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THE ECLIPSE OF THE LEX LOCI SOLUTIONIS — A FALLACY EXPLODED

J. H. C. Morris*

I. Introductory

Traditionally, the question what law governs the validity of a contract is the most confused subject in the conflict of laws.[1] At least four theories have been advocated by writers or adopted by courts, namely that the law of the place of contracting, or the law of the place of performance, or the law intended by the parties, or the law of the country with which the contract has the closest and most real connection, determines the validity of the contract. In England the validity of a contract is governed by the "proper law," which Dicey defines as "the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed."[2] The *Restatement*, on the other hand, prefers the theory that the validity of a contract is governed by the law of the place of contracting.[3]

The object of this paper is not to argue the merits of any of the above-mentioned theories, but to consider the following question: Assuming that the validity of the contract is not governed by the law of the place of performance (either as such, or because it is the law intended by the parties, or the law of the country with which the contract has the closest and most real connection), are there any matters which should be governed by the law of the place of performance, that is, by a different law from that which governs the validity of the contract itself?

Dicey[4] and the *Restatement*[5] both say that if the performance of a contract is illegal by the law of the place of performance, there is no obligation to perform. Dicey also contemplated the possibility that a contract might be subject to one proper law so far as concerned its

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1. "No topic of the Conflict of Laws is more confused than that which deals with the law applying to the validity of contracts." 2 BEALE, CONFLICT OF LAWS 1077 (1935). "The question of what law determines the validity of a contract . . . is the most confused subject in the field of Conflict of Laws." GOODRICH, CONFLICT OF LAWS 321 (3d ed. 1949). "There is no topic in the conflict of laws in regard to which there is greater uncertainty than that of contract." LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 261 (1947). "The subject, Contracts, is the most confused one in conflict of laws. "CHEATHAM, GOODRICH, GRISWOLD AND REESE, CASES AND MATERIALS ON CONFLICT OF LAWS 493 (3d ed. 1951).
2. DICEY, CONFLICT OF LAWS 579, Rule 136 (6th ed. 1949).
3. RESTATEMENT, CONFLICT OF LAWS § 332 (1934).
4. DICEY, CONFLICT OF LAWS 637, Exception to Rule 141 (6th ed. 1949).
5. RESTATEMENT, CONFLICT OF LAWS § 360(1) (1934).

validity, and to another proper law so far as concerned its mode of performance.[6] The *Restatement* is more specific. Section 358 provides that the law of the place of performance determines not merely the manner, time and locality of performance and the persons by whom or to whom performance is due, but also the sufficiency of performance and excuses for nonperformance. In this paper, a critical analysis, based on recent English cases, will be made of these two alleged rules that the law of the place of performance governs the legality of performance and the mode of performance, including, according to the *Restatement*, the sufficiency of performance and excuses for nonperformance.

We begin with some general reflections. Assuming that the law of the place of performance does not govern the validity of the contract itself, it is obvious that the more the scope of the law of the place of performance is expanded, the more difficult it will be to distinguish between questions of the substance of the obligation and questions of the mode or legality of performance.[7] This appears most clearly from a comparison between the classic cases of *Liverpool and Great Western Steamship Co. v. Phenix Insurance Co.*[8] and In re *Missouri Steamship Co.*[9] on the one hand, and the equally well-known case of *Louis-Dreyfus v. Paterson Steamships Ltd.*[10] on the other. Professor Beale, the learned Reporter of the *Restatement*, in his *Treatise on the Conflict of Laws*,[11] discussed the first two cases under the heading "Creation of a Contract" and the third case under the heading "Performance of a Contract"; yet it would seem that in all three cases, the situation was basically the same.

In the *Liverpool* and *Missouri* cases, a contract was made in the United States for the shipment of goods from the United States to England on board an English ship. The contract contained a clause exempting the carrier from liability for loss or damage caused by the negligence of its servants. The clause was invalid by the law of the place of contracting but valid by English law. The goods were lost off the coast of Wales. The exculpatory clause was held invalid in the *Liverpool* case, but valid in the *Missouri* case. Of course the damages claimed, being for the full value of the goods, greatly exceeded the amount of the freight; and this has tended to obscure the fact that

6. DICEY, CONFLICT OF LAWS 672, Rule 161, Sub-rule 3, Second Presumption (5th ed. 1931). This rule remained unchanged in the first five editions of Dicey, but has been altered in the sixth edition, at 593. The original rule and the alteration are quoted verbatim note 31 *infra*.

7. The difficulties inherent in this distinction, and the danger of expanding the scope of the *lex loci solutionis*, are well pointed out by LORENZEN, *op cit. supra* note 1, at 317-18. Compare CHEATHAM, GOODRICH, GRISWOLD AND REESE, *op. cit. supra* note 1, at 505.

8. 129 U.S. 397, 32 L. Ed. 788 (1888).

9. [1889] 42 Ch. 321 (C.A.)

10. 43 F.2d 824 (2d Cir. 1930).

11. 2 BEALE, CONFLICT OF LAWS 1084, 1267 (1935).

the validity of the contract, as opposed to the validity of the clause, was not in question in either case. The contract itself was clearly valid, whether or not the shipper would have been entitled to refuse to pay the freight, or, having paid it, to recover it back. That being so, it would seem that the *Liverpool* case, if the *Restatement's* rule is correct, should have been decided the other way on the ground that the question was one of sufficiency of performance or excuses for nonperformance which, according to the *Restatement,* are determined by the law of the place of performance, in this case English law.

In *Louis-Dreyfus v. Paterson Steamships Ltd.,* a contract was made in Minnesota for the shipment of wheat from Duluth, Minnesota, to Montreal, Canada. The ship was stranded and sank at the entrance to the Cornwall Canal in the St. Lawrence river, in Canadian territory. There were no relevant exceptions available to the carrier by Minnesota law, but by the law of Canada, the carrier was not liable if he used due care to make the ship fit for the voyage. In an action by the shipper for damage to the wheat, it was held that the carrier was not liable if he could prove that the ship was seaworthy. Judge Learned Hand said that though the law of the place of contracting determined the validity of an exculpatory clause limiting the carrier's common law duty, even when the parties expressly stipulated that all questions should be decided according to some foreign law, yet the law of the place of performance determined matters of performance, including excuses for nonperformance.

With all respect to the learned Judge, it is submitted that the distinction between this case and the *Liverpool* and *Missouri* cases is nebulous. If, in the *Louis-Dreyfus* case, the contract had contained a clause expressly setting forth the effect of the Canadian law, the decision would presumably have been different, because the validity of the clause would have been in issue. Yet what difference does it make whether the carrier relies on Canadian law as such or on a contractual clause which is valid by Canadian law? Moreover, if Canada was regarded as the place of performance because the ship sank in Canadian waters, and not because the place of destination was Montreal, the decision would presumably have been different if the ship had sunk in American waters. It is quite impracticable to make the carrier's liability depend on the accident of where the goods happened to be damaged. The carrier requires to know before the ship leaves port whether he will be liable for damage to the goods, for if he will be liable, his only recourse is to insure or to increase the freight; and after the accident has happened, it is too late to do either.

It certainly is not a rule of the English conflict of laws that the law of the place of performance determines excuses for nonperformance. This was settled by the leading case of *Jacobs, Marcus & Co. v. Credit*

Lyonnais.[12] The defendants, a French firm carrying on business in London, contracted to sell a quantity of esparto to the plaintiffs, who were London merchants. The contract was made in London. It stated that the esparto was to be shipped from Algiers and paid for in London. An insurrection broke out in Algiers after less than half the quantity had been delivered and the defendants refused to deliver any more. Their defence was that by French law they were excused by *force majeure*. But it was held that the proper law of the contract was English law and that the defendants were not excused, notwithstanding the contrary rule in the *lex loci solutionis*, since it is a rule of English domestic law that a seller of goods is not excused if his source of supply dries up.[13] The court said that the *lex loci solutionis* might well regulate the method of performance, but could not go further and operate as a discharge.

II. LEGALITY OF PERFORMANCE

We proceed to examine section 360 of the *Restatement* and Dicey's Exception to Rule 141, which provide that there is no duty to perform if performance is illegal by the *lex loci solutionis*. Dicey's Exception has been judicially approved on numerous occasions in England,[14] but the only modern English case which supports it is *Ralli Brothers v. Compania Naviera de Sota y Aznar*.[15] In that case a contract, the proper law of which was English, provided that freight at the rate of £50 a ton should be paid in Barcelona for a cargo of jute to be shipped to that port. After the date of the contract, but before the arrival of the cargo, a Spanish decree fixed the maximum freight on jute at a lower rate than the contract rate and made it illegal to pay more. It was held that only the Spanish rate was payable and not the higher contract rate. The court distinguished *Jacobs v. Credit Lyonnais* on

12. [1884] 12 Q.B. 589 (C.A.). The headnote (syllabus) is misleading in treating the question as one of illegality. It seems to have misled Professor Beale, who says that performance was forbidden by the law of the place of performance. See 2 BEALE, CONFLICT OF LAWS 1087 (1935). Elsewhere he approves of the decision in the *Louis-Dreyfus* case, *id.* at 1267, and disapproves of that in the *Jacobs* case, *id.* at 1263.

