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MULTIPLE CURRENCY AND INDEX CLAUSES

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THE PROBLEM

After the Joint Resolution of June 5, 1933, abrogating the gold clause,¹ had definitely been held constitutional,² questions concerned with its construction came into the foreground. Among them the problem of the so-called multiple currency clauses is of particular importance. Such provisions, which are to be found in many American bonds and coupons, give the creditor an option to receive payment at a fixed ratio, in one of several currencies. The following coupon, detached from a 1912 bond, may be quoted as an example:

"Bethlehem Steel Company will pay to bearer at its office or agency in the City of New York, U. S. A., Twenty-five Dollars United States Gold Coin, or in London, England, Five Pounds, Two Shillings, Ten Pence, or in Amsterdam, Holland, Sixty-two Guilders, Twenty-five Cents, being six months' interest then due on its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bonds, Series A, No.—."

The question has arisen whether under the Joint Resolution an American holder of such a coupon, upon tendering it in Amsterdam, is entitled to the guilder amount specified therein. A claim for the dollar equivalent of the guilder amount was dismissed in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, Justice Merrell dissenting.³ No appeal was taken. The contrary has been held, in a declaratory judgment, by a California

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1. 48 STAT. 113 (1933), 31 U. S. C. A. § 463 (1935).

2. *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240 (1935).

3. 244 App. Div. 634, 280 N. Y. Supp. 494 (1st Dep't 1935).

district court in *McAdoo v. Southern Pac. Co.*,⁴ and, with regard to the rights of a foreign holder of such coupons, quite recently by the Circuit Court of Appeals for the Second Circuit in *Anglo-Continental Treuhand A. G. v. St. Louis S. W. Ry.*, in an opinion by Judge Learned Hand.⁵ Further litigation centered on the question is pending.⁶

Since for all practical purposes application of American law seems to be certain,⁷ the discussion of the legal situation has to be based primarily on the text of the Joint Resolution, the preamble of which enunciates:

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of *coin or currency of the United States*, or in an amount of *money of the United States* measured thereby, obstruct the power of the Congress to regulate the *value of the money of the United States*, and are inconsistent with the declared policy of the Congress to maintain at all times the *equal power of every dollar, coined or issued by the United States*, in the markets and in the payment of debts."⁸

And on this ground the Resolution does away with

"obligations purporting to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in *money of the United States* measured thereby. As used in this resolution, the term 'obligation' means an obligation payable in *money of the United States*; and the term 'coin or currency' means *coin or currency*

4. 10 F. Supp. 953 (N. D. Cal. 1935).

5. N. Y. L. J., Jan. 20, 1936, at 339, (1936) 84 U. OF PA. L. REV. 661. This decision was handed down while this article was on the way to the printer and therefore it could not be discussed fully. The writer is satisfied to find his views, as to important points, supported by the authority of Judge Hand's opinion.

6. According to the N. Y. Times, Nov. 1, 1935, at 33, two European banks, the N. V. Anglo-Continental Trust Maatschappij of Rotterdam and the Mondiale Handels- und Verwaltunga A. G. in Lichtenstein brought suit, in the Philadelphia federal district court, against the Bethlehem Steel Co. for payment of the guilder value.

7. In comments on the New York decision, doubts have been raised as to whether Dutch law should control the situation, Amsterdam being the place of the exercise of the bond (or coupon) holder's option. See (1935) 35 COL. L. REV. 1132; (1935) 49 HARV. L. REV. 152. There is indeed some foreign authority for this view: 126 Entscheidungen des Reichsgerichts in Zivilsachen 196 (1929), analyzed in Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation* (1934) 44 YALE L. J. 53, 70, and possibly the opinion of Lord Warrington of Clyffe, concurring, in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* [1934] A. C. 122, 136. The theory of the Permanent Court of International Justice in the cases of Serbian and Brazilian Loans, P. C. I. J. Series A, Nos. 20-21 (1929) seems dubious. See Nussbaum, *supra*, at 67, 69. RESTATEMENT, CONFLICT OF LAWS (1934) § 356, referred to in the comments, holds the law of the place where the option is exercised governing as to the "manner of performance" and some other matters likewise connected with the performance. However, the validity of the contract or of a part thereof, presupposing the exercise of the option, is not within the scope of this rule; it depends rather on the law of the country with which the contract has its most contacts; see Nussbaum, *supra* at 72. This would be in the United States inasmuch as the bonds and coupons are issued in America by an American corporation in the customary form of such bonds and coupons. Under the Restatement's "place of contracting" doctrine (§§ 314, 332) probably the same result would be reached. As to *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N. Y. 22 (1935), see *infra* note 28.

8. 48 STAT. 112 (1933). Italics added.

of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.”⁹

The Bethlehem Steel coupon, referred to above, gives the holder an alternative right to a specified amount of “dollars United States gold coin”, and the same is true for practically all multiple currency bonds and coupons floated in this country. In a certain sense, therefore, those bonds and coupons doubtless are reached by the Joint Resolution. They probably were included in the “seventy-five billion dollars or more of gold obligations” contemplated by Congress as the subject of the legislative action.¹⁰ In the *Bethlehem Steel* case the defendant corporation seems to have inferred therefrom that the multiple currency bonds, being at the same time gold obligations, have to be debased to the face dollar amount like all other gold obligations. But this argument obviously is fallacious. The Joint Resolution struck the words “gold coin”, attached to the dollar amount, from the bond, the reference to foreign currency remaining intact. It is unthinkable that the New York court should have overlooked this simple counter-argument. Nevertheless, the court referred to the fact that the coupons sued upon were “obligations payable in the money of the United States.” “While they provide for payment in sterling or guilders, they are, nevertheless, within the spirit and intent of the Joint Resolution.”¹¹ The court is not explicit as to this line of reasoning. A possible theory would be to the effect that we are faced with a dollar debt fortified by the guilder option in the same manner as by a gold clause. Such an assumption, likewise, would be erroneous. As soon as the guilder option is exercised, no dollar claim is left.¹² The debtor then has to pay Dutch currency in Amsterdam, and conversion into dollars can result only from the well-known Anglo-American rule according to which money judgments are to be decreed only in the currency of the forum.¹³ The right to a definite amount of dollars as existing prior to the exercise of the choice is irrelevant in this situation. The adjudication can not be different if exclusively foreign currencies are put at the holder’s option. The fact that the American holder, in addition to his right to take guilders or pounds, is entitled to dollars cannot be detrimental to him. Moreover “guilder” is not the same as “gold”,¹⁴ nor is guilder

9. 48 STAT. 113 (1933), 31 U. S. C. A. § 463 (1935). Italics added.

10. *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 313 (1935).

11. 244 App. Div. at 636, 280 N. Y. Supp. at 496.

12. On the effect of the exercise of an option, see *Layton v. Pearce*, 1 Doug. 15 (K. B. 1778), cited in *Dinsmore v. Duncan*, 57 N. Y. 573, 580 (1874).

13. The cases are collected in Fraenkel, *Foreign Moneys in Domestic Courts* (1935) 35 COL. L. REV. 360. By virtue of this rule, every debt stipulated to be paid in foreign money “may possibly be paid in dollars” [(1935) 49 HARV. L. REV. 152, 153], but this, of course, is not intended by the Joint Resolution when it refers to “obligations payable in money of the United States.”

14. It may be mentioned that, under Dutch law, the silver five guilder coins are unlimited legal tender. See TATE, *MODERN CABIST* (28th ed. 1929) 184. But this would seem immaterial to the problem at hand.

value identical with gold value, since the guilder fluctuates in terms of gold values. In November, 1925, it had depreciated nearly 25 per cent in terms of its gold value.¹⁵

However, even if multiple currency clauses would not fall within the scope of the Joint Resolution its application may be justifiable under the view that we are confronted with an attempt to "evade" the prohibition set up by the legislature. The "evasion" doctrine was known to ancient Roman law, and it has been universally adopted by modern civil law; French courts in particular apply it.¹⁶ According to it, acts apt and intended to frustrate the end of an imperative¹⁷ or prohibitive law are to be treated as a violation of the law, although they do not conflict with its exact terms. The great Roman jurist Paullus taught: "Contra legem facit qui id facit quod lex prohibet, in fraudem vero qui salvis verbis legis sententiam ejus circumvenit."¹⁸ Anglo-American law does not possess an elaborate theory of evasion, but the concept of evasion, natural and evident in itself is at least not unknown in this country and it is employed particularly where marriages are entered into in a foreign jurisdiction in order to escape the marriage requirements of the domestic law of the parties.¹⁹ It possibly gives the explanation for the decision of the New York court. For it is striking that the opinion passes over the problem presented by the wording of the Resolution, and merely refers to its "spirit and intent". The court bases this view on the consideration that "it would be exceedingly unjust to compel the appellant to meet its obligations on the basis of the old standard, when the entire income from its business is received in the existing currency,"²⁰ but the relevancy of this argument is confined by the court to relations between citizens of our own country:

"Equity and justice demand that all who live under and enjoy the benefits of our government should be placed upon an equal footing, at least in so far as our currency is concerned. Mindful of its underlying purposes, good citizenship requires that the resolution should be

15. MEMORANDUM SUR LES MONNAIES 1913-1922 (Ed. by the League of Nations, 1923)

50. Recovery of the guilder took more than two years.

16. The leading monograph is: LIGEROPOULO, *LE PROBLÈME DE LA FRAUDE À LA LOI* (1928). See, in addition, DESBOIS, *LA NOTION DE FRAUDE À LA LOI ET LA JURISPRUDENCE FRANÇAISE* (1927) and VETSCH, *DIE UMGEHUNG DES GESETZES* (1917).

