THE DISCHARGE OF FOREIGN MONETARY OBLIGATIONS IN THE ENGLISH COURTS

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ALTHOUGH the problem of interpretation and discharge of obligations to pay money under a contract has an ancestor of moderate antiquity in the collateral line in *The Case de Mixt Moneys*,[1] decided by the Privy Council in 1604, only in the present century of international commerce, fluctuating currencies, and exchange control regulations has it assumed the proportions and character of a major question in the law of contracts. Its modern ramifications include a considerable number of difficult minor problems to which Continental jurists, but few American or English writers, have devoted their attention. One cannot hope to do more in this short paper than deal with the principles involved in some of the major problems in this field and to refer to the more important cases. For those of you who may wish to pursue these questions, the chief works in English, all written by jurists of Continental origin, are Mann, *The Legal Aspect of Money* (1938), Nussbaum, *Money in the Law* (1939), and Kahn-Freund, part editor of Dicey's *Conflict of Laws* (6th edition, 1949), the last-named drawing extensively on, but bringing up-to-date, the work of Mann. To all these writers I should like to acknowledge the help I have received from their writings.[2] But if English writers have rather neglected this aspect of the discharge of contracts in the conflict of laws, English courts, and particularly the Judicial Committee of the Privy Council, have been unable to allow themselves such a luxury.

In approaching some of the problems with which the courts have had to deal, it is helpful to restate four principles of the English conflict of laws which have the somewhat rare distinction of not being open to much doubt.

[1] Gilbert v. Brett (1604) Davis 18 (P. C. of Ireland).

[2] See also Wolff, Private International Law (1945) pp. 467 ff.; Schmitthoff, The Export Trade (1948), particularly Chaps. 8 and 26; Ernst Cohn, "Currency Restrictions and the Conflict of Laws" 55 L. Q. R. 552 (1939).

1. The validity of the discharge of the obligations of a contract is governed by the proper law of the contract.[3]

2. The method of performance of a contract is governed by the law of the place of performance.[4]

3. The interpretation of a contract is governed by the proper law of the contract.[5]

4. Judgment for a sum of money in the English courts can only be given in English currency, i.e., sterling.[6]

The initial problem is one of characterisation of foreign currency as money or as a mere commodity. English law on this question has not yet fully evolved, and it may well be that foreign currency would be differently classified according to the nature of the transaction in which it was concerned. For the purpose of income tax, for example, it may appear too much to expect English law to treat untaxed income from foreign investments received in England in a foreign currency merely as a non-monetary commodity.[7] Again, if A in Michigan sold to B in New York a consignment of cars to be delivered in England, payment to be made in the common dollar currency of A and B, it would be unreasonable for English courts, hearing an action for breach of contract for failure to deliver, to regard the transaction as other than breach of a contract of sale. If, on the other hand, the currency in question is regarded by the parties themselves, being reasonable business-men, as a commodity to be bought and sold with money which is legal tender in the place of payment, the subject-matter of the contract is clearly in a different category, as when G in London asks his bankers to obtain for him a quantity of U. S. dollars for the purpose of visiting America.[8] The broad distinction, in short, should rest on the answer to the question: is the foreign currency the medium of payment or the subject-matter of the contract? If the former, there seems no substantive reason why an action for debt, as distinct from one for damages for breach of contract, should not lie in the English courts after conversion of the amount of foreign currency into sterling. If the latter,

[3] Gibbs v. Société Industrielle des Métaux (1890) 25 Q. B. D. 399; Ralli v. Dennistoun (1851) 6 Ex. 483; Ellis v. M'Henry (1871) L. R. 6 C. P. 228; Swiss Bank Corporation v. Boehmische Industrial Bank [1923] 1 K. B. 673.

[4] Di Ferdinando v. Simon, Smits & Co. [1920] 3 K. B. 409 (C. A.).

[5] Chatenay v. Brazilian Submarine Telegraph Co. [1891] 1 Q. B. 79.

[6] Manners v. Pearson [1898] 1 Ch. 581.

[7] But see Rhokana Corporation Ltd. v. Inland Revenue Commissioners [1938] A. C. 380, 2 All E. R. 51, judgment of Lord Atkin.

[8] Mann, The Legal Aspect of Money (1938) pp. 129 ff.

the treatment of dollars, francs, or marks in the same way as automobiles, wine, or treatises on legal philosophy is reasonable and natural.