13. *Cf.* Blackburn Bobbin Co., Ltd. v. T. W. Allen and Sons Ltd., [1918] 1 K.B. 540, [1918] 2 K.B. 467 (C.A.).

14. Ralli Brothers v. Compania Naviera Sota y Aznar, [1920] 2 K.B. 287 (C.A.), per Lord Sterndale, M.R., at 291, per Warrington, L.J., at 295, per Scrutton, L.J., at 300; Foster v. Driscoll, [1929] 1 K.B. 470 (C.A.), per Sankey, L.J., at 520; Rex. v. Int'l Trustee for the Protection of Bondholders Aktiengesellschaft, [1937] A.C. 500, per Lord Wright at 519; Kleinwort Sons and Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft, [1939] 2 K.B. 678, per Mackinnon, L.J., at 694, per Du Parcq, L.J., at 697, per Atkinson, J., at 700. See also the dictum of Lord Sankey in De Beeche v. South American Stores Ltd., [1935] A.C. 148, 156.

15. [1920] 2 K.B. 287 (C.A.). This is also the principal case relied on in 2 BEALE, CONFLICT OF LAWS § 360 (1935), which of course corresponds to RESTATEMENT, CONFLICT OF LAWS § 360 (1934).

the ground that in that case performance was not illegal, but only difficult or impossible.[16]

The principle of this decision does not apply if the law of the place of performance merely gives the defendant an excuse for nonperformance without actually making it illegal for him to perform in the agreed manner.[17] Nor does the principle apply if the illegality is imposed by the law of the defendant's residence or place of business and not by the law of the place of performance. Thus in *Kleinwort v. Ungarische Baumwolle Industrie A/G*,[18] Hungarian exchange control legislation was held to afford no defence to Hungarian debtors who had promised to pay in London under a contract governed by English law.

In *Rex v. International Trustee for the Protection of Bondholders A/G*,[19] Lord Wright referred to Dicey's Exception and remarked that it was "too well established now to require any further discussion." Notwithstanding this embargo, the question has been much discussed whether the Exception is part of the English conflict of laws at all.[20] It has been strenuously argued that it is merely a rule of the English domestic law of contracts and does not apply unless the proper law of the contract is English. According to this argument, if the proper law of the contract is not English, it does not necessarily follow that illegality by the *lex loci solutionis* furnishes an excuse for nonperformance; whether it does so or not is a matter for the domestic rules of the proper law. This argument is undoubtedly attractive. The proper law has better claims than the law of the place of performance to regulate the effects of illegality, which are very different in different systems of domestic law. Illegality and its effect are clearly matters which concern the substance of the obligation, and the law of the place of performance has nothing to do with that.

The question whether this view is correct assumes practical importance in connection with exchange control restrictions. English courts are reluctant to hold that foreign exchange control restrictions are contrary to public policy, though no doubt they would do so if the

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16. Per Lord Sterndale, M.R., at 292, per Warrington, L.J., at 297, per Scrutton, L.J., at 301.

17. Rex v. Int'l Trustee for the Protection of Bondholders Aktiengesellschaft, [1937] A.C. 500; *cf.* Jacobs v. Credit Lyonnais, [1884] 12 Q.B. 589 (C.A.).

18. [1939] 2 K.B. 678; *cf.* Trinidad Shipping Co., Ltd. v. G. R. Alston and Co., [1920] A.C. 888 (P.C.); Central Hanover Bank and Trust Co. v. Siemens and Halske Aktiengesellschaft, 15 F. Supp. 927 (S.D.N.Y. 1936).

19. [1937] A.C. 500, 519.

20. CHESHIRE, INTERNATIONAL CONTRACTS 71-74 (1948); CHESHIRE, PRIVATE INTERNATIONAL LAW 225-27 (4th ed. 1952); FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS 330-34 (1947); 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 535 *et seq.* (1947); Mann, *Proper Law and Illegality in Private International Law*, 18 B.Y.B.I.L. 97, 107-13 (1937); *cf.* DICEY, CONFLICT OF LAWS 638-40 (6th ed. 1949).

restrictions were confiscatory or otherwise shocking.[21] On the other hand, they give effect to English exchange control restrictions, whatever the proper law of the contract, if the English statute containing the restrictions was intended to apply to the transaction in question.[22] They also give effect to foreign exchange control restrictions if the legislation imposing the restrictions forms part of the proper law of the contract.[23] And it is possible that they might feel obliged to give effect to foreign exchange control restrictions, even if the foreign law was not the proper law of the contract, by reason of the international obligation contained in Article VIII, §. 2 (b) of the Bretton Woods Agreement. This section, which is part of English law,[24] provides that "exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of any member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member."[25] If, in addition to all this, English courts should feel obliged to uphold foreign exchange restrictions merely because performance was to be in the country imposing the restrictions, and even though that country was not a party to the Bretton Woods Agreement and its law was not the proper law of the contract, it is obvious that serious and quite unnecessary obstacles will be imposed to the free flow of international trade. It is therefore much to be hoped that Dicey's Exception will be treated as a rule of English domestic law, and not applied unless the proper law of the contract is English.[26]

In two recent exchange control cases in the House of Lords, Lord Reid had occasion to refer to the principle of Dicey's Exception. In the first case he said: "The law of England will not require an act to be done *in performance of an English contract* if such act would be unlawful . . . by the law of the country in which the act has to be done."[27]

In the second case he said: "I think that it is now settled law that, *whatever be the proper law of the contract,* an English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act has

21. Kahler v. Midland Bank, [1950] A.C. 24, 27, 36, 46-47, 57; Zivnostenska Banka National Corp. v. Frankman, [1950] A.C. 57.
22. Boissevain v. Weil, [1950] A.C. 327.
23. De Beeche v. South American Stores Ltd., [1935] A.C. 148; Kahler v. Midland Bank, [1950] A.C. 24; Zivnostenska Banka National Corp. v. Frankman, [1950] A.C. 57.
24. Bretton Woods Agreement Act, 1945 9 & 10 GEO., 6 c. 19, and orders made thereunder.
25. The meaning of this badly drafted section is obscure.
26. The exception is retained in the present edition, but only because the editors felt it "not to be convenient to alter the wording of a Rule which has been judicially approved on so many occasions." DICEY, CONFLICT OF LAWS 639, n.83 (6th ed. 1949).
27. Kahler v. Midland Bank, [1950] A.C. 24, 48 (italics added).

to be done."[28] Nothing in the context suggests that Lord Reid noticed any difference between his two formulations; but it is only for the earlier and narrower one that any authority exists.

III. Mode of Performance

Section 358 of the *Restatement* lays down that the law of the place of performance determines not merely "the manner, time and locality of performance" but also "the sufficiency of performance and excuse for nonperformance."[29] Comment *a* to that section admits that "there is no logical line which separates questions of the obligation of the contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place of performance." But the Comment goes on to insist that there is "a practical line which is drawn in every case by the particular circumstances thereof." According to the next sentence of the Comment, the "regulation of the substance of the obligation" is a matter for the law of the place of contracting, while the "minute details" of the manner, method, time and sufficiency of performance are matters for the law of the place of performance. It is submitted that the sufficiency of performance and especially excuses for nonperformance cannot be dismissed as "minute details," for these matters relate to discharge; and if they are to be governed by the law of the place of performance, that law is permitted to encroach on the sphere of the law governing the substance of the obligation. As has been seen in our discussion of the *Louis-Dreyfus* case, it is virtually impossible to distinguish between excuses for nonperformance and questions of the substance of the obligation.

Dicey's treatment of this matter was more tentative and less precise than that of the *Restatement*. He laid down the following presumption for ascertaining the proper law of the contract in accordance with the intention of the parties:

> "*Second Presumption:* — When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, *especially as to the mode of performance*,[30] may be presumed to be the law of the country where the performance is to take place (lex loci solutionis)."[31]

28. Zivnostenska Banka National Corp. v. Frankman, [1950] A.C. 57, 79 (italics added).

29. Professor Beale's *Conflict of Laws* contains, surprisingly, no section corresponding to § 358 of the *Restatement*, but he several times lays down the broad proposition that "the law of the place of performance governs matters relating to the performance of contracts." See, *e.g.* 2 Beale, Conflict of Laws 1261, 1268, 1270, 1272 (1935); *cf.* Goodrich, Conflict of Laws 342 (3d ed. 1949).