17. Expounding this concept is not necessary for the purpose of the present discussion.

18. D. I. 3. 29. Equal treatment of violation and evasion of the law is required in a decree of the emperors Theodosius and Valentinianus, C. I. 14. 5: "Non dubium est in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem. Nec poenas insertas legibus evitabit, qui se contra juris sententiam scaeva praerogativa verborum fraudulenter excusat."

19. GA. CODE (Parker, 1933) §§ 53-214: "All marriages solemnized in another State by parties intending at the time to reside in this State shall have the same legal consequences and effects as if solemnized in their state. Parties residing in this state may not evade any of the provisions of its laws as to marriage by going into another state for the solemnization of the marriage ceremony." See also MASS. GEN. LAWS (1932) c. 207, § 10.

20. 244 App. Div. at 636, 280 N. Y. Supp. at 496.

accepted in a spirit which will not permit an unfair advantage at the expense of the debtor.”²¹

The emotional emphasis flashing through the argument of the court is another indication that something similar to an evasion doctrine is hovering behind the language used by the court.

To be sure, evasion at best could be found only in the fact that an American bondholder demanded instead of dollars guilders payable in Amsterdam or Swiss francs payable in Zurich, without having substantial connections with either Holland or Switzerland—for the sole purpose of profiting from the non-devaluation of the guilder or franc—thereby maintaining the gold standard of his investment. Certainly since the Joint Resolution merely forbids the incurring of obligations containing a gold clause, incurring of similar obligations—possibly foreign currency obligations—may be included in the prohibition under the evasion doctrine.²² However, extension of the prohibitive rule to the exercise of an option would mean an inordinate stretching of the statute exceeding reasonable limits inherent in the evasion doctrine.²³ Yet even if this argument should not be followed, the Joint Resolution would prove inapplicable. For the main point is that abrogation of rights flowing from multiple currency clauses (not involving, or deprived of a gold clause) is not within the spirit and intent of the Joint Resolution.

SPIRIT AND INTENT OF THE JOINT RESOLUTION

There is in the Congressional data not the slightest suggestion that Congress had considered an impairment of multiple currency clauses. Those clauses are not mentioned in the Congressional material, either directly or indirectly. Also, the very able and careful brief prepared by the defendant's attorney in the *Bethlehem Steel* case, while collecting a large amount of Congressional data, does not include any statement referring to multiple currency clauses, nor does the New York court do so. Thus, there is at least no documentary evidence for the assertion, which certainly requires proof, that multiple currency clauses were within the intent and spirit of the Joint Resolution.

21. *Id.* at 636, 280 N. Y. Supp. at 497.

22. See Judge Hand in *Anglo-Continental Treuhand A. G. v. St. Louis S. W. Ry.*, N. Y. L. J., Jan. 20, 1936, at 339: "It is not necessary for us to decide that the Joint Resolution does not cover any conceivable promises to pay foreign currency. Possibly it may."

23. In *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, Merrell, J., in his dissent (244 App. Div. at 644, 280 N. Y. Supp. at 505), refers to a hypothetical situation where under an American life insurance contract the insurance was to be paid in guilders or American dollars, according to whether the insured should die in Holland or in the United States. Subsequently he died in Holland. The insurance company then undoubtedly would have to pay guilders, and quite the same result, in Justice Merrell's opinion, should be true in the case at bar, since through the exercise of the option the debtor's obligation had been confined to a guilder payment. The analogy, however, does not hold good. The hypothetical case seems to presuppose that the deceased had his last domicile or residence in Holland, and this would change the situation. There would be no option.

This argument, of course, is not decisive. We have to examine the substance of the multiple currency situation with an eye to the aims of the federal legislation. Such an investigation will disclose the fundamental diversity, from a legislative viewpoint, between gold clauses and multiple currency clauses.

To be sure, not all reasons which have been advanced in favor of the diversity proposition will stand analysis. Thus it has been said that an agreement to deliver Dutch guilders is an agreement to deliver commodities,²⁴ like Dutch bulbs, or that it is as if one would borrow his neighbor's cow.²⁵ Such comparisons are intended to illustrate the fact that agreements of the type mentioned are outside the scope of monetary legislation as represented by the Joint Resolution. Yet it should not be questioned that Dutch guilders are money, at least in Holland, where they are payable under the terms of the bond.²⁶ In the writer's opinion a debt payable in foreign currency ordinarily is a money debt irrespective of the place of payment except where foreign money is dealt in as such.²⁷

Nor are there, from the angle of constitutional and international law, any greater objections to legislative action by Congress on multiple currency clauses than there are to such action on gold clauses. That legislation purporting to give protection to the national monetary system may also reach debts stipulated in foreign currency is a commonplace proposition within the many European and non-European countries which have instituted a compulsory foreign currency regulation. This phenomenon is thoroughly known to American holders of foreign debts. It may even be said that the constitutional power of Congress to regulate the value of the money of the United States is more closely related to foreign currency clauses than to gold clauses, because trading in foreign currency (necessary for making

24. Merrell, J., *id.* at 644, 280 N. Y. Supp. at 505.

25. California district court in *McAdoo v. Southern Pac. Co.*, 10 F. Supp. 953, 955 (N. D. Cal. 1935) ("To put a homely illustration . . ."). *In re Missouri Pac. R. R.*, 7 F. Supp. 1 (1934) the court, at 9, compared gold coin to opium in an effort to emphasize its commodity character. The prosiness of legal discussion in the monetary field sometimes seems to stimulate fanciful comparisons.

26. In the *Bethlehem Steel* case, Merrell, J., erroneously refers [244 App. Div. 634, 644, 280 N. Y. Supp. 494, 505 (1935)] to *Hicks v. Guinness*, 269 U. S. 71, 80 (1925), where *German* marks payable in *America* were concerned. In *Gross v. Mendel*, 171 App. Div. 237, 157 N. Y. Supp. 357 (1st Dep't 1916) likewise cited by Justice Merrell, *id.* at 644, 280 N. Y. Supp. at 505-506, the court in examining the conversion rate of exchange for marks payable in Germany, said that there was no reason why a different rule should be applied to contracts for the delivery of wheat, cotton or other specific articles of merchandise. But the point was to ascertain the day controlling the conversion and the court utilizes the analogy of merchandise for this purpose only. This seems also to be the view of Judge Hand in *Anglo-Continental Treuhand A. G. v. St. Louis S. W. Ry.*, N. Y. L. J., Jan. 20, 1936, at 339, cited *supra* note 5, when he states in the case of promises to pay foreign money in foreign countries—"its cost in dollars is still the measure, for foreign money is a commodity . . . lawful to buy, unlike gold." The language used by Hand, J., to be sure, is not unobjectionable as to this point.

27. See NUSSBAUM, *DAS GELD IN THEORIE UND PRAXIS DES DEUTSCHEN UND AUSLÄNDISCHEN RECHTS* (1925) 188 *et seq.* [Spanish translation, *TEORIA JURIDICA DEL DINERO*, by Prof. Sancho Seral of the University of Zaragoza (1929) 295 *et seq.*]

payments) is likely to influence the value of domestic currency even more than trading in gold. The express power of Congress to regulate the value of foreign coin may not be directly in point, but it supports the theory that federal protection of the national monetary system is constitutionally not confined to dollar contracts.²⁸ Internationally, likewise, legal difficulties are by no means greater than in the case of gold clauses to which foreigners frequently are parties. Those foreigners certainly can be reached by federal legislation at least in so far as they have submitted to American law. We shall examine this point later on.²⁹ Here we are concerned merely with the question whether the United States can legislate on foreign currency debts as such. No doubt she can do like other states which have trodden this road.

However, diversity, and fundamental diversity, between gold clauses and multiple currency clauses appears when the situation is regarded from an economic and political standpoint. In *Norman v. Baltimore & Ohio R. R.*, Chief Justice Hughes remarked,—as referred to above,—that seventy-five billion dollars or more³⁰ of such obligations were outstanding, the annual interest charges on which probably amounted to between three and four billion dollars. The Court points out that the terrific weight of such indebtedness caused Congress to enact the Joint Resolution. In the *City Bank Farmers* case the defendant submitted to the court statistics carefully elaborated by Mr. E. Fontaine Broun of New York, on multiple currency bonds issued by American corporations and which were outstanding on January 31, 1934.³¹ All of them were alternatively payable in the United States in gold dollars. \$285,587,634 of these bonds contained the multiple currency clause as to principal and interest, \$396,786,334 as to interest only; with regard to \$193,561,500, the interest on which was payable under a multiple currency clause, it was not possible to determine whether the clause

28. Merrell, J., in the Bethlehem Steel case (244 App. Div. at 640-1, 280 N. Y. Supp. at 501-2), points out that the effect of the Joint Resolution on guilders payable in Amsterdam would be "extraterritorial" and therefore unconstitutional. However, the doctrine of the inherent territorial limits of sovereignty has developed mainly with an eye to taxation, and even here it has been held that Congress may tax property of American citizens situated abroad; see decisions cited: Note (1929) 29 COL. L. REV. 624, 627-628. And it is a well-settled rule that a court, in the exercise of its judicial power, which is an attribute of sovereignty, may enjoin an American resident from committing or omitting an act abroad. See RESTATEMENT, CONFLICT OF LAWS (1934) § 96; 1 BEALE, TREATISE ON THE CONFLICT OF LAWS (1935) 415. No precedent seems to exist defining the territorial boundaries with regard to the power of Congress to regulate or alter contracts within general constitutional limits. And in the international situation before us, as pointed out above, there would be no reasonable ground for fettering Congress. Constitutional difficulties will arise rather where interstate relationships are concerned. Therefore, *Ewen v. Thompson-Starrett Co.*, 208 N. Y. 245, 247, 101 N. E. 894, 896 (1913) cited by Merrell, J., at 641, 280 N. Y. Supp. at 501, seems not to be pertinent. For the constitutional question see (1935) 49 HARV. L. REV. 152.