English courts have not yet taken a final position on this question, though judges have said more than once that foreign currency for purposes of English law is not money, but a commodity.[9] Typical of this element of uncertainty is the judicial history of *Rhokana Corporation, Limited* v. *Inland Revenue Commissioners*,[10] in which a company issued debentures under a trust deed providing for payment of interest in sterling in London, or, at the option of the holders, in dollars in New York or florins in Amsterdam (a so-called "*option de change*"). The company under a statutory duty by English law deducted income-tax before paying interest, and the question arose of the date at which the exchange value of the interest was to be taken for purposes of tax deduction in those cases in which the holders had exercised the option for payment in United States dollars. The case did not directly involve an obligation to pay exclusively in a foreign currency, and arose on a technical point of English tax machinery; but with these reservations two passages from the judgment of Lord Atkin in the House of Lords are of general interest. In the first[11] he remarked, "I do not see how one can deduct income tax, which is a tax in sterling, from dollars, and, in a case where the tax is based on the value of the dollars at a future time, it appears to be impossible to comply with the section." Yet a little later,[12] he remarked, ". . . in my opinion, nothing in this case throws doubt upon the obligation of a taxpayer to account in a sterling valuation for profits and gains which he receives in foreign currency, or can in any way interfere with the free play of commerce expressed in any currency which the business man finds suitable." It may be not entirely unjustifiable to draw from these remarks conflicting implications of the legal nature of foreign currency: from the former, that such currency is not money in the English sense: from the latter, that it is. It is of interest in this connection that the House of Lords, by a majority of four to one, reversed the decision of the Court of Appeal and restored that of Lawrence, J., at first instance.

Problems of particular interest in this general field are those relating to the discharge of currency obligations, and those concerned with the scope of operation of foreign exchange control. The crux of the first group of problems turns on the question of whether one party to a contract, who

[9] For a discussion of this problem and relevant cases, see Mann, *op. cit.*, Ch. V.

[10] [1937] 1 K. B. 788 (Court of Appeal); [1938] A. C. 380, 2 All E. R. 51 (House of Lords).

[11] [1938] 2 All E. R. 51, at 54.

[12] *Id.*, at 55.

has promised payment in a foreign currency, can discharge his obligation by paying in that currency in England, or whether only payment in sterling will operate as a discharge. Is this a question of discharge of a substantive obligation, to be governed by the proper law of the contract, or one of the mode of performance, to be governed by the law of the place of payment? English law regards the determination of the money of account as a substantive question within the sphere of the proper law[13] and the money of payment as an aspect of the mode of performance, to be governed by the *lex loci solutionis*.[14] But these are no more than signposts to the applicable law, and still leave open the question of what, assuming that English law is the proper law in the first case and the *lex loci solutionis* in the second, will be the money of account and the money of payment in a contract for payment of dollars in England. On the question of substantive obligation governed by English law, English courts have consistently applied the widely-accepted principle of nominalism, even though payment is stipulated in a foreign currency, so that payment of an equivalent number of units of account to that stipulated will be effective to discharge the obligation, whether or not the value of those units has appreciated or depreciated between the dates of contract and of payment. This principle has been applied in the cases of a debased Irish coinage in the sixteenth century,[15] of devalued German marks after the first world war[16] and of United States dollars after 1933,[17] and is well formulated in Rule 160 of the latest edition of Dicey's *Conflict of Laws*.[18]

It is obvious that no English court could apply any rule of revalorisation consistently with this principle, even where considerable changes had taken place in the value of foreign currency,[19] except through the connecting

[13] Dicey, The Conflict of Laws (6th ed. 1949) Rule 163; Mann, *op. cit.*, Ch. 6, and cases there cited.

[14] Dicey, *op. cit.*, Rule 164; Wolff, *op. cit.*, s. 447.

[15] Gilbert v. Brett (1604) Davis 18.

[16] *Re* Chesterman's Trusts [1923] 2 Ch. 466.

[17] R. v. International Trustee for Bondholders A. G. [1937] A. C. 500.