30. Italics added.

31. Dicey, Conflict of Laws 672 (5th ed. 1931). The wording has been altered in the sixth edition at 594. The words italicised have been omitted and the following sentence added: "This presumption . . . will usually apply

According to Dicey, then, the "mode of performance" may be regulated by the law of the place of performance, although some other law is the proper law of the contract. Until 1934 there was no authority, apart from certain inconclusive dicta,[32] for extending Dicey's rule beyond matters which could fairly be said, in the language of the *Restatement,* to constitute "minute details" of performance. In 1934, however, Lord Wright, while delivering what has sometimes been regarded as the leading opinion in the case of *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.,* attempted to widen the scope of the rule far beyond anything which Dicey could have had in mind:

> "It is established that prima facie, whatever is the proper law of the contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract."[33]

It is obvious that Lord Wright's observation is directly contrary to the decision of the Court of Appeal in *Jacobs v. Crédit Lyonnais,* and it is significant that the only authority which he cited for it was *Ralli Brothers v. Compania Naviera de Sota y Aznar,* which, as we have seen, dealt with the legality, and not with the mode, of performance. It is submitted that Lord Wright's theory is as objectionable as the *Restatement's* attempt in section 358 to enlarge the scope of the law of the place of performance, and for the same reason, namely, that it allows that law to encroach on the sphere of the law governing the substance of the obligation. The influence of Lord Wright's theory on the English conflict of laws will be considered in connection with two lines of cases, those dealing with the determination of the money of account, and those dealing with gold clauses. It will be seen that Lord Wright's dictum, after a chequered career, has at last received its quietus. It is one of the best illustrations to be found in our books of Lord Sumner's remark that "no 'guidance' is more misleading, no 'kindly light' is more of a will-o'-the-wisp than an obiter dictum sometimes contrives to be."[34]

A. *Money of Account Cases*

Money, in law as in economics, serves the double function of a measurement of value and a medium of payment. Hence it is vital for lawyers to distinguish between the money of account, that is the currency in which a debt is measured, and the money of payment, that

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to the mode of performance as distinguished from the substance of the obligation."

32. Chatenay v. Brazilian Submarine Telegraph Co., Ltd., [1891] 1 Q.B. 79, 83 (C.A.), per Lord Esher, M.R.

33. [1934] A.C. 122, 151.

34. Sorrel v. Smith, [1925] A.C. 700, 743.

is the currency in which a debt must or may be paid.[35] If *A* borrows $1000 from *B* in New York, there is no doubt that U. S. dollars are both the money of account and the money of payment. If the contract provides that repayment shall be made in London, there may well be a question whether *A* must or may repay the debt in dollar bills or pound notes (money of payment), but there can be no doubt that his obligation is still measured in U. S. dollars (money of account). It is obvious that whenever the money of payment differs from the money of account, an exchange operation will be necessary in order to convert the currency of the money of account into the currency of the money of payment, but the quantum of the obligation remains fixed. Difficult questions arise if the money of account is ambiguously described in the contract, if, for instance, the debtor's obligation is expressed in units of account which are common to the currencies of several countries, each of which has some connection with the contract. If, for example, a Belgian in Paris borrows 1000 francs from a Swiss, it may well be a question whether the money of account is Belgian, French or Swiss francs. In such a case the difficulty is due to the failure of the parties to make their meaning clear; and the difficulty is so obvious that cases of this sort are rare. But sometimes the difficulty arises by reason of supervening events which could not possibly have been in the contemplation of the parties. This may happen when the same word or symbol, *e.g.*, pound or £, is apt to describe the money of account of two countries, *e.g.*, England and Australia or New Zealand, and at the date of the contract the two currencies are and always have been of equal value, while at the date when payment is due their values are unequal.

Ever since the retreat from the gold standard in 1931 the English, Australian and New Zealand courts have been confronted with many difficult cases of this sort. Before that date the United Kingdom and Dominion pounds were not always of precisely equal value when measured in terms of each other or of gold; but the fluctuations were only between the "gold points" and never wide enough to involve serious difficulties. But after the departure from the gold standard the Australian pound (£A) became depreciated to the extent of 25% in terms of the English pound (£E). The New Zealand pound (£NZ) at first became depreciated to the extent of 10% only, but in 1932 the New Zealand Government, in order to assist its primary exporters to compete in world markets, deliberately depreciated it to 25% of the £E.

What then is the position when Australian or New Zealand debtors owe "pounds" to English creditors, or English debtors owe "pounds" to Australian or New Zealand creditors, and the debt was contracted

35. The distinction between money of account and money of payment is clearly stated by MANN, THE LEGAL ASPECT OF MONEY 138-39 (1938), and by Dixon, J., in Bonython v. Commonwealth of Australia, 75 L.R. 589, 620-24 (1948).

before 1931 and is payable after that date? If the amount of the debt is £100 and the action is brought in England, an English court will give judgment for £E100 if the money of account is £E but for only £E80 if the money of account is £A or £NZ; if the action is brought in Australia or New Zealand, an Australian or New Zealand court will give judgment for £A125 or £NZ125 if the money of account is £E, but for only £A100 or £NZ100 if the money of account is £A or £NZ. The identity of the money of payment thus raises no serious question, but the ascertainment of the money of account has proved a problem of acute difficulty. No doubt it is a question of construing the contract in accordance with the canons of construction and presumptions furnished by its proper law. But this does not take us very far, because the canons of construction and presumptions in English, Australian and New Zealand domestic laws are the same.[36] Moreover, to ask what the parties would have agreed if the subsequent devaluation of the £A and £NZ had occurred to them is to ask a question which admits of no certain answer, for clearly the creditor would have stipulated for the more valuable currency, and the debtor for the less valuable.[37]

The English, Australian and New Zealand cases about to be discussed all have certain features in common. An Australian or New Zealand company issues debentures before 1931 to debenture-holders in England, Australia and New Zealand and promises to pay interest and to repay principal after 1931 in "pounds" or "pounds sterling." Sometimes the contract specifies a single place of payment.[38] More often the contract provides for the establishment of one register of debenture-holders in England and another in Australia or New Zealand, and goes on to provide that the company,[39] or the debenture-holders,[40] may transfer their registration from one register to the other. Sometimes the debenture-holders are given an option to require payment of interest and repayment of principal either in London or in Australian or New Zealand cities.[41] The option cases have raised the most difficult problems. Options in international loans usually assume one of two

36. Broken Hill Proprietary Co., Ltd. v. Latham, [1933] Ch. 373 (C.A.), per Maugham, J., at 388, per Lawrence, L.J., at 399; Goldsbrough Mort and Co., Ltd. v. Hall, [1948] Vict. L.R. 145, per Fullagar, J., at 152; National Bank of Australasia Ltd. v. Scottish Union and National Insurance Co., Ltd., 84 C.L.R. 177 (1951), per Latham, C.J., at 209.

37. Goldsbrough Mort and Co. Ltd. v. Hall, 78 C.L.R. 1 (1949), per Latham, C.J., at 14-15; Bonython v. Commonwealth of Australia, [1951] A.C. 201 (P.C.), per Lord Simonds at 219.

38. See, *e.g.*, Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd., [1934] A.C. 122.

39. See, *e.g.*, Broken Hill Proprietary Co., Ltd. v. Latham, [1933] Ch. 373 (C.A.).

40. See, *e.g.*, National Bank of Australasia Ltd. v. Scottish Union and National Insurance Co., Ltd., [1952] A.C. 493 (P.C.).

41. See, *e.g.*, Auckland v. Alliance Assurance Co., Ltd., [1937] A.C. 587 (P.C); Bonython v. Commonwealth of Australia, [1951] A.C. 201 (P.C.).

main forms, options de change and options de place.[42] An option de change enables the creditor to require repayment in different currencies at specified rates. The object is obviously to protect the creditor against the devaluation of some of the specified currencies before repayment is due. In an option de change there are, or at any rate may be, separate promises in respect of each option, and the money of account will, or at any rate may, differ in accordance with which option is exercised.[43] An option de place, on the other hand, merely enables the creditor to require repayment at different places. Nothing is said about different currencies. The object is obviously to enable the creditor to require repayment at some place that may be more convenient to him than the others. The option is mere machinery for the convenience of the creditor. If the currency circulating at the place where the option is exercised appreciates in terms of the other currencies before the time for repayment, that ought not to enlarge the creditor's rights, for there is only one promise to pay.[44] If a contract for the payment of Canadian dollars entitles the creditor to an option for payment in Montreal or London, no one doubts that the exercise of the London option neither increases nor diminishes the debtor's obligation. Why then should it be otherwise merely because Australia and New Zealand have adopted the same word (pound) and the same symbol (£) as has the United Kingdom to describe their currency units and Canada has not?

