary policy and possibly the nature, quality and concepts of money which have radically changed.[14] Thus the Scylla and Charybdis confronting the courts rest in two factors: lack of precedent and unsuitability of some of the scanty principles developed in the past with respect to a substantially different money.

In their search for a solution, at first, the courts were tempted to develop simple mechanical rules by which foreign money would be valued at a fixed date: when the obligation accrued (maturity, or breach day);[15] or under certain circumstances when judgment was rendered.[16] In numerous instances the outcome proved to be contrary to the principle that damages are to be compensatory. At times it reduced the obligation of the party at fault. At others it improved the creditor's position far beyond what he would have obtained if there had been no default.[17] These ill effects led to their rejection by what this writer considers the weight of decisions of our courts.[18] Yet a number of recent cases still cling to the discredited mechanical doctrines.[19] Most unfortunately some of the decisions contradict each other as to which of the different mechanical rules should be applied,[20] suggesting sometimes that different rules have been adopted by federal and New York State courts.[21]

[13] FOSTER, RODGERS, BOGEN AND NADLER, MONEY AND BANKING, 4th ed., 409-416, 423-426 (1953).

[14] CRUMP, note 2 supra, at 148, 149 points out that prior to 1914 devaluation of a currency "was regarded as a breach of faith both to the holders of the currency in question and also to other countries," but that the "war of 1914-18 rendered this attitude untenable." See also notes 3 and 5 supra.

[15] Part II-B and D infra.

[16] Part II-C infra.

[17] Notes 15 and 16 supra.

[18] Part III-A infra.

[19] De Sayve v. De La Valdene, 124 N.Y.S. (2d) 143 at 151 (1953) [but see critique in notes 49, 208 and 258 infra]; Taubenfeld v. Taubenfeld, 198 Misc. 108, 97 N.Y.S. (2d) 158 (1950); Bonell v. Von Schultz, 197 Misc. 756, 95 N.Y.S. (2d) 617 (1950).

[20] Compare the cases cited in note 19 supra.

[21] De Sayve v. De La Valdene, 124 N.Y.S. (2d) 143 (1953); CONFLICTS RESTATEMENT, New York Annotations §424 (1935); MANN, note 8 supra, at 309, and numerous other writers. But see Parts III and IV infra.

What then should a creditor of a foreign money obligation collect where there was a delay in payment? When are damages for depreciation of foreign money recoverable? As of what time and in what currency are they to be computed? How is the value of a foreign money obligation to be measured where no damages may be had? The answers to these and other incidental questions require a thorough analysis of certain features peculiar to the law of money.

It is the purpose of this article to clarify these problems, to sum up the primary principles by which they are governed and to show why the rational rule, emphasizing reparation of the loss due to depreciation of foreign money after maturity, rather than mere mechanical doctrines, is bound to prevail.[22]

II. THE MECHANICAL RULES

A. *The Ambulatory Concept of Money*

A few general remarks on certain legal characteristics of monetary obligations made at the outset, and an outline of what this writer refers to as the mechanical valuation rules, will facilitate the understanding of the special problem examined in this paper.

[22] The importance of this problem was recognized in numerous writings and court decisions. Many of the conclusions expressed therein are of great value. It is submitted, however, that none of them contains a complete systematic presentation of the underlying principles. It is for this reason that they did not succeed in deducing what this writer considers the rational rule.

Among the numerous writings on this subject are NUSSBAUM, MONEY IN THE LAW NATIONAL AND INTERNATIONAL 361-374 (1950); MANN, note 8 supra, at 245-255, and cc. IX and X; 5 WILLISTON, CONTRACTS, rev. ed., §1410A (1937); CHITTY, CONTRACTS 435-437 (1947); 5 CORBIN, CONTRACTS §1005 (1951); MCCORMICK, DAMAGES 190-204 (1935); DICEY, CONFLICT OF LAWS, 6th ed., Rules 160-163 (1949); 2 BEALE, CONFLICT OF LAWS §§423.1, 424.1 (1935); CONFLICT OF LAWS RESTATEMENT §§423, 424 (1934); 15 AM. JUR., Damages §§60, 63 (1938); Gluck, "The Rate of Exchange in the Law of Damages," 22 COL. L. REV. 217 (1922); Rifkind, "Money as a Device for Measuring Value," 26 COL. L. REV. 559 (1926); Drake, "The Proper Rule in Fluctuating Exchanges," 28 MICH. L. REV. 229 (1930); Fraenkel, "Foreign Moneys in Domestic Courts," 35 COL. L. REV. 360 (1935); Graveson, "The Discharge of Foreign Monetary Obligations in English Courts," UNIV. OF MICH. LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS (1951); notes: 40 HARV. L. REV. 619 (1927); 36 VA. L. REV. 215 (1950); 15 MOD. L. REV. 369 (1952); 68 L. Q. REV. 163 (1952); 61 YALE L. J. 758 (1952); 52 COL. L. REV. 141 (1952); 36 MINN. L. REV. 968 (1952), and others cited in the above writings. Among the older writings of a different era, see STORY, COMMENTARIES ON THE CONFLICT OF LAWS, 7th ed., 425-444 (1883), and SEDGWICK, DAMAGES, 9th ed., §§273-275, pp. 538, 542 (1912).

The problem of selecting the proper kind of rates of exchange, such as a single official rate, one of the multiple official or free market rates (see cases and materials cited in notes 125, 127, 205, 206 infra) requires a separate analysis and exceeds the scope of this paper.

Although the economic and legal concepts of money are different,[23] some of the economic functions of money are important criteria for its legal classification.

In an international market merchandise (commodities) may be bought, sold, or paid for either in domestic or foreign currencies. The commodity is the *object* of the transaction. The respective currencies, such as dollars, sterling, francs, etc., serve as the measure of its value or as a generally accepted medium of payment. Performing these important functions of "money" (measure of value and general medium of payment)[24] they were treated by the parties and are to be classified for this purpose as "money."[25]

On the other hand, in our domestic market foreign money itself may be bought and sold for dollars or even another currency. Here the foreign money becomes the *object* of the transaction. For certain limited purposes of the transaction it was treated by the parties, and may have to be classified in law, as a commodity.[26] In turn, the dollars or another currency in which its (foreign money acquired as a commodity) value was measured or payment was made may have been contemplated to function in this transaction, and therefore may have to be classified as "money." This does not prevent the recipient of the foreign money, previously treated as a commodity for the limited purposes of the transaction,

23 E.g., Bank demand deposits, checking accounts or checks are frequently considered money by economists. See KENT, MONEY AND BANKING, rev. ed., 5 (1951); CRUMP, note 2 supra, at 26. See also HALM, MONETARY THEORY, 2d ed., 28ff. (1946). In law, such deposits, accounts or checks are choses in action distinguishable from money in many respects. Thomson v. Bank of British North America, 82 N.Y. 1 (1880); Rhodes & Co. v. Weisglass & Co., 178 N.Y.S. 378 (1919); Palmer v. Golden, 127 Misc. 487, 216 N.Y.S. 509 (1926), affd. 221 App. Div. 360, 223 N.Y.S. 897 (1927). See also NUSSBAUM, note 22 supra, at 108-113; MANN, note 8 supra, at 24.

24 FOSTER, RODGERS, BOGEN AND NADLER, note 13 supra, at 10-11; KENT, note 23 supra, at 5; CHANDLER, note 3 supra, at 6-11.

25 Parker v. Hoppe, 258 N.Y. 365 at 367, 179 N.E. 770 (1932) (denial of motion for reargument), note 48 infra; Guaranty Trust Co. v. Henwood, 307 U.S. 247 at 255, 59 S.Ct. 847 (1939); 20 YALE L. J. 604 at 606, 609, 617 (1911); MANN, supra note 8, at 142-144, 149-154; NUSSBAUM, supra note 22, at 22-24, 318-321. The problem of classification of currencies as "money" or "commodity" is examined throughout this article (esp. Parts II-B to D and III-B). Considerable confusion was caused by the erroneous view of some older authorities indiscriminately holding that foreign money was always a mere commodity. See, e.g., Petkus v. Lietuvos Ukio Bankas, 123 Misc. 193, 204 N.Y.S. 726 at 729 (1924); Marrache v. Ashton, [1943] A.C. 311; CONFLICTS RESTATEMENT §423 (1934); TORTS RESTATEMENT, c. 47, comment to §911 (1939). It may be interesting to note that in Bronson v. Rodes, 7 Wall. (74 U.S.) 229 at 250-251 (1868), and in other cases, even specific kinds of domestic money (gold coins) were classified as a mere commodity. However, this view was expressly rejected in Norman v. Baltimore & Ohio R. Co., 294 U.S. 240 at 301-302, 55 S.Ct. 407 (1935).

26 Brown v. Perera, 182 App. Div. 922, 176 N.Y.S. 215 (1918); Richard v. American Union Bank (2d case), 253 N.Y. 166 at 175, 170 N.E. 532 (1930). See also note 27 and Part III-B infra.

to use the same as money (measure of value or medium of payment) in another transaction, or vice versa.[27] This shows that the classification as "money" or "commodity" depends on the facts of the case and, as will be illustrated later,[28] on the purposes of the classification.

Similar ambulatory features are encountered in connection with the classification of money as *domestic* or *foreign*. The dollar, franc or mark may be foreign or domestic to one or either party, to the controlling law, place of payment, forum, domicile, place of business of the parties or the purpose for which it was intended to be used. Consequently, in accordance with the contemplation of the parties Czechoslovak money payable in Germany under a Czechoslovak contract was classified as foreign for determining whether damages for its depreciation after a default in payment were recoverable.[29] Again in accordance with a different intention of the parties Czechoslovak money owing under a wholly Czechoslovak contract between two Czechoslovak nationals, looking upon Czechoslovak crowns as their domestic currency, appears to have been properly classified by a New York court as domestic with respect to the question of damages. For a different purpose, namely with regard to the procedural requirement that judgments are to be expressed in our national currency, the same decision treated the Czechoslovak money as foreign.[30] In this respect the intention of the parties was irrelevant. The reasons for such classifications are more complicated and are discussed further below.

These few examples illustrate that the characterization of money, as *foreign* or *domestic* will again change in accordance with the purposes of the classification. The relativity of these concepts creates substantial difficulties for, in law, as explained further

27 Compare Richard v. American Union Bank (1st case), 241 N.Y. 163, 168, 149 N.E. 338 (1925) with Richard v. American Union Bank (2d case), note 26 supra. See also Brown v. Perera, note 26 supra, showing that even where for certain limited purposes money may have to be treated as a "commodity" it may still have to be classified as "money" for other objectives.

28 Part III-B infra.

29 Highest Court of Czechoslovakia, Official Report (Vazny) 15865, Rv. I 266/35 (1937).

30 Perutz v. Bohemian Discount Bank, 279 App. Div. 386, 110 N.Y.S. (2d) 446 (1952), revd. on other grounds 304 N.Y. 533, 110 N.E. (2d) 6 (1953); Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S.Ct. 166 (1926), was based on similar views, but see also Part IV-D infra distinguishing between the domestic and foreign money valuation rules.

below, *money* and *commodity*, and *domestic* and *foreign* money are governed by different principles.[31]

Quite generally it may be stated that under our law losses from fluctuations or changes in value of goods are usually recoverable in actions for breach of contract, while no damages for depreciation of our domestic money are permissible.[32] With respect to foreign money, this analysis will attempt to show that the recovery of such damages is limited to certain special situations.[33]

The frequent disregard of this problem of classification and of its effect contributed to the unsatisfactory results obtained by the courts.

B. *The Single Rule Doctrine*

The early post World War I decisions began by trying to solve the question of valuation of foreign money after maturity by applying some of the rules on breach of contract to deliver goods (commodities).[34] This commodity concept of foreign money led to the adoption of the so-called breach or maturity-day rule.[35] In accordance with the rule that damages for non-delivery of goods are to be measured as of the time and place stipulated in the contract, the valuation was said to be required at the rate of exchange of the foreign money prevailing at the time of maturity of the

[31] Part III-B and H infra.

[32] Part IV-B infra.

[33] Part III infra.

[34] Petkus v. Lietuvos Ukio Bankas, 123 Misc. 193, 204 N.Y.S. 726 at 729 (1924); cases cited in note 35; Gluck, "The Rate of Exchange in the Law of Damages," in 22 COL. L. REV. 217 at 249-250 (1922); Di Ferdinando v. Simon, Smits & Co., [1920] 3 K.B. 409 at 413 (per Bankes, L. J.) citing Vaugham Williams, L. J., as saying in Manners v. Pearson, [1898] 1 Ch. 581 at 592 that the "mode of computing the value of foreign currency in English Sterling, and thus converting the one currency into the other, is based upon damages for breach of contract to deliver the commodity bargained for at the appointed time and place. . . ." To the same effect see Celia v. Volturno, [1921] 2 A.C. 544 at 551, per Lord Buckmaster, but see id. at p. 568, dissenting opinion of Lord Carson, pointing out that Vaugham Williams, L. J., "was a dissenting judge, and his judgment cannot be reconciled with the judgments delivered by the majority of the Court, Lindley, M. R. and Rigby, L. J."; and Drake in 28 MICH. L. REV. 229 at 233 (1930), saying that Manners v. Pearson "is apparently not in line with the decision in *Scott v. Bevan*," 2 B. and Ad. 78, 109 Eng. Rep. 1073 (1831), also relied upon in the Di Ferdinando case and "is *not* in accordance with the 'breach day' rule." With respect to the two different breach-day rules see Part II-D infra.

[35] See authorities cited in note 34 supra; Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37, 138 N.E. 497 (1923); Sokoloff v. National City Bank, 250 N.Y. 69, 164 N.E. 745 (1928); Kantor v. Aristo Hosiery Co., 222 App. Div. 502, 226 N.Y.S. 582, affd. 248 N.Y. 630, 162 N.E. 553 (1928). See also II-D infra.

obligation, breach of contract, or commission of the wrong.[36] All moneys foreign to the forum were treated as "foreign."[37]

As it usually was the foreign money which had depreciated in terms of the money of the forum the result frequently favored the injured party.[38] Faith in the stability of their own national currency inherited from a happier past seems to have induced the courts to believe that the rule would always do justice.[39] Moreover, the fixing of the quantum of the obligation as of a single date was expected to discourage speculation.[40]

The subsequent devaluations and depreciation of the dollar and sterling illustrate the fallacy of these assumptions.[41] Where it was the money of the forum which had depreciated the maturity-day valuation, instead of giving compensation, worked to the benefit of the party at fault. As pointed out before, it reduced the obliga-

[36] See cases cited in notes 34 and 35 supra. However, such generalizations as may be implied from the literal meaning of the name by which the rule became known are not quite accurate. It should be noted that in Celia v. Volturno, [1921] 2 A.C. 544, one of the leading breach-day cases, the loss of earnings in Italian money was measured as of the respective times of loss of hire during two subsequent periods of time, while the ship damaged in a collision had been repaired, rather than as of the time of the preceding collision (tort). In another case, Cummings v. London Bullion Co., [1952] 1 All E.R. 383 at 388, Denning, L. J., pointed out that "the critical date is not so much the date when the cause of action arose, but rather the date when the debt should have been paid." After having considered the effect of §33 (1) of the English Exchange Control Act, 1947, he stated that the debt was not payable until the debtor was given a Treasury permission to do so. To the same effect, see id., p. 389, per Romer, L. J. See also Comptoir Commercial D'Importation v. Zabriskie, 127 Misc. 461, 216 N.Y.S. 473 at 477 (1926) (valuation as of the diverse times when the respective items of the loss caused by the breach had been incurred).

[37] Sokoloff v. National City Bank, 250 N.Y. 69, 164 N.E. 745 (1928) (Russian roubles owing to a Russian); the Di Ferdinando case and Celia v. Volturno, both cited in note 34 supra (Italian lire owing to Italian plaintiffs); the Zabriskie case, cited in note 36; and Page v. Levenson, (D.C. Md. 1922) 281 F. 555 (French francs owing to French plaintiffs). It is doubtful whether Parker v. Hoppe, 258 N.Y. 365, 179 N.E. 770 (1932), in which roubles owing to a Russian creditor were valued at the breach-day rate of exchange, although frequently cited among leading breach-day cases, belongs in this group (see note 48 infra). It should be noted that the subsequent two-rule doctrine distinguishes between two categories of foreign money. See II-D infra. With respect to the problem of classification in general, see II-A supra and Part III-B infra.

[38] See cases cited in notes 34 and 35 supra.

[39] Except for the first World War period the United Kingdom was on the gold standard until 1931. This and the international position of the sterling made it one of the most desirable currencies up to that time. The fixing of the value of foreign money in terms of sterling as of breach day may have been believed to protect the creditor from further fluctuations of the real value of the obligation. The subsequent depreciation and devaluation of the pound and the modern monetary theories that have prevailed in numerous countries show that this view was erroneous. See Part I; and DAY, THE FUTURE OF STERLING (1954).

[40] Celia v. Volturno, [1921] 2 A.C. 544 at 558, per Lord Sumner; on this subject see also MANN, supra note 8, at 329.

[41] See note 39 supra.

tion.[42] The debtor may have profitably speculated in the money of a foreign forum.

The unreliability of the rule in the opposite direction made itself noticeable where the obligation expressed in the creditor's own national currency had depreciated in terms of the money of the forum. Thus an award of pounds sterling computed by an English court at the pre-depreciation breach-day rate of exchange of lire gave an Italian plaintiff at the time of judgment the equivalent of 96,000 lire, where his loss was only 48,000 lire.[43] The domestic purchasing power of his national currency or its rate of exchange in terms of other foreign exchanges may not have been reduced, or at least not in the same proportion. The depreciation of his national currency in terms of the wholly unrelated money of a foreign forum may not have caused him any damage at all.[44] Had timely payment been made the lire may have depreciated even in his possession. These facts and the question of whether such damages had been within the contemplation of the parties were not even taken into consideration by the court, for the rule, whose application may have resulted in a windfall to the creditor, was purely mechanical.[45]

It will be noted that under the iron laws of arithmetic the breach-day valuation will always work to the benefit of one of the parties irrespective of the merits of the case. Where it is the currency whose value is being measured (mensuratum)—in our example the lira—which depreciates in terms of the currency in which it is being measured (mensura)—in our example, sterling—the result will favor the creditor. Where the latter money depreciates in terms of the former, the outcome will favor the debtor. Consequently, whether the injured party is placed in an equal, a better, or a worse position becomes a matter of chance.