29. *Infra* p. 577.

30. Probably more. See Nussbaum, *supra* note 7, at 58.

31. The amount of multiple currency bonds issued in the United States by foreign debtors is presumably much higher. See DOLLAR COUPONS STATED TO BE PAYABLE AT HOLDER'S OPTION IN MULTIPLE CURRENCIES (Pamphlet ed. by A. Iselin & Co.).

was stipulated also for the principal. Payments on these bonds in foreign currency would require a disbursement, for annual interest, of seven million dollars over the face dollar amount; about eighty-two million dollars would be required for the principal, and—taking into account the \$193,561,500—seventeen million dollars more would be required, thus totalling ninety-nine million dollars on the rate of exchange in effect on November 17, 1933.³² However, the latter figures surmount the actual burden since the foreign bondholders have to be paid in their respective currencies anyhow. Moreover, most bonds are callable and redemption would eliminate the interest load. Calling the bonds is particularly profitable and has been done where the multiple currency clause does not include the principal.³³ Where the debtor cannot or is not prepared to redeem there may be sufficient time until maturity to accumulate a special currency adjustment fund which may be less burdensome owing to the possibility, which is certainly not unlikely, that the foreign currencies may depreciate likewise. No similar opportunities existed as to gold dollar debts, and they are, to a great extent, not as long termed as multiple currency bonds. Furthermore, the gold dollar debts were scattered all over the country. Frequently they are imposed upon less moneyed people through mortgage deeds, *etc.*, whereas the multiple currency clause almost exclusively occurs with loans of large companies. And there is still another important difference. Gold clauses have been customary in this country since the beginning of the Republic³⁴ and had become, in certain fields of financing, matters of form which debtors simply had to accept without receiving an equivalent for the risk incurred. It is significant that French and other foreign courts, faced with similar clauses, sometimes simply refused to attribute any legal effect to them under the theory that the parties, in contracting, did not realize that the clauses meant anything.³⁵ This is bad law, but may be a motive for legislative action. In the case of a multiple currency clause, however, there is no similar justification to deny or invalidate the liability incurred. Those obligations have always been undertaken with a clear understanding of their meaning and with no pressure of an actually inescapable custom. It can not even be alleged that the rate of exchange risk incurred was not considered by the borrowers. For it is remarkable that in most cases the multiple currency clause was conceded

32. The end figures were reported in the newspapers; see N. Y. Times, June 1, 1935, at 25.

33. To what extent multiple currency bonds actually have been redeemed or called for redemption, it is hard to say, but the amount in question seems to be considerable, according to expert information. The point was not made in the affidavit of Mr. E. Fontaine Broun.

34. Hanna, *Currency Control and Private Property* (1933) 33 Col. L. Rev. 617, 633, n. 20.

35. Tribunal Supérieur Colmar, Nov. 20, 1921 (1922) REVUE JURIDIQUE DE L'ALSACE ET DE LORRAINE 98; Jan. 17, 1923 (1923) *id.* at 256; Tribunal civil de la Seine, April 6, 1927 (1927) I GAZETTE DU PALAIS 750; Supreme Court of Czechoslovakia, March 17, 1927 (1928) ZEITSCHRIFT FUER OSTRECHT 1209 (debtor a Czechoslovakian municipality).

only as to interest, not as to principal. Such a limitation will not be found in any gold bond.

That the Joint Resolution cannot be regarded as having simply and plainly abolished the multiple currency clauses is clearly recognized both by the debtors invoking the Resolution and by the New York court. The latter held that it is only between Americans that the rule which deprives the bondholder of his right to foreign currency operates.³⁶ No strictly legal ground for this limitation has been set forth; evidently it was felt unjust and unnatural to take from a Dutchman the right to guilders or from a Swiss the right to Swiss francs. The Joint Resolution being over-stretched as to the subject matter, the balance was sought to be restored by reading into the law restrictions with regard to the parties concerned. The latter is the price for the former.

However, the court and the debtors entirely overlooked the fact that if foreign creditors are not reached by the Joint Resolution in the case of the multiple currency clauses, the same conclusion must necessarily follow with regard to gold clauses. Since foreign holdings of American gold debts are very considerable, the consequences would be disastrous; it may be remembered that one per cent of those debts amounts to nearly a billion dollars. As suggested above, at least those foreign creditors who have submitted, with regard to the debt, to American law can be reached by the Joint Resolution.³⁷ Thus a foreigner by acquiring a bond issued under and governed by American law becomes, as to the bond, subject to American law. Obviously, Congress did not intend to create a law discriminatory against Americans. Congress played a fair game in extending at the same time the protection of the law to foreign gold debtors obligated under American law. The loss put on the shoulders of the American people by the relief granted to foreign debtors was, during the Congressional deliberations, publicly stated by Secretary of the Treasury Woodin as amounting to about two and one-half billion dollars³⁸ and the bill was even attacked by

36. In the Bethlehem Steel case, the court says:

"It is not contended by the appellant that the holders of these coupons, who are subjects of England and Holland, respectively, are governed by the terms of the joint resolution. In fact, the affidavits show that all payments have been made to *bona fide* holders in foreign countries in accordance with the terms of the agreement. It is claimed, however, and rightfully so, that the citizens of our country are controlled by the terms of the joint resolution, particularly where, as here, the bonds were purchased in the United States by citizens thereof, and the parties who purchased them expected to be paid in dollars, the value of which was not to be governed by the currency of any other country." (244 App. Div. at 636, 280 N. Y. Supp. at 496-7.)

And next the court stresses the significance, in the present situation, of "good citizenship". Although a certain reserve in the language of the court seems to exist, it is for all practical purposes clear that the discrimination suggested by the defendant was approved by the court.

37. In *Compania de Inversiones Internacionales* (a Republic of Columbia corporation) v. *Industrial Mortgage Bank of Finland*, 269 N. Y. 22, 198 N. E. 617 (1935), the court even ruled that an American court had to apply the Joint Resolution irrespective of the law governing the contract. This would hardly seem justifiable.

38. U. S. News, May 20-27, 1933, at 3, col. 2.

Congressional debaters as favoring foreign debtors.³⁹ This proves, at least, that some effect of the Joint Resolution upon foreign parties was clearly envisaged by Congress. This has recently been acknowledged by the New York Court of Appeals when it applied the Resolution to a contract made between foreign corporations.⁴⁰

The discrimination suggested by the New York court and the multiple currency debtors is particularly inappropriate and contrary to the spirit of the Joint Resolution in the case of bearer bonds, which form the preponderant or exclusive type of multiple currency clauses. Distinguishing among the holders means breaking down the bearer clause. There are, in international finance, precedents where, as a consequence of political or monetary vicissitudes, a break down of bearer clauses by differentiation among the holders was enacted.⁴¹ For this purpose legal characteristics and an appropriate machinery for the differentiation must be established. Such a measure ought to be considered carefully because of its repercussions upon the foreign markets previously appealed to by the issue of the bonds. Nothing similar was intended by the Joint Resolution. It purports to do away with gold clauses, not to destroy bearer clauses connected with multiple currency bonds; not even silver clauses are affected by the Federal Act.⁴²

To sum up: The multiple currency situation under both legal and legislative views is wholly different from the gold clause situation. It cannot be presumed therefore that Congress, in impairing the gold clauses, intended to reach the multiple currency clauses. Hence, an American holder of a multiple currency bond does not evade the Joint Resolution when choosing payment in foreign currency under the terms of the bond. Even less does he directly violate the Resolution since its text is unambiguously confined to gold obligations. No true interpretation of the Joint Resolution can ever yield a different result. It has been said that the Joint Resolution

39. 78 CONG. REC. 4539 (Rep. McFadden) and 4542 (Rep. Beedy).—Some Congressional orators, like Mr. Steagall, Chairman of the House Committee on Banking and Currency, in charge of the Joint Resolution (73d Cong.), weighing the presumable effects of the Joint Resolution, occasionally talked in terms of (gold) obligations of *citizens*. But these utterances, referred to by the defendant in the Bethlehem Steel case, were made without any emphasis and without any view as to foreigners. The court did not cite them, despite its need for substantial motivation.

40. *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N. Y. 22, 198 N. E. 617 (1935).