The first important case on this subject to reach the English courts was *Broken Hill Proprietary Co. Ltd. v. Latham*.[45] It is a case which deserves more attention than it has received because, though it was overruled by the House of Lords in the following year,[46] the only possible conclusion from subsequent cases[47] is that the House of Lords was not justified in overruling the *Broken Hill* case and that the de-

42. The distinction between the two types of option is clearly stated in MANN, THE LEGAL ASPECT OF MONEY 147-51 (1938).

43. In Guarantee Trust Co. of New York v. Henwood, 307 U.S. 247, 59 Sup. Ct. 847, 83 L. Ed. 1266 (1939), an option for payment in sterling in London, in guilders in Amsterdam, in marks in Berlin, or in francs in Paris, at specified rates of exchange, as well as in dollars in New York, did not enable bondholders who chose payment in guilders to escape from the effect of the joint resolution of Congress of June 5, 1933. In this case the Supreme Court was divided 5-4. *Cf.* Rhokana Corporation, Ltd. v. Inland Revenue Comm'rs, [1938] A.C. 380, a tax case. English courts have not yet been faced with the most difficult conflicts problems which are apt to be created by options de change.

44. Broken Hill Proprietary Co., Ltd. v. Latham, [1933] Ch. 373 (C.A.), per Lawrence, L.J., at 402, per Romer, L.J., at 410; Bonython v. Commonwealth of Australia, 75 C.L.R. 589 (1949), per Latham, C.J., at 598, per Rich, J., at 608, per Dixon, J., at 623; [1951] A.C. 201 (P.C.), per Lord Simonds at 219; National Bank of Australasia Ltd. v. Scottish Union and National Insurance Co., Ltd., 84 C.L.R. 177 (1951), per Fullagar, J., at 242. *Contra*: Auckland v. Alliance Assurance Co., Ltd., [1937] A.C. 587 (P.C.).

45. [1933] Ch. 373 (C.A.).

46. Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd., [1934] A.C. 122.

47. See page 523 infra.

cision in the *Broken Hill* case was correct. Like all the cases on this subject, it evinced remarkable differences of judicial opinion. The facts were typical. In 1920 a company incorporated in Victoria issued mortgage debentures which were repayable in 1940 or earlier. Interest was payable and principal repayable in "pounds" at Sydney, Melbourne, Adelaide or London at the holder's option. A register of debentures was established in London as well as in Melbourne and the company was empowered to transfer registrations from one register to the other. It will be seen that the contract was far more closely connected with Australia than it was with England. The debentures were issued in Australia; the trustees were resident in Australia; the debentures were secured by a floating charge on the company's lands in Australia; the company was incorporated in Australia and carried on business in Australia. On the other hand, the company had a branch office in England; one of the two registers of debentures was in England; and one of the four places for repayment was in England. In 1932, after England and Australia had abandoned the gold standard, the question arose whether debenture-holders electing to be paid in London could claim to be paid the nominal amount of their debentures in English pounds without any deduction for Australian exchange. It was held by a majority of the Court of Appeal,[48] reversing the trial judge, that they could not. This decision seems obviously correct. It was based on the fact, which subsequent cases show is now indisputable, that the Australian pound is separate and distinct from the English pound. As for the London option, it was obviously conferred for the convenience of debenture-holders electing to be paid in London, and not with the object of increasing the obligations of the company. In fact, if the company had had to pay in English pounds, the whole of its sinking fund arrangements for the service of the loan would have been upset.

In the following year, however, this decision was overruled by the House of Lords in *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*[49] The facts were almost exactly the converse of those in the *Broken Hill* case, but with the significant difference that there was no option, only one place of payment being mentioned in the contract. The Adelaide Electric Company was incorporated in England to transact business in Australia. In 1921 by special resolution of the shareholders the whole conduct and control of its business was transferred to Australia, except certain formal matters required by statute to be observed in England. The resolution provided that all dividends should be paid to the shareholders in Adelaide, South Australia. In

48. Lawrence and Romer, L.JJ.; Lord Hanworth, M.R., dissenting. The trial judge was Maugham, J.
49. [1934] A.C. 122.

1932 the shareholders claimed to be paid the nominal amount of their dividends in English pounds without deduction for Australian exchange. It was held by the House of Lords, reversing the Court of Appeal and the trial judge, that they were only entitled to be paid the nominal amount in Australian pounds. Their Lordships were not, however, in agreement as to the reasons for their decision. A majority, consisting of Lords Warrington, Tomlin and Russell, took the surprisingly unrealistic view that there was no difference between the English and Australian pounds, not only in 1921 when the contract was made, nor even in 1932 when the question arose, in spite of a difference of some 25% in the value of the two currencies. From their point of view it was natural to conclude that, since the money of account was thus fixed, the company could discharge its indebtedness in whatever was legal tender at the place of payment, that is, in Australian pounds. Lord Wright on the other hand took the view that the two currencies were different in 1921 and 1932 "not only in a business sense but in a legal sense."[50] From his point of view it would have been natural to conclude that, since there was an ambiguity in the description of the money of account, the ambiguity ought to be resolved by reference to the proper law of the contract; for clearly the identity of the money of account is a matter which affects the substance of the obligation. The proper law of this contract, as Lord Wright and others expressly said,[51] was English. Unfortunately Lord Wright ignored the proper law of the contract and looked direct to the law of the place of performance. "It is established," he said, "that prima facie, whatever is the proper law of the contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract."[52] Almost equally unfortunate was the express overruling of the *Broken Hill* case. From the point of view of the majority this was a consequence of their opinion that the English and Australian pounds were the same, and, since this was a mere question of fact, it has probably done little harm. But from Lord Wright's point of view the overruling of the *Broken Hill* case implies that in his opinion there is no difference between contracts which specify a single place of payment, and contracts which give the creditor an option de place. This conclusion is quite unacceptable, for if the creditor is allowed to convert an option de place into an option de change, he can unilaterally increase the quantum of the obligation

50. *Id.* at 155. Lord Atkin delivered a short speech in which he held that the two pounds were the same in 1921 but different in 1932; but otherwise he agreed with Lord Wright.

51. *Id.*, per Lord Warrington at 137, Lord Tomlin at 145, and Lord Wright at 156.

52. *Id.* at 151.

and so enforce a totally different contract from that made by the parties.

This is precisely what the creditor was permitted to do in the next case, *Auckland v. Alliance Assurance Co. Ltd.*,[53] where the facts were substantially similar to those in the *Broken Hill* case. In 1920 a New Zealand city corporation, acting under the powers conferred by the New Zealand Local Bodies Loans Act, 1913, issued debenture bonds repayable at the holder's option either in Auckland, New Zealand, or in London. The proper law of the contract was that of New Zealand. The Privy Council, affirming a majority decision of the New Zealand Court of Appeal, held that a debenture-holder which exercised its London option was entitled to be paid the nominal amount of the debentures in English currency without any deduction for New Zealand exchange. The judgment of the Board was delivered by Lord Wright. Although he appeared to accept the view of the majority in the *Adelaide Electric* case that the English and Australian pounds were the same in 1921,[54] and held in the case before him that the English and New Zealand pounds were the same in 1920,[55] Lord Wright referred to the decision in the *Adelaide Electric* case in terms consistent only with his own minority opinion:

> "The House of Lords held that the true meaning of the word 'pound' must be determined on the basis of a rule depending on a well known principle of the conflict of laws — namely, that the mode of performance of a contract is to be governed by the law of the place of performance. *That principle, no doubt, is limited to matters which can be fairly described as being the mode or method of performance, and is not to be extended so as to change the substantive or essential conditions of the contract.*"[56]

It is strange that Lord Wright should have regarded his minority opinion in the *Adelaide Electric* case as constituting the *ratio decidendi* of the whole House; but however that may be, it is evident from the passage italicised above that Lord Wright was already beginning to feel unhappy about the monster he had created in the *Adelaide Electric* case. As for the decision in the *Auckland Corporation* case, it is manifestly wrong. In the two most recent cases on the subject (to be discussed later in this article), the Privy Council said that the *Auckland Corporation* case "must be regarded as a very special decision on the facts of the particular case."[57] That is about as close as an appellate

53. [1936] N.Z.L.R. 413 (C.A.), [1937] A.C. 587 (P.C.).

54. *Id.* at 604.

55. *Id.* at 606.

56. *Ibid.* (italics added).

57. National Bank of Australasia Ltd. v. Scottish Union and National Insurance Co., Ltd., [1952] A.C. 493, 511 (P.C.). See also Bonython v. Commonwealth of Australia, [1951] A.C. 201, 221 (P.C.).

tribunal in England ever comes to saying that a previous decision of its own was wrong.