[18] (1949) pp. 718–9: "A debt expressed in the currency of any country involves an obligation to pay the nominal amount of the debt in whatever is legal tender at the time of payment according to the law of the country in the currency of which the debt is expressed (*lex monetae*), irrespective of any fluctuations of the value of that currency in terms of sterling or any other currency, of gold, or of any commodities which may have occurred between the time when the debt was incurred and the time of payment."

[19] British Bank for Foreign Trade v. Russian Commercial and Industrial Bank (No. 2) (1921) 38 T. L. R. 65. Mann, *op. cit.*, p. 208.

factor of the proper law.[20] Indirectly, an exception to this rule against revalorisation exists in the reference which English law makes to the *lex pecuniae* to determine the number and nature of units of account in the case of converted currencies, for under such circumstances the ascertainment of these facts at the date when payment is due will necessarily involve consideration of a rate of exchange or rate for conversion fixed by the *lex pecuniae* as between its old and new currencies, as happened in Germany in 1924.[21] In a case dealing with devaluation of the Turkish pound, Lord Wright, delivering the opinion of the Judicial Committee of the Privy Council, remarked, "The unit of account must . . . be applied to the appropriate currency, which may vary from time to time."[22] Similarly, in *Re Chesterman's Trusts*,[23] a mortgage debt in marks was held payable in depreciated marks, irrespective of the place of payment, since the rights of the mortgagee were defined by German law "as it exists from time to time."[24]

Furthermore, English law allows an exception to the rule governing interpretation of a contract by the proper law in the case of foreign currencies, for whether or not such a currency is legal tender, whether, in other words, it is money or a commodity under the *lex pecuniae*, must be determined by that law itself, even though it differs from the proper law of the contract.[25] In the words of Lord Wright, "The currency in any particular country must be ascertained in accordance with the law of that country."[26] Again, in *Pyrmont, Limited* v. *Schott*,[27] an appeal dealing with liability for repayment in Gibraltar of a loan of Spanish pesetas, Lord Porter remarked, "The form in which such payment is to be made must be regulated by the municipal law of the country whose unit of account is in question, and what would or would not be a legal tender must depend on the law on that subject in force at the time when the tender should have been made." Although it is clearly settled that an English action for recovery of a sum of money, and the resulting judgment, must be expressed in terms of sterling,[28] and although this principle may apply equally to a

[20] On this, compare Dicey, *op. cit.*, Rules 160 and 161.

[21] Kornatzki v. Oppenheimer [1937] 4 All E. R. 133; *cf.* *Re* Chesterman's Trusts [1923] 2 Ch. 466; Dicey, *op. cit.*, p. 722.

[22] Ottoman Bank v. Chakarian [1938] A. C. 260, [1937] 4 All E. R. 570, 575.

[23] [1923] 2 Ch. 466.

[24] *Per* Lord Sterndale, M. R., at 478.

[25] Pyrmont, Ltd. v. Schott [1939] A. C. 145, [1938] 4 All E. R. 713 (P. C.).

[26] Ottoman Bank v. Chakarian, above.

[27] [1938] 4 All E. R. 713, at 720.

[28] Di Ferdinando v. Simon, Smits & Co. [1920] 3 K. B. 409 (C. A.).

declaratory judgment,[29] it is doubtful whether any rule of English law exists to prevent parties stipulating for payment in England in whatever currency they choose. The need for conversion into sterling arises when legal proceedings are instituted and is based on a procedural requirement of the common law. Apart from the special case of legal proceedings, when England is the *lex loci solutionis* payment may apparently be made either in the money of account or in sterling.[30] Against this view, however, is the statement of Lord Russell of Killowen, dealing with the special question of whether a debt payable in pounds was to be discharged in English or Australian pounds. In the course of his judgment in the House of Lords in *Adelaide Electric Supply Company Limited* v. *Prudential Assurance Company Limited*[31] he asked, "The question then is, how can the company discharge that indebtedness? The answer can, I think, only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account." The unit of account is no more than a symbol or denomination connoting the appropriate currency.[32]

That legal tender of the place of payment, however, may not be the only means of discharging a monetary obligation may be deduced from a decision of the Judicial Committee in the following year,[33] in which a New Zealand firm had engaged an English tailor for employment in New Zealand at seven hundred pounds a year sterling. During the period of employment the New Zealand pound became increasingly less valuable in relation to the English, and the decision of the Privy Council in favour of the English pound as the money of account seems also to imply that English pounds could have been the money of payment in New Zealand. Lord Wright remarked,[34] "If the word 'sterling' had not been inserted, the salary would have been payable in New Zealand currency, that being the place of payment, on the principles laid down in the *Adelaide Case*." An even stronger case on the facts in favour of payment in England in a foreign currency is *Graumann* v. *Treitel*,[35] for there it was impossible at the relevant

[29] *Contra*, Mann, *op. cit.*, pp. 236, 289. See Kornatzki v. Oppenheimer [1937] 4 All E. R. 133, above n. 21.