Nevertheless, at least as the law stands now, the breach or maturity-day rule has found general acceptance in the English courts.[46] For a time it appeared that it would also prevail in this

[42] Barry v. Van den Hurk, [1920] 2 K.B. 709; Lebeaupin v. Crispin, [1920] 2 K.B. 715; Page v. Levenson, (D.C. Md. 1922) 281 F. 555; Khoury v. Khayat, [1943] A.C. 507; Sulka v. Brandt, 154 Misc. 534, 277 N.Y.S. 421 at 422 (1935).

[43] Di Ferdinando v. Simon, Smits & Co., [1920] 3 K.B. 409. A similar result was obtained in the Zabriskie case cited in note 36 supra. Here the plaintiff was a French corporation suing in New York for compensation of a loss sustained in France in the national currency of that country.

[44] Notes 3 and 5 supra.

[45] See Part II-D infra.

[46] Ibid.; and Part IV-C infra.

country.[47] However, a growing opposition soon came into existence in the United States.[48] At present, to a large extent the views expressed in the early post-World War I New York decisions,

[47] See the New York cases cited in note 35 supra. It is, however, doubtful whether such later cases as Parker v. Hoppe, 257 N.Y. 333, 178 N.E. 550 (1931), rearg. denied 258 N.Y. 365; 179 N.E. 770 (1932), and Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71, 193 N.E. 897 (1934), although frequently cited among the leading breach-day decisions, are to the same effect. Some of the principles expressed therein come very close to the doctrine which led to the adoption of the judgment-day rule. See the following note.

[48] Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 (1921); Metcalf Co. v. Mayer, 213 App. Div. 607, 211 N.Y.S. 53 (1925); Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S.Ct. 166 (1926); Zimmerman v. Sutherland, 274 U.S. 253, 47 S.Ct. 625 (1927); Richard v. American Union Bank (1st case), 241 N.Y. 163, 149 N.E. 338 (1925). These cases reject the "commodity concept" with respect to valuations of foreign currency functioning as money. See also Richard v. American Union Bank (2d case), 253 N.Y. 166, 170 N.E. 532 (1930). It was particularly under the influence of the two Richard decisions and of the Humphrey case, supra, that the New York Court of Appeals decisions began to vacillate. In Parker v. Hoppe, 257 N.Y. 333, 178 N.E. 550 (1931), rearg. denied 258 N.Y. 365, 179 N.E. 770 (1932), based on the purchaser's rescission of a wholly Russian contract between two Russian parties for the delivery of goods, plaintiff was entitled to a refund of 100,000 roubles originally paid on account of the purchase price. Plaintiff argued that the judgment award in dollars should be computed at the rate of exchange of the roubles prevailing on the day when the payment had been made to the seller. The court, holding (p. 341) that "damages upon breach of contract are to be measured as of the day of the breach, as a general rule," and that this also applied to a rescission, decided that the time of the rescission was the proper date. But, thereafter (258 N.Y. 366), Judge Crane, writing the opinion, examined the hypothetical question that could have been raised if "defendant upon the plaintiff's demand had paid back the 100,000 roubles," and continued: "They would have been received in Russia in the money of that country. No account would have been taken of depreciation. If upon receiving them the plaintiff had immediately brought his rubles to New York, he could only have gotten for them their value in our money at that time. No one here would have given him their value as it was a year before." The difficulty is that there was no indication that the parties contemplated or that they might have been reasonably expected in the ordinary course of their business to transfer the rubles to New York at that or any other time. Yet, the rescission-day valuation placed the plaintiff in the same position as if that had been the case. In the subsequent decision, denying the motion for reargument and refusing to value the rubles as of the original payment day, Judge Crane (p. 367) distinguished plaintiff's claim for repayment of a sum of money from a contract to deliver a commodity: "The parties in this contract were dealing with money as money. Had property of any other nature been given to the seller, on rescission he would have been obliged to return the identical property or replace it in value as of the time received less natural deterioration, cost of keep and like deductions." It is submitted that under this reasoning, endorsing the nominalistic principle, a judgment-day conversion would have been more appropriate under ordinary circumstances (see Part III-B and C, infra). A few years later, in Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71 at 81, 193 N.E. 897 (1934), Judge Crane cited with approval the view of Justice Holmes in Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 at 519, 47 S.Ct. 166 (1926), one of the leading judgment-day cases based on the view that it is not within the province of the lex fori to award damages where they are not permissible under the controlling law, and that "the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here." (See Part II-C and note 51 infra.) Judge Crane correctly concludes that "the right to a sum of money due upon contract is to be determined by the terms of that contract the world over." Certain doubts arising from these two decisions dealing with ruble obligations may be due to the particular circumstances resulting from the complete collapse of the Russian currency system. (Note particularly that the ques-

adopting the breach or maturity-day rule as the general rule, herein referred to as the single rule doctrine, no longer appear to be authoritative.[49]

C. *The Two-Rule Doctrine*

In the course of a re-examination of the results of the single rule principle, some of the legal distinctions between monetary and non-monetary obligations, and between domestic and foreign money came to the foreground.[50] In this connection the place of payment was believed to be particularly important.[51]

tion of a judgment-day conversion was not even raised in the Parker case.) Such breakdowns of a currency system must be distinguished from a mere depreciation. See Part IV-B (2) infra. With respect to rubles see also Tillman v. National City Bank of New York, (2d Cir. 1941) 118 F. (2d) 631; and Rashba, "Debts in Collapsed Foreign Currencies," 54 YALE L. J. 1 (1944).

49 United Shellac Corp. v. Jordan, 277 App. Div. 147, 97 N.Y.S. (2d) 817 (1950); Perutz v. Bohemian Discount Bank, 279 App. Div. 386, 110 N.Y.S. (2d) 446 (1952), revd. on other grounds 304 N.Y. 533, 110 N.E. (2d) 6 (1953); Buxhoeveden v. Estonian State Bank, 106 N.Y.S. (2d) 287 (1951); In re Manus' Estate, 106 N.Y.S. (2d) 102 (1951); Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952), affd. without op. 304 N.Y. 942, 110 N.E. (2d) 884 (1953), and in general Part III infra. Professor Nussbaum's apprehension (note 22 supra, at 373), that after the English model the breach-day rule might be adopted by New York courts may prove to be unfounded. [The justification of the judgment-day conversion in Bonnell v. Von Schultz, 197 Misc. 756, 95 N.Y.S. (2d) 617 (1950), and of the breach-day valuation in Taubenfeld v. Taubenfeld, 198 Misc. 108, 97 N.Y.S. (2d) 158 (1950), appears to be doubtful.] The endorsement of the breach-day rule in the De Sayve case, mentioned in note 1 supra, may be due to an error. In this case the larger part of the underlying obligation was and remained a dollar debt, with respect to which no valuation problem was involved in an American court, unless our courts were required to give effect to a French law by virtue of which this dollar obligation was to be converted into francs as of a certain date. It is only in the event that this French law, based on the French *cours forcé* doctrine mentioned in note 208, is not contrary to our public policy that the underlying obligation became a franc debt. If this was the case and the francs were owed to a French citizen the court seems to have erred in testing the righteousness of the outcome in dollars, rather than francs, where no loss in our national currency seems to have been sustained. Consequently, the problem hinges on the following two problems: was the respective French law calling for the conversion of the dollars into francs contrary to our public policy? Was the obligation to be measured in dollars or in francs? If the obligation remained a dollar debt the outcome giving plaintiff a dollar for dollar was correct, although the court's theory, based on the inapplicable breach-day rule, was wholly unjustified and uncalled for. If, however, the obligation became a franc debt under the French law, if this law is not contrary to our public policy, and if plaintiff can prove no special damages in our national currency, then under our law the application of the breach-day rule giving plaintiff about thirteen times as much as he would have been able to obtain in a French court is a clear windfall. The breach-day conversion is absolutely unjustifiable with respect to the remaining part of the underlying obligation, a sterling debt. On the question of public policy and other details of this case see notes 208 and 258 infra.

50 See Part II-A and Part III-B infra.

51 It was erroneously assumed that the place of payment always offered an easy test with respect to the following matters: (a) Determination of the controlling law. (b) Classification of the currency as foreign, or as a commodity, with respect to the question of damages for its depreciation. See CONFLICT OF LAWS RESTATEMENT §423 (1934); BEALE, note 22 supra, §423.1. See Part III-B infra. (c) Determination of the currency in which

Under our law an obligation for *payment* of a sum of our domestic *money* remains unaffected by the depreciation of the dollar, whether it occurs before or after maturity.[52] A reduction in the purchasing power of the dollar or a deterioration of its rate of exchange in terms of another foreign exchange does not give rise to any claim of damages. This nominalistic concept was assumed to have become a part of the laws of all civilized countries with respect to obligations *payable* within their territory in their national currency (e. g., German marks in Germany).[53] Consequently, in such situations where the obligation was expressed in

damages for the depreciation of money were to be measured. See Part III-D infra. It was on the theory that the question of damages resulting from a breach of contract was governed by the law of the place of performance that in Hicks v. Guinness, 269 U.S. 71 at 80, 46 S.Ct. 46 (1925), where the debt was due to an American creditor and was to be paid in the United States, it was held that the extent of the secondary obligation was governed by American law. See also Zimmerman v. Sutherland, 274 U.S. 253 at 255-256, 47 S.Ct. 625 (1927); and Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71 at 80, 193 N.E. 897 (1934). However, a statement to this effect in the latter appears to be a mere dictum, as it was stipulated that Russian law should govern. The validity of this controversial conflict of laws doctrine, although favored by numerous writers and adopted by the *Conflicts Restatement*, §§372, 413, appears to be highly doubtful, insofar as it may affect the substance of the obligation (as distinguished from a mere mode of performance) in disregard of the proper law of contract. See 2 RABEL, THE CONFLICT OF LAWS 466 (1947); NUSSBAUM, note 22 supra, at 148; MANN, note 8 supra, at 289; Revillon v. Demme, 114 Misc. 1, 185 N.Y.S. 443 at 445 (1920); Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952), affd. 304 N.Y. 942, 110 N.E. (2d) 884 (1953) [question of damages for breach of an American contract for payment of a sum of money current at the foreign place of performance decided under our law; but see interpretation of this case in CORBIN, CONTRACTS (1953 Supp.) §1005, p. 6, n. 72, favoring the law of the forum, criticized in Part IV-A infra]; and Pavenstedt v. New York Life Ins. Co., 203 N.Y. 91 at 96, 96 N.E. 104 (1911), one of the leading cases on the doctrine of re-exchange [damages for the loss from the dishonor of bills drawn in this country upon a foreign place controlled by our law; *contra:* STORY, CONFLICT OF LAWS, 8th ed., c. VIII, §314, pp. 438-444 (1883), suggesting that this is not "a departure from the rule that the law of the place of payment is to govern," because the bill of exchange should not be construed to set forth a foreign place of payment but to contain merely a guarantee of acceptance and payment at such place]. See also Swift & Co. v. Bankers Trust Co., 280 N.Y. 135 at 140-145, 19 N.E. (2d) 992 (1939). This conflict of laws problem exceeds the scope of this paper.

52 Julliard v. Greenman, 110 U.S. 421, 4 S.Ct. 122 (1884); Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407 (1935); Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428 (1935); Perry v. United States, 294 U.S. 330, 55 S.Ct. 432 (1935); Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S.Ct. 166 (1926). See also Part IV-B (1) and D infra.

53 See Deutsche Bank Filiale Nurnberg v. Humphrey, note 52 supra, in which Justice Holmes states (at p. 519) with respect to an obligation controlled by German law for payment of marks on deposit with a German bank in Germany: "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 contract and by the German law—but we 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

the money of the foreign place of payment and particularly where the obligation was controlled by the law of such foreign country, our courts assumed no damages were recoverable in the courts of the foreign country of payment. The foreign currency was treated as "money," rather than a "commodity." It was also emphasized that the creditor should not be placed in a better position merely by bringing an action in an American court.[54] Hence, a valuation of the foreign money in our national currency at the judgment (trial)-day rate of exchange was expected to give the proper equivalent in dollars, in which our judgments are to be expressed (judgment-day rule).

A different situation was felt to exist where the obligation was expressed in a currency foreign to the place of performance.[55] In this case, after a default in payment, the foreign money was believed to be comparable at least to some extent to a mere commodity.[56] Where an American creditor was entitled to an amount of German marks payable in this country he may have *sold* them for *dollars* at the *price* (rate of exchange) prevailing in the American market on maturity day. Therefore, where there was a decline in the rate of exchange of the marks after the debtor's default in payment the creditor's loss should be measured *in dollars*

might have accrued, however much the mark might have fallen in value as compared with other things. See *Société des Hôtels le Touquet Paris-Plage* 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. *Legal Tender Cases,* 12 Wall. (79 U.S.) 457, 548, 549. 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 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." This nominalistic view, resulting from an inaccurate application of our "domestic money rule" to an obligation expressed in foreign money, appears to be subject to serious criticism, both under our own law, and under the controlling foreign law. See Part IV-D infra. Moreover, the German "revalorization" (discussed in Part IV-B (2) infra) does not appear to have been pleaded (NUSSBAUM, note 22 supra, at 359, n. 93). Subsequently the American creditor was indemnified for his loss from depreciation of the mark in proceedings before the Mixed Claims Commission under the Peace Treaty of 1921 [see 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 735 (1943)]. However, this inaccuracy, although important in another respect (Part IV-D), detracts little from the general importance of this leading federal decision, recognizing that the question of damages is controlled by the applicable foreign substantive law and not by the law of the forum. See Part IV-A, infra.

54 The Humphrey case, 272 U.S. 517 at 519, 47 S.Ct. 166 (1926).

55 Hicks v. Guinness, 269 U.S. 71, 46 S.Ct. 46 (1952). CONFLICTS RESTATEMENT §423 (1934); 2 BEALE, note 22 supra, §423.1. See also note 51 supra, and Part III-B infra.

56 Ibid.; Richard v. American Union Bank (1st case), 241 N.Y. 163 at 166, 167, 149 N.E. 338 (1925), interpreting the decision in Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37, 138 N.E. 497 (1923).

(rather than marks) as of the time and place of the stipulated performance, i.e., at the maturity (breach) date rate of exchange (breach-day rule).[57]

This led to the view that there were in fact two rules. The breach or maturity-day rule applicable where the value of money not currency of the state of performance was to be measured; the judgment-day rule where the obligation based on a foreign cause of action was expressed in the national currency of the foreign place of payment.[58] Under this view, referred to herein as the two-rule doctrine, the place of payment became the test for the application of one or the other rule.

Under the mechanics of this two-rule doctrine no damages could be recovered by an American creditor for the depreciation of marks payable in Germany.[59] However, the doctrine permits damages where the marks are payable in this country.[60] The different treatment of these two situations may be contrary to the contemplation of the parties. In both instances the American creditor may have intended to convert the marks into his national currency upon payment at maturity. In the absence of prohibitive exchange control restrictions he may have sold the marks for dollars at their maturity rate of exchange had timely payment been made, irrespective of the place of performance. This was recognized in several leading decisions clearly concluding that the fact that the foreign money was the national currency of the place of payment did not preclude the recovery of damages for its depreciation after a default in payment.[61]

57 Hicks v. Guinness, note 55 supra.

58 Royal Ins. Co. v. Compania Transatlantica Espanola, (D.C. N.Y. 1932) 57 F. (2d) 288 at 291, 292; Sun Ins. Office Ltd. v. Arauca Fund, (D.C. Fla. 1948) 84 F. Supp. 516; Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952; Paris v. Central Chiclera, (5th Cir. 1952) 193 F. (2d) 960 at 962; United Shellac Corp. v. Jordan, 277 App. Div. 147, 97 N.Y.S. (2d) 817 (1950); Perutz v. Bohemian Discount Bank, 279 App. Div. 386, 110 N.Y.S. (2d) 446 (1952), revd. on other grounds 304 N.Y. 533, 110 N.E. (2d) 6 (1953); Buxhoeveden v. Estonian State Bank, 106 N.Y.S. (2d) 287 (1951); Bonell v. Von Schultz, 197 Misc. 756, 95 N.Y.S. (2d) 617 (1950); CONFLICTS RESTATEMENT §§423, 424 (1934); BEALE, note 22 supra, §§423.1, 424.1; 5 WILLISTON, CONTRACTS, rev. ed., §1410A (1937); 15 AM. JUR., Damages §§60, 63 (1938); NUSSBAUM, note 22 supra, at 367, 368. Some of these authorities stress the additional conflict of laws requirement, that the obligation must be controlled by foreign law, as a prerequisite for the application of the judgment-day rule. On this subject see notes 48 and 51 supra. Moreover, in United Shellac Corp. v. Jordan, supra, Justice Van Voorhis added (at p. 823) that "the conversion privilege is confined to a time which would not benefit" the party at fault. On this subordination of the mechanical rules to the requirement of "justice," see Part III-A, and note 75 infra.

59 Note 53 supra.

60 Note 55 supra.

61 See Part III-B and C infra.

It is not intended to deny that the place of payment may sometimes be a reliable basis for a presumption as to the intentions of the parties.

The error of the two-rule doctrine rests in that it would make the presumption conclusive, rather than rebuttable. The place of payment is just as unsuitable as a conclusive criterion for the determination of whether damages for depreciation of a currency are recoverable as it is for its classification as domestic or foreign.