The fallacy underlying Lord Wright's *lex loci solutionis* theory clearly appears from the decision of the Privy Council in *Mount Albert Borough Council v. Australasian etc. Assurance Society Ltd.*[58] This was not a money of account case, and the fact that there was a clear-cut statutory difference between the domestic laws of the two countries concerned allowed the issues to emerge in sharper focus. In 1926 a New Zealand borough corporation, acting under the powers conferred by the New Zealand Local Bodies Loans Act, 1913, borrowed £130,000 from an insurance company incorporated in Victoria and carrying on business in Australia and New Zealand. The borough corporation issued debentures charged on the borough rates, and therefore on New Zealand land. The interest on the debentures was payable in Victoria. In 1931 the Victorian Financial Emergency Act reduced the rate of interest on all mortgages to £5 per cent per annum. It was held by the Privy Council, affirming the decision of the New Zealand Court of Appeal, that the Victorian Act did not affect the borough council's obligation to pay interest in Victoria, because the proper law of the contract was that of New Zealand.[59] Lord Wright again delivered the judgment of the Board. Once more he emphasised that the law of the place of performance will prima facie govern the incidents and mode of performance, that is, performance as contrasted with obligation; thus, in the present case there was no doubt that the word "pound" in the contract meant the Australian and not the New Zealand pound. [There was, of course, no difference in value between the Australian and New Zealand pounds either at the date of the contract or at the date when payment was sought, and no necessity to decide between them.] Speaking of the *Adelaide Electric* case, Lord Wright said:

> "The House of Lords was not concerned there with . . . questions of the substance of the obligation which, in general, is fixed by the proper law of the contract under which the obligation is created. The House of Lords was concerned only with performance of that obligation, in regard to the particular matter of the currency in which payment was to be made. . . .[60] The House of Lords had no intention of questioning the distinction emphasized in *Jacobs v. Credit Lyonnais* between obligation and performance."[61]

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58. [1936] N.Z.L.R. 54 (C.A.), [1938] A.C. 224 (P.C.). *Cf.* Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society, 50 C.L.R. 581 (1934).

59. If the Victorian statute had made it *illegal* for the debtor to pay interest in excess of the rate therein specified, instead of merely affording him a good discharge, it would have been necessary to consider whether the principle of the *Ralli Brothers* case applied.

60. Of course Lord Wright is here confusing two totally distinct matters, the identity of the money of account and the identity of the money of payment.

61. [1938] A.C. 224, 241 (P.C.)

This belated reference to *Jacobs v. Crédit Lyonnais* is welcome, and suggests that Lord Wright had now changed his mind since the *Adelaide Electric* case, without, however, intimating that he had done so. For in a later passage in his speech, Lord Wright expressly said that "the amount payable" was "a matter of obligation" and not "a mode or manner of performance."[62] But the question what amount was payable was the very question at issue in the *Adelaide Electric* case. How can it possibly be maintained that the question whether a debtor owes £1000 or £1250 for every £1000 of his indebtedness is a question of the mode of performance, while the question whether his half-yearly instalments of interest amount to £3250 or £3697 is a question of the substance of the obligation? As Fullagar, J., put it in the next case to be considered, "it does seem a little unkind to tell a creditor in Melbourne that it is not a matter of substance whether he is entitled to receive from his debtor £1000 or £1250 in Australian currency."[63]

It was clear by now that the law of the place of performance only governed the mode of performance, and not the substance of the obligation. But it was far from clear what matters fell within these two categories; for Lord Wright seemed to treat the vital matter of the amount of the obligation sometimes as a question of the mode of performance, and sometimes as a question of the substance of the obligation. Matters remained in this unsatisfactory state for the next ten years, until the case of *Goldsbrough Mort. and Co. Ltd. v. Hall*[64] reached the Supreme Court of Victoria. In that case Fullagar, J., in an admirably lucid judgment delivered a strong counterattack upon Lord Wright's whole position. The facts were somewhat complicated. In 1895 a company incorporated in Victoria issued debenture stock to debenture-holders in England and Australia and promised to repay the principal in "pounds" in 1948. No place of payment was specified, but there were two stock registers, one in London and the other in Melbourne, so it was a reasonable assumption that the place of payment was England for debenture-holders on the London register and Victoria for those on the Melbourne register. The company carried on business in Australia and its property was situated there. On the other hand, it had been formed to take over the business and indebtedness of a former English company; the debenture-holders' trustees were resident in England; and the trust deeds were executed there. The company admitted that it was bound to pay debenture-holders on the London register in English pounds, but it claimed that it was only bound to pay debenture-holders on the Melbourne register the nominal amount of their debentures in Australian pounds. It based its claim

62. *Id.* at 242.
63. Goldsbrough Mort and Co., Ltd. v. Hall, [1948] Vict. L.R. 145, 152.
64. [1948] Vict. L.R. 145; 78 C.L.R. 1 (1949).

on Lord Wright's theory that the money of account, so far as the Australian debenture-holders were concerned, was fixed by the *lex loci solutionis*. By this time the inexorable pressure of events, reinforced indeed by a decision of the Privy Council in an income tax appeal,[65] made it impossible any longer to contend that the English and Australian pounds were the same. Fullagar, J., therefore held with Lord Wright in the *Adelaide Electric* case that the English and Australian pounds were quite separate, at any rate after 1931; but he emphatically rejected Lord Wright's view that the determination of the money of account is a mere matter of the mode of performance:

> "If there are different moneys of account then the question cannot be one of mode of performance but must be one of the substance of the obligation, and the substance of the obligation is a matter of construction and therefore governed not by the lex loci solutionis, but by the proper law of the contract."[66]

The learned judge then pointed out that in the present case it was immaterial whether English or Victorian law was the proper law of the contract, because "the general and particular rules relating to the construction of contracts are common to English and Victorian law." He proceeded to examine the circumstances in which the debentures had been issued; pointed out that there were no grounds for inferring an intention that the substance of the obligation should vary with the place where the stock was registered; and concluded that because "the whole setting was English" the company was bound to pay Australian as well as English debenture-holders in English pounds or their equivalent in Australian exchange. This decision was affirmed by a majority of the High Court of Australia.

The significance of Fullagar, J.'s, new approach to the problem, particularly his insistence that the determination of the money of account is a question of the substance of the obligation and not a question of the mode of performance, emerged in *Bonython v. Commonwealth of Australia*,[67] a case which sounds the death knell of Lord Wright's *lex loci solutionis* theory. In 1895 the Government of Queensland, then a self-governing colony, issued a series of debentures and promised to pay the holders the sum of "£1000 sterling" in 1945 either in Brisbane, Sydney, Melbourne or London at the holder's option. Some of the debentures were subscribed for in England and others in Australia. In 1932 the Commonwealth of Australia took over the public debt of Queensland. In 1945 the holders of some debentures which had originally been issued in Australia claimed to exercise their London option and to be paid the nominal amount of their debentures in English

65. Payne v. Deputy Federal Comm'r of Taxation, [1936] A.C. 497 (P.C.).
66. Goldsbrough Mort and Co., Ltd. v. Hall, [1948] Vict. L.R. 145, 151.
67. 75 C.L.R. 589 (1948), [1951] A.C. 201 (P.C.).

pounds without any deduction for Australian exchange, or the equivalent thereof in Australian pounds. The Privy Council, affirming a majority decision of the High Court of Australia, held that the debenture-holders' claim failed. The Board held that the proper law of the contract was that of Queensland; that the English and Queensland monetary systems were different, not only in 1945, but also in 1895;[68] that the money of account was that of Queensland; and that the debenture-holders were entitled to no more than the nominal amount of their debentures in Australian pounds. Lord Wright's theory was decisively repudiated by Lord Simonds, delivering the judgment of the Board:

> "It has been urged that, if London is chosen as the place of payment, then English law as the lex loci solutionis governs the contract and determines the measure of the obligation. But this contention cannot be accepted. The mode of performance of the obligation may, and probably will, be determined by English law; the substance of the obligation must be determined by the proper law of the contract."[69]

Lord Simonds was no less emphatic in his reference to the London option:

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68. This was regarded as a question of fact, no doubt in order that the decision might not be inconsistent with the sacred principle that no court has power to overrule a decision of the House of Lords on a point of law. Lack of space prevents adequate discussion of the intricate question of when the £E and £A became different moneys of account. In the *Bonython* case the Privy Council held that in 1895 "though there were in a real sense two monetary systems, the money of account was the same. . . ."[1951] A.C. 201, 219. In the *National Bank* case, the Privy Council held that "if, as the Board found to be the case in *Bonython's* case, there were in 1897 different monetary systems in England and Queensland, it necessarily follows that there were different moneys of account. . . ." [1952] A.C. 493, 512; though in the High Court of Australia, Dixon, J., could still say that in 1897 there was no difference. 84 C.L.R. 177, 225 (1951). The conclusion that the moneys of account were different in 1897 seems as astonishing as the opinion of the majority in the *Adelaide Electric* case that they were the same in 1932. For in 1897 the United Kingdom Parliament still had power to legislate for a colony, and colonial legislation was still subject to the Colonial Laws Validity Act, 1865; it was not until 1900 that the Commonwealth of Australia was given power to legislate with regard to currency, coinage and legal tender [Commonwealth of Australia Act, 1900, § 51 (xii)], and not until 1909 that it exercised the power [Federal Coinage Act, No. 6 of 1909]. Nor does it help matters to say, as the Privy Council said in the *National Bank* case, that in 1897 the two pounds were "potentially different," for that is merely being wise after the event. Are the English and the Northern Irish pounds "potentially different" today because there is a small "anti-partition" minority in the Northern Irish Parliament? Are the Puerto Rico and Alaska dollars "potentially different" today from the United States dollar because the United States may one day grant independence to Puerto Rico, or retrocede Alaska to Russia? To the present writer it seems quite immaterial whether the moneys of account were separate or the same at the date of the contract. If they were separate at the time for payment, the problem is the same, whether at the time of the contract they were actually the same or merely assumed to be so. For the problem is to ascertain the real or presumed intention of the parties. *Contra: Mann, On the Meaning of the "Pound" in Contracts,* 68 L.Q. Rev. 195 (1952).

69. Bonython v. Commonwealth of Australia, 75 C.L.R. 589 (1948), [1951] A.C. 201, 219 (P.C.).

"[I]t cannot have been intended that the debenture-holder should obtain a different measure of value, or the Queensland Government be placed under a different liability, according to the place of payment; in other words, it is clear that the same substantial obligation was imposed on the Queensland Government whatever the place chosen for payment, the choice being given to the debenture-holder purely as a matter of convenience."[70]

Thus the seventeen-year-old heresy is finally expunged from the English conflict of laws.[71] The result of the case seems to be that the majority of the House of Lords in the *Adelaide Electric* case were wrong in regarding the English and Australian pounds as the same; that Lord Wright in the *Adelaide Electric* case was wrong in supposing that the determination of the money of account is a matter of the mode of performance; that the *Auckland Corporation* case was wrongly decided and is not to be followed; and that the *Broken Hill* case was rightly decided and should never have been overruled.

The conflict of laws problem is now so well settled that in the most recent money of account case, *National Bank of Australasia Ltd. v. Scottish Union and National Insurance Co. Ltd.*,[72] Lord Wright's theory was neither relied on in argument nor mentioned in the judgments. But unfortunately the proper method of determining the money of account in cases where it is ambiguously described cannot yet be said to be settled. Some observations on this question will now be made.

It is evident that the problem cannot be solved merely by ascertaining the proper law of the contract, and then assuming that the money of account is the currency circulating in the country of the proper law. This is so for at least two reasons. In the first place, the parties' description of the money of account may not be ambiguous at all. It was ambiguous in the *Bonython* case, because "pounds sterling" had not, in 1895, come to denote the money of England as opposed to the money of Queensland. It was not ambiguous in *De Bueger v. Ballantyne and Co., Ltd.*[73] where under a contract made in England between a London tailor and a New Zealand firm of drapers, the tailor agreed to serve for three years in New Zealand as a tailor's cutter at a salary of "£700 sterling." In 1932, when the contract was made, the New Zealand pound was at a discount of 10% compared to the English pound; but later in the same year it depreciated further to nearly 25%.

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70. *Ibid.*
71. For this, great credit is due to critical discussion of Lord Wright's *lex loci solutionis* theory by MANN, THE LEGAL ASPECT OF MONEY 173-79 (1938), and by Kahn-Freund, *Recent Currency Decisions*, 2 MOD. L. REV. 69-72 (1938). There is no doubt that these criticisms influenced Fullagar, J., in Goldsbrough Mort and Co., Ltd. v. Hall, [1948] Vict. L.R. 145, and that Fullagar, J.'s, clear and forceful judgment in turn influenced the High Court of Australia and the Privy Council in *Bonython's* case. See, *e.g.*, [1951] A.C. 201, 221.
72. 84 C.L.R. 177 (1951), [1952] A.C. 493 (P.C.).
73. [1936] N.Z.L.R. 511 (C.A.), [1938] A.C. 452 (P.C.).

It was held by the Privy Council, reversing a majority decision of the New Zealand Court of Appeal, that the tailor was entitled to be paid in English pounds or their New Zealand equivalent, because by 1932 the expression "pounds sterling" had come to denote the money of England and not the money of New Zealand. It was therefore unnecessary to determine the proper law of the contract.

In the second place, and this in practice is a more important point, the proper law of the contract cannot determine the money of account without the assistance of some rule or presumption in the domestic rules of the proper law. All that the proper law can do is to furnish the necessary canons of interpretation and presumptions;[74] and there is every reason to believe that on this question, the canons of interpretation and presumptions of English, Australian and New Zealand domestic law are the same.[75] It is quite fallacious to argue that because the proper law of the contract in the *Bonython* case was that of Queensland, therefore the Australian pound was the money of account.[76] For there is clearly no rule of Queensland domestic law that the money of account in every Queensland contract must be Australian pounds, any more than there is a rule of English domestic law that the money of account in every English contract must be English pounds. The money of account in an English contract may well be Australian or New Zealand pounds or, for that matter, dollars or francs.

The most that a system of domestic law can be expected to furnish, then, is a canon of interpretation or a presumption in favour of some money of account. In most of the English, Australian and New Zealand cases, at the time of the contract neither the parties nor anyone else had ever dreamt that the word "pound" was capable of describing more than one money of account. In such cases it is useless to inquire what the parties intended. It is therefore necessary to fall back on a presumption. The question is whether this presumption should be in favour of the *moneta causae,* that is, the currency of the proper law of the contract, or the *moneta loci solutionis,* that is, the currency of the

74. This is well pointed out by Latham, C.J., in National Bank of Australasia v. Scottish Union and National Insurance Co., Ltd., 84 C.L.R. 177, 208-09 (1951); *cf.* Fullagar, J., in Goldsbrough Mort and Co., Ltd. v. Hall, [1948] Vict. L.R. 145, 152.

75. See note 36 *supra.*

76. Lord Simonds came perilously close to arguing in this fashion in the *Bonython* case when he said: "The question, then, is what is the proper law of the contract, or, to relate the general question to the particular problem, within the framework of what monetary or financial system should the instrument be construed." [1951] A.C. 201, 221. This is a highly misleading statement. Monetary or financial systems have nothing whatsoever to do with the construction of contracts. Contracts are construed in accordance with legal systems. The legal system selected as the proper law of the contract may yield a reference to its own "monetary or financial system," *i.e.,* its currency, or it may not. Fortunately, on the next page Lord Simonds made it clear that he regarded it as "not inconceivable that the legislature of a self-governing colony should authorize the raising of a loan in terms of a currency other than its own," *i.e.,* other than that of the country of the proper law. *Id.* at 222.

place of payment. Dr. Mann and Professor Kahn-Freund both think that the presumption of English domestic law is in favour of the *moneta loci solutionis.* Dr. Mann says: "It is a rule of English (municipal) law . . . that, in the absence of circumstances indicating a different intention of the parties, the money of the place of payment is the money of account meant by the parties."[77]

Professor Kahn-Freund says: "Where English law is the proper law of the contract, the parties are presumed to have intended to measure the obligation in the currency of the country in which the debt is payable."[78] Both these learned writers emphasize that the presumption in favour of the *moneta loci solutionis* is easily rebuttable. It will not apply, for instance, if the place of payment is not fixed in the contract, for example, if it has to be deduced with the assistance of further presumptions, or because the creditor is given an option de place. Dr. Mann says that the presumption in favour of the *moneta loci solutionis* is "easily rebuttable," that it is "an emergency solution," "a last resort to be displaced by even the slightest indication in the circumstances of the case."[79]

It may be doubted whether so frail a presumption is of much value in determining an elusive problem of interpretation. It may be suggested that a presumption in favour of the *moneta causae* might accord better with the probable intentions of the parties. If a Canadian sells his car in Montreal to another Canadian for 2000 dollars, and requests the buyer to pay the price into a Boston bank so that the seller may have the money available there when he buys a new car, it would seem natural to conclude that the parties were thinking in terms of Canadian dollars (*moneta causae*) as the measure of the obligation, and in terms of U.S. dollars (*moneta loci solutionis*) only as the mode of payment. Of course the intensity of any presumption in favour of the *moneta causae* would diminish to the extent that the proper law of the contract was uncertain, just as the intensity of any presumption in favour of the *moneta loci solutionis* diminishes to the extent that the place of payment is uncertain. There is a danger, too, that a court might be misled by the similarity of the two enquiries, (1) with what system of domestic law is the contract most closely connected, and (2) within the framework of what monetary system were the parties contracting.[80] But if the danger is perceived it ceases to confuse. It was clearly present to the mind of Fullagar, J., in *Goldsbrough Mort. and Co. Ltd. v. Hall* when he said:

77. MANN, THE LEGAL ASPECT OF MONEY 179 (1938).

78. DICEY, CONFLICT OF LAWS 734, Rule 163 (6th ed. 1949). But see *id.* at 647, 649.

79. MANN, THE LEGAL ASPECT OF MONEY 168 (1938).

80. A good example of such confusion is the statement of Lord Simonds in the *Bonython* case, quoted note 76 *supra.*

"It is, of course, necessary to keep separate and distinct preliminary questions of choice of law from ultimate questions to be decided in accordance with the law chosen, though it will often be found that many of the matters which must guide us when we seek the proper law are the very matters which must also guide us when we reach the ultimate question of substance."[81]

Perhaps it does not much matter whether we say that the presumption is in favour of the *moneta causae*, but that it is rebutted if the place of payment is specified in the contract, or whether we formulate the presumption the other way round; for every one now agrees that the presumption in favour of the *moneta loci solutionis* must be applied with the greatest caution when the place of payment is not expressly fixed.[82] But, unless every case of this kind is to be litigated, there must be a presumption one way or the other; and we still await its authoritative formulation. The failure of the Privy Council to discuss this aspect of the matter in the *Bonythun* and *National Bank* cases is as unfortunate as was the failure of Lord Wright in the pre-war cases to distinguish between the money of payment and the money of account.

Of course, neither presumption will solve all cases. If, for instance, under an English contract a Frenchman promises to pay "francs" to a Swiss in England, obviously neither a presumption in favour of the *moneta causae* nor a presumption in favour of the *moneta loci solutionis* will solve the problem whether French or Swiss francs are owed, and the court will have to rely on other indications. But such cases are rare. The commonest cases are likely to remain those in which the description of the money of account is equally applicable to the *moneta causae* and the *moneta loci solutionis*. In such cases, the presumptions in the domestic laws of the *lex causae* and the *lex loci solutionis* are likely to be the same, and when this is so, it becomes unnecessary to determine the proper law of the contract. Now that Lord Wright's heresy has been eliminated, the conclusion is that, except in the rarest cases, the determination of the money of account is not a separate problem in the conflict of laws at all. A choice between domestic laws is necessary when the presumptions in the domestic laws differ, but a choice between currencies can usually be made on the basis that the potentially applicable domestic laws each contain the same presumption.

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81. [1948] Vict. L.R. 145, 152.

82. It was precisely because the Privy Council believed that the majority of the High Court of Australia had not been cautious enough that the decision of the High Court was reversed in the *National Bank* case: "In the present case . . . their Lordships think that the caution which Dixon and Fullagar JJ. administered to themselves should have led them to the opposite conclusion to that which they in fact reached." [1952] A.C. 493, 511-12.

B. *Gold Clause Cases*

The gold clause affords quite a different setting for the problem of the *lex loci solutionis*. In England, no doubt for historical reasons, gold clauses have been far less usual in long-term loans than they have been in the United States; nor has it yet been necessary to abrogate them by statute or to declare them contrary to public policy.

The leading case on gold clauses in English domestic law is *Feist v. Societe Intercommunale Belge d'Electricite*,[83] which decided that if English law is the proper law of the contract, any reference therein to gold coin must prima facie be construed as a gold value clause and not as a gold coin clause, *i.e.*, as determining the measure of the debtor's liability but not its mode of discharge. The creditor is thus entitled, not to the specified number of gold sovereigns, but to pound notes sufficient to purchase that number of sovereigns. English courts are reluctant to imply a gold clause unless the contract contains a specific reference to gold; they will not, for instance, imply a gold value clause in one part of the contract merely because another part contains such a clause.[84]

The leading case on gold clauses in the English conflict of laws is *Rex v. International Trustee for the Protection of Bondholders A/G.*[85] In February, 1917, a few weeks before the United States entered the first World War, the British Government floated a dollar loan in New York City. They issued notes, convertible into bonds, promising to repay the principal in 1937 at the option of the holder either in New York City in gold coin of the United States of the standard of weight and fineness existing in February 1917, or in London in sterling money at the fixed rate of $4.86½ to the pound.[86] In 1933 the joint resolution of Congress retrospectively abrogated all gold clauses payable in money of the United States. In 1937, when repayment became due, the question arose whether the British Government's obligation was affected by the joint resolution. The Court of Appeal, applying a principle laid down by Beale[87] but not by any English writer on the conflict of laws, held that where a sovereign state is a party to a contract, the proper law must necessarily be that of the sovereign, in this case English law, with the result that the obligation was unaffected by the joint resolution. But the House of Lords held that Beale's principle

83. [1934] A.C. 161.
84. In Rex. v. Int'l Trustee for the Protection of Bondholders Aktiengesellschaft, [1937] A.C. 500, a gold clause was not implied in an option for payment in London, though it was contained in an option for payment in New York. In New Brunswick Ry. Ltd. v. British and French Trust Corp. Ltd., [1939] A.C. 1, a gold clause was not implied in interest coupons, though it was contained in the bonds.
85. [1937] A.C. 500.
86. This was an option de change, but the London option, since it said nothing about gold, was of no use to the bondholders.
87. 2 BEALE, CONFLICT OF LAWS 1102 (1935).

stated no more than a circumstance to be considered; it could not be regarded as a binding rule. In this case the contract was made and to be performed in New York, the loan was expressed in dollars, and the obligor was bound to maintain securities in New York of greater value than that of the loan. Hence the conclusion was irresistible that New York law was the proper law of the contract, with the result that the British Government fulfilled its obligation by paying the bondholders the nominal amount of their bonds in depreciated paper dollars.

This case decides that the validity, meaning and effect of a gold clause are determined by the proper law of a contract. But the decision of the House of Lords left open two points that are directly relevant to the questions discussed in this article. If the proper law of the contract differs from the law of the place of performance, (1) what is the effect of legislation purporting to abrogate gold clauses which is enacted in the country of the place of performance? (2) What is the effect of such legislation enacted in the country of the proper law?

(1) It is plain from the decision of the Court of Appeal in *Rex v. International Trustee* that such legislation in the *locus solutionis* has no effect on the obligation. The Court of Appeal held that the proper law of the contract was English law and that the British Government were obliged to pay in accordance with the full tenor of the gold value clause. The place of performance was, of course, New York. The judgment of the court was delivered by Lord Wright, who discussed the question whether the principle of the *Ralli Brothers* case compelled the court to give effect to the joint resolution, and concluded, as we have seen, that it did not, because the joint resolution did not actually make it illegal for the debtor to pay his debt in full. He never even discussed the question whether effect should be given to the joint resolution by reason of a general principle of the conflict of laws that "whatever is the proper law of the contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than that of the proper law of the contract." Since Lord Wright himself had laid down precisely this principle only two years earlier,[88] it is surprising that he never referred to New York law except to determine whether performance was illegal there.

(2) The converse situation — legislation abrogating the gold clause enacted in the country of the proper law of a contract to be performed elsewhere — was considered in *New Brunswick Railway Co.*

88. See Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd., [1934] A.C. 122, 151.

Ltd. v. British and French Trust Corporation.[89] In 1884 a railway company incorporated in New Brunswick and owning a railway in that province, issued in New Brunswick a series of mortgage bonds in which it promised to pay the registered holder thereof in 1934 "£100 sterling gold coin of Great Britain of the present weight and fineness" in London. The bonds were secured by a mortgage of the railway's land in New Brunswick. In 1935 a holder of some bonds sought to recover the principal according to the tenor of the gold clause. In 1936 the trial judge held, no doubt wrongly, that the *Feist* case was distinguishable, that the gold clause was a gold coin clause and valueless to the bondholder because of the departure from the gold standard, and that the bondholder could only recover the nominal amount of its bonds. In 1937, while an appeal from this decision was pending, the Canadian Gold Clauses Act, 1937, purported retrospectively to annul gold clause obligations "payable in money of Canada" or "governed by Canadian law, whether payable in Canada or elsewhere." There could be no doubt that the railway's obligation was "governed by Canadian law" though it was "payable elsewhere." There could also be no real doubt that the gold clause was a gold value clause and not a gold coin clause. But did the fact that the bonds were payable in London mean that they were unaffected by the Canadian Act? The Court of Appeal was faced with two inconsistent lines of authority: the *Adelaide Electric* case and its descendants apparently holding that the money of account is to be determined by the law of the place of performance, and the *Mount Albert* case holding that the principle of the *Adelaide Electric* case is limited to questions of the mode of performance and does not extend to questions of the substance of the obligation. There should have been no doubt that the validity of the gold clause affected the substance of the obligation and not merely its mode of performance. But the Court of Appeal held that the validity of the clause must be determined by English law as the law of the place of performance and not by the Canadian law as the proper law of the contract, with the result that the railway was bound to pay £162 for every £100 of nominal indebtedness. Greer, L. J., confessed his inability to reconcile the *Adelaide Electric* and *Mount Albert* cases, but he preferred to follow the former.[90] Scott, L. J., tried to reconcile them, but his attempt was hopelessly unconvincing, as indeed it was bound to be.[91] But it was left to Slesser, L.J., to demon-

89. [1937] 4 All E.R. 516 (C.A.), [1939] A.C. 1.