41. *E. g.*, on the ground of the PEACE TREATIES OF ST. GERMAIN, art. 203, annex par. 2, and of TRIANON, art. 186, annex par. 2, providing for a distribution of the bonded Austrian public debt among the "successor states". See FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION (1931) 500 *et seq.*, 842, 880. The technique applied was stamping the bonds. For the repercussion to foreign markets: see, *e. g.*, Oberlandesgericht Jena, Judgment of Nov. 3, 1921 (1922) 22 BANKARCHIV 69. Under the present German foreign currency decrees, certain bearer securities, if held by foreigners, are exempt, as to interest or dividends, from the transfer prohibition. In order to have the money transferred, the foreigner has to give an affidavit stating his quality as a foreigner and some other facts. Basic is the German law of Feb. 4, 1935 (1935) REICHSGESETZBLATT 103, § 19, par. 2.

42. *Holyoke Water Powers Co. v. American Writing Paper Co., Inc.*, 68 F. (2d) 261 (C. C. A. 1st, 1933).

is poorly drafted.⁴³ However, compared with the numerous foreign statutes abrogating or encroaching upon gold clauses,⁴⁴ the American law, which in a remarkable way utilizes foreign doctrines, is a model of carefulness.⁴⁵ Perfect clarity is not missing with regard at least to multiple currency clauses. But still if there were an ambiguity in the text the Resolution would not be applicable to the multiple currency situation for the very material reasons expounded above.⁴⁶

COMPARATIVE ASPECTS

Comparative investigation strongly supports these views. Some foreign legislation expressly provides for a different treatment of gold debts and foreign currency debts⁴⁷ and where only abrogation or restriction of gold clauses was contemplated by a statute it has been held that such regulation did not include debts in foreign currency, even though the currency be gold. This is particularly true with regard to Germany where gold clauses have been abrogated by a decree of September 28, 1914.⁴⁸ Applicability of this decree to foreign currency debts has never been considered by courts or legal writers. *E. g.*, the Reichsgericht passed a number of judgments on multiple currency clauses, but in no case did it refer to the decree nor was the decree referred to by the parties.⁴⁹ Also, a Greek appellate court has held a Greek decree against gold clauses not to be applicable to foreign currency debts.⁵⁰ In Belgium a decree of August 2, 1914, exempting the National Bank from redemption of its notes in coin, proclaimed the notes legal tender "notwithstanding any agreement to the contrary." Although "gold" was not specifically mentioned, the Belgian Court of Cassation declined to apply the decree to agreements taking the value of foreign (English)

43. (1935) 35 COL. L. REV. 1132.

44. See Nussbaum, *supra* note 7, at 61. A number of such foreign statutes are reported in NUSSBAUM, VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTS (1918) 20 *et seq.*

45. See Nussbaum, *supra* note 7, at 55.

46. Hence, the principle that "remedial statutes" should be broadly construed [(1935) 49 HARV. L. REV. 152, 153, referring to 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (2d ed. 1904) § 583] cannot apply. Incidentally it is doubtful if the Joint Resolution constitutes a "remedial" statute. Rather it is a "retrospective" one, because abrogating existent rights, and should be construed in a restrictive way, since such statutes "are looked upon with general disfavor", *id.* at § 580. Also the use of the "analogy" concept pointed to by some modern writers [Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213, 222; Gelhorn, *Contracts and Public Policy* (1935) 35 COL. L. REV. 679, 681] will be disposed of by the arguments of our text.

47. *E. g.*, the Austrian legislation of 1933, see (1934) 8 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 464; the Roumanian, see Nussbaum, *op. cit. supra* note 44, at 84; and the Mexican, see a statute of July 25, 1931 (Diario official of Mexico, July 27, 1931, n. 23) concerning gold clauses, and a statute of February 15, 1935 [quoted in DOMKE, LA CLAUSE-OR (2d ed. 1935) n. 26] concerning foreign currency debts.

48. (1914) REICHSGESETZBLATT 417.

49. Reichsgericht, Dec. 11, 1919 (1920) JURISTISCHE WOCHENSCHRIFT 373; Oct. 20, 1921 (1922) 22 BANKARCHIV 69; Mai 17, 1923 (1923) LEIPZIGER ZEITSCHRIFT 493.

50. Appellate Court of Aegaeus (1923), (1924) 51 JOURNAL DU DROIT INTERNATIONAL 512.

money as the measure of payment.⁵¹ French law is somewhat different. Abrogation of gold clauses started there not from a governmental fiat, but from an inherited public policy purporting protection of the monetary system.⁵² Under this broad view, which is unlike the English and American one,⁵³ foreign currency debts were also reached. An exception, however, was provided by the courts for "international contracts" (or "international payments"), a rule highly disputable from the angle of law and clearly influenced by the fact that the French in international finance are quite preponderantly creditors. Loans floated in several countries by means of a multiple currency clause have invariably been held to be international. This doctrine, which was used by the Permanent Court of International Justice in the famous case of the Serbian and Brazilian Government loans in favor of the French bondholders,⁵⁴ has been also applied by French courts to multiple currency clause bonds issued in France by French corporations.⁵⁵

The result is that multiple currency clauses have been also upheld in France in spite of a gold clause horror which is as strong as and even deeper rooted than the American one.

Still more interesting is the attitude of foreign courts towards the discrimination problem. Outside the United States, too, multiple currency debtors after the depreciation of their domestic currency have attempted to confine their domestic bondholders to domestic currency regardless of the bearer clauses. The debtors alleged that the bonds of those holders were floated in the holders' (and the debtors') country and that in such a case the holders would be entitled only to domestic currency, the reference in the bonds to foreign currency aiming merely at foreign holders. It is true that in this country discrimination against American bondholders is primarily derived from an alleged spirit and intent of the Joint Resolution, but the reasoning of the foreign debtors would be sound in this country if it were sound at all.⁵⁶

51. *Judgments de Mai* 30, 1929, I *Pasicrisie Belge* (1929) 206.

52. See NUSSBAUM, *LA CLAUSE-OR DANS LES CONTRATS INTERNATIONAUX* (lecture, 1933) published in (1934) 43 *RECUEIL DES COURS PROFESSÉS À L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE* 559, 580.

53. See *Feist v. Société Intercommunale Belge d'Electricité* [1934] A. C. 161 (1933), 82 U. OF PA. L. REV. 533, and *Bronson v. Rodes*, 7 Wall. 229 (U. S. 1868).

54. See *supra* note 7. Contrary to the statement of Mr. Justice McReynolds, dissenting in *Norman v. Baltimore & Ohio R. R.*, 294 U. S. at 363 (1935), the court did not uphold the gold clause itself (thus far being in accord with the majority of the Supreme Court of the United States), but applied the French rule on international contracts.

55. See decisions cited *infra* note 60; on the principle see also decisions cited *infra* notes 57, 59.

56. In the *Bethlehem Steel* case the court incidentally notes that the bonds were purchased in the United States by citizens thereof, and the parties who purchased them expected to be paid in dollars (244 App. Div. at 635, 280 N. Y. Supp. at 494). It has also been noted that the "foreign currency clause" did not appear in the American prospectus and in the interim certificates issued to American subscribers [(1935) 35 COL. L. REV. 1132] and that only a New York but not a Dutch agent was named in the bond [(1935) 49 HARV. L. REV. 153]. Those circumstances, however, are not referred to in the judgment and they are irrelevant. Preparatory documents like a prospectus or an interim certificate may sometimes be of

The problem presented to the courts proved particularly crucial in France. While the "international contract" doctrine, as a whole, constitutes a powerful protection of French financial interests, there are some cases where the doctrine would operate against French debtors. The franc having been devaluated, in 1928, to about twenty per cent of its value, French debtors who previously had by international contracts become obligated in gold or in a non-devaluated foreign currency really found themselves in a predicament. The French courts in a number of cases gave relief to French debtors by denying, contrary to the facts, the international character of the contract,⁵⁷ or by pushing aside a distinct gold clause as being irrelevant,⁵⁸ or by interpreting, contrary to the apparent intent of the parties, francs payable in Switzerland to be French francs.⁵⁹ By this method French and non-French holders were hurt equally. To be sure in some cases the French courts decided to the contrary, holding the French debtors liable towards the holders, including the French creditors, for the gold value.⁶⁰ Yet never did the French courts touch upon the equality of the bondholders' rights. As the Court of Cassation well put it, a loan through bearer bonds forms an "indivisible whole".⁶¹ This attitude of the French courts in a precarious situation deserves particular attention.

Somewhat dramatical was the German development. In 1913 a German corporation issued bearer bonds payable either in German money (1000 marks) or in Swiss money (1240 francs), this rate of exchange corresponding to the pre-war par. After the war and the collapse of the German

assistance to clarify the real meaning of an ambiguous bond phrase but they cannot possibly be used to set aside bondholders' privileges flowing from an unambiguous text of the bond itself. And omitting, in the bonds, the name of the foreign agent is a matter of routine and convenience, since in the case of a long-termed loan it is desirable to reserve the liberty of changing a foreign agent. The situation as to the New York "fiscal agent" is different.

57. Cour de Cassation, May 17, 1927, (1928) 55 JOURNAL DU DROIT INTERNATIONAL 419, criticised by Prof. Perroud, *ibid.* (ann.), and by Prof. Esmein (1927) RECUEIL SIREY 289; March 27, 1929, (1929) I RECUEIL SIREY 174; Nov. 7, 1932 (1933) 60 JOURNAL DU DROIT INTERNATIONAL 1197, criticised by Prof. Perroud at 1200.