[30] Dicey, *op. cit.*, p. 740.

[31] [1934] A. C. 122, at 148.

[32] Auckland City Council v. Alliance Assurance Co. Ltd. [1937] A. C. 587, at 605.

[33] De Bueger v. J. Ballantyne & Co. Ltd. [1938] 1 All E. R. 701.

[34] *Id.*, at 706.

[35] [1940] 2 All E. R. 188. See also Société des Hôtels Le Touquet Paris-Plage v. Cummings [1922] 1 K. B. 451.

date for the debtor, a German refugee, to pay marks in Germany. Atkinson, J., in the King's Bench Division remarked, "It seems quite clear that, if he had chosen to produce marks, and to pay to the plaintiff the number of marks which he owed him, that would have been a good discharge." Furthermore, once English courts adopt the classification of foreign currency as a commodity, logic at least should lead them to approve of the specific performance of an obligation to deliver that commodity, whether the place of delivery is England or elsewhere. The Privy Council has had no hesitation in supporting obligations to deliver foreign currency which was not legal tender at the place of payment.[36]

Of greater importance in the discharge of foreign currency obligations than the question of whether payment must be made in currency A or currency B, (for under normal circumstances of a free market the value of any currency can be fairly expressed in terms of any other), are the two issues involved in the question of such conversion, namely, by what law is the rate of exchange at the relevant date to be determined, and what law determines the relevant date of conversion?

Most writers[37] are agreed that the proper law of the contract should decide whether or not the debtor has an option of paying in the money of account or the currency of the place of payment, but the actual question of what law governs the rate of exchange, assuming that a conversion is either necessary or possible, has been somewhat neglected. In one sense the rate of exchange, differing in various countries in respect of the same two currencies, may substantially affect the rights and liabilities of the parties and should on principle be governed by the proper law of the contract. This solution is adopted by Dicey's editors,[38] though with an expression of doubt. On the other hand the actual possibility, legality, and process of exchange in the country of payment are clearly subject to the municipal law of that country, and authority exists for the suggestion that this question is determined by the law of the place of payment.

In *Graumann* v. *Treitel*,[39] on the dissolution of a German partnership, accounts which were taken in Germany showed the defendant's liability to pay a sum of marks in Berlin. The proper law of the partnership and of the resulting liability was German. Both parties became resident in Eng-

[36] I. e., Spanish pesetas in Gibraltar. Pyrmont, Ltd. v. Schott [1938] 4 All E. R. 713; Marrache v. Ashton, Marrache v. Onos [1943] 1 All E. R. 276.

[37] Dicey, *op. cit.*, Rule 164; Mann, *op. cit.*, pp. 250–1; Wolff, *op. cit.*, s. 447; Nussbaum, Money in the Law (1939) pp. 422 ff.

[38] *Op. cit.*, Rule 164.

[39] [1940] 2 All E. R. 188.

land, and in an action which Atkinson, J., classified as one of debt, not of damages, he held that the debt in marks should be calculated in sterling "at the official current rate of exchange at the time when payment ought to have been made," i.e., the official London rate. At the relevant date the official rate was twelve marks to the pound, whereas marks could have been bought in a recognized London market at thirty-six to the pound. This decision accordingly is also authority for the proposition that the rate of exchange of foreign currency against pounds is the official rate once proceedings have begun, though until that date the debtor may discharge his liability by buying money on any recognized market.[40]