The two-rule doctrine is a composition of the breach-day and the judgment-day rules. Besides being afflicted with some defects peculiar to itself it also suffers from the inadequacy of its component parts. The vagaries of its mechanics become even clearer if once more the effect of the inflexible laws of arithmetic is taken into consideration. As in the case of the mechanical breach-day rule they will affect the outcome. Under the mechanized judgment-day rule the situation is only reversed. Here the depreciation of the money whose value is being measured (mensuratum)—in our example the marks—in terms of another currency (mensura)—in our example the dollar—works to the detriment of the creditor.[62] The depreciation of the latter may give him an advantage. The outcome still remains a matter of chance.[63]

D. *The Two Different Breach-Day Rules*

The breach-day rules as adopted in England[64] and in the earlier New York decisions[65] appear to be of a different character. In view of the weight given to the English law by our courts this difference must be briefly explained in order to avoid confusion.

In both the valuation *date* was grounded on the commodity concept of money and on the view that the mode of computing value of foreign currency was based upon *damages* for breach of contract to deliver the commodity bargained for at the appointed

[62] The Humphrey case, 272 U.S. 517, 47 S.Ct. 166 (1926); Bonell v. Von Schultz, 197 Misc. 756, 95 N.Y.S. (2d) 617 (1950).

[63] See Part I and Part II-B supra.

[64] Di Ferdinando v. Simon, Smith & Co., [1920] 3 K.B. 409; Celia v. Volturno, [1921] 2 A.C. 544; Vionnet v. Wills, [1939] 4 All E.R. 136; [1940] 1 K.B. 72; Cummings v. London Bullion Co., [1952] 1 All E.R. 383. See also DICEY, CONFLICT OF LAWS, 6th ed., Rule 165 (3), p. 745 (1949); and notes of Professor Kahn-Freund, 68 L. Q. REV. 163 (1952); and Mann, 15 MOD. L. REV. 369 (1952).

[65] Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37, 138 N.E. 497 (1923); Petkus v. Lietuvos Ukio Bankas, 123 Misc. 193, 204 N.Y.S. 726 at 729 (1924); Kantor v. Aristo Hosiery Co., 222 App. Div. 502, 226 N.Y.S. 582, affd. 248 N.Y. 630, 162 N.E. 553 (1928); Sokoloff v. National City Bank, 250 N.Y. 69, 164 N.E. 745 (1928).

time and place.[66] However, from this point on the American and English decisions followed a different course.

In England the loss from depreciation of foreign money was held to be "too remote a consequence of the breach to be taken into consideration."[67]

If this view had been also based on the commodity concept of money it may not have constituted an exception to the general rule on damages for breach of contract to deliver goods. The question of proximity of the cause would have remained primarily one of *fact*.[68] If, under a different factual situation, the loss were found not to be too remote, damages for depreciation of foreign money would be permissible.

However, the remoteness seems to have been based on the contrary view that foreign money is not a commodity. The loss from depreciation of foreign money appears to have been considered too remote, as a matter of law, rather than fact. In other words, it became one of the basic principles of the English law, at least as it now appears to stand, that damages for depreciation of foreign money are not recoverable.[69]

On the other hand, in the earlier New York decisions, any mention of the question of remoteness of the loss from deprecia-

[66] See note 34 supra.

[67] Di Ferdinando v. Simon, Smith & Co., [1920] 3 K.B. 409 at 415, per Scrutton, L. J.; similarly in Celia v. Volturno, [1921] 2 A.C. 544 at 561, per Lord Parmoor.

[68] McCORMICK, DAMAGES 560-562 (1935); 1 SUTHERLAND, DAMAGES, 4th ed., c. 3, §§15, 16, 48, 49 (1916); 1 SEDGWICK, DAMAGES, 9th ed., c. VIII, §§138-143 (1912).

[69] Celia v. Volturno, [1921] 2 A.C. 544 at 558 (per Lord Sumner), stating, "Fluctuations in foreign exchange inevitably introduce a speculative element into all transactions and affairs, and, unless the parties themselves have provided for this by some contract, the law must apply the same principles as if they had remained stable." See also DICEY, note 64 supra, Rule 160. But see lower court decision in Mehmed Dogan Bey v. Abdeni & Co., [1951] 2 All E. R. 162 (claim for damages resulting from devaluation of the pound sterling decided by arbitration), in which McNair, J., examined the question of whether the remoteness of the loss constituted a question of fact or of law; and the optimistic view, expressed in the new (1953) edition of Dr. Mann's book, note 8 supra, at 87 and 252, that the problem may be one of fact. Dr. Mann points out (p. 252) that it is not "inconceivable that upon proper proof of the necessary facts damages for delayed payment of a foreign currency debt will be recoverable in England." Unfortunately, as the English law now appears to stand, this still remains only a wish, however desirable it may be. If it should prevail, it would constitute a complete repudiation of the present English breach-day rule. This might lead to the adoption of, what this writer considers to be, the American rule, previously expressly rejected in Vionnet v. Wills, [1939] 4 All E.R. 136; [1940] 1 K.B. 72 at 73, a case cited with approval even after the Abdeni decision, supra, in Cummings v. London Bullion Co., [1952] 1 All E.R. 383; East India Trading Co. v. Carmel Exporters and Importers, [1952] 1 All E.R. 1053 at 1056; and In re Russian Commercial and Industrial Bank, [1955] 1 All E.R. 75 at 77, 78. With respect to sales of foreign exchange (as a commodity) Dr. Mann's optimistic view may be more in accordance with the present state of the English law. See NUSSBAUM, note 22 supra, at 344; Graveson, "The Discharge of Foreign Monetary Obligations in English Courts," in LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 113, 114 (University of Michigan, 1951).

tion of foreign money was conspicuously absent. They were based on the opposite view that such damages were permissible and that the breach-day valuation would indemnify the injured party.[70] Where this result was not obtained, it was mostly due to the inherent fallacies of the rule.[71]

The foregoing considerations show that in fact the English breach-day rule is based on a contradiction. On one hand foreign money is treated as being subject to a different rule from commodities. Damages for depreciation of foreign money are held not to be recoverable as a matter of law. On the other hand, however paradoxical this may appear to be, the determination of the date as of which the foreign money is to be valued is based on the "commodity-valuation rule," as if damages were recoverable.

For many years there was serious doubt whether the breach-day rule was limited to actions for unliquidated sums of money, such as may arise out of breach of contract, or tort, or whether it also applied to claims for liquidated amounts of money (debts).[72]

In spite of its unsoundness, justly criticized by numerous writers, the present weight of English decisions still appears to consider the breach-day rule equally applicable to both.[73]

III. THE AMERICAN (NEW YORK) RATIONAL RULE

A. *Rejection of Mechanical Standards*

In this country the rules of damages have been relied upon more persistently. Contrary to England, the emphasis has been on reparation of the loss.[74] The courts, although frequently

70 See cases cited in note 65 supra; Gluck in 22 COL. L. REV. 217 at 249, 250 (1922); 15 AM. JUR., Damages §60 (1938); 4 TORTS RESTATEMENT, c. 47, §911, comment (1939); CONFLICT OF LAWS RESTATEMENT §423 (1934); CONFLICT OF LAWS RESTATEMENT, New York Annotations §423 (1935). To the same effect see also Melzer v. Zimmerman, 118 Misc. 407, 194 N.Y.S. 222 at 224, 225 (1922); Strohmeyer & Arpe Co. v. Guaranty Trust Co. of New York, 172 App. Div. 16, 157 N.Y.S. 955 at 958 (1916).

71 See Part II-B and C supra. However, in Sulka v. Brandt, 154 Misc. 534, 277 N.Y.S. 421 at 422 (1935) in which the breach-day conversion worked to the benefit of the party at fault, because of the appreciation of the foreign money in terms of dollars, the per curiam opinion states that "the mere circumstance that the fluctuation of exchange went against the plaintiff would not seem to justify a departure from this rule."

72 DICEY, supra note 64, Rule 165 (3); MANN, THE LEGAL ASPECT OF MONEY, 1st ed., 292, 301 (1938); In re Chesterman's Trusts, [1923] 2 Ch. 466, per Sterndale, M. R. and Warrington, L. J.

73 Vionnet v. Wills; Cummings v. London Bullion Co.; East India Trading Co. v. Carmel Exporters and Importers; In re Russian Commercial and Industrial Bank, note 69 supra; Grauman v. Treitel, [1940] 2 All E.R. 188; CHESHIRE, PRIVATE INTERNATIONAL LAW, 4th ed., 663, 664 (1952); notes of Professor Kahn-Freund and Dr. Mann, cited in note 64 supra; and MANN, note 8 supra, at 319, 320. But see criticism of Mann's views in note 69 supra. On certain exceptions to the rule, see note 247 infra.

74 See the authorities cited in note 70; Richard v. American Union Bank (1st case),

saying that they were applying the mechanical rules, in fact tested the result by examining whether it was "just."[75] This subordination of the mechanical rules to the requirement of "justice" in truth constituted their complete repudiation.[76] Judging from what the courts *did*, it will be found that they reverted to the basic principles from the oversimplification of which the erroneous rules had been derived.[77] The following analysis shows what these principles are and what outcome is "just."

241 N.Y. 163, 149 N.E. 338 (1925); (2d case) 253 N.Y. 166, 170 N.E. 532 (1930); Hicks v. Guinness, 269 U.S. 71 at 80, 46 S.Ct. 46 (1925), based on the leading federal case on consequential damages, Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 23 S.Ct. 754 (1903); Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952), affd. 304 N.Y. 942, 110 N.E. (2d) 884 (1953); Ghuneim & Co. v. Southwestern Shipping Corp., 124 N.Y.S. (2d) 303 at 307-308, 17 A. (2d) 1300 (1953); 5 CORBIN, CONTRACTS 53 (1951); 5 WILLISTON, CONTRACTS, rev. ed., §1410A (1937); MCCORMICK, DAMAGES 203, 204 (1935); Rifkind, "Money as a Device for Measuring Value," 26 COL. L. REV. 559 at 587 (1926); Drake, "The Proper Rule in Fluctuating Exchanges," 28 MICH. L. REV. 229 at 242, 249 (1930).

[75] Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952 at 956, emphasizing that "the judgment-day rule yields a just result in this case" (but see note 150 infra); Matter of Heck, 203 Misc. 788, 116 N.Y.S. (2d) 255 at 258-259 (1952) (considering the equities of the outcome); United Shellac Corp. v. Jordan, 277 App. Div. 147, 97 N.Y.S. (2d) 817 at 822, in which, after having restated the two mechanical rules (see Part II-C supra), Van Voorhis, J., concluded that under the established law upon this subject the conversion privilege was confined to a time which would not benefit the party at fault. [This well-meant statement is not quite accurate and requires some limitation. In accordance with the general principles of our law "damages must be calculated on the basis of plaintiff's loss and not on the basis of defendant's gain." See Mutual Life Ins. Co. of New York v. Tailored Woman, Inc., 283 App. Div. 173, 126 N.Y.S. (2d) 573 at 578 (1953), motion for rearg. denied, 283 App. Div. 1030, 131 N.Y.S. (2d) 866 (1954).] See also 5 WILLISTON, CONTRACTS, rev. ed., §1338, p. 3763 (1937), saying that the general purpose of the law is and should be, to give compensation; MCCORMICK, note 74 supra, at 560; and the passage in note 80 infra; Eder, "Legal Theories of Money," 20 CORN. L. Q. 52, stressing the desirability of placing the injured party in as good a position as he would have been in had there been no breach or wrong; the suggestions in 36 MINN. L. REV. 968 at 971, 972 (1952); and note 76 infra.

[76] Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 at 389 (1952), affd. without op. 304 N.Y. 942, 110 N.E. (2d) 884 (1953). In this case an obligation expressed in the currency of a foreign place of payment was converted into dollars, at the breach-day rate of exchange. Citing Orlik v. Wiener Bank Verein, 204 App. Div. 432, 198 N.Y.S. 413 (1923), Van Voorhis, J., pointed out that "that conclusion appears to be correct under the facts of this case" and continued: "Although the contract was to be performed abroad in terms of foreign currencies, plaintiff's principal place of business is in the United States, and the circumstances indicate that in the normal course of business it would have reduced the foreign funds to United States currency as soon as it was entitled to receive them and to the extent that it would have been able to do so." With respect to the Orlik case, see Part IV-D, and notes 253 and 254 infra. Under the mechanized "two rule doctrine" the currency of the foreign place of payment would have been valued at the judgment-day rate of exchange. See Part II-C supra.

[77] This seems to have been recognized by Judge Van Voorhis in the Hughes Tool Company case, note 76 supra, at 389. He states: "when applied to particular factual situations there may be less discrepancy than is commonly supposed between the New York decisions and the rule adopted by the United States Supreme Court (*Deutsche Bank* v. *Humphrey*, 272 U.S. 517, 519), the American Law Institute (Restatement, Conflict of Laws, §424) and indorsed by Professor Williston (5 Williston on Contracts, §1410A).

B. *Importance of Proper Classification of Money*

The difficulty of the problem discussed in this paper lies primarily in whether damages for depreciation of the foreign money after default in terms of another currency are permissible. This, in turn, may depend on whether, under what circumstances, and to what extent, for this limited purpose, foreign money is comparable to a commodity.[78]

The solution of this problem was found not to rest solely in the inherent nature of foreign money but in the contemplation of the parties. Although there is some similarity with the problem of determination of what money is to be classified as foreign,[79] the characterization as foreign, by itself, may not justify a recovery of damages.[80]

In *Richard v. American Union Bank* (1st case)[81] in consideration of a sum of dollars, defendant's predecessor agreed to open a credit in Roumanian lei in Bucharest, for the benefit of plaintiff, a New York banker. The lei, or the credit of lei, were the object of the transaction. Although *acquired* as a commodity, it was held that where the credit was to be opened in Roumania, it must be assumed in the absence of "special circumstances," that when the contract was made the lei were intended to be *used* "as money in the country where it is the recognized medium of exchange."[82] Because of this *intended use* as money, damages for delayed payment were held not to be recoverable (nominalism).

When it was shown in a subsequent action, based on the same breach, that in this transaction between these two New York banks

In *Shaw, Savill, Albion & Co.* v. *The Fredericksburg* (189 F. 2d 952) the United States Circuit Court of Appeals in this circuit appears to have considered that the customary generalizations upon this subject are oversimplified." With respect to the basic principles from the oversimplification of which the putative rules were derived, see Part III-C, D and G, and Part IV-A, C and D infra.

78 See Part II-A supra.

79 Ibid.

80 Richard v. American Union Bank (1st case), 241 N.Y. 163, 149 N.E. 338 (1925). See also McCORMICK, note 74 supra, §49, p. 190, suggesting that it should be determined "in each case whether under the circumstances it is fair to apportion to the creditor or to the debtor the risk of fluctuations in the foreign currency, considering the nationality of the parties and the nature of the transaction."

Similar considerations may have led to the adoption of Art. 115 (8) of tit. II, c. I (Regulations) of the Universal Postal Convention signed at Brussels on July 11, 1952. It provides in substance that a creditor country is entitled to damages for depreciation of the debtor country's currency, if the loss was caused by an unjustifiable delay in payment. Both the United States and the United Kingdom are parties to said convention. See also note 242 infra.

81 241 N.Y. 163 at 168, 149 N.E. 338 (1925).

82 Ibid.

"both parties understood that the commodity was purchased here for resale as a commodity in the market here," damages for delayed performance were held to be permissible.[83]

Another illustrative example of the importance of the contemplated *use* of the foreign currency and of the changing characterization thereof for different purposes may be found in *Hicks v. Guinness.*[84] Here the underlying transaction was a foreign currency debt expressed in German marks. The marks payable in this country to an American creditor functioned (were acquired) as money (measure of value) and were to be treated as such until the maturity of the obligation. It was until then that the obligation may have been discharged by payment of the nominal amount of marks no matter how much they may have depreciated in the intervening time (nominalism).

However, a different situation arose after a default in payment. It appears that the parties understood that, had timely payment been made, the American creditor would have converted the marks into his own national currency by selling the marks in the American market for dollars. Because of this contemplated use of the marks it was proper to permit him to treat the German currency as a commodity from that moment on. The loss from its depreciation in terms of dollars after maturity was held to be recoverable.

This shows that foreign money, even where *acquired* as the object of the transaction (commodity) may be intended to be *used* (expended) as medium of exchange (money). Where this is the case no loss from its depreciation after the stipulated time of performance may have been sustained, and no damages may have been contemplated.[85] In this respect the situation is analogous to that in which the foreign currency had been acquired and intended to be used as money.

On the other hand, even where the foreign money had been *acquired* as a medium of exchange (money, foreign currency debt), the creditor may have intended to *use* it as a commodity. In this event its depreciation may have caused him a loss.[86]

[83] Richard v. American Union Bank (2d case), 253 N.Y. 166 at 175, 170 N.E. 532 (1930). The opinion points out, "The fact that the commodity purchased for resale here might in a foreign country be used as a medium of exchange becomes irrelevant when it appears that the parties understood that the purchase was made by the plaintiffs not for use in Roumania but for resale here." The value of performance was held to be fixed by the price in the American market in which the lei were intended to be resold.

[84] 269 U.S. 71 at 80, 46 S.Ct. 46 (1925).

[85] Richard v. American Union Bank (1st case), note 81 supra.

[86] Hicks v. Guinness, note 84 supra; Hughes Tool Co. v. United Artists Corp., note 76 supra.

Similarly where the foreign money had been *acquired* and intended to be *used* as the object of both the underlying and of the intended future transaction (American contract to open a credit of leis in Roumania for resale for dollars in New York), its depreciation after the stipulated time of performance may have caused a loss to the innocent party.[87]

In two of these situations the characterization of the foreign currency as "money" or "commodity" was changing in accordance with the different purposes for which the classification was required.

However, where the underlying transaction was a foreign currency debt (rather than a sale of, or an executory contract to open credit in foreign money in consideration of payment of domestic money), the creditor has certain additional rights.

Placing him in a position comparable to that of a purchaser of goods for all purposes would be contrary to the particular nature of the original obligation (a foreign currency debt) and may not do justice. If this commodity concept of money were to be applied in all respects it might reduce the quantum of the obligation where the creditor's own national currency had depreciated. The problem was solved by Justice Holmes in *Hicks v. Guinness,* pointing out that the creditor had an *option* of proceeding either in debt or for breach of contract.[88]

The former would permit him to recover the equivalent of the primary obligation.[89] The latter creates a new and different secondary obligation to be measured in the currency in which the loss had been sustained (substantive conversion).[90] The distinction between these two causes of action is analyzed further below.[91]

The foregoing analysis shows that damages for delayed payment or delivery of foreign currency are not limited to situations in which the foreign currency was *acquired* as a commodity;

[87] Richard v. American Union Bank (2d case), note 83 supra.