58. See *supra* note 35.

59. Cour de Cassation, June 5, 1934, (1935) 62 JOURNAL DU DROIT INTERNATIONAL 90, reversing App. Court of Paris, Jan. 7, 1932 (1932) I GAZETTE DU PALAIS 651 (regarding bonds of the Company "L'Est Lumière") criticized by Prof. André Prudhomme, editor of the JOURNAL DU DROIT INTERNATIONAL; App. Court of Besançon, Dec. 28, 1931 (1932) II GAZETTE DU PALAIS 656 (Société Anonyme de Souchaux); App. Court of Paris, May 3, 1935 (1935) Dalloz Hebdomadaire 353 (Papeteries de France). In the first case, franc bonds were subscribed and made payable at the holder's option in France and Switzerland. A holder demanded Swiss francs in Switzerland, but the company set up as a defense that the Swiss banking houses entrusted with the service of the loan had "received" according to their correspondence, the subscriptions to the loan in French francs and that it was in such francs that the corporation was credited. The court held this defense good considering it entirely immaterial "how minimum whatever the discount between the two currencies may have been." It was not alleged by the corporation that the Swiss subscribers—who probably were debited by the Swiss banking houses in Swiss francs—were able to perceive, from the subscription forms, the relevance of the language employed as to the kind of francs, both francs belonging to the Latin Monetary Union and being at par.

60. Judgment of June 19, 1933, (1933) II GAZETTE DU PALAIS 368 (Compagnie Electrique du Loire et du Centre); App. Court of Besançon, Dec. 30, 1931 (1932) *id.* at 656 (Papeteries de France). See, however, the last decision cited *supra* note 59.

61. Judgment of June 19, 1933, *supra* note 60.

monetary system German bondholders demanded the francs amount which was payable in Zurich. The Reichsgericht dismissed the claim, construing the bond to the effect that francs were owed only on those bonds which originally had been subscribed in Switzerland and that the bonds of the claimant were not in this category.⁶² However, the judgment met with such keen criticism⁶³ that but half a year later when a similar case came up before the Reichsgericht, this court held to the contrary⁶⁴—an extraordinary if not unique occurrence in the history of the court, if one takes into account the shortness of the interval between the decisions. The Reichsgericht in the second judgment emphasized that a different interpretation of the bonds would “better conform to the needs of international finance for which the bonds were created.” The same view was maintained in a subsequent decision.⁶⁵

In Switzerland the Federal Court, highest judicial agency of the country, likewise professed the sound doctrine in a case where the gold clause of a bearer bond held by the plaintiff was abrogated by the law. The plaintiff argued that, under the circumstances of the case the abrogation of the gold clause would lead to an “unfair enrichment of the debtor to the detriment of the creditor.” The court, however, rejected this argument pointing out that it is “contrary to the very nature of these securities (namely bearer bonds), to distinguish among the holders, searching into the conditions under which one bond or another was acquired.”⁶⁶ The Supreme Court of the former Saar Territory, by a decision of December 21, 1934, likewise refused to discriminate among the holders of bearer bonds with regard to the time of their possession.⁶⁷

Thus comparative investigation affords a clear picture. It harmonizes with what has been said by the California federal court in *McAdoo v. Southern Pac. Co.*:

“ . . . they [the bonds] contain no such word of limitation [for the benefit of foreign holders] and the Court has no right to read into a document limitations in no way implied.”⁶⁸

MULTIPLE CURRENCY CLAUSES INCURRED UNDER THE JOINT RESOLUTION

Although the doctrine advanced in the *Bethlehem Steel* case does not stand analysis, there may be a repercussion of the Joint Resolution on the

62. Judgment of Dec. 21, 1925 (1925) JURISTISCHE WOCHENSCHRIFT 1320.

63. See Nussbaum (1925) JURISTISCHE WOCHENSCHRIFT 1320 (annotation), and Springer (1926) 25 BANKARCHIV 291.

64. Judgment of July 1, 1926 (1926) JURISTISCHE WOCHENSCHRIFT 2675. The bonds were on order, but endorsed in blank.

65. Judgment of Dec. 22, 1927 (1928) 28 BANKARCHIV 162.

66. Judgment of May 23, 1928 (1929) 56 JOURNAL DU DROIT INTERNATIONAL 497-498, in the case of the *Crédit Foncier Franco-Canadien*.

67. DOMKE, LA CLAUSE-OR (2d ed. 1935) 21.

68. 10 F. Supp. at 954.

multiple currency matter. The Resolution not only abolishes gold obligations existing at the time of its enactment, but it forbids entering into such obligations in the future. Suppose Americans, under the rule of the Resolution, make a contract payable in a foreign currency generally considered at the time of contracting to be more stable than the dollar. Such conduct may be perfectly justifiable, for instance, where an American importer resells imported goods to an American wholesaler, thus trying to unload or distribute the risk as to the varying rates of exchange which he has taken in the ordinary course of his business. But where no such justification appears, suspicion and even an adverse presumption possibly will arise to the effect that nothing else is sought by the agreement than to secure, to the creditor, a guarantee virtually replacing a gold clause. Although the language of the Joint Resolution does not cover this case, application of the Federal Act might be possible under an evasion doctrine.⁶⁹ Of course, the situation would be materially different from the cases decided because it presupposes a contract made under the rule of and in the teeth of the Joint Resolution.

As a question of evasion, new multiple currency obligations giving additional protection to the creditors would seem of dubious validity if agreed upon between Americans. Bonds of this type, issued by an American and offered to the American capital market, will possibly not be registered by the Securities and Exchange Commission (under the Securities Act of 1933), since an implied power of the commission to reject securities of a dubious legality should be assumed. In any event, the existing doubts should be sufficient to bar the further issue of American multiple currency bonds, at least of those alternatively payable in American dollars. The writer therefore refrains from examining closer the validity or invalidity of the hypothetical bonds.

Under the Joint Resolution no sound objection can arise to the issue of dollar bonds giving the holder the privilege to have the equivalent of the dollar, at the current rate of exchange, paid abroad in the local currency. This "option de place" (as opposed to the "option de change" granted by the multiple currency clause)⁷⁰ obviously does not give a protection similar to

69. Foreign currency debts are sometimes "disguised", the amount contracted for being expressed first in domestic currency, as a factor in order to determine on a fixed equation the amount to be paid in foreign currency. Thus in *Brown v. Alberta & Great Waterways R. R.*, 59 D. L. R. 520 (1921), bonds were issued by a Canadian company at 1000 Canadian dollars each, but principal and interest exclusively payable in England in English pounds at the rate of 4.86 2/3 Canadian dollars for an English pound (the pre-war parity). In this case only pounds were owed; conversion, by the Canadian court, into Canadian currency resulted from the procedural rule mentioned above. On "disguised" foreign currency debts in general, see NUSSBAUM, *DAS GELD IN THEORIE UND PRAXIS DES DEUTSCHEN UND AUSLÄNDISCHEN RECHTS* (1925) 206 *et seq.*

70. In *Levy v. Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 210 App. Div. 422, 206 N. Y. Supp. 261 (1st Dep't 1924) the court held certain bonds issued by the defendant to contain an option de place, whereas the court below had read an option de change into the bonds, 121 Misc. 681, 202 N. Y. Supp. 396 (Sup. Ct. 1923). Similar questions have been dealt with in numerous foreign decisions, see NUSSBAUM, *VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTS* (1928) 70, n. 4.

that afforded by a gold clause, or else a bonded loan issued by an American debtor may be split up in an American and a foreign (or several foreign) "tranche", each differently articulated and only the American payable in dollars. This type probably is workable only in the case of very large loans, such as those issued by the German Government under the Versailles Treaty ("Dawes" and "Young" loans).

The general question of how far a stipulation for payment in foreign currency, as between Americans, will be unobjectionable, may be somewhat illuminated by a comparison with French law. To be sure, the French law, unlike the American, has not primarily been antagonistic to the gold clause in itself, but has rather placed emphasis on the maintenance and enforcement, in monetary emergency, of the legal tender decrees against any "agreements to the contrary" ("nonobstant toutes clauses ou dispositions à ce contraires").⁷¹ For historical and textual reasons, the evasion doctrine is not needed in order to restrict contracts stipulated in foreign currency. Moreover, the broad French doctrine which upholds gold and other protective clauses in "international contracts" cannot be transplanted into American law. Nevertheless, the basic French conception is closely cognate to the policy of the Joint Resolution as set forth by the preamble and by *Norman v. Baltimore & Ohio R. R.*, and therefore it will be of assistance in determining what agreements to pay in, or to have payment measured by, foreign currency may be justified. *E. g.*, such agreements were upheld when concerning c. i. f. contracts or resales of goods bought c. i. f.,⁷² including those made through bills of delivery (filière).⁷³ Likewise, a French exporting agent, having sold in foreign currency, was held liable to refund foreign currency to his principal under the existing contract.⁷⁴ That multiple currency obligations undertaken by French debtors were also upheld resulted directly from the "international contract" rule discussed above.