In contrast, and possibly in contradiction, to this decison is the judgment of the Judicial Committee of the Privy Council in *Marrache* v. *Ashton* and *Marrache* v. *Onos*.[41] The appellant had mortgaged his land in Gibraltar to the respondents for various sums of money in Spanish pesetas which, though not legal tender in Gibraltar, are in common use there. The mortgagees claimed repayment at 42.25 pesetas to the pound which was the official rate in London under the Clearing Office (Spain) Order, 1936. At that date pesetas could be exchanged in Gibraltar at 132 to the pound and at the Spanish frontier post at fifty-three to the pound. Lord Macmillan, treating this action as one of damages, not of debt, had no doubt as to which of these wildly divergent rates to apply. "The appellant," he said, "not having specifically performed his contracts by delivering peseta notes to the respondents became liable to them in damages for his failure to deliver to them the stipulated quantity of the commodity which he had contracted to deliver. The measure of damages for his failure is the sum in sterling which it would cost the respondents to obtain for themselves in the market the amount of the commodity which the appellant was bound but failed to deliver to them." Judgment was given on the rate of 132 pesetas to the pound.

Perhaps only a distinction between actions for debt and actions for damages for breach of contract can reconcile these divergent judicial pronouncements, just as the same distinction seems also to be fundamental in the second part of this problem, that of the date at which a rate of exchange shall be applied. English law is unsettled, though the tendency would seem to be in the direction of treating the breach of foreign currency obligations as actions for breach of contract, consistently with the characterisation of such currency as a commodity. At least four possible alterna-

[40] See extract from judgment of Atkinson, J., cited above, p. 118, and *cf.* Dicey, *op. cit.*, Rule 164.

[41] [1943] 1 All E. R. 276.

tives exist as to the date at which the rate of exchange may be calculated, namely, maturity of obligation, date of actual payment, date of commencement of proceedings and judgment date. In 1943[42] the Judicial Committee of the Privy Council was able to express its opinion emphatically in favour of the date of maturity. "There can . . . be now no doubt as to the English law on this point. . . . English law has adopted the first rule, not only in regard to obligations to pay a sum certain at a particular date, but also in regard to obligations, the breach of which sounds in damages, as for an ordinary breach of contract, and also in regard to the satisfaction of damages for a wrongful act or tort."[43]

Yet despite this confident assertion, a shadow of doubt remains if one reads literally the judgment of Farwell, J., in *Kornatzki* v. *Oppenheimer*.[44] The case concerned a compromise of a German action in 1905, resulting in an obligation to pay an annuity of eight thousand marks. In 1924 the Reichsmark was introduced and the old marks ceased to be legal tender. The learned Judge decided the question of present liability by reference to German Law[45] and held, "I have come to the conclusion that . . . the sum which the German courts would award is . . . £500 per annum, paid in marks at the rate of exchange prevailing when the payments are made."[46] It is apparent, however, from the terms of the declaration made accordingly, that no distinction was either made or anticipated between the dates of maturity and those of payment, and the decision is of relatively minor importance on the question of the date at which exchange must be calculated. It is of interest to compare the two-fold American rule which would apply the rate of exchange at the maturity date in contracts to deliver foreign currency in the United States,[47] but the rate as of the judgment date when action is brought in the U. S. for failure to deliver currency abroad.[48] The justification of this dualism by Mr. Carlyle E. Maw,[49] cited at length by

[42] Syndic in Bankruptcy of Nasrallah Khoury v. Khayat [1943] 2 All E. R. 406.

[43] *Id.*, at 409 *per* Lord Wright. See also Di Ferdinando v. Simon, Smits & Co. [1920] 3 K. B. 409 (breach of contract) and SS. Celia v. SS. Volturno [1921] 2 A. C. 544 (tort); Schmitthoff, Conflict of Laws (2nd ed. 1948) p. 369; Dicey, *op. cit.*, p. 740. *Cf.* Apostolic Throne of St. Jacob v. Said [1940] 1 All E. R. 54, in which the Privy Council applied the date of payment.

[44] [1937] 4 All E. R. 133.

[45] Civil Code, art. 242.

[46] [1937] 4 All E. R. at 140.

[47] Hicks v. Guiness, 269 U. S. 71 (1925).

[48] Die Deutsche Bank Filiale Nürnberg v. Humphrey, 272 U. S. 517 (1926).

[49] Note in 40 Harvard Law Rev. 619 (1927).

Beale,[50] appears to involve an unconvincing element of choice of jurisdiction in what should in all such cases be a pure question of choice of law.