[88] 269 U.S. 71 at 80, 46 S.Ct. 46 (1925): "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. 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.'" Italics added. See also comment in note 138 infra.

[89] See Part III-F infra.

[90] See Part III-D, E, and Part IV-A infra.

[91] Part III-E, F, G (2), H infra.

and that whether the foreign currency functions as money or commodity at the time of its *acquisition,* it may or may not be intended to continue to function as such.

C. *Effect of Doctrine of Consequential Damages*

The emphasis on the contemplation of the parties is based on the doctrine of consequential damages.[92] The courts are considering whether the loss was foreseeable, being the usual result of the breach or wrong, or whether, although unusual, it was within the contemplation of the parties.[93]

Hicks v. Guinness, decided by the United States Supreme Court, expressly relies on *Globe Refining Co. v. Landa Cotton Oil Co.,* one of the leading cases on the doctrine of consequential damages.[94]

[92] With respect to the doctrine of consequential damages, as developed from the English decision in Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), see 5 WILLISTON, CONTRACTS, rev. ed., §§1355-1357 (1937); 1 SUTHERLAND, DAMAGES, 4th ed., §§45-52, 170-207 (1916); MCCORMICK, note 74 supra, at 566-568, pointing out that this doctrine, while occasionally criticized, has been accepted by the courts, some codes, and the American Law Institute, *Restatement of Contracts* §330. See also the emphasis on "foreseeability" in 5 CORBIN, CONTRACTS §§997, 998 (1951).

[93] See the authorities cited in note 74 supra. It should be noted that this constitutes an exception to the general rule that damages for delay in payment of a debt, as distinguished from a contract to open a credit, are limited to interest. Analyzing this problem under Czechoslovak law, Kubes in "Komentar k Ceskoslovenskemu Obecnemu Zakoniku Obcanskemu" (1937) (Commentary on the Czechoslovak Civil Code), Vol. V, p. 962, points out that currency depreciation is an extraordinary phenomenon not covered by the provisions of said code (i.e., Austrian Civil Code of 1811, as amended, §1333, in effect in Czechoslovakia until December 31, 1950) dealing with moratory interest. The same conclusion was reached by Professor Sedlacek (id., Vol. IV, p. 324). Examining the effect of "subjective mora" (culpable delay, or default), he states that with respect to monetary obligations the debtor's liability is not restricted to statutory interest but extends "as the courts are now constantly deciding, to the loss sustained by the creditor as the result of a decline of the rate of exchange of money." He states further, "In this instance the courts have exceptionally adopted the principle that with respect to monetary obligations it is not the nominal sum of currency units but their abstract monetary value, which is not determined by the nominal (numerical) amount of currency units that is owed." (Translation mine. It includes a certain inaccuracy of the language of the original text with respect to the "abstract monetary value.") No matter how correct under the Czechoslovak law, this further view of Professor Sedlacek exceeds the scope of damages recoverable under the New York law, insofar as it goes beyond the limits of the doctrine of consequential damages. Under the present state of the English law the question of whether damages for depreciation of foreign money are included in the payment of interest, raised in In re Chesterman's Trusts, [1923] 2 Ch. 466 at 479, 485, per Lord Sterndale, M. R., and Warrington, L. J., seems to require a negative answer. In England no damages are recoverable irrespective of whether interest was to be paid. See Société des Hôtels Le Touquet Paris-Plage v. Cummings, [1922] 1 K.B. 451 at 460, and in general Part II-D supra.

[94] Both cited in note 74 supra.

The decisions in the two *Richard* cases,[95] decided by the New York Court of Appeals with respect to the sufficiency of the pleadings, are based on the same doctrine.[96] They become clearer if it is considered that the distinction between losses foreseeable as the result of the breach and those, which although unusual, are within the contemplation of the parties "corresponds rather closely with the distinction between 'general' and 'special' damages, in the sense of those which need not, and those which must be, specially claimed in the pleadings."[97]

The original *Richard* action was dismissed for insufficiency because the loss was not pleaded as "special damages."[98] In the absence of a pleading of "special circumstances" that the parties either contemplated a liability for damages for depreciation of foreign money payable where current when measured by our own currency, or that in fact such depreciation did cause plaintiff any damage, the complaint was held not to set forth facts sufficient to constitute a cause of action.[99]

In other words, the loss was not considered to be such a usual consequence of the breach as would fall within the scope of "general damages." When in the subsequent action based on the same breach such special circumstances had been pleaded, the complaint was held to be sufficient. The distinction between the two decisions lies solely in the pleading of the relevant facts.[100]

As above stated, damages for depreciation of foreign currency are not limited to instances where such currency was *acquired* as a commodity.[101] However, most frequently, where the currency foreign to the forum was acquired as money (debt), compensation for its depreciation in terms of another currency was not contemplated (nominalism).[102] This is particularly so where the money

[95] Ibid.

[96] To the same effect see note, 52 COL. L. REV. 141 at 142 (1952).

[97] MCCORMICK, note 74 supra, at 566.

[98] Richard v. American Union Bank (1st case), 210 App. Div. 22, 205 N.Y.S. 622 at 627-628 (1924), affd. 241 N.Y. 163, 149 N.E. 338 (1925).

[99] Ibid., 241 N.Y.S. 163 at 168.

[100] Richard v. American Union Bank (2d case), 253 N.Y. 166 at 175, 170 N.E. 532 (1930). See also note 83 supra. It should be noted that under the mechanical valuation rules there was no room for this question of pleading. However, under the present rational doctrine the conclusion reached in the first Richard case that the loss must be pleaded as special damages appears to be correct and most salutary. It will secure compensation where proper and prevent windfall awards where no loss was sustained or contemplated. See note 248 infra.

[101] See Part III-B supra.

[102] Such was the situation in Perutz v. Bohemian Discount Bank, 279 App. Div. 386, 110 N.Y.S. (2d) 446 (1952), revd. on other grounds, 304 N.Y. 533, 110 N.E. (2d) 6 (action in an American court based on a wholly Czechoslovak contract between two nationals

foreign to the forum is payable in the country of which it is the currency to one of its nationals.

Where, however, the conversion into another currency was within the contemplation of the parties, the place of payment may be of lesser or no importance.[103] In this respect a comparison of the decisions in *Hicks v. Guinness*[104] and *Hughes Tool Co. v. United Artists Corp.*[105] is illustrative. Correctly or incorrectly, both were considered to be controlled by our law.[106] In both, foreign money was payable to an American creditor assumed to have intended to convert the same into dollars (his own national currency).

They differed with respect to the place of payment. In the *Hicks* case the marks were payable in the United States, where they are foreign money. In the *Hughes Tool Company* case the foreign money was payable abroad in the country where it was current. In both, damages for the depreciation after default in terms of dollars were held equally recoverable. The fact that in the latter the depreciated money was the national currency of the place of payment was irrelevant. Both were decided under our doctrine of consequential damages.[107] If the facts assumed by the courts were correct the results were certainly "just."

In both of these cases the breach was complete. The compensation was, therefore, included in the dollar award computed at the breach-day rate of the foreign money of contract. In the *Richard* case payment was actually made. The credit was opened in lei that have depreciated after default. In this situation an independent claim for the consequential damages was held to have survived the belated payment.[108]

Three of the foregoing cases were decided by New York State courts. The *Hicks* case was decided by the United States Supreme

of said country. Under the facts of the case the same conclusion with respect to the problem now under discussion would have to be reached under our law). See also Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 (1921); Matter of King, 129 Misc. 244, 221 N.Y.S. 730 at 732 (1927); Paris v. Central Chiclera, (5th Cir. 1952) 193 F. (2d) 960. It is particularly on this ground that such windfall awards in Comptoir Commercial D'Importation v. Zabriski, mentioned in note 43 supra, are subject to serious criticism.

103 See Part II-A, supra.

104 269 U.S. 71, 46 S.Ct. 46 (1925).

105 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952), affd. 304 N.Y. 942, 110 N.E. (2d) 884 (1953).

106 The former because of the place of payment in this country; the latter (apparently) in accordance with a contrary, and more correct, conflict of law theory that the obligation is governed by the proper law of contract. See note 51 supra.

107 With respect to Hicks v. Guinness, see this section, supra; with respect to Hughes Tool Co. v. United Artists Corp., see note 76 supra.

108 See note 139 infra.

Court. At least with respect to cases decided under our substantive law there does not appear to be any justification for the view that different rules have prevailed in federal and state courts.[109]

It may now be seen that the defect of the mechanical two-rule doctrine lay to a large extent in its oversimplification of the doctrine of consequential damages.[110]

Instead of examining whether the loss, if any, was the natural result of the breach or whether it was within the contemplation of the parties, the mechanical criterion was based solely on whether the obligation was payable in the national currency of the place of payment.[111] Where this was the case damages were conclusively presumed not to have been within the contemplation of the parties. Where it was not, damages were conclusively presumed to have been intended. The fallacy of this view has been already explained and will be considered further.[112]

D. *Money of Damages*

Before examining the question as of what time the damages for depreciation of a foreign money after maturity are to be measured it must be ascertained in what currency the computation is to take place.[113]

1. The mechanical rules developed in this country assumed erroneously that damages for depreciation of foreign money were to be measured in the currency of the place of payment.[114] It was said that the loss sustained by a Russian creditor from defendant's failure to pay a sum of francs in London was to be measured

109 See Part IV-E infra. To the same effect, although somewhat more cautiously, see opinion of Justice Van Voorhis in Hughes Tool Co. v. United Artists Corp., cited in note 77 supra; the New York State cases cited in note 49 supra, following what was believed to be the rule enunciated by the United States Supreme Court; and the analysis of the Parker and Dougherty cases in note 48 supra. This and the following analysis show that the view, that different rules had been adopted by federal and New York State courts, expressed by numerous writers [see 5 WILLISTON, CONTRACTS, rev. ed., §1410A (1937); MCCORMICK, DAMAGES 190 (1935); MANN, note 8 supra, at 312, 313; NUSSBAUM, note 22 supra, at 366, 367, 373; CONFLICT OF LAWS RESTATEMENT, New York Annotations §424 (1935)] is not substantiated.

110 Note 77 supra.

111 Note 51 supra.

112 Part III-D infra.

113 The importance of a proper determination of the money of damages was explained in Part I supra.

114 See Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37 at 39, 138 N.E. 497 (1923), and its interpretation in Richard v. American Union Bank (1st case), 241 N.Y. 163 at 166, 167, 149 N.E. 338 (1925); CONFLICT OF LAWS RESTATEMENT §423 (1934); BEALE, note 22 supra, §423.1. With respect to English law see Part IV-C infra.

in pounds sterling.[115] Depending on whether such a conversion was contemplated and a loss was actually sustained this may or may not have yielded a just result.

In *Richard v. American Union Bank* (first case)[116] this mistaken doctrine would have deprived an American creditor of any compensation for the loss actually sustained by him in dollars where Roumanian money, the lei, payable in said country had depreciated after a default in payment. The court found that an attempt "to prove that there was a decline in the 'market value' of lei in a country where lei were the national currency and the standard by which to determine values in damages . . . is impossible of achievement."[117] In fact, had plaintiff intended to use the lei in Roumania, as originally assumed by the court, the result may have been proper. He may not have sustained any loss as a result of their depreciation in terms of dollars. In Roumania the value of the lei may have remained unchanged.

When it was alleged in a subsequent case, based on the same breach, that the lei to be delivered in Roumania had been purchased for resale in New York for dollars and that the loss had actually been sustained in American money, the same court in fact repudiated the erroneous rule. It recognized that where the resale for dollars was within the contemplation of the parties the loss was recoverable in American money.[118]

This is in accordance with the general rule explained further below that such damages are to be measured in the currency in which the loss was actually sustained, provided this was within the contemplation of the parties.[119]

2. Another opinion expressed sometimes, that in our courts such damages were always to be *measured* in dollars,[120] is equally

115 Cases cited in the preceding note.

116 241 N.Y. 163, 149 N.E. 338 (1925).

117 Id. at p. 167.

118 Richard v. American Union Bank (2d case), 253 N.Y. 166 at 175, 170 N.E. 532 (1930).

119 Part III-D (3) infra.

120 Guinness v. Miller, (D.C. N.Y. 1923) 291 F. 769 at 770 (later decided in the U.S. Supreme Court and reported as Hicks v. Guinness, in note 84 supra). In this lower court decision Judge Learned Hand states that, apart from specific performance, obligations must be *discharged* in the money of the forum, no other being available, and that "the obligation so created can only be *measured* in that medium." Italics added. See also Petkus v. Lietuvos Ukio Bankas, 123 Misc. 193, 204 N.Y.S. 726 at 729 (1924). These cases fail to distinguish between substantive and procedural conversions (see E and F infra); and, at least with respect to the problem now under discussion, between the "creation" of the right duty relationship and its "enforcement." [On this subject see COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 39 (1942); and Part IV-A infra]. Compare also Guinness v. Miller, supra, with Booth & Co., Inc. v. Canadian Govern-

erroneous. It was recognized in a great many cases that damages and other obligations may have to be measured in foreign money.[121] Moreover, it became one of the principles of our law that by merely instituting an action in this jurisdiction the foreign obligation is neither enlarged nor transformed into a domestic money obligation.[122]

The proper determination of the currency in which such losses are to be measured has become particularly important in our modern era. At present most currencies are inconvertible into

ment Merchant Marine, Ltd., (2d Cir. 1933) 63 F. (2d) 240 (recognizing defendant's right to discharge an obligation in pounds sterling); and with English Transcontinental, Ltd. v. Puebla Tramway, Light & Power Co., 186 Misc. 481, 61 N.Y.S. (2d) 356 (1946), holding that the underlying obligation was not measured in the money of the United States. See also cases cited in note 121 infra. The decision in Guinness v. Miller assumes further quite generally that damages for torts committed within a jurisdiction are always to be measured in its national currency, and that the courts of all countries are required to express judgments in the money of the forum. With respect to the fallacies of the former assumption see Part III-D (3) infra; with respect to the latter, see note 8 supra. However, this does not necessarily affect Judge Learned Hand's more general statement that "no court can enforce any law but that of its own sovereign," frequently cited in support of the "local law" theory of conflict of laws, or of the "homologous right theory," as distinguished by Professor Cavers in "The Two 'Local Law' Theories," 63 HARV. L. REV. 822 at 832 (1950).

121 Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952 (pounds sterling); Paris v. Central Chiclera, (5th Cir. 1952) 193 F. (2d) 960 (Mexican currency); The Vaughan and Telegraph, 14 Wall. (81 U.S.) 258 (1871) (Canadian dollars); Richard v. American Union Bank (1st case), cited in note 81 supra (Roumanian lei); Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S.Ct. 166 (1926) (German marks); Matter of King, 129 Misc. 244, 221 N.Y.S. 730 (1927) (French francs); Transamerica General Corp. v. Zunino, 82 N.Y.S. (2d) 595 (1948) (Italian lire); Perutz v. Bohemian Discount Bank in Liquidation, 279 App. Div. 386, 110 N.Y.S. (2d) 446 (1952), revd. 304 N.Y. 533, 110 N.E. (2d) 6 (Czechoslovak crowns); Sulyok v. Penzintezeti Kozpont Budapest, 279 App. Div. 528 at 533, 539, 111 N.Y.S. (2d) 75 (1952), affd. as mod. in other respects 304 N.Y. 704, 107 N.E. (2d) 604 (1952) (Hungarian forints). With respect to English decisions (holding that damages for depreciation of foreign money were not recoverable), see Celia v. Volturno, [1921] 2 A.C. 544 at 558, per Lord Sumner, stating that "the claimant's right is exclusively a right to lire, and would result in a judgment for lire, if only an English Court was, so to speak, competent to express itself in Italian." In the same decision Lord Sumner points out (p. 554) that "the cost of 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. . . ." See also MANN, note 8 supra, at 209-211.

122 Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 at 519, 47 S.Ct. 166 (1926), stating that "the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here," cited with approval in Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71 at 80, 81, 193 N.E. 897 (1934). To the same effect, Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 at 57 (1921); Transamerica General Corp. v. Zunino, 82 N.Y.S. (2d) 595 at 602 (1948), reading in part as follows: "I find nothing in those cases, or in any others, however, which intimates that a creditor who is entitled to a designated number of units of any foreign currency becomes entitled to any designated number of United States dollars merely because he brings an action in the United States." On this problem see also Part III-F infra.

gold.[123] A great many of them are not freely exchangeable for other currencies, or transferable to foreign countries, or (with respect to so-called blocked accounts) even within the boundaries of the country where current.[124]

Even where exchangeable into other currencies their value is often arbitrarily fixed by a single or multiple rate of exchange.[125] Consequently the substitution of a so-called "hard currency" (such as dollars) for a "soft currency," or vice versa, may substantially affect the quantum of the obligation.[126]

All these facts are to be considered in order to prevent placing the injured party in a better or worse position than he would have been in, if there had been no breach or wrong.[127] Where the law of damages comes into play it must be borne in mind that its general purpose is to give compensation.[128]

3. It should be noted that the question of determination of the currency in which the loss should be measured is not a peculiarity arising only in connection with damages for the depreciation of foreign money after maturity. In fact, it is one of the neglected general problems of the law of damages.[129]

123 HALM, MONETARY THEORY, 2d ed., 207 (1946); BEYEN, MONEY IN THE MAELSTROM 37-39 (1949); Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428 (1935); Perry v. United States, 294 U.S. 330, 55 S.Ct., 432 (1935).

124 See Survey in Part II of "Sixth Annual Report, Exchange Restrictions" (1955) of International Monetary Fund; Landau v. Commissioner of Internal Revenue, 7 T.C. 12 (1946); Marache v. Ashton, [1943] A.C. 311; Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952), affd. 304 N.Y. 942, 110 N.E. (2d) 884 (1953).