EFFECT OF HOLDING THE JOINT RESOLUTION APPLICABLE TO MULTIPLE CURRENCY CLAUSES

A. Differentiation among Bondholders

In case the Joint Resolution should be held applicable to multiple currency clauses, the limits of its application will have to be ascertained. They will depend on the particular theory on which such application is rested. The theory may be to the effect that the clauses, when giving the holder by their terms an alternative right to gold dollars, are embraced within the very pro-

71. Law of 12/18 Sept. 1790. See MESTRE AND JAMES, *LA CLAUSE-OR EN DROIT FRANÇAISE* (1926) 39. In Belgium a similar clause was construed restrictively, *supra* note 51.

72. App. Court of Paris, May 12, 1928, and App. Court of Orléans, June 27, 1928 (1929) 56 JOURNAL DU DROIT INTERNATIONAL 111; App. Court of Amiens, Dec. 28, 1933 (1934) II GAZETTE DU PALAIS, Table analytique at 135.

73. Cour de Cassation, May 10, 1933 (1935) 62 JOURNAL DU DROIT INTERNATIONAL 388.

74. Cour de Cassation, July 8, 1931 (1932) 59 JOURNAL DU DROIT INTERNATIONAL 721.

visions of the Joint Resolution. Untenable as the proposition may be, it is advanced as an argument by the debtors, and it is insinuated by the New York court in the *Bethlehem Steel* case when it says that the bonds are payable in the money of the United States and are therefore within the spirit and intent of the Joint Resolution in spite of the fact that they also provide for payment in sterling or guilders. If this be true, the right to receive guilders or English pounds was abrogated, together with the gold claims, by the enactment of the Joint Resolution, at least as to the bonds then belonging to American holders. The result would be that a subsequent acquirer of such a bond, even a foreigner, would be entitled only to dollars. He would be considered as something like a constructive mala fide holder. This was indeed the view of the defendant in the *Bethlehem Steel* case. Only those foreigners, then, are bona fide holders who were such before the Joint Resolution and consequently their successors also (although the defendant contested the conclusiveness of this consequence). This theory, which rests on an alleged interpretation of the Joint Resolution, may be labeled the "objective" one.

The evasion doctrine would rather lead to a "subjective" theory, stressing the bad, namely "evasive" intent of the parties. The greater part of the opinion of the New York court seems to lean toward this view, and particularly the references to "equity and justice", and the phrase "good citizenship requires that the resolution should be accepted in a spirit which will not permit an *unfair* advantage to the creditor at the expense of the debtor."⁷⁵ Taking the "subjective" theory as a point of departure, the situation looks different. Any American bondholder demanding, by exercise of his option, guilder payment from an American debtor, and likewise a non-American holder, doing the same in the interest of an American, would probably be considered "mala fide", even where the bond belonged to a non-American on June 5, 1933; at least this fact would not be determining. On the other hand, a foreign holder having acquired the bond from an American after that date, but unknowingly, would probably be protected as being actually "bona fide". This, of course, might cause an emigration of American holdings of such bonds. Nevertheless, the subjective theory is, comparatively speaking, much more justifiable than the objective one.

Inasmuch as foreign bondholders must be exempted from the effect of the Joint Resolution, there is a momentous doubt as to whether the qualification as a foreigner depends on domicile or on nationality. The New York opinion at one time speaks of "subjects of England and Holland",⁷⁶ thereby pointing toward nationality, at another time of "(bona fide) holders in foreign countries".⁷⁷ In the writer's opinion, the domicile theory should be preferred, since it is the emergency of a person indebted in gold dollars, but

75. 244 App. Div. at 639, 280 N. Y. Supp. at 497.

76. 244 App. Div. at 636, 280 N. Y. Supp. at 496.

77. 244 App. Div. at 636, 280 N. Y. Supp. at 497.

earning paper dollars which was to be met by the Joint Resolution.⁷⁸ The type of currency earned, of course, depends on his domicile rather than on his nationality. The domicile interpretation also would constitute the sounder view inasmuch as it better harmonizes with the objectives proclaimed by the preamble of the Joint Resolution and approved by the Supreme Court, namely, "to maintain . . . the equal power of every dollar . . . in the markets and in the payment of debts"⁷⁹ (thus the preamble) and thereby to protect "domestic currency" (thus the Supreme Court in *Norman v. Baltimore & Ohio R. R.*).

Finally, the question might be touched upon as what, in the situation before us, actual "bona fides" may amount to. Shall a foreigner, in purchasing a bond, be held under a duty to start an investigation into the residence of the seller? I think the question should be answered in the negative, particularly where the bond is purchased through the channels of a foreign stock exchange. The brokers and dealers of such an exchange cannot be compelled to reveal the domicile of the selling outsider. Certainly such a compulsion cannot be based on doubtful conclusions drawn from an American statute.

The factual situation, however, does not conform with the theories advanced above. The debtors have decided to protect themselves, inventing for this purpose novel and peculiar devices. They make the payment of any of the bonds or coupons thereof dependent on the signing by the holder of comprehensive and troublesome declarations.

However, no authority exists, either in this country or elsewhere, as far as the writer sees it, for a debtor making payment dependent on declarations⁸⁰ and on "solemn" (or even sworn)⁸¹ statements of his creditor, distrusting the Scriptural passage: "But let your yea be yea; and your nay, nay. . . ." Even under the ruling of the New York court the burden of proof would be on the debtor raising a defense against the clear text of the bond or coupon.⁸² And the bondholder becomes subject, under the form ordinarily used by the debtors,⁸³ to a severe examination. This form starts

78. See *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 315 (1935).

79. 48 STAT. 112 (1933).

80. In a case where a bank announced that it would not pay its notes when cut, the court said: "The . . . exception is as extraordinary as it is novel; and it is probably the first instance of a debtor's undertaking to prescribe terms to his creditors." *Bank of United States v. Sill*, 5 Conn. 106, 112 (1823). Also see *Martin v. Bank of United States*, Fed. Cas. No. 9,156, at 885 (E. D. Pa. 1821).

81. See the letter of the Bethlehem Steel Co., in note 83, *infra*.

82. WIGMORE, EVIDENCE (2d ed. 1923) §§ 2466, 2537.

83. The Bethlehem Steel declaration is in the following form:

"I (We) do solemnly declare:

that I (We) am (are) the owner(s) of:

\$..... Bethlehem Steel Company, First Lien and Refunding Mortgage 5% Bonds
Nrs.

from which the accompanying coupons due, 19..., tendered herewith for payment, have been detached;

that I (we) am (are) at this date, and I (we) have been continuously for a period of six months prior to this date, a bona fide resident of a country or countries other than the United States of America;

from the "objective" theory: the guilder clause is stricken out of bonds which did not belong to a bona fide resident of a country other than the United States on June 5, 1933. At the same time the form tries to take advantage of the contrary theory, the "subjective" one, requiring the holder who presents the bond or coupon to be actually a resident of a country other than the United States. Moreover, the bond must have been actually owned by such a (bona fide) resident not only on, but continuously since June 5, 1933. Here a third theory appears to the effect that as soon as a bond, with its guilder clause still valid, is acquired by an American resident it becomes imbued with an invisible taint destroying the right to obtain guilders under the bond. Even if all these requirements be satisfied, the debtor will not pay unless the present holder is, and has been continuously for a certain period prior to the tender of the bond or coupon, a bona fide resident of a country other than the United States. And coupons will be paid, although they are independent negotiable instruments,⁸⁴ only to the owner of the bond.

that the bond or bonds from which this (these) coupons was (were) detached has or have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933; that my (our) permanent residence is at:

.....

....., 19...
Signature of Owner of Bonds."

A letter from the Bethlehem Steel Company to the New York Stock Exchange, dated August 7, 1934, goes even further. It reads as follows: "The coupon shall be accompanied by: (1) An affidavit signed and sworn to by the owner of the bond or bonds from which such coupons were detached or by a duly authorized representative of such owner on a date not more than twenty days prior to the date on which such coupons shall be so surrendered and showing:

(a) The number or numbers of the bond or bonds from which such coupons were detached;

(b) The name of the owner of such bond or bonds;

(c) That such owner is at the date of the making of such affidavit, and has been continuously for a period of six months prior to said date, a bona fide resident of a country or countries other than the United States of America; and

(d) That the bond or bonds from which such coupons were detached has or have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933; and

(2) In the case of a non-resident alien of the United States of America, United States Treasury Department Ownership Certificate Form No. 1001 (green) duly filled in and signed by such owner, or, in the case of a national of the United States of America resident of a country other than the United States of America, United States Treasury Department Ownership Certificate Form No. 1000 (white) duly filled in and signed by such owner."

The declaration required by the Southern Pacific is very similar to the first mentioned Bethlehem Steel form. Both seem to come from a common source and to be the ordinary type used by the corporations. The American Water Works, however, is satisfied by the following declaration:

"I hereby certify that I am the owner of

to the par value of \$. and numbered
that I am nor a resident or citizen of the United States of America, that I now have a permanent address at and that this certificate is made for the purpose of inducing the as its paying agent to pay to me or to my order the amount of the aforesaid."

84. *Hamilton v. Wheeling, Public Serv. Co.*, 88 W. Va. 573, 107 S. E. 401 (1921); *Nuzman v. Bennett*, 115 Kan. 766, 224 Pac. 900 (1924); *Toon v. Wapinitia Irr. Co.*, 117 Ore. 374, 243 Pac. 554 (1926).