One of the major problems of international commerce to-day is created by the extensive, indeed almost universal, use of exchange control regulations. Starting after the Franco-Prussian War, this cloud, no bigger than a man's hand, grew in magnitude with the first world war, during the inter-war years obscured the entire German economy and in our day has covered the whole sky. The purpose of these regulations, restricting the export of local currency and regulating the types of foreign currency which may be imported, is generally to promote the internal economic recovery of a country by maintaining or raising the internal and international exchange value of the local currency. Although the English exchange control regulations are hardly typical, it may be useful to sketch them as a rough pattern. They are contained in the Exchange Control Act, 1947, and delegated legislation made thereunder, continuing, with some amendment, wartime controls which existed by virtue of the Defence (Finance) Regulations, 1939.[51] The purpose of this control has been explained in a Government memorandum[52] as being to ensure prompt payment for imports by obtaining prompt payment for exports, "and all useful foreign exchange, however acquired, must, therefore, be surrendered to the Exchange Equalisation Account against payment in sterling." The Act only applies to countries outside the list of Scheduled Territories, which constitute the so-called "sterling area," but as both the United States and Canada are outside this area, the effect of the Act is to limit contractual freedom in respect of payment when the parties are persons in either of these countries and the United Kingdom. The Regulations prescribe the currency in which and the account from which payment has to be made, and their effect on freedom of contract may be judged from the requirements of the Act,[53] that payment must be made to a person resident in the United Kingdom, in such a manner as is prescribed in relation to the goods and destination stipulated, not later than six months after the date of export, and that the amount of payment has to be such as to represent a return for the goods which is in all the circumstances satisfactory in the national interest, whether or not it happens to satisfy the parties to the contract.

Exchange control regulations are in various countries sanctioned by

[50] Conflict of Laws (1935) vol. 2, pp. 1341 ff.

[51] See generally, Schmitthoff, The Export Trade, particularly Chs. 8 and 26.

[52] Cmd. 6945.

[53] S. 23, and Statutory Instruments made thereunder.

penalties varying from fine to capital punishment, but have the general characteristic that any contract involving their breach is or may be tainted with illegality varying from minor misdemeanour to high treason. In an effort to maintain international trade and the obligations of contract English courts have fitted the effects of such regulations into the general pattern of choice of law rules in contract, while French and Swiss courts seem to ignore foreign currency restrictions, whether or not imposed by the proper law, on the grounds of the limited purpose of protecting local currency in the former case and of public order in the latter.[54] Although American law would apparently determine the effect of exchange control regulations by reference to the law of the place of payment,[55] local considerations of public policy and natural justice, whether in peace or war, have at times overriden the pure choice of law rule.[56] And although Dr. Mann has advocated the restriction of this overriding effect of public policy to time of war,[57] it is doubtful whether at the time of writing he had in mind either the extraordinary conditions of "cold war" which pass for peace in our time or the existence of international conventions, such as the Bretton Woods Agreement,[58] which establish a type of international public policy and ensure the enforcement of foreign exchange control regulations in accord with that policy by the courts of any high contracting party.[59] So far as English law is concerned in respect of the Bretton Woods Agreement, this respect for foreign control restrictions is now statutory.[60] Furthermore, it is obvious that no court will enforce a contract in breach of the currency regulations of the *lex fori* if such are applicable to the contract either under the general principles of choice of law or the special provisions of local legislation in the country of the forum.[61]

Within these limits it is possible to discover the principles of choice of law which the English courts apply to determine the effect and operation of exchange control regulations. Those principles have been complicated in one direction by the element of illegality normally involved in breach

[54] Mann, *op. cit.*, p. 261.

[55] Restatement of the Law of Conflict of Laws (1934) pars. 358, 363, 370.

[56] As in the case of German Jewish refugees reclaiming sea-passage money from German steamship lines—Pan-American Securities v. Fr. Krupp A.-G., 169 Misc. 445 (1938). See Wolff, Private International Law p. 481.

[57] *Op. cit.*, pp. 262-3.

[58] December 27, 1945, embodied into English law by the Bretton Woods Agreements Act, 1945.

[59] Articles of Agreement of the International Monetary Fund, Washington (1945) Art. VIII, s. 2(b).

[60] Bretton Woods Agreements Order, 1946, s. 3 (S. R. & O. 1946, No. 36).