125 On the discrepancy between the so-called "official" and "free market" rates of exchange see note 124 supra; and PICK, BLACK MARKET YEARBOOK (1954); KENT, note 23 supra, at 547, 575-577; KRIZ, THE PRICE OF GOLD, Princeton Univ., Essays in International Finance No. 15, p. 4 (1952).

126 See Part I supra. It is only surprising that in the early post World War I era, as long as New York law favored the single breach-day rule (see Part II-B supra), foreign creditors did not flood our courts with their foreign causes of action, whenever the defendant had assets in this country, in order to cash in on the windfall profits. [See, e.g., Comptoir Commercial D'Importation v. Zabriskie, 127 Misc. 461, 216 N.Y.S. 473 (1926), mentioned in note 9 supra.] To some extent a foreign creditor's position may be improved even under the present state of our law. Under our procedural conversion rule a judgment based on a soft currency obligation must be expressed in dollars, one of the hardest currencies, at the judgment-day rate of exchange. Unfortunately, this cannot be avoided as long as the statutory provisions mentioned in Part I supra remain unchanged.

127 See Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 at 385 (1952), affd. without op. 304 N.Y. 942, 110 N.E. (2d) 884 (1953), in which the court held that foreign monies which would have been blocked in the foreign place of payment are to be converted into dollars at the lower "free market" rate of exchange, rather than at the "official rate of exchange," because "these parties did not intend that defendant should solve plaintiff's foreign exchange difficulties."

128 MCCORMICK, note 74 supra, at 560. See also notes 74, 75 and 80 supra.

129 See authorities cited in notes 130-133 infra.

From such a general point of view Professor Nussbaum refers to the currency in which damages in contracts and torts are to be computed as "money of damages."[130] This terminology appears to be very appropriate. He suggests that its determination constitutes a question of fact and that comparatively the best standard for its determination seems to be the currency of the damaged party's place of business or domicile.[131]

Dr. Mann[132] and Dicey's *Conflict of Laws*,[133] although in agreement that the problem raises a question of fact, tried to narrow its scope. Dr. Mann points out that although no general principle may be laid down with safety, "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."[134] According to Dicey's *Conflict of Laws*, it appears that "where English law is the proper law of a contract, damages for its breach must be assessed in the currency in which the loss was incurred, unless a contrary intention emerges from the contract itself."[135]

The basic proposition, that the determination of the currency in which the loss was sustained raises a question of fact, appears to be only one part of the general rule. By itself it does not answer the question of the recoverability of such loss. It is here that the doctrine of consequential damages comes into play. Was the currency in which the loss had actually been sustained within the contemplation of the parties? If it was, it must be measured in such a currency. If it was not, the loss may be too remote.[136]

A limitation of the first part of the general principle suggested by the above writers, based on the domicile of the creditor, or the currency in which the loss was sustained, or even the place of performance, may frequently give the correct answer. However, it fails to define the complete *general* rule. As it appears from this analysis, the damages, if recoverable, are to be measured in the money in which the loss was actually sustained, provided such loss

130 NUSSBAUM, note 22 supra, at 404, by analogy with "money of contract" in which the quantum of the obligation was measured.

131 Id. at 405.

132 MANN, note 8 supra, at 204-211.

133 DICEY, note 64 supra, Rule 163.

134 MANN, note 8 supra, at 209.

135 Note 64 supra, at 734. However, Rule 163 is preceded by a caveat ("semble"). It should be noted that the statement constitutes the general rule, without any particular reference to damages for depreciation of foreign money. According to Rule 160 of said work such damages are not recoverable under English law (Part II-D supra).

136 Richard v. American Union Bank, both cases; and Hughes Tool Co. v. United Artists Corp., all cited in note 74 supra. See also the conclusions reached in 65 HARV. L. REV. 887 at 889 (1952).

was either the natural result of the breach, or was within the contemplation of the parties.[137] The correct answer will be obtained once more by merely continuing the process of considering the problem under the doctrine of consequential damages.

E. *Substantive Conversions*

The most important characteristic of these valuations, based on the controlling law of damages, is that they determine not only the quantum, but may also affect the very nature of the new, secondary obligation. The primary obligation may be transformed into a secondary obligation expressed in a different currency (substantive conversion), irrespective of whether litigation will ensue.[138] In certain instances "payment" of the original sum in depreciated money, even if accepted, may not fully discharge the obligation.[139]

This may lead to three different situations:

1. The loss may have been sustained in the same currency, foreign to the forum, in which the original obligation had been expressed. Usually no damages will be recoverable,[140] except where permissible by special provisions of a controlling foreign

137 Cases cited in the preceding note.

138 See opinion of Justice Holmes in Hicks v. Guinness, 269 U.S. 71 at 80, 46 S.Ct. 46 (1925), pointing out that when the contract was broken the creditor may have refused to accept the stipulated amount of marks having become entitled to a sum of dollars by operation of law (see passage quoted in note 88 supra). Professor Nussbaum (note 22 supra, at 372) argues that the theory advanced by Justice Holmes, "that the amount of foreign currency, if payable in the United States, is *ipso facto* transformed into a dollar amount" is untenable. He seems to overlook, however, that there was no "ipso facto" transformation just because the obligation was payable in the United States. The decision was based on the doctrine of consequential damages. The conversion was not procedural but substantive. The problem involved the determination of the "money of damages" and of its quantum. The place of performance was merely one of the elements to be considered. Coupled with the nationality of the creditor it appears to have convinced the court that the loss in dollars had been the natural and foreseeable result of the breach.

139 See Richard v. American Union Bank (2d case), 253 N.Y. 166 at 174, 170 N.E. 532 (1930), holding that, although payment in depreciated money had been accepted, the injured party "may still retain his right of action for damages caused by delay. (Pers. Prop. Law [Cons. Laws, ch. 41], §130)." See also dictum in Guinness v. Miller, (D.C. N.Y. 1923) 291 F. 769 at 771; and note 148 infra. Although an independent claim for damages may survive "payment" in depreciated money, such damages are most frequently (almost automatically) included in the result obtained by a correct selection of the conversion date. See Hicks v. Guinness, cited in note 138; Hughes Tool Co. v. United Artists Corp., cited in note 127 supra; and B, F, and G (2) (a) of this part.

140 This was believed to be the situation in the first Richard case cited in note 81 supra; Deutsche Bank Filiale Nurnberg v. Humphrey, cited in note 122 supra; Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 at 57 (1921); and in the judgment-day cases cited in note 58 supra.

law.[141] (E.g.: Original obligation expressed in Italian money payable in Italy to an Italian creditor. No damages in any other currency were contemplated. Loss sustained in Italian money. Action instituted in an American court.)

No *substantive* conversion into another currency comes into effect. If the controlling law permits such damages, they will be either included in the ultimate obligation or constitute a new independent obligation in the same currency.[142] Although this may affect the quantum of the secondary obligation it still remains to be expressed in the original currency.

2. In the second situation the loss may have been sustained in a currency different from that in which the original obligation was expressed, both of which may be foreign to the forum. (E.g.: Original obligation expressed in French francs. Recoverable loss sustained in pounds sterling. Action instituted in an American court.) Here the original franc obligation is transformed into an ultimate (secondary) sterling obligation.[143] According to the principles explained further below, this *substantive* conversion of the francs into pounds sterling is to be effected as of the day on which it had been contemplated that the creditor would have converted the French money into English money had timely payment been made.[144] Consequently the ultimate sterling amount will include damages.

3. In the third situation the loss from depreciation of a currency foreign to the forum may have been sustained in a currency which happens to be the national currency of the forum, into which the creditor may have intended to convert the original foreign money had timely payment been made.[145] (E.g.: Original obliga-

141 Transamerica General Corp. v. Zunino, 82 N.Y.S. (2d) 595 at 604, 605 (1948), in which the court considered whether under art. 1224 of the Italian Civil Code of 1942 damages were recoverable for depreciation of Italian money payable in Italy to an Italian creditor.

142 See the Zunino case, cited in the preceding note, at 605; Dach, "Conversion of Foreign Money," 3 AM. J. COMP. LAW 156 at 162, 167, 170-171 (1954); MANN, note 8 supra, at 330, 331; and note 139 supra.

143 Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37 at 39, 138 N.E. 497 (1923), as interpreted in Richard v. American Union Bank (1st case), 241 N.Y. 163 at 166, 167, 149 N.E. 338 (1925). With respect to the erroneous assumption expressed in these two cases that the damages are to be measured in the currency of the place of performance, as a general rule, see criticism in note 51, and in Part III-D (1) supra.

144 Part III-G infra. With respect to the additional procedural conversion of the pounds sterling into dollars, in which the judgment must be expressed in an American court, see Part III-F infra.

145 Hicks v. Guinness, note 138 supra; and Hughes Tool Co. v. United Artists Corp., note 127 supra.

tion expressed in German money. Recoverable loss sustained in United States dollars. Action instituted in an American court.) Here again, for the reasons explained in the preceding subsection the original foreign money obligation is transformed into an ultimate, secondary dollar obligation in which damages are included (substantive conversion). Nothing else but the full payment thereof will discharge this secondary obligation. Except for interest and costs its quantum and nature remain unaffected by the institution of an action. The judgment award will be identical with the ultimate secondary obligation.

F. *Procedural Conversions*

Similarly, were it not for our procedural rule preventing our courts from rendering judgments in foreign money, the judgment award would be for the ultimate amount of lire in the first, and for sterling in the second situation mentioned in the preceding section.

However, in view of our procedural rule requiring judgments to be expressed in our national currency, unless prior payment is made, a substantially and different conversion-valuation comes into play. By reason of this rule of the *lex fori* the court must fix the exact dollar equivalent of the ultimate foreign money obligation (procedural conversion).[146]

No such conversion is required until the very time of judgment. Until such time, except for interest and costs, the obligation may be discharged by payment of the numerical amount of the ultimate obligation, whatever it may be.[147] Being unable to grant relief for the identical sum the court's award must be almost identical. No correct equivalent in the money of the forum will be obtained, unless this procedural conversion is effected as of the time of judgment (and for practical reasons, as of the time of trial).[148]

The foregoing analysis shows that where damages for depreciation of foreign money after default are recoverable they are included in the ultimate amount or constitute an independent

146 See note 8 supra, and Part IV-A and C infra. The term "procedural conversion" was used in a different sense by Professor Drake in 28 MICH. L. REV. 229 at 230, 231, 241 (1930). Professor Nussbaum (note 22 supra, at 364 ff.) refers to conversions of this type as "compulsory judicial conversions."

147 Cases cited in notes 121, 140 supra, and Part IV-A and C infra.

148 Ibid. 29 N.Y. Consol. Laws (McKinney, 1948) §27, providing that the computation of the dollar equivalent in which judgments or decrees are to be rendered should be "as near as may be, in dollars and cents, rejecting lesser fractions."

obligation. They come into existence by operation of the controlling *substantive law.* On the other hand the procedural conversion is based on the *lex fori.* To effect the *procedural conversion* of any other day than that of judgment (trial) would amount either to awarding damages where none are recoverable, or to giving double indemnity where damages had already been awarded by the preceding substantive conversion.

The procedural conversion is not devised to affect the quantum of the recovery. Its sole purpose is to fix the equivalent of the ultimate obligation in terms of the money of the forum.[149] It follows that all procedural conversions are to be effected at the judgment (trial)-day rate of exchange.

G. *The Conversion Date*

1. It remains to be considered as of what time substantive conversions are to be effected under our law. One general principle common to all types of conversions (valuations), whether substantive or procedural, may be derived from the subsequent analysis. All are to be effected as of the time when the necessity thereof had first arisen. The various types of conversion differ, however, with respect to the question of when such necessity arises.

In spite of the apparent obviousness of this general principle, it frequently remained unnoticed.[150] If strictly adhered to, it would have prevented procedural conversions as of any other than judgment (trial)-day. No necessity of such conversions arises until that very date.[151]

149 With respect to certain unfortunate consequences resulting from procedural conversion of soft currency claims into dollar obligations as of the time of judgment, see last part of note 126, and Part I supra. The convertibility and transferability of the currency involved may affect the kind of rate of exchange to be applied. This question and, more particularly, whether the so-called "official" or the "free market" rate of exchange is proper in a given situation exceeds the scope of this paper and requires a separate analysis. The procedural conversion is controlled by the lex fori. See Part IV-C infra.

150 It is in this respect that the decision in Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952, may be justly criticized, insofar as it disregards that a part-payment in dollars, made on account of a sterling obligation before the devaluation of the pound, is to be converted into pounds at the payment-day, when the necessity of a conversion has arisen, rather than at the post-devaluation judgment-day rate of exchange. Two types of conversions were required in this case. A substantive conversion of the part-payment in dollars (money of payment) into pounds (money of damages), to be effected at the payment-day rate; and a procedural conversion of the remaining balance of English money into dollars to be effected at the judgment-day rate. The conversion of the entire original sterling obligation into dollars at the post-devaluation judgment-day rate, disregarding that a part payment in dollars had been made before the devaluation of the sterling, may have given the injured party about £10,000 less than the amount of the loss sustained by plaintiff in English money.

151 See Part III-F supra.

With respect to substantive conversions the answer to the question of when such necessity had first arisen is not so uniform. It depends on the purpose for which the measurement is required. An agreement may permit or even require the discharge of a foreign money obligation (money of account, money of contract) by payment in a different currency (money of payment).[152] The time as of which the valuation is to be effected may or may not have been fixed by the parties.

In other instances payment in a different currency may be permissible under the so-called local payment rule allowing the discharge of all monetary obligations (with certain exceptions) by payment of any money that is legal tender at the place of payment.[153] Where the time was not fixed by agreement the controlling substantive law will determine the date as of which the valuation should be made.[154] Under our law, in the absence of the question of damages or of other special provisions of the controlling law, the measurement is to be effected at the rate of exchange prevailing on the day of actual payment.[155] It is as of this day that the necessity thereof had first arisen. No other computation renders a correct equivalent.

Similarly, in view of the usual rule "that the right of an executor to set off debts owing by legatees is fixed at the time of death" a mark indebtedness of a German legatee of an American

[152] Booth & Co. v. Canadian Government Merchant Marine, Ltd., (2d Cir. 1933) 63 F. (2d) 240; Pennsylvania Railroad Co. v. Cameron, 280 Pa. 458, 124 A. 638 (1924).

[153] NUSSBAUM, note 22 supra, at 360, 361; DICEY, note 64 supra, Rule 164; MANN, note 8 supra, at 282-285; Proposed Uniform Commercial Code—Commercial Papers (Official Draft, 1952 Text and Comment ed.) § 3-107 (2).

[154] The controversial conflict of laws problem of determination of the law governing the quantum of the obligation exceeds the scope of this paper. (See note 51 supra, and Part IV-A and C infra.) Another difficulty may arise from the uncertainty of the borderline between matters of substance and mere details of performance. The latter are governed by the law of the place of performance (see 2 BEALE, note 22 supra, § 361.2, p. 1268). As long as both, the money of account and the money of payment, are freely convertible into gold and freely exchangeable and transferable the discharge of the obligation in the local currency of the place of payment appears to be such a detail. However, the substitution of a "hard" and freely exchangeable currency for a "soft" nonexchangeable money *"in obligatione"* or vice versa may affect the very substance. (See Part I-B, and note 126 supra.) It is in this light that the conflict of laws rules should be carefully applied to modern monetary problems.

[155] Booth & Co. v. Canadian Merchant Marine, Ltd., (2d Cir. 1933) 63 F. (2d) 240 at 241 (as no foreign law was pleaded the problem appears to have been either held to be controlled by the New York law or the foreign law seems to have been deemed to be identical with ours). The same conclusion follows from the underlying principles of the judgment-day rule. See Part III-F supra, and the judgment-day cases cited in note 58 supra.

testator to be applied against the former's share was valued as of said time.[156]

The date as of which such necessity actually arises was also suggested where both the money of account and the money of payment are fixed by contract but where an item expressed in a different currency is to be taken into consideration. (E.g.: Limits of coverage by insurance measured in currency *A*, compensation payable in currency *B*, loss sustained in currency *C*.)[157]

Under the law of negotiable instruments the date of conversion may be fixed by the doctrine of re-exchange. The amount of money of a foreign place of payment may have to be converted into the currency of the country where the dishonored bill was drawn at the rate of exchange prevailing on the day of dishonor.[158] Here the date as of which the necessity of conversion had first arisen was fixed by a specific rule.

2. The problem becomes more difficult where the substantive conversion is based on the law of damages. Here the time as of which the valuation is to be effected fluctuates.

In this determination of the *quantum* of the *new*, different and hitherto *unliquidated* secondary obligation (as distinguished from the *equivalent* of the *original*, primary obligation)[159] the underlying principles of the doctrine of consequential damages will again prove to be useful. The injured party is to be placed in the same position as if there had been no breach or wrong, provided this was within the contemplation of the parties.[160]

(a) The situation where the stipulated foreign currency (money of account, money of contract) depreciated in terms of another currency after default will be considered first.[161]

Where the stipulated foreign money had been intended to be converted into such other currency immediately upon payment,

[156] Matter of Heck, 203 Misc. 788, 116 N.Y.S. (2d) 255 at 258, 259 (1952). On this case see note 75 supra.

[157] MANN, note 8 supra, at 290, 291.

[158] Pavenstedt v. New York Life Ins. Co., 203 N.Y. 91 at 95, 96 N.E. 104 (1911); Gross v. Mendel, 171 App. Div. 237, 157 N.Y.S. 357 (1916), affd. 225 N.Y. 633, 121 N.E. 871 (1918), as interpreted in Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 at 57 (1921); Simonoff v. Granite City Nat. Bank, 279 Ill. 248, 116 N.E. 663 (1917); Furness, Withy & Co. v. Rothe, (4th Cir. 1923) 286 F. 870. With respect to the conversion of foreign money into pounds sterling under §72, subs. 4 of the English Bill of Exchange Act, 46 Vict., c. 6 (1882), see note 232 infra.

[159] See Part III-E infra.

[160] See Part III-C and D supra.