90. *Id.* at 526. Greer, L.J., erroneously supposed that the opinion of Lord Wright in the *Adelaide Electric* case "must be taken to represent the majority of the Lords who heard the appeal. . . ." The opinion of Greer, L.J., in the *New Brunswick* case is quite inconsistent with his opinion in St. Pierre v. South American Stores Ltd., [1937] 3 All E.R. 349, 352 (C.A.). This was another gold clause case.

91. New Brunswick Ry. Ltd. v. British and French Trust Corp., [1937] 4 All E.R. 516, 541-44 (C.A.).

strate, no doubt unconsciously, the manifest absurdity of the reasoning of the Court of Appeal: "In my view the legislation here invoked, the Canadian Gold Clauses Act, 1937, does not . . . affect the substantial obligation between the parties, which, in the present case, are clearly governed by Canadian law."[92]

It is an extraordinary theory that the amount of the debtor's indebtedness should be regarded as a mere question of the mode of performance. It does seem a little unkind to tell a debtor in New Brunswick that the question whether he owes his creditor in England £162 or £100 is not a question of substance.

When the case reached the House of Lords, the decision of the Court of Appeal was affirmed, but on a totally different ground, and one which made it unnecessary either to determine the proper law of the contract or to refer to the law of the place of performance. By adopting a restrictive interpretation of the Canadian Act, four Lords out of five concluded that it could not apply in the unusual circumstances of this case, *i.e.*, after the issue of a writ in England.[93] Lord Wright was one of the four who took this view and he preferred to reserve his opinion on the "important and difficult questions" discussed in the Court of Appeal.[94] He might perhaps have added that the difficulties were almost entirely of his own making. Only Lord Romer pursued the will-o'-the-wisp which had so grieviously misled the Court of Appeal:

> "For in the case of a contract which is governed by English law, but which provides for its performance in a foreign country, a term is to be implied in the contract that such performance shall be regulated by the law of that country, i.e. the lex loci solutionis, and there being no evidence that Canadian law differs from our law in this respect it is to be assumed that this rule prevails in Canada."[95]

This statement adopts Lord Wright's theory that the law of the place of performance governs "performance," and gives it a new and particularly undesirable twist. For the concluding words suggest that the law of the place of performance only has this effect by virtue of a rule of the proper law of the contract, and not by virtue of a supposed rule of the English conflict of laws.[96] Such a flirtation with the

92. [1937] 4 All E. R. at 528.
93. They held that § 4 of the Canadian Act (the only relevant section) did not directly alter the obligation of either party or provide that the contract was to have effect as if the gold clause were omitted, but merely gave the debtor a good discharge if he tendered and paid the nominal amount of the debt. It was too late to make such a tender after the creditor's claim had been repudiated by the debtor and the creditor had accepted the repudiation by issuing a writ. See [1939] A.C. 1, per Lord Maugham 22-24, Lord Thankerton at 26, Lord Russel at 29, and Lord Wright at 34.
94. *Id.* at 31.
95. *Id.* at 44.
96. Compare the similar statement of Evatt, J., in Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society, 50 C.L.R. 581 (1951). "Although the law of country A is the proper or governing law of the contract, and the law of country B may be referred to in order to determine the method and incidents of performance of the contract, this is because the

renvoi doctrine in a branch of the conflict of laws which has hitherto been relatively free of the doctrine is neither to be welcomed nor encouraged.

The reasoning of the Court of Appeal in the *New Brunswick* case was not expressly repudiated in the House of Lords. On the contrary, it was expressly adopted by Lord Romer. One is therefore left with an uneasy feeling that Lord Wright's *lex loci solutionis* theory may yet exert a greater influence in gold clause cases than it has had in money of account cases. It is much to be hoped that the decisive repudiation of the theory in the *Bonython* case has finally eliminated it, no matter what the context in which it is sought to be applied.

IV. Conclusions

Lord Wright's heretical doctrine that the law of the place of performance governs any obligation to be performed in a country other than that of the proper law has at last been eliminated from the English conflict of laws, certainly in money of account cases, and probably in all cases. In the course of its short but chequered career it has brought in its wake at least two unjustifiable decisions,[97] one unjustifiable overruling[98] and much searching of heart among the judges, including Lord Wright himself.[99] The fatal objection to it as a principle is that it is wide enough to cover almost any question that can arise under a valid contract. Its adoption would restrict the scope of the proper law of the contract almost entirely to matters of formation.

The narrower doctrine that illegality by the law of the place of performance is fatal to the cause of action is but a segment of the wider doctrine enunciated by Lord Wright. Though the occasions on which it has been applied are rare, it has recently been described in the highest tribunal as "settled law."[100] It, too, has received the blessing of Lord Wright,[101] which is strange because it was largely through his instrumentality that the cognate doctrine that illegality by the

law of country A itself requires or concedes that the methods, and incidents of performance should depend upon the law in force at the locality of performance, country B." *Id.* at 604.

97. Auckland v. Alliance Assurance Co., Ltd., [1937] A.C. 587 (P.C.); New Brunswick Ry. Ltd. v. British and French Trust Corp. [1937] 4 All E.R. 516 (C.A.).

98. Broken Hill Proprietary Co., Ltd. v. Latham, [1933] Ch. 373 (C.A.).

99. See, *e.g.*, Auckland v. Alliance Assurance Co., Ltd., [1937] A.C. 587, 603-06 (P.C.) (Lord Wright); Mount Albert Borough Council v. Australasian Assurance Society Ltd., [1938] A.C. 224, 240-42 (Lord Wright); New Brunswick Ry. Ltd. v. British and French Trust Corp., [1937] 4 All E.R. 516, 525-26 (Greer, L.J.), 527-28 (Slesser, L.J.), 541-44 (Scott, L.J.).

100. Zivnostenska Banka National Corp. v. Frankman, [1950] A.C. 57, 79, per Lord Reid.

101. Rex v. Int'l Trustee for the Protection of Bondholders Aktiengesellschaft, [1937] A.C. 500, 519.

law of the place of contracting is fatal was abandoned.[102] Although the illegality doctrine has not yet done as much harm as the mode of performance doctrine, its capacity for harm is almost as great; it should clearly be eliminated. That would leave the proper law of the contract as the main arbiter of the validity and effect of its terms. There are encouraging signs that this is now regarded as a desirable aim.[103]

The lesson of the cases discussed in the previous pages is plain for all to read. It is simply that chaos results when the law of the place of performance is allowed to encroach on the sphere of the law governing the substance of the obligation. That lesson has an importance which far transcends the particular jurisdictions in which the cases were decided, or the particular currency questions which were there discussed. It effects the whole theory of the validity and effect of contractual clauses in the conflict of laws.[104]

102. See Vita Food Products, Inc. v. Unus Shipping Co., Ltd., [1939] A.C. 277, 295, 300 (P.C.), disapproving dicta in *Re* Missouri Steamship Co., 42 Ch. D. 321 (C.A. 1888), and The Torni, [1932] P. 78 (C.A.). This article has been severely critical of Lord Wright and mildly critical of Judge Learned Hand, each of whom has now retired from high judicial office after a long and distinguished career on the Bench. The writer desires to make clear that he yields to no one in his admiration for the work of these two men in the sphere of domestic law, especially for their contributions to commercial law and the law of torts.

103. Kahler v. Midland Bank, [1950] A.C. 24, 27-28, per Lord Simonds; Zivnostenska Banka National Corp. v. Frankman, [1950] A.C. 57, per Lord Reid at 83, per Lord Radcliffe at 86.

104. I am indebted to my friends Professor Kahn-Freund, of the London School of Economics, and Mr. P. B. Carter, Fellow of Wadham College, Oxford, who kindly read this article in draft and contributed many valuable suggestions.