[61] Boissevain v. Weil [1949] 1 All E. R. 146. Dicey, *op. cit.*, Rule 166 (3).

of currency restrictions, thus taking the issue in this respect out of the field of mere private contract, and on the other by the limits of recognition to be accorded to foreign restrictions to which the English courts would attribute a confiscatory or penal character. The two possible principles which have been advanced as the governing law are the proper law of the contract[62] and the law of the place of payment.[63] English law has adopted both. That English courts will give effect to the exchange control regulations of the proper law is clear from the decision of the Court of Appeal in *St. Pierre* v. *South American Stores*.[64] In that case a Chilean subject granted a lease in Paris of land in Chile to two English firms, with an option of payment of rent in Chile or Europe, at the wish of the lessor. The export of local currency had been prohibited in Chile and the English court, holding that the proper law of the contract was Chilean and that therefore the obligation of payment was governed by that law, decided that in consequence of the exchange control restrictions, "this contract can have its obligations discharged in Chile, but not elsewhere."[65]

In two recent decisions the House of Lords has applied this principle to foreign exchange control regulations prohibiting the delivery of securities without the consent of a nominated foreign authority. In *Kahler* v. *Midland Bank, Limited*[66] and *Zivnostenska Banka National Corporation* v. *Frankman*[67] under contracts, the proper law of which was held to be Czech, securities belonging to a Czech customer were deposited by the Czech headquarters of a bank in the custody of a bank in England. The absolute beneficial owner in both cases sued the English bank for delivery to him of the bonds. In both cases the bank's defence succeeded, that under Czech exchange control regulations[68] delivery to the plaintiff could be legally made only with the prior consent of the Czech National Bank, which had been refused. In *Kahler's Case*, Lord Simonds remarked, "If the proper law is the law of Czechoslovakia, I have no doubt that the defence is a valid one, for the courts of this country will not compel the performance of a contract if by its proper law performance is illegal."[69] Although in *Kahler's Case*, at least, the plaintiff might have succeeded had he repudiated

[62] Mann, *op. cit.*, p. 260. Dicey, *op. cit.*, Rule 166 (1); Wolff, p. 480.

[63] Dicey, *op. cit.*, Rule 166(2); Restatement, Conflict of Laws, par. 358.

[64] [1937] 3 All E. R. 349. See also de Beéche v. South American Stores [1935] A. C. 148.

[65] *Per* Slesser, L. J., *id.*, at 356.

[66] [1949] 2 All E. R. 621.

[67] [1949] 2 All E. R. 671.

[68] [1949] 2 All E. R. 671, sect. H (iii); [1949] 2 All. E. R. 621, sect. H.

[69] [1949] 2 All E. R. 624.

the contract on the ground of duress exercised by the German-controlled Czech bank, he chose to base his claim on an affirmation of the contract, and the House of Lords was not prepared to accept the plea that the present Czech exchange control regulations were of a penal or confiscatory character so as to refuse enforcement of them on that ground. The legal influence of international monetary policy clearly affected the English classification of the relevant Czech provisions in the *Frankman Case*, in which Lord Simonds, dealing with the principle of non-enforcement of foreign penal or confiscatory laws, observed, "I do not exclude the possibility of this principle applying where it appears that the law which is sought to be enforced or relied on is in reality confiscatory, though in appearance regulatory of currency, but I see no reason why it should be applied in the case of a law which does not appear to differ in material respects from the legislation contemplated by the Bretton Woods Agreement which is now part of the law of this country."[70]

Furthermore, it may be deduced from *Ralli Bros.* v. *Compania Naviera Sota y Aznar*[71] that full effect would be given to the currency restrictions of the law of the place of payment. Assuming that a conflict exists between the proper law and the *lex loci solutionis* in this matter, which would the English courts follow? No such situation has yet presented itself to the courts, but on principle it is considered that effect would be given to either of these systems which prohibited or restricted the payment in question, subject, in the first place, to what has already been said of public policy, and secondly to the duty of the English judge to do justice between the parties,[72] a duty which, as in the refugee cases before American courts, may lead to a preference for one or another of the competing laws. And of the two, the proper law should and probably would prevail, not only because it governs the substantial obligations of the parties and the construction of the contract, but even more because in its subjective sense it embodies the vital commercial principle of liberty of contract.