[161] This was the situation in most of the earlier English and American breach-day cases. See Part II-B supra.

nothing else than a breach (maturity)-day conversion will make reparation.[162]

It is of this time that the necessity of conversion had first arisen and is therefore to be effected. Furthermore, in view of the general rule of the law of damages that in the absence of special circumstances the valuation is to be effected as of the time of breach,[163] there even seems to be a rebuttable presumption in favor of such a valuation, provided the damages are recoverable at all.[164]

(b) A different situation arises where the foreign money appreciates after the breach or wrong. Here the breach-day valuation may not afford adequate relief to the injured party. Where the currency was acquired as a "commodity" (sale of exchange) it appears that in accordance with the doctrine of *Baker v. Drake*[165] and *Wright v. Bank of the Metropolis*[166] the valuation is to be effected as of a later date, after plaintiff learned of the loss and was in a position to replace it.[167] It appears that the injured party is required to mitigate the loss. He is expected to "cover" himself by purchase or sale of the stipulated currency in order to prevent the loss from increasing.[168] No damages may be required for depreciation after the day when the replacement of the loss became possible.

(c) However, where the underlying transaction was a foreign currency debt (rather than a sale of exchange) the requirement of mitigation of damages does not seem to come into play. Although this is not clearly settled, it appears that no "cover" is required where the foreign currency functions as money (as dis-

162 Hicks v. Guinness, cited in note 138 supra; Hughes Tool Co. v. United Artists Corp., cited in note 127 supra.

163 1 SEDGWICK, DAMAGES, 9th ed., §243, pp. 491, 492 (1912); MCCORMICK, note 74 supra, §48, pp. 183-189; 5 WILLISTON, CONTRACTS, rev. ed., §1381 (1937); TORTS RESTATEMENT §927 (1939); and id., §911, comment, subdiv. K, p. 573 (according to which plaintiff may have an election with respect to time); 40 N.Y. Consol. Laws (McKinney, 1948) §148 (3); Uniform Sales Act §67.

164 Where such damages are recoverable the foreign currency is treated to some extent as a commodity for this limited purpose. Where no damages are recoverable the valuation is to be effected as of the actual payment-day; and if no prior payment was made, as of the judgment (trial) date.

165 53 N.Y. 211, 13 Am. Rep. 507 (1873).

166 110 N.Y. 237 at 249, 18 N.E. 79 (1888). On the widespread adoption of these principles by the majority of the American states and the different position of the English law, see MCCORMICK, note 74 supra at 183-189, but, with regard to England, see MANN, note 8 supra, at 97, and the cases there cited.

167 MCCORMICK, note 74 supra, at 187; 2 SEDGWICK, DAMAGES, 9th ed., c. XXII (1912).

168 NUSSBAUM, note 22 supra, at 324, 344; Rifkind in 26 COL. L. REV. 559 at 567 (1926); but see Part I supra.

tinguished from a commodity). This is particularly so where the innocent party had already parted with the consideration (quid) in return for which the promise of payment had been made.[169]

Consequently, there may be instances where, in accordance with the doctrine of consequential damages, the valuation may have to be effected at a higher, or depending on the facts of the case, even the highest intermediate rate between breach and judgment-day.

It is, however, more likely that where the foreign currency functioning in the underlying transaction (acquisition) as money appreciates after default the injured party may elect to proceed in debt, rather than for damages for breach of contract.[170] This will permit him to avoid any loss resulting from the depreciation of his own national currency or of any other money than that in which the obligation had been expressed.[171]

H. *Actions in Debt and Breach of Contract Distinguished*

The distinction between actions in debt and for damages for breach of contract has been examined in numerous decisions both in this country and in England.[172] With respect to our domestic money obligations the distinction is obscured by the various functions of money and the rigidity of the nominalistic principle.[173]

[169] Ibid. See also Part III-H infra.

[170] With respect to the election see Hicks v. Guinness, 269 U.S. 71 at 80, 46 S.Ct. 46 (1925), passage quoted in note 88 supra, and Part III-H infra.

[171] He must then receive either the originally stipulated amount of foreign money, or its equivalent in the money of payment at the actual payment-day rate of exchange; or, where no such prior payment is made, the award in dollars (money of the forum) must be effected at the (trial) judgment-day rate of exchange.

[172] Hicks v. Guinness, note 170 supra; Richard v. American Union Bank (1st case), 241 N.Y. 163 at 171, 149 N.E. 338 (1925) (dissenting opinion of Judge Lehman); Parker v. Hoppe, 258 N.Y. 365 at 367, 179 N.E. 770 (1932) (see note 48 supra). See also Matter of King, 129 Misc. 244, 221 N.Y.S. 730 at 732, 733 (1927); and the authorities cited therein, examining the distinction between action for breach of contract and action on the contract. In England the problem was examined in Société des Hôtels Le Touquet Paris-Plage v. Cummings, [1922] 1 K.B. 451 at 457, per Bankes, L.J., 463-464, per Atkin, L. J.; In re Chesterman's Trusts, [1923] 2 Ch. 466 at 479, per Lord Sterndale, M.R., and at 485, per Warrington, L.J.; In re British American Continental Bank—Goldzieher & Penso's Claim, [1922] 2 Ch. 575; same—In re Lisser & Rosenkranz's Claim, [1923] 1 Ch. 276 at 284, 291; New Brunswick Railway Co. v. British and French Trust Corp., [1939] A.C. 1 at 29, per Lord Russell of Killowen; Grauman v. Treitel, [1940] 2 All E.R. 188; Vionnet v. Wills, [1939] 4 All E.R. 136 at 138, per Clauson, L. J.; Cummings v. London Bullion Co., [1952] 1 All E.R. 383 at 384, 385; DICEY, note 64 supra, at 748, 749; MANN, note 8 supra at 62, 63, 152, 330.

[173] BOUVIER'S LAW DICTIONARY (3d rev. 1914) p. 752, points out: "whether when the law gives judgment on a contract to pay money—*e.g.* on a promissory note—this is to be regarded as enforcing performance of the promise, or as awarding damages for the breach of it, is a question on which jurisconsults have differed." See also 1 CLARK,

As far as domestic money obligations are concerned the currency *stipulated* as the medium of exchange (money) is assumed by law to be identical in its nature and value with the currency which *by operation of law* is the general subsidiary means of discharge of all obligations (money).[174] Therefore, it becomes irrelevant whether it is the primary or the secondary obligation which is being enforced, or whether, in fact, there is any such distinction at all.

In England the distinction has been held to be irrelevant even with respect to foreign money obligations.[175] As long as the English law does not permit damages for depreciation of foreign currencies,[176] the primary (debt) and the secondary obligation (debt plus nominal damages) are deemed to be identical.

However, as far as foreign money obligations are concerned the situation is different under our law. Depending on the *contemplation* of the parties and the facts of the case, a new and different secondary obligation may come into existence as a result of the breach.[177] The question now is whether this transformation is absolute or whether it comes into effect only if the injured party elects to claim it (option).

In this respect it should be considered that the parties usually intend to protect the *creditor* against depreciation of the stipulated *foreign* money of contract after maturity. It is this foreign money which primarily determines the quantum of the obligation. The parties are not assumed to have intended to reduce the obligation if the creditor's own national currency should depreciate in terms of the stipulated foreign money of contract. To do otherwise would amount to changing the very nature of the primary obligation, or to assuming that the parties may have contemplated giving the party at fault a premium for his breach.[178] It becomes ir-

NEW YORK LAW OF DAMAGES, c. XIV, p. 333 (1925). Cf. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, 3d ed., 31 (1926).

174 See Part IV-B (1) infra.

175 Vionnet v. Wills, [1930] 4 All E.R. 136 at 138, 139, per Clauson, L.J., pointing out that no distinction "can in principle be drawn between the case of a claim in respect of breach of contract which results in relief by way of damages and a like claim which results in relief by way of judgment for a fixed sum." To the same effect see Cummings v. London Bullion Co., [1952] 1 All E.R. 383 at 384, 385; and In re Russian Commercial and Industrial Bank, [1955] 1 All E.R. 75 at 77, 78. See also Part IV-C infra.

176 See Part II-D supra.

177 See Part III-C, D, E supra.

178 Here the "money of damages" may resemble a currency (money of measure) by which the value of an obligation expressed in a different currency (money of account) is to be measured pursuant to a contractual valuation clause. (On the absolute or relative effect of fluctuation of value of the "money of measure" on the quantum of the

relevant that the loss from depreciation of the stipulated foreign money, if any, and if claimed, may have been required to be measured in the creditor's own national currency or another money.

This shows that the principle enunciated by Justice Holmes,[179] giving the creditor an option of claiming either the debt or damages for the breach of contract to make payment, is well founded.[180] It is in line with the frequently emphasized view that the party at fault should not be enabled to speculate[181] or even to benefit from the breach.[182]

Where the creditor elects to enforce the primary obligation, and proceeds on the theory of debt, a valuation of the money of contract in terms of another currency, if any, is to be effected at the rate of exchange prevailing on the day of actual payment.[183] Where no such prior payment is made the judgment (trial)-day rate of exchange will be applied in the procedural conversion.[184]

IV. LIMITS OF THE LEX FORI

A. *Substantive Conversions Governed by Lex Causae*

The foregoing analysis deals primarily with problems arising under American, and more particularly under New York law. A full survey of the conflict of laws aspect of this problem would exceed the scope of this article. However, since it was suggested by some writers that the question of *damages* for depreciation of

obligation see MANN, note 8 supra, at 162, 163.) It was for similar reasons that a decision of the Highest Court of Czechoslovakia of Feb. 4, 1938, Rv. II 884/36, Official Reports (Vazny) 16692, held that the amount of rent in domestic money under a lease, containing a dollar valuation clause, was not impaired by the devaluation of the dollar (money of measure). The devaluation of the latter had not been within the contemplation of the parties. The parties intended to protect the lessor against depreciation of the stipulated domestic currency (money of account).

179 See notes 88 and 138 supra.

180 With respect to somewhat similar elections of the injured party, see TORTS RESTATEMENT, comment to §911, subdiv. K, p. 573 (1939); East India Trading Co. v. Carmel Exporters and Importers, [1952] 1 All E.R. 1053 at 1055 (option of conversion as of original breach-day or as of foreign judgment-day, under English law). See also Dr. Mann's comment, note 8 supra, at 275, 277, on art. 41 of the (League of Nations) Uniform Law on Bills of Exchange and Notes, and on art. 36 of the (League of Nations) Uniform Law of Checks, giving the creditor an option between a breach-day or a payment-day valuation; and Dach, "Conversion of Foreign Money," 3 AM. J. COMP. LAW 155 at 177-181 (1954).

181 See note 40 supra.

182 See note 75 supra.

183 See Part III-G (1) supra.

184 See Part III-F supra.

foreign money is governed by the lex fori,[185] a few basic principles pertaining to foreign causes of action must be mentioned in order to prove that under our conflict law this view is untenable.[186]

The error may emanate from three sources: from a failure to distinguish between substance and procedure, or as defined in another connection, from confusing "the 'creation' of the right-duty relation with problem of its 'enforcement' ";[187] from a mistaken view of what our public policy is on this subject;[188] or from an unrestrained adoption of certain doctrines which seem to have prevailed in England.[189]

As illustrated by Professor Cook, a secondary right, although frequently referred to as "remedial," is "as much 'substantive' as the primary right itself."[190] This has been unmistakably recognized by both the leading federal and New York State decisions, even with respect to damages for depreciation of foreign money.[191]

185 5 CORBIN, CONTRACTS §1005, pp. 53-55 (1951); Drake, "The Proper Rule in Fluctuating Exchange," 28 MICH. L. REV. 229 at 248 (1930); MCCORMICK, DAMAGES §49 (1935) (fluctuations in the value of money). With respect to English law on this subject see CHESHIRE, PRIVATE INTERNATIONAL LAW, 3d ed., 835-858 (1947); WOLFF, PRIVATE INTERNATIONAL LAW, 2d ed., 242-244 (1950); and Part IV-C infra.

186 Purely procedural conversions effected by reason of a requirement of the lex fori that judgments are to be expressed in dollars are of course clearly distinguishable. See Part III-F supra, and Part IV-C infra.

187 COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 39 (1942).

188 See Part IV-B infra.

189 See Part IV-C infra.

190 Cook, "'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 at 349 (1932); and COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, c. VI, p. 172 (1942). To the same effect, see 1 BEALE, note 22 supra, §8A.26, pp. 83, 84; and 3 id., §606.1, p. 1629; 2 RABEL, THE CONFLICT OF LAWS 276, 277, 542, 543 (1947); CONFLICT OF LAWS RESTATEMENT §§412-416 (1934); 11 AM. JUR., Conflict of Laws §134 (1937) (with respect to contracts); GOODRICH, THE CONFLICT OF LAWS §91, p. 179 (1927); STUMBERG, CONFLICT OF LAWS, 2d ed., 134, 152, 155, 160 (1951); Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws," 31 YALE L. J. 53 at 72 (rule 4) (1921); NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 174, 175 (1943); MCCORMICK, note 74 supra, at 4, 8-10 (however, with respect to valuation of foreign money, see his views cited in note 185 supra). See also FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS, 2d ed., 309, 310 (1954) (but see also id., p. 819, with respect to torts). *Contra*: writings cited in note 185 supra; and 11 AM. JUR., Conflict of Laws §186 (1937) (with respect to torts); with respect to English law see Part IV-C infra.

191 Hicks v. Guinness, 269 U.S. 71 at 80, 46 S.Ct. 46 (1925); Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 at 519, 47 S.Ct. 166 (1926); Zimmerman v. Sutherland, 274 U.S. 253 at 255, 256, 47 S.Ct. 625 (1927); Transamerica General Corp. v. Zunino, 82 N.Y.S. (2d) 595 at 604 (1948); Dougherty v. Equitable Life Assurance Soc., 266 N.Y. 71 at 80, 81, 193 N.E. 897 (1934); Revillon v. Demme, 114 Misc. 1, 185 N.Y.S. 443 at 445 (1920); Sirie v. Godfrey, 196 App. Div. 529, 188 N.Y.S. 52 (1921); Buxhoeveden v. Estonian State Bank, 106 N.Y.S. (2d) 287 (1951); Perutz v. Bohemian Discount Bank, 279 App. Div. 386, 110 N.Y.S. (2d) 446 (1952), revd. on other grounds, 304 N.Y. 533, 110 N.E. (2d) 6 (1953); Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952), affd. without op. 304 N.Y. 942, 110 N.E. (2d) 884 (1953) [see, however, Prof. Corbin's interpretation of this decision in 5 CORBIN, CONTRACTS (1953 Supp.) §1005, p. 6, n. 72, in favor of the lex fori]. To the same effect, see 5 WILLISTON, CONTRACTS, rev. ed., §1410A (1937); 15 AM. JUR., Damages §63 (1938); suggestion in MANN, supra note 8, at 330-331; notes 51 and 154 supra.

Although most of these decisions appear to be based on the so-called "vested right" theory,[192] the same conclusion must be reached under the "local law" theory.[193]

It makes little difference whether the courts are deemed to enforce a foreign acquired vested right as assumed by the former, or whether they are deemed to have adopted "a rule of decision identical or at least highly similar though not identical in scope with a rule of decision found in the system of law in force in another country with which some or all of the foreign elements are connected," as assumed by the latter.[194] Consequently, both the "vested right" or the "rule of decision" will be primarily[195] determined by the controlling substantive law, applicable under our conflict rules, unless the provisions of the foreign law are contrary to our public policy.

B. *Public Policy*

The question of what our public policy is on this subject may be tested by the following considerations. Although the provisions of the foreign law may be far more complicated, the following two propositions are basic. It may, or may not, permit damages for depreciation of the currency involved.

1. As far as the first proposition is concerned, it should be noticed that to a limited extent our own substantive law does permit such damages, even with respect to the currency of the foreign place of payment.[196]

[192] See decisions of Justice Holmes in Deutsche Bank Filiale Nurnberg v. Humphrey, and in Zimmerman v. Sutherland, both cited in the preceding note; and the analysis in Reiblich, "The Conflict of Laws Philosophy of Mr. Justice Holmes," 28 GEO. L. J. 1 at 7-10 (1939); also Dougherty v. Equitable Life Assurance Soc., 266 N.Y. 71 at 80, 193 N.E. 897 (1934); and Transamerica v. Zunino, 82 N.Y.S. (2d) 595 at 602, 603 (1948).

[193] Bernstein v. Van Heygen Freres, S.A., (2d Cir. 1947) 163 F. (2d) 246 at 249, cert. den. 332 U.S. 772, 68 S.Ct. 88 (1947); COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS, c. I, pp. 20, 21 (1942); Reiblich in 28 GEO. L. J. 1 at 14 (1939). This will also apply to the "homologous right theory," as distinguished by Professor Cavers in 63 HARV. L. REV. 822 at 832 (1950).

[194] COOK, note 193 supra. Professor Cook goes even further with respect to cases in which, from the point of view of the foreign state, the facts are purely domestic. A similar conclusion follows under the "comity theory" (see Reiblich, note 192 supra).

[195] Prima facie; the somewhat ambiguous word "primarily" is used to indicate the sequence of the considerations involved in this process, rather than their importance.

[196] Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952); Richard v. American Union Bank (2d case), 253 N.Y. 166, 170 N.E. 532 (1930); the cases based on the doctrine of re-exchange and particularly Pavenstedt v. New York Life Ins. Co., 203 N.Y. 91, 96 N.E. 104 (1911); note 158 supra. See also Orlik v. Wiener Bank Verein, 204 App. Div. 432, 198 N.Y.S. 413 (1923), discussed in Part IV-D, and in notes 253 and 254 infra.

It is only with respect to our own national currency that in view of the nominalistic principle and the provisions of the Joint Resolution of Congress of June 5, 1933[197] no damages are permissible. This enactment forbids any freezing of the value of the money of the United States.[198] An award of damages would do exactly that.