It will not be necessary to explore the theories underlying the last two requirements. Nor should words be wasted to show that in many cases the holder will be simply unable to find out if his predecessors have been bona fide residents of non-American countries. There is no doubt that the terms of the form cannot be justified under the ruling of the appellate division or on any other legal grounds. As appears from the opinion of the appellate division, this declaration form was not submitted to the court, which was satisfied by an affidavit of an employee of the defendant to the effect that payments had been made to bona fide holders in foreign countries. As a matter of fact, the defendant was under no duty to exhibit the declaration form in the proceedings. There may be serious doubts whether the court, if aware of the form, would have decided the way it did.

Since it is rumored that one corporation or another intends to accomplish a clear demarcation by stamping the bonds, it may be said that there is no chance in law to withhold a payment due in foreign currency under the terms of the bond merely because the bond is not stamped. And there is no duty on the holders to turn in their bonds to the debtors for stamping purposes.

B. Effects of Discrimination

Discrimination among the bondholders, though originating in a desire to protect foreign creditors, in fact adversely affects their situation to a great extent. Demanding affidavits or declarations of bondholders does not conform with the law, but it is a natural effect of discrimination. The position of the debtors is strong enough to enforce the giving of declarations. A bondholder abroad, objecting to the declaration, ordinarily will not be inclined to bring a lawsuit against the American corporation in order to have the coupons paid. Most of them would rather sell the bonds, though some may even give unconscionable declarations. It is this situation which explains over-demanding on the part of the issuers.

Even disregarding those demands, discrimination is certain to injure the foreign bondholders. While the multiple currency bonds ordinarily are traded within all of the countries in the currency of which they are payable, and most of them are listed on the respective stock exchanges (New York, Amsterdam, Zurich, *etc.*), the market is naturally coherent. Disturbances of the American business will have their repercussions on the foreign ones. When, for instance, the guilder is among the currencies indicated, the Dutch public is handicapped under the discrimination rule, as well in selling as in buying the bonds. The selling Dutch bondholder will find the market narrowed, since the American capitalist will not be willing to pay the Amsterdam market price, being uncertain that the debtor will pay him guilders; and the risk may deter a prospective Dutch buyer from acquiring a bond which belonged to an American citizen. This is all the worse if one takes into

account the tremendous uncertainty which exists as to the demarcation line between protected and unprotected bondholders.

SUITS IN FOREIGN COURTS

Considering the foreign repercussions of the discrimination doctrine, one should not be surprised to find American multiple currency bonds being dealt with by foreign courts. Already, on March 27, 1935, the Tribunal civil de la Seine, on a complaint of the Société financière commerciale et industrielle, in Paris, has held the Bethlehem Steel (company and corporation) liable to pay the guilder amount according to the terms of the 1912 bonds regardless of any declaration of the holder.⁸⁵ Further litigation against the Bethlehem Steel is said to be pending in Holland. There is no difficulty for foreign courts in assuming jurisdiction over an American corporation. The fact that the bond is payable at a place within State X will, according to various continental laws, be sufficient to give State X, and more specifically, the court of that place, jurisdiction over the debtor with regard to actions on the bond, either under the theory that the choice of the place implies an "election of domicile" for this special situation (special domicile)⁸⁶ or under a statutory rule resting jurisdiction on the location of the place of performance.⁸⁷ In several countries like France⁸⁸ and Holland,⁸⁹ the state, through the court at the plaintiff's domicile, assumes jurisdiction over any foreigner residing abroad. It was on the ground of this rule that the Bethlehem Steel was sued in Paris.

That the foreign courts will reject the application of the Joint Resolution to multiple currency clauses is almost certain. The authority of the decision of the New York Supreme Court, Appellate Division, in the *Bethlehem Steel* case has been undermined by the decision of the Circuit Court of Appeals of the Second Circuit. Foreign courts will probably prefer the view of the circuit court as more convincing. Moreover, those foreign courts which have protected the Joint Resolution against public policy defenses⁹⁰ would hardly be disposed to extend this favorable attitude to the

85. 33 BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL (1935) 103.

86. Thus Swiss Federal Tribunal, Nov. 4, 1926, and Dec. 19, 1927 (1927) 52 III AMT-LICHE SAMMLUNG DER ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS 165 and 53 III *id.* at 196; Tribunal civil of Antwerp, Jan. 5, 1935, 32 BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL (1935) 93.

87. GERMAN CIVIL PROCEDURE CODE (Zivilprozessordnung) § 28; ITALIAN CODICE DI PROCEDURA CIVILE § 91, par. 2.

88. CODE CIVIL art. 14.

89. DUTCH CIVIL PROCEDURE CODE (Wetboek van burgerlijke regtsvordering) § 127.

90. Cf. Hague, Vienna and Copenhagen decisions cited Nussbaum, *supra* note 7, at 76. Since the publication of that article the same view has been taken by the Appellate Court of the Hague, Judgments of Jan. 14, 1935, Weekblad van het Recht No. 12861 (concerning the bonds of the Royal Dutch Shell and the Batavia Petroleum Cie.); by the Rotterdam Court of first resort, Judgment of April 29, 1935 (1935) 33 BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL 109 (American loan of the municipality of Rotterdam); by the Tribunal of Torino, Judgment of July 7, 1934 (1935) II RIVISTA DEL DINIATO COMMERCIALE 97 (American loan of the Societa Adriatica di Elettricità); by the very elaborate advisory opin-

impairment of bearer clauses. Abrogation of gold clauses has become a generally used device in countries whose currency has depreciated,⁹¹ and behind the Joint Resolution is the authority of the federal government and of Congress; but the multiple currency problem and particularly the discrimination rule present a different feature. The disturbance of the foreign markets brought about by the break-up of the bearer clauses will probably be viewed by a foreign court as a violation of its public policy. And of course the New York rule will not be followed where application of the Joint Resolution, as such, is refused. Thus, the Tribunal civil de la Seine, in the case cited, considered the loan of the Bethlehem Steel to constitute an international contract and therefore rejected, in very general terms, the application of the Joint Resolution. The same view was taken by the Tribunal civil of Antwerp with regard to an American loan of the municipality of Antwerp.⁹²

The bearer clause, then, will presumably be reestablished by the foreign courts, and under it a bondholder, a national of the forum, may sue as undisclosed agent of an American principal or in a similar relation. The American thus escapes the rule under which a court will not assume jurisdiction in law suits between non-nationals,⁹³ and at the same time, save the burdensome "*cautio judicatum solvi*", to wit, a security to be placed by foreign plaintiffs, at the demand of the defendant, for his cost.⁹⁴ As to the right of action the result will at least be a simplification of the pleadings, since, by virtue of the bearer clause, the suing holder cannot be compelled to reveal his principal.⁹⁵

ion of the Austrian Supreme Court, Nov. 26, 1935 (1935) *Amtsblatt der oesterreichischen Justizverwaltung*, No. 10, regarding the obligations under the American *tranches* of the League of Nation loan and under the International Federal Loan (1930); and the decision of the Copenhagen Court has been affirmed by a judgment of the Supreme Court of Denmark, dated Dec. 14, 1934 (1935) 9 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 281. *Contra*: Appellate Court of Stockholm, by a divided Court, in a very insignificant opinion of April 16, 1935 (American loan of the Swedish National Debt Office) (1935) 33 *BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL* 142. The whole material has recently been discussed by MARTIN DOMKE, *LA CLAUSE-OR, LA NON-APPLICATION DE LA LEGISLATION AMERICAINE AUX EMPRUNTS INTERNATIONAUX* (2d ed. 1935). The author, in his analysis, moves along the lines of the French doctrine.

91. See Nussbaum, *supra* note 7, at 61; Brazilian Statute of Nov. 27, 1933 (1934) 30 *BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL* 261.

92. Tribunal Civil of Antwerp, Jan. 5, 1935 (1935) 32 *BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL* 93. That the jurisdictions following the French doctrine would decide this was predicted in Nussbaum, *supra* note 7, at 80.

93. See *e. g.*, for French law, NIBOYET, *MANUEL DE DROIT INTERNATIONAL PRIVÉ* (1928) 895 *et seq.*

94. NIBOYET, *supra*; NUSSBAUM, *DEUTSCHES INTERNATIONALES PRIVATRECHT* (1934) 405.

95. There is a natural presumption that the bearer is the owner. A rule to this effect is laid down by the GERMAN CIVIL CODE § 793, par. 1; see 2 STAUDINGER, *KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH* (9th ed.) 1607. The position of the plaintiff holder may be fortified by transferring legal ownership to him. When testifying as to this fact, on denial of the defendant, he would not have to answer a question as to his transferor.

In the case of the *Société financière Commerciale et Industrielle against the Bethlehem Steel Co.*, American holders possibly were behind the plaintiff. After all, it will not be difficult for American bondholders to obtain a favorable judgment from a foreign court against an American multiple currency debtor.

Such a judgment may be denied recognition in the United States for want of reciprocity⁹⁶ or for want of jurisdiction⁹⁷ or for reasons of public policy,⁹⁸ but even then it is likely to become troublesome to the debtor in case he has assets or wants to do business within the boundaries of the foreign jurisdiction. Also, debts held by the bond issuer against residents of that jurisdiction would be seizable under the foreign judgment, *e. g.*, banking accounts set up for the foreign service of the loans.

An analogous problem appears within the intra-American, interstate field, as shown by the divergent attitude of the New York and California courts; but the international situation, with its better chances to the bondholder, deserves special attention.