English courts have imposed two important limitations on the recognition and enforcement of foreign currency restrictions. In the first place, exchange control regulations which form no part of the law of the place of contracting or payment, or of the proper law, will be disregarded.[73] In

[70] [1949] 2 All E. R. 676, sect. A.

[71] [1920] 2 K. B. 287.

[72] Wolff, *op. cit.*, 482–3; Graveson, Conflict of Laws (1948) pp. 5–7; Rabel, The Conflict of Laws (1945) Vol. 1, p. 91.

[73] Pyrmont Ltd. v. Schott [1938] 4 All E. R. 713 (P. C.).

Marrache v. *Ashton*,[74] the facts of which have already been given, Spanish prohibitions against export and import of pesetas, the subject of a loan in Gibraltar, were considered irrelevant. Lord Macmillan, delivering the opinion of the Judicial Committee of the Privy Council, observed:[75]

"The only necessary reference to Spanish law was for the purpose of ascertaining what in Spain was legal tender for the payment of so many Spanish units of account. This having been ascertained the Court at Gibraltar was not concerned with the domestic currency regulations and restrictions imposed by the Spanish Government."

The second limitation, more important because of the likelihood of its more frequent operation, is the refusal of English courts to give effect to foreign currency restrictions which are not comprised in either the proper law or the *lex loci solutionis*, but which prohibit one party to a contract from exporting currency, either local or foreign, from the foreign country to the place of payment.[76] In *Kleinwort, Sons and Company* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Credit Bank*[77] the Court of Appeal refused to accept Hungarian currency restrictions as an excuse for the failure of a Hungarian firm to carry out its obligation to pay sterling in London under a contract of which the proper law was English. "Primarily, it is our business," remarked du Parcq, L.J., somewhat dryly, "to see that English contracts are observed, and that they are carried out according to English law."[78] American courts have adopted the same attitude towards impossibility and illegality of performance.[79] Extreme cases of exchange control, such as the German system of blocked accounts operating before and during the last war, may be of such a character as to justify their classification as confiscatory legislation. Although no case has yet arisen in England in which the point has been in issue in respect of exchange control regulations,[80] it is probable that the courts would restrict the operation of such confiscatory decrees to property situated within the boundaries of the enacting country, putting upon them a narrow construction.[81]

[74] [1943] 1 All E. R. 276, above.

[75] *Id.*, at 279.

[76] *Cf.* Dicey's formulation, *op. cit.*, p. 751.

[77] [1939] 2 K. B. 678, 3 All E. R. 38.

[78] [1939] 3 All E. R. at 46.

[79] See, for example, judgment of Patterson, J., in Central Hanover Bank & Trust Co. v. Siemens & Halske A.-G., 15 F. Supp. 927 (1936).

[80] But see Banco de Vizcaya v. Don Alfonso de Borbón y Austria [1935] 1 K. B. 140.

[81] Dicey, *op. cit.*, pp. 152 ff.; Cheshire, Private International Law (3rd ed. 1947) pp. 174 ff.

Finally, in those cases in which foreign currency control restrictions may properly operate, the question arises of the effect of the illegality constituted by their breach. Illegality in payment usually will not vitiate the entire contract, and the English courts will if necessary read into the contract an implied term that payment shall be legally made.[82] Where no such implication is possible because payment has been promised in one currency and one place only, and payment in that currency and in that place is prohibited, there appear to be two alternatives: (a) to regard the entire contract as frustrated (this is a hard view which the English courts have been reluctant to adopt)[82]; (b) to regard the restrictions creating illegality as a temporary expedient to deal with an emergency situation.[83] In this view the restrictions should not affect the substantive obligation to pay, but merely defer the date of payment. This principle, implicit in the Restatement,[84] appears at first sight an attractive *tabula in naufragio*, until one recalls the French proverb that nothing is so permanent as the provisional. To be less inspired, but more factual, the present English exchange control restrictions were introduced to deal with an emergency which arose at eleven o'clock one Sunday morning ten years ago. English courts have not so far applied this reasoning, and it is considered that their whole tradition would lean against so doing. For the English judge, though he may once have been an optimist, has never willingly been a prophet.

[82] Ralli Brothers v. Compania Naviera Sota y Aznar [1920] 2 K. B. 287.
[83] Mann, *op. cit.*, p. 272.
[84] Par. 360.