However, this ban does not apply to obligations expressed in other currencies.[199] Under its widest interpretation the prohibition was extended to so-called multiple currency clauses giving the creditor an option of demanding payment either in dollars, or in other stipulated currencies. This construction was based on the theory that there was only one basic obligation expressed in dollars.[200] But, a multiple currency bond, in which neither the basic nor the optional obligations were expressed in our national currency, was held not to be affected by the prohibition. Neither the fact that in this country by operation of law the obligation may be dischargeable in dollars,[201] nor the circumstance that the judgment must be expressed in domestic currency, appears to have been sufficient to vitiate the clause.[202] In this instance it is not the value of the dollar which is measured (mensuratum). The dollar itself is the measure (mensura) of the value of the foreign currency (mensuratum).[203] Under our law there is a conclusive

[197] 48 Stat. L. 113, c. 48, § (a) (1933), 31 U.S.C. (1952) §463 declaring all provisions purporting "to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby," insofar as made with respect to obligations "payable in money of the United States," to be contrary to our public policy; and making such obligations dischargeable "upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." Its constitutionality was upheld in the cases cited in notes 200 and 204 infra. With respect to the nominalistic principle, see Legal Tender Cases, 12 Wall. (79 U.S.) 457, 548, 549 (1871).

[198] See Guaranty Trust Co. v. Henwood, 307 U.S. 247 at 252, 253, 59 S.Ct. 847 (1939), pointing out that the prohibition contains "a catchall second sentence sweeping in 'every obligation' existing or future, 'payable in money of the United States,' irrespective of 'whether or not any such provision is contained therein or made with respect thereto.'"

[199] English Transcontinental, Ltd. v. Puebla Tramway, Light & Power Co., 186 Misc. 481, 61 N.Y.S. (2d) 356 (1946); In re Wirth's Estate, 132 N.Y.S. (2d) 98 (1954).

[200] Guaranty Trust Co. v. Henwood, note 198 supra; Bethlehem Steel Co. v. Zurich General Accident & Liability Ins. Co., 307 U.S. 265, 59 S.Ct. 856 (1939).

[201] With respect to the so-called "local payment rule" see Part III-G (1) and note 153 supra.

[202] See cases cited in note 199 supra. Strangely enough the procedural conversion of the Swiss francs into dollars in the Puebla Tramway case was effected as of breach day.

[203] The distinction between "dollar-measure" (mensura) and "dollar-mensuratum" is of great importance. It explains why, under our law, the depreciation of the dollar must be disregarded, with respect to obligations for payment of a liquidated sum of domestic money, while the decline of its purchasing power may affect the quantum of unliquidated damages where the "mensuratum" does not consist of our national currency. On this subject in general see also NUSSBAUM, note 22 supra, at 180, 181; MANN, note 8 supra, at 95-100; Eder, "Legal Theories of Money," 20 CORN. L. Q. 52 at 65, 66

presumption of the value of the dollar. It is deemed to have remained stable as a matter of law, rather than fact.[204] Under this conclusive presumption there is no room for any damages for its depreciation.

On the other hand, in the absence of statute or treaty,[205] the value of foreign money may, under our law, raise a question of fact.[206] Moreover, it may fluctuate with time and place. The default or delay in performance may cause a loss. Such loss may be recoverable. As it is the value of the foreign money which is being measured (mensuratum) in our or in another currency (mensura) there is nothing in our law that would make the recovery of damages objectionable.

It is only the value of the dollar which our law does not permit to be measured by any other standard than that conclusively set forth by the statute. It follows that, with respect to obligations expressed in the money of the United States, damages for its depreciation are contrary to our public policy.[207] No matter what the provisions of the controlling foreign law may be, it appears that no such damages may be awarded by an American court.[208]

(1934); Dawson and Cooper, "The Effect of Inflation on Private Contracts: United States 1861-1879," 33 MICH. L. REV. 852 at 886-888 (1935); Simpkins v. Low, 54 N.Y. 179 (1873).

204 Norman v. Baltimore & Ohio R. Co., 294 U.S. 240 at 304, 305, 55 S.Ct. 407 (1935); Nortz v. United States, 294 U.S. 317 at 329, 330, 55 S.Ct. 428 (1935); Perry v. United States, 294 U.S. 330 at 356-358, 55 S.Ct. 432 (1935); Legal Tender Cases, 12 Wall. (79 U.S.) 457, 549 (1871).

205 With respect to valuation for customs purposes see Tariff Act of June 1930, 46 Stat. L. 739, §522, 31 U.S.C. (1952) §372; Barr v. United States (Cust. & Pat. App. 1947) 161 F. (2d) 362 (1947). See, however, Barr v. United States, 324 U.S. 83, 65 S.Ct. 522 (1945); NUSSBAUM, note 22 supra, at 337-339. On "par values of currencies" under the Articles of Agreement of the International Monetary Fund, TREATIES AND OTHER INTERNATIONAL ACT SERIES No. 1501, U.S. Dept. of State (1946) art. IV and esp. its §4(a) and (b); Gold, "The Fund Agreement in the Courts, in INTERNATIONAL MONETARY FUND STAFF PAPERS 315-324 (1951), and id., 482 (1952). Note, however, that the second sentence of art. IV, §4(b) provides that member countries "whose monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed by the Fund" are deemed to be fulfilling the obligations stated therein. This appears to constitute an exemption in favor of this country.

206 Freund v. Laenderbank Wien, N.Y. L.J. June 29, 1949, p. 2289 (Sup.Ct., N.Y. City, Valente, J.) affd. 277 App. Div. 770, 97 N.Y.S. (2d) 549 (1950); Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 110 N.Y.S. (2d) 383 (1952), affd. without op. 304 N.Y. 942, 110 N.E. (2d) 884 (1953); Landau v. Commissioner, 7 T.C. 12 (1946); Estate of Fokker v. Commissioner, 10 T.C. 1225 (1948); Strauss v. United States Lines Co., 180 Misc. 664, 42 N.Y.S. (2d) 618 (1943). See also Marrache v. Ashton, [1943] A.C. 311; and Gold, note 205 supra.

207 See notes 197 and 198 supra, and note 208 infra.

208 Bethlehem Steel Co. v. Zurich Accident & Liability Ins. Co., 307 U.S. 265, 59 S.Ct. 856 (1939). An interesting illustration of this problem may be found in De Sayve v. De La Valdene, 124 N.Y.S. (2d) 143 (1953), affd. without op. 283 App. Div. 918, 130 N.Y.S. (2d) 865 (1954), motion to appeal granted and appeal dismissed, 307 N.Y. 861, 122 N.E. (2d) 747 (1954), motion to appeal and/or rehearing granted, 122 N.E. (2d) 336 (1954), and discussed in notes 1, 49 and 258. Under the controlling French law (namely the *cours forcé* doctrine mentioned in the last paragraph of this note) an

The foregoing shows that under our law there are two rules on damages for depreciation of money. One, which may be referred to as the "domestic money rule," applies to our own national currency, with respect to which such damages are not permissible. Another, the "foreign money rule" is applicable to foreign money, irrespective of whether it is the national currency of the foreign place of payment, with respect to which such damages may be permissible.[209]

2. There remains to be considered whether the lack of such a remedy may be deemed contrary to our public policy. No damages for depreciation of our own national currency being permissible, under our law it would be difficult to condemn comparable provisions of the foreign law, as long as the conditions in the foreign country are similar to ours.

The more liberal rules of damages for depreciation of other

obligation expressed in dollars and pounds payable in France under a French contract, was to be converted into francs as of a certain date. As the result of a subsequent depreciation of the franc the procedural reconversion of the amount of francs into dollars as of judgment date would have given plaintiff far less than "dollar for dollar" of the original obligation. Assuming that there was some fallacy in the theory leading to such a result the court decided that the franc obligation was to be converted into dollars at the breach-day rate of exchange. However, the question whether a conversion of the original dollar obligation into francs constituted freezing of the value of the dollar in terms of francs as of the date fixed by French law, and whether this was contrary to our public policy and therefore unenforceable in our courts (see n. 200 supra), was neither raised nor decided. Under the paramount law of the forum this part of the obligation may have remained one for the original amount of dollars that had been owed, with such interest and costs as may have become due. There may have been no need for any conversion. But, all this does not apply to another part of plaintiff's claim based on a debt of a sum of pounds sterling. The compulsory conversion of the English money into francs under the controlling French law, is certainly not objectionable. The amount of francs obtained thereby should have been converted into dollars at the judgment-day rate of exchange (procedural conversion).

Although court decisions are lacking there may be instances calling for a restrictive interpretation of the cases cited in note 200 supra. Some of the recent international agreements to which this country is a party contain provisions indicating some relaxation of the strictness of our public policy with respect to the nominalistic principle and valorization clauses. See, e.g., the Universal Postal Convention of 1952 discussed in note 80 supra; and the Articles of Agreement of the International Bank for Reconstruction and Development, TREATIES AND OTHER INTERNATIONAL ACTS SERIES, No. 1502, U.S. Dept. of State (1946), art. II, §9 (a), and art. IV, §4 (b) (i), containing re-valuation provisions applicable in the event of a devaluation, or under a certain condition, a depreciation of the currencies involved. Moreover, in certain instances a strict interpretation of the above decisions may nullify even such customary clauses fixing the rate of exchange as are mentioned in Part III-G (1) supra, or in United Shellac Corp. v. Jordan, 277 App. Div. 147, 97 N.Y.S. (2d) 817 (1950). In this connection the French exception to the *cours forcé* doctrine based on the distinction between "domestic" and "international contracts" appears to be of interest. On this exception see decision of Cour de Cassation, Chambre Civ. of June 21, 1950, reported in 77 J. DU DROIT INT. (Clunet) 1196 (1950); Lerebours-Pigeonniere, "A propos du Contrat International," 78 J. DU DROIT INT. (Clunet) pp. 4-29 (1951); and the authorities cited therein.

[209] On some difficulties caused by the failure to distinguish properly between these two rules of our law see D infra.

currencies are being gradually developed. It could hardly be said that the lack of comparable provisions of a foreign law would be shocking to our concept of justice. This was clearly recognized in the numerous judgment-day cases.[210]

Whatever doubts there are appear to be based on a substantially different situation, namely that of a complete collapse of a national currency system.[211] Such a breakdown of the national currency was experienced in Russia in the early years after the Bolshevik revolution[212] and in Germany in the first half of the twenties,[213] and in certain other countries.[214]

The new currency unit introduced in Germany in 1924 was the equivalent of one trillion units of the preceding collapsed currency in which previous obligations had been expressed.[215] This would have practically wiped out almost all obligations. The relief known as "revalorization" made available under the German law consisted in a new determination of the *primary* obligation on more or less equitable bases, irrespective of any default in payment.[216]

As it was the debt and not the currency[217] which was revalorized under the German law of obligations, similar relief was refused by an English court where the obligation was controlled by English law.[218] The English decision was based on the view that "revalorization" was unknown to English law.[219] It was this conclusion that was questioned by Professor Corbin.[220]

[210] See Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S.Ct. 166 (1926) and other judgment-day cases cited in note 58 supra. These cases rest on the assumption that the foreign law does not permit such relief.

[211] See MANN, note 8 supra, at 47, 48, 84, 85; and note 220 infra.

[212] See Dougherty v. Equitable Life Assurance Soc., 266 N.Y. 71, 193 N.E. 897 (1934); Tillman v. Nat. City Bank of New York, (2d Cir. 1941) 118 F. (2d) 631; Rashba, "Debts in Collapsed Foreign Currencies," 54 Yale L. J. 1 at 12 (1944); and last part of note 48 supra.

[213] NUSSBAUM, note 22 supra, at 199 ff.; cases cited in note 42 supra.

[214] MANN, note 8 supra, at 80-82.

[215] NUSSBAUM, note 22 supra, at 201.

[216] Id. at 206-215. The judicial revalorization was based on §242 of the German Civil Code providing in substance that the debtor must perform his obligation in accordance with good faith (Treu and Glauben).

[217] See note 218 infra.

[218] Anderson v. Equitable Life Assurance Society of the United States, 134 L.T.R. (n.s.) 577 at 562 (1926) per Bankes, L.J., p. 565, per Warrington, L.J.

[219] Ibid.

[220] 5 CORBIN, note 185 supra, §1005, p. 55. As far as American substantive law is concerned his view on revaluation of obligations under such extraordinary circumstances, as a complete collapse of the currency system, may be justified. See Drake, "The Proper Rule in Fluctuating Exchanges," 28 MICH. L. REV. 229 (1930), relying on the interesting case of Willard v. Tayloe, 8 Wall. (75 U.S.) 557 (1869); but see evaluation of this decision in NUSSBAUM, note 22 supra, at 188, 189. See also the interesting case in Matter of Lendle, 250 N.Y. 502, 166 N.E. 182 (1929). There may be exceptional instances where the lack of such redress may be contrary to our public policy. See Rashba's example in 54 YALE L.J. 1 at 12 (1944) (prohibition of enforcement of debts by Soviet law; consequently

Whatever may be said with respect to whether under our or the English law a relief comparable to the German "revalorization" is available in the event of a complete collapse of a currency, it raises a different problem from that analyzed in this paper.[221] In problems resulting from the collapse of a currency system we are faced with the determination of the quantum of the *primary* obligation, irrespective of any breach. Even if payment of the numerical amount of the debt had been made at maturity the obligation may not have been validly discharged.[222]

On the other hand, with respect to the problem analyzed in this paper, none of the modern decisions of our courts goes beyond the value of the obligation at its maturity.[223] They assume that the obligation would have been fully discharged by payment of its numerical (nominal) amount had timely payment been made, no matter how much the money may have depreciated in the meantime. Where there was a breach (delay of payment) or a wrong, the problem is whether a new secondary obligation came into existence by operation of law.[224]

The preceding considerations show that the absence of a relief comparable to ours, with respect to damages for depreciation of foreign currencies after default, is usually not contrary to our public policy. Consequently none should be awarded, where this is the case.

C. *American and English Conflict of Laws Treatment of Procedural Conversions*

Where, occasionally, it was held[225] that "the conversion date of the foreign money is to be determined by the law of the forum" this referred to a mere procedural conversion into dollars in which the judgment of an American court was to be expressed.[226]

no room for provisions that would remedy the hardship resulting from the collapse of the currency). However, any generalization that would permit our courts to disregard the foreign law just because of its adherence to the nominalistic principle appears to be untenable. Any exception would require a careful scrutiny. Our own law is based on the nominalistic principle and on the constitutional power of the government over currency. Its exercise may affect the value of private contracts. Julliard v. Greenman, 110 U.S. 421, 4 S.Ct. 122 (1884); Ling Su Fan v. United States, 218 U.S. 302 at 310, 311, 31 S.Ct. 21 (1910); and the cases cited in notes 200 and 204 supra.

221 NUSSBAUM, note 22 supra, at 218.

222 Id. at 207.

223 See Part II-B, C and D supra.

224 See Part III-C, D and E supra.

225 Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952 at 956, citing CONFLICTS RESTATEMENT §424, comment.

226 See Part III-F supra. With respect to maritime law see note in 52 COL. L. REV. 141 (1952).

It is only to this extent, that the controlling foreign law, by which the quantum of the obligation is measured, does not come into play in our courts.[227] This shows the importance of the distinction between substantive and procedural conversions under our conflicts doctrine.

In England the situation is different. It will be recalled that the English breach-day rule is not intended to be compensatory.[228] Contrary to the American law no damages for depreciation of foreign money appear to be recoverable. Consequently, under the English doctrine there is no need for any substantive conversion into another money in which the loss is to be measured (money of damages). No new and different secondary obligation comes into existence by operation of law; or, if it does, its nature and quantum are identical with the primary obligation.[229]

This explains why, even after an action had been instituted in England, a debt of a sum of francs was held to have been discharged by payment of the original (nominal) amount in francs which had greatly depreciated after the default.[230] The fact that on the belated payment day the debtor may have purchased the original (numerical) amount of francs for a far lesser sum of English money than on breach day was therefore irrelevant. Quite obviously this result is contrary to that which would have been obtained by the operation of the breach-day rule.

Yet, in another case, based on almost identical facts, and controlled by the same French law, where the debtor failed to take advantage of his opportunity of discharging the obligation in depreciated francs, the judgment award in sterling was computed at the pre-depreciation maturity (breach) -day rate of exchange.[231]

The inconsistency of these two groups of cases, both of which appear to be equally authoritative, cannot be reconciled in any way other than by concluding that the English breach-day rule is (usually) a provision of the English procedural law.[232] Need-

227 This follows from the well-established principle that matters of procedure are governed by the law of the forum. See 3 BEALE, note 22 supra, §584.1; GOODRICH, THE CONFLICT OF LAWS §81, p. 151 (1927); id., 2d ed., §77, p. 187 (1938); STUMBERG, CONFLICT OF LAWS, 2d ed., 134 (1951); COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS, c. VI, pp. 156, 165, 166 (1942); NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 187 (1943). In this connection see also note 147 supra.

228 Part II-D and note 69 supra.

229 Note 230 infra, Part III-H and note 175 supra.

230 Société des Hôtels Le Touquet Paris-Plage v. Cummings, [1922] 1 K.B. 451 at 460, 463. The same conclusion was expressed in a dictum in Grauman v. Treitel, [1940] 2 All E. R. 188 at 200.

231 Vionnet v. Wills, [1939] 4 All E.R. 136; [1940] 1 K.B. 72 at 73. To the same effect see cases and writings cited in notes 69 and 73 supra.

232 DICEY, note 64 supra, at 749; CHITTY, CONTRACTS 435 (1947); WOLFF, PRIVATE INTERNATIONAL LAW, 2d ed., 242, 244 (1950); MANN, note 8 supra, at 316, 325. In fact, as

less to add that, being purely procedural and not intended to compensate the injured party, there is no logical justification of the breach-day, rather than a judgment-day valuation in the money of the forum.[233] This procedural character of the English conversion-valuation rule, together with a certain other peculiarity[234] of the English law, resulted in an interesting conflict of laws doctrine.