However, the question arises as to whether the debtor may, in an American court having jurisdiction over the bondholder, obtain an injunction prohibiting the bondholder from proceeding with the foreign suit. "A purpose to evade the effect of the law of the domicile of the parties, by suing in a foreign state, where the substantive law is materially different, is everywhere recognized as a sufficient ground for injunctive relief."⁹⁹ Under this well-settled rule¹⁰⁰ the injunction would lie, particularly since, if the appellate division is right, American public policy would be involved.¹⁰¹ At least a suit in a foreign court seems enjoinable.¹⁰² Still, attempts of the bond debtor to obtain an injunction will probably fail for other reasons. Even supposing that where an agent (or dummy) is suing for the real party in interest an injunction will be granted against the latter (although there seems to be no authority therefor), the plaintiff will not be able to ascertain the facts behind the complaint except in rare cases. The probability of his succeeding is so slight that the injunction menace hardly constitutes any effective deterrent against the institution of a proceeding in a foreign court. Still further remote in law and fact appears the possibility

96. *Hilton v. Guyot*, 159 U. S. 113 (1895).

97. *Grubel v. Nassauer*, 210 N. Y. 149, 103 N. E. 1113 (1913).

98. *RESTATEMENT, CONFLICT OF LAWS* (1934) § 445; 2 *BEALE, TREATISE ON THE CONFLICT OF LAWS* (1935) 1412.

99. *Weaver v. Alabama Great So. R. R.*, 200 Ala. 432, 76 So. 364 (1917).

100. The cases are collected in Note (1930) 69 A. L. R. 591. See also Roscoe Pound, *The Progress of the Law—Equity* (1920) 33 HARV. L. REV. 420, 426; 5 POMEROY, *EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES* (2d ed. 1919) § 2091.

101. *Miller v. Gittings*, 85 Md. 601, 37 Atl. 372 (1897).

102. As to the intra-American situation, the interpretation of a federal statute, by a court of State X, is hardly sufficient to justify such a court in enjoining a citizen from taking advantage of the fact that the courts of State Y profess a divergent opinion. The situation is different where non-recognition of American law by a foreign court is aimed at and likely to be expected.

that a bondholder, having enforced payment through a foreign jurisdiction, would be held liable to redress by an American court.

Of course, an American court will not be concluded by the attitude of foreign jurisdictions or by the possibility of foreign evasion. It is for the court to give full effect to American law and public policy. Nevertheless, in a sensitive field like international finance, where each country depends on the good intentions of the others, particular care should be bestowed not to confuse and irritate foreign markets by overdoing a domestic public policy, justifiable in itself. The broad abrogation, by the Joint Resolution, of the gold clauses has so far not resulted in foreign law suits intended to enforce gold payment upon American debtors, but the refusal of the American debtors to satisfy multiple currency bonds according to their terms has so resulted, although much smaller amounts are involved here. This is significant. Thus the discussion of the effects of holding the Joint Resolution applicable to multiple currency clauses leads back to our analysis of the Act. The apparently confusing and detrimental nature of those effects fortifies the view that the Joint Resolution should not be extended in this manner. It is not contended that the doctrine advanced in this article is without shortcomings. But they will be slight compared with those resulting from the opposite theory. A solution that will be entirely satisfactory in all cases is unattainable. Yet, if relief to debtors should be necessary—which has not been proved so far—it should be granted by the legislature, aware of the special implications inherent in the multiple currency problem. Judicial interference here is out of place. In approaching the problem before us, a law court would depend on the application of broad legal principles which cannot yield the clear demarcation which is indispensable in this situation; still worse, those principles by their corollaries will jeopardize momentous interests which doubtless should be protected by federal legislation. And certainly the debtors are neither entitled nor competent to set up a device for relief by their own unilateral acts.

INDEX CLAUSES

As we have seen under the Joint Resolution, it would be ordinarily inadvisable to have a contract between Americans payable in foreign currency. The question remains as to how far a price or other payment may be contracted for in terms of price indices or commodity values. The problem is one of business expediency as well as of law, and its discussion might be timely, not only because of the doubts raised by the *Bethlehem Steel* case as to the importance of the Joint Resolution, but because of the lasting uncertainty as to the future purchasing power of the dollar.¹⁰³

103. So outstanding an expert as Professor Edwin Kemmerer of Princeton University, at a meeting of the American Academy of Political and Social Science of Nov. 28, 1935, pre-

To meet the disadvantages resulting from the fluctuations of purchasing power, it seems an ideal device to have contracts, at least long term ones, on indices reflecting that power or else to incorporate a similar variable into the contract. Some economists have even advanced the opinion that such a "tabular" standard could contribute considerably to the stabilization of social relations and render commercial crises less intense.¹⁰⁴ To be sure, in statistical science there exist considerable controversies as to the significance, selection, and computation of index figures.¹⁰⁵ Says Professor John Maynard Keynes:

"There is at present a most serious lack of satisfactory index-numbers of Purchasing Power. Hitherto no official authority has compiled an index-number which could fairly be called an Index-Number of Purchasing Power. They generally deal with one or other of the secondary price levels, such as the wholesale, or cost-of-living price-levels. . . . Apart from all this, all the Index-Numbers at present available are much too crude to take account of the subtleties and serious difficulties of the problem of measuring changes between one position and another. . . .

"An Index-Number of the Purchasing Power of Money should include, directly or indirectly, once and once only, all the items which enter into final consumption (as distinct from an intermediate productive process) weighted in proportion to the amount of their money-income which the consuming public devote to them. Since it would be a matter of great complexity to compile a completely comprehensive index on these lines, we should be satisfied in practice with an index which covered a large and representative part of total consumption. But we have not at present even this."¹⁰⁶

For business and law, however, those difficulties do not weigh so heavily. All that reasonably can be expected for practical purposes is to provide for such alterations of the price level as would make the effect of such alterations distinctly felt in an economic way by the parties. Leaving aside the fact that various scientific indices, though differing in method, ordinarily do not differ materially in results, every important country has developed official and generally recognized indices, available for ordinary contract purposes. One example is the U. S. Bureau of Labor Statistics index of wholesale prices. In special situations the parties may also resort to local commodity prices for a standard of deferred payments.

Still, attempts made to introduce such "stabilizing" devices have frequently failed, particularly in the field of investment. In this country an

dicted that the American consumer could reasonably expect a redoubling of prices when the depression ends and the world scramble for gold subsidies. *N. Y. Times*, Nov. 30, 1935, at 17.

104. See LAUGHLIN, *THE PRINCIPLES OF MONEY* (2d ed. 1919) 46 *et seq.*

105. A survey with an eye to legal readers is given by Dawson and Coultrap, *Contracting by Reference to Price Indices* (1935) 33 *MICH. L. REV.* 685, with ample references.

106. 1 *TREATISE ON MONEY* (1930) 53.

interesting experiment was made by Professor Irving Fisher, the well-known champion of a dollar standardized as to purchasing power. Professor Fisher, in 1925, caused the Rand Cardex Company of Buffalo to issue bonds warranting to the holder "such sum of money as shall possess the present purchasing power of one thousand dollars (\$1,000) with interest thereon at the rate of seven per cent. per annum, payable quarterly on January first, April first, July first, and October first, in such sums as shall, at the respective times of payment, equal in purchasing power one and seventy-five one-hundredths per cent. (1.75%) of said purchasing power of one thousand dollars (\$1,000), all to be based upon an index number of the prices of commodities defined and fixed in accordance with the amplified statement below."¹⁰⁷ "The index number employed was that for wholesale prices of the U. S. Bureau of Labor Statistics, and applied as of Jan. 1, April 1, July 1, Oct. 1, the quarterly due dates, each such index number being a three months' average."¹⁰⁸ Some years later the Rand Cardex Company being merged into another enterprise, the index bonds were replaced by ordinary bonds and by preferred stock.¹⁰⁹ Since then the index bond type has disappeared,¹¹⁰ and there seems to be little inclination in business towards its revival.¹¹¹

A particular shortcoming of the index bonds lies in the fact that they are not negotiable instruments since they do not provide for payment of "a sum certain in money."¹¹² A buyer of the bond, therefore, will not benefit by the protection granted by the law to a holder in due course of a negotiable instrument against claims of former holders and against certain defenses of the debtors. Such a bond, therefore, would be unfit for negotiation and considerably impaired even for investment purposes. It is not likely that this difficulty can be overcome by novel clauses providing for negotiability.¹¹³

107. See *The Annalist*, Nov. 13, 1925, at 603.

108. *Id.* at 604.

109. IRVING FISHER, *STABLE MONEY* (1934) 112.

110. FISHER, *id.* at 388, remarks that "A few analogous types have been used by other commercial companies," but he does not give particulars. Nor are other instances mentioned elsewhere.

111. An elaborate index bond type was suggested by Dawson and Coultrap, *supra* note 105, at 696.

112. NEGOTIABLE INSTRUMENTS LAW § 1, No. 2. See Nebolsine, *The Gold Clause in Private Contracts* (1933) 42 *YALE L. J.* 1051, 1093; Dawson and Coultrap, *supra* note 105, at 698. The lack of certainty may also entail disadvantages in the procedural field, such as inapplicability of summary proceedings. See, as to German law, NUSSEBAUM, *VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTS* (1928) 33.

113. *Contra*: Dawson and Coultrap, *supra