Contrary to the general principles adopted by the English courts with respect to other monetary problems, such as those arising under the American gold clause prohibition[235] or the German revalorization,[236] no effect is given to the foreign conversion (valuation) rules, whatever the controlling law may be. The valuation date is determined by the English lex fori.[237]

In fact, if the foreign valuation rules were also procedural, as may have been assumed by the English court, they could have been properly disregarded.[238] But, we have noted that in the United States, for example, there are two different types of conversions (valuations). One substantive,[239] another procedural.[240] In numerous foreign countries judgments may be expressed in the original foreign money actually owed.[241] Consequently,

damages were held not to be recoverable, the conversion into pounds sterling was usually clearly procedural. See cases cited in notes 64 and 73, supra. But see Khoury v. Khayatt, [1943] A.C. 507 at 514, 515, in which the conversion of Turkish pounds, owing under a promissory note made in Palestine, into Palestine currency, was clearly substantive. It was based on a provision of Palestine law, corresponding with §72, subs. 4 of the English Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), requiring that an amount of foreign money be translated into United Kingdom currency according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. This enactment fixes both the money of payment and the date of conversion, irrespective of whether litigation will ensue. See MANN, note 8 supra, at 282. Interestingly enough, owing to the depreciation of the Palestine pound in terms of Turkish pounds after maturity of the obligation, the breach-day conversion worked to the benefit of the defaulting party.

233 Criticizing the English law for its failure to adopt principles comparable to ours, Professor Drake in 28 MICH. L. Rev. 229 at 236 (1930), points out that the English rule was reached "simply by following the precedents rather than by appealing to any rational principle of law or justice."

234 See note 237. With respect to the doctrine of Philips v. Eyre, L.R. 6 Q.B. 1 at 28 (1870), and Machado v. Fontes, [1897] 2 Q.B. 231.

235 The King v. International Trustee for the Protection of Bondholders, [1937] A.C. 500 (quantum of a dollar obligation controlled by American law determined in accordance with the American Gold Clause prohibition). See also DICEY, note 64 supra, Rule 162.

236 Kornatzki v. Oppenheimer, [1937] 4 All E.R. 133; Re Schnaper, [1936] 1 All E.R. 322. In these cases controlled by German law the obligation expressed in marks was revalued by English courts in accordance with the rules of the German law.

237 CHESHIRE, PRIVATE INTERNATIONAL LAW, 3d ed., 857, 858 (1947); 4th ed., 662 (1952); DICEY, note 64 supra, Rule 165 (2), and id., comment on p. 749.

238 Note 227.

239 Part III-D and E; part IV-A.

240 Part III-F; part IV-C.

241 Note 8 supra.

there may be no need for any procedural conversion into the money of the forum. Or, irrespective of whether judgments may or may not be rendered in the original foreign currency, the governing (foreign) law may provide whether damages for depreciation of foreign, or even domestic, money are recoverable and to what extent.[242] Such rules are clearly substantive.

It was recognized that "if the proper law determines what constitutes a breach, it is also entitled to determine the consequences of the breach,"[243] and that "there can be no doubt, at least on principle, that remoteness of liability must be governed by the proper law of the obligation that rests upon the defendant."[244]

There is no justification for a different approach with respect to damages for depreciation of foreign money, particularly where valuation *agreements,* such as gold clauses, increasing or reducing the quantum of the obligation in the event of fluctuation of the value of money, were held not to be contrary to English public policy.[245]

To some extent this regrettable position of the English conflict of laws may be due to what was referred to as the "peculiar English doctrine" that for a tort to be actionable in England it must be both unjustifiable by the lex loci delicti and actionable by the lex fori.[246] Whatever may be said with respect to torts, it does not explain the English theory with respect to contracts.

242 Part III-D and E; Transamerica General Corp. v. Zunino, 82 N.Y.S. (2d) 595 at 604, 605 (1948), dealing with the question of damages for depreciation of money under art. 1224 of the Italian Civil Code of 1942; decisions of the Highest Court of Czechoslovakia of Oct. 25, 1935, Rv. II 781/33, Official Reports (Vazny) 14649 (permitting damages for a loss from devaluation of pounds sterling payable in London to a Czechoslovak creditor); of Feb. 27, 1937, Rv. I 266/35, Official Reports (Vazny) 15865 (permitting damages for a loss from devaluation of Czechoslovak money payable by a Czechoslovak firm to a German plaintiff in Germany; and of Feb. 2, 1928, Rv. I 849/27, Official Reports (Vazny) 7763 (permitting damages resulting from the decline of the rate of exchange of German marks owing by a Czechoslovak debtor to a German creditor; and in general sources mentioned in note 93, supra; 2 SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS, 3d ed., 666, 667 (1950); MANN, note 8 supra, at 251, 252; Dach's comparative outline in 3 AM. J. COMP. LAW 156, 161 ff. (1954); and last part of note 208 supra.

243 CHESHIRE, note 185 supra, at 853 (see also 4th ed., 1952, p. 660).

244 Ibid.; J. D'Almeida Araujo v. Sir Frederick Becker & Co., [1953] 2 All E.R. 288 at 290, 291 (with respect to contracts).

245 Feist v. Société Intercommunale Belge d'Electricité, [1934] A.C. 161; New Brunswick Railway Co. v. British and French Trust Corp., [1939] A.C. 1. See also part of opinion of Lord Summer in Celia v. Volturno, [1921] 2 A.C. 544 at 558, cited in note 69 supra. It is difficult to understand why indemnity for the depreciation of foreign money after a default of payment should be refused by an English court, where permissible under the proper law, if such compensation is enforceable, where based upon the terms of a contract. Quite logically the parties may have found it superfluous to repeat the indemnity provisions of the controlling law in the contract.

246 CHESHIRE, note 185 supra, at 856; 4th ed., 1952, p. 662; DICEY, note 64 supra, Rule 174, pp. 800 and 806. To some extent Professor Cheshire's view, favoring the lex

The difficulty of the rationale of the English valuation (conversion) rule rests simply in the fact that it is purely mechanical. As the English law now seems to stand, and however regrettable this may be, the conversion date of the foreign money into pounds sterling is determined by the English lex fori. With very few exceptions[247] these conversions are effected as of breach or maturity-day, whatever the cause of action may be.

Thus the American and English conflict of laws doctrines on this subject appear to be substantially different.

D. *Confusion Resulting from Presumption of Similarity of Foreign and Domestic Law*

The preceding part of the discussion of the problem shows that both the provisions of our substantive law and the rules of our conflicts law are settled. The difficulties that may be encountered in cases based on foreign causes of action seem to arise under what may be referred to as an "emergency rule" of our law. In the

fori, and failing to distinguish between substantive and procedural conversions, is based on a passage in the judgment of Lord Wrenbury in Celia v. Volturno, [1921] A.C. 544 at 563, 564, a case in which no conflict of laws problem was involved. A collision of two ships occurred on the high seas. The case was therefore governed by English law in its entirety [DICEY, note 64 supra, at 806; CHESHIRE, 4th ed., note 185 supra, at 273-275; HANCOCK, TORTS IN THE CONFLICT OF LAWS 276, 278-279 (1942)]. Moreover, the action was in tort. Even if these views were justifiable in torts there does not appear to be any valid reason for their extension to contracts. Such an extension is contrary to Professor Cheshire's views cited in notes 243 and 246, particularly where, both in the Volturno and in the Di Ferdinando cases, "remoteness" was one of the grounds for the court's conclusion that damages for depreciation of foreign money were not permissible. See also the critical evaluation of the doctrine of Philips v. Eyre, L.R. 6 Q. B. 1 at 28 (1870); and of Machado v. Fontes, [1897] 2 Q.B. 231, in CHESHIRE, note 185 supra, 4th ed., c. X (1952).

247 With respect to claims based on foreign judgments the creditor was held to have an option to have the foreign currency valued either at the rate of exchange prevailing on the date of the foreign judgment, under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 GEO. V, c. 13, §2 (3), or at the original breach date rate of exchange. East India Trading Co. v. Carmel Exporters and Importers, [1952] 1 All E.R. 1053 at 1055, 1056, per Sellers, J. The learned judge cites Dicey's Rule 86, p. 410, that "A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given." Some English writers refer to the provision of § 2 (3) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, supra, as an exception to the general breach-day rule. Another statutory exception in favor of the judgment-day rate of exchange is set forth in the Carriage by Air Act, 1932, 22 & 23 Geo. V, c. 36, §1 (5). On these exceptions see DICEY, note 64 supra, at 749; MANN, note 8 supra, at 318; CHESHIRE, PRIVATE INTERNATIONAL LAW, 3d ed., 858 (1947); (4th ed. 1952) p. 664; SCHMITTHOFF, ENGLISH CONFLICT OF LAWS 365 (1945). It is doubtful whether the decisions in In re Chesterman's Trusts, [1923] 2 Ch. 466 [distribution of the assets of a trust fund situated in England in which the value of a debt expressed in foreign money was computed at the rate of exchange prevailing on the date of the court's decision (certificate)], and in Kornatzki v. Oppenheimer, [1937] 4 All E.R. 133 [a sum of German marks revalorized under German law converted into English money at the judgment-day rate of exchange] constitute valid exceptions. With respect to foreign money purchased as a commodity see note 69 supra. See also that part of note 80, supra, dealing with the Universal Postal Convention of 1952.

absence of proof of the controlling law it may be assumed that with respect to fundamental obligations the foreign law is the same as our own law.[248] The question is, however, which of the two different rules of our law is applicable.[249]

If the imaginary "assimilated foreign law" is to be patterned according to our "*domestic* money rule," no damages would be recoverable.[250] Under this theory our rule on dollar obligations would be extended to obligations actually expressed in such *foreign* money as is current at the foreign place of payment. This appears to have been done in *Deutsche Bank Filiale Nurnberg v. Humphrey*.[251]

If, on the other hand, the assumed "assimilated foreign law" were patterned according to our "foreign money rule" damages for depreciation of the national currency of the foreign place of payment might be recoverable. Our law permits damages for depreciation of the currency of the foreign place of payment, provided this was within the contemplation of the parties.[252] Such an interpretation may have motivated the decision in *Orlik v. Wiener Bank Verein*.[253] In this case a breach-day conversion resulted in an award of damages for depreciation of Austrian money, payable to an American creditor in Vienna.

Under this interpretation any possible criticism of the decision[254] would be limited to doubts as to whether such damages

[248] 5 WILLISTON, note 74 supra, at 3928; 3 BEALE, note 22 supra, §622A.1; GOODRICH, THE CONFLICT OF LAWS § 83, pp. 164, 165 (1927); SCHMITTHOFF, THE ENGLISH CONFLICT OF LAWS 369 (1945). According to some authorities [see BEALE, supra; and the authorities cited in Ehag Eisenbahnwerte Holding A.G. v. Banca Nationala a Romaniei, 306 N.Y. 242, 117 N.E. (2d) 346 at 349 (1954)], this presumption applies only to the laws of jurisdictions which adopted the common law of England. The foregoing comparison of English and American law shows, however, that quite contrary rules on the problem now under discussion were developed in these two basically common law countries. Moreover, the subject matter is affected by legislative enactments. For these reasons a distinction based on whether the respective legal system is based on the common law of England does not appear to be useful in this connection. It appears, therefore, that the party claiming to be entitled to damages for depreciation of foreign money under the controlling law should be required to plead the respective provisions of the same. See Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp., 302 N.Y. 342 at 350, 98 N.E. (2d) 466 (1951); and note 100 supra.

[249] With respect to the rules of our law, one on damages for depreciation of our own national currency (domestic money rule) and another on monies foreign to the forum (foreign money rule), see last part of Part IV-B (1) supra.

[250] Ibid.

[251] 272 U.S. 517 at 519, 47 S.Ct. 166 (1926). See Part II-C, and note 53 supra. The same theory was applied in Bonell v. Von Schultz, 197 Misc. 756, 95 N.Y.S. (2d) 617 (1950).

[252] Cases cited note 196 supra.

[253] 204 App. Div. 432, 198 N.Y.S. 413 (1923). In this case, in which the facts were almost identical with the Deutsche Bank case, note 251 supra, the valuation of the Austrian currency was effected as of breach day.

[254] This decision was criticized by Dr. Mann, note 8 supra, at 314, 315. However, under this construction Dr. Mann's doubts of the correctness of the decision; and of the

were within the contemplation of the parties. However, this would raise a mere question of fact.[255]

Whatever the merits of these two possible ways of determining the "assimilated" rule of the foreign law may be, the problem is of minor importance. It is only an emergency makeshift. The parties may and should plead the provisions of the controlling foreign law.[256] Furthermore, the finding of a rule of the foreign law constitutes only a determination of a question of fact in our courts. It does not become a binding precedent to which the doctrine of stare decisis would apply. If in a subsequent case it is proved that the foreign law is different, the court will decide accordingly.[257]

E. *Federal and State Rules*

There does not appear to be any discrepancy between the federal and New York law on this subject.[258] A discussion of the *Erie* doctrine[259] therefore becomes unnecessary. However, with respect to the question of jurisdiction of federal courts it may become important to decide whether, in what instances, and to what extent, the problem raises a federal question.[260]

CONCLUSION

These principles of the New York law may be very roughly summarized as follows:

1. The necessity of a conversion-valuation of foreign money may arise from two substantially different causes: (a) either from

views of Mr. Fraenkel in 35 COL. L. REV. 360 (1935) in support of that outcome appear far less substantiated.

255 Part III-C supra.

256 See last part of note 248 supra.

257 Ottoman Bank of Nicosia v. Chakarian (2d case), [1938] A.C. 260 at 279, per Lord Wright; Krajina v. Tass Agency, [1949] 2 All E.R. 274 at 282, 283, per Tucker, L.J.

258 See Part III-A and C, and notes 77 and 109 supra; and Part IV-D. However, this does not justify the oversimplified view expressed in De Sayve v. De La Valdene, 124 N.Y.S. (2d) 143 at 155 (1953), that the conversion principles expressed in Hicks v. Guinness and in the Humphrey case, supra, were matters as to which the state courts are not bound to follow federal decisions. In view of the recognized control of the federal government over matters of currency, there may be, and certainly are, instances involving federal questions. See critique of the De Sayve case in notes 49, 208 supra and note 260 infra.

259 Erie R. Co. v. Tompkins, 304 U.S. 64 at 78, 58 S.Ct. 817 (1938), holding that "There is no federal general common law . . . applicable in a State. . . ." On this subject see also NUSSBAUM, note 22 supra, at 373; and Shaw, Savill, Albion & Co. v. The Fredericksburg, (2d Cir. 1951) 189 F. (2d) 952 at 956.

260 28 U.S.C. (1952) §1331; BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, §25, pp. 50-53 (1950); 1-A OHLINGER'S FEDERAL PRACTICE, rev. ed., 64-66 (1950). It should

the requirement of the applicable substantive law (substantive conversions);[261] or (b) by reason of the procedural rule of the forum requiring judgments to be expressed in domestic money (procedural conversions);[262] or (c) from both.[263]

2. Where in accordance with the rules of conflict of laws the problem is controlled by New York law, the date as of which the valuation is to be effected depends on whether damages for depreciation of the foreign currency after default in terms of another money are recoverable.[264]

3. Under New York law such damages are recoverable within the scope of the doctrine of consequential damages (*Hadley v. Baxendale*).[265]

4. Within these limits such damages are to be measured: (a) in the currency in which the loss was actually sustained (money of damages), although it may be different from the money in which the obligation was originally expressed (money of account, contract), or from the money of the forum;[266] (b) as of such time as would place the innocent party in the same position as if there had been no breach or wrong.[267] This will usually be

(i) where the foreign money depreciates after default in terms of the money of damages—as of the time of breach;[268]

(ii) where the foreign currency acquired in the respective transaction as a mere commodity (as distinguished from money) appreciates after maturity—as of the time plaintiff learned of, and was in a position to replace the loss. Mitigation of damages ("cover") may be required;[269]

(iii) where the foreign currency functioning in the underlying transaction as money (medium of exchange) appreciates after maturity—as of a subsequent time depending

be noted that in this country the requirement that all proceedings in the courts of the United States shall be kept in dollars and cents is a part of a federal statute. See note 8 supra; and Bronson v. Rodes, 7 Wall. (74 U.S.) 229 at 254, 19 S.Ct. 141 (1868); also last part of note 220, and Part IV-C supra, on the constitutional power of the government over currency. However, the problem may be a fairly complicated one.

261 Part III-D (3) and E.
262 Part III-F.
263 Part III-E (2) and F, and note 144.
264 Part III-B, C, D (3), E and G.
265 Part III-C.
266 Part III-D (3) and E.
267 Part III-C, G and H.
268 Part III-G (2) (a).
269 Part III-G (2) (b).

on the contemplation of the parties. Mitigation of damages ("cover") is not required.[270] Plaintiff has, however, an option to proceed on the theory of debt (rather than breach of contract), under which the valuation, if any, would be effected as of the time of the actual payment, or judgment (see points 6 and 8).[271]

5. Where the valuation is required under the doctrine of re-exchange, the valuation is to be effected as of the time of dishonor of the bill of exchange.[272] However, plaintiff appears to have an option to proceed "in debt" on the theory of enforcing the primary obligation rather than the "re-exchange."[273]

6. Where no damages are claimed or recoverable the valuation is to be effected as of the time when the necessity thereof had first arisen, unless a different provision is contained in the contract. Where no prior valuation was required this will be as of the time of actual payment.[274]

7. A foreign money obligation is not transformed into a domestic money obligation by merely instituting an action in New York.[275]

8. Judgments are to be expressed in dollars and cents.[276] Where the ultimate obligation (which, depending on the applicable substantive law, may or may not include damages) is expressed in foreign money, its conversion into the money of the forum (procedural conversion) is to be made as of judgment (trial) -day.[277]

9. In cases based on a foreign cause of action, damages for depreciation of foreign money are recoverable in accordance with the provisions of the controlling substantive law.[278]

10. Whatever the provisions of the applicable foreign law may be, no damages for depreciation of the money of the United States may be allowed by an American court.[279]

270 Part III-G (2) (c).
271 Part III-G (2) (c), and H.
272 Part III-G (1).
273 Part III-H.
274 Part III-G (1).
275 Part III-D (1) and (2), and F.
276 Note 8 supra.
277 Part III-F.
278 Part IV.
279 Part IV-B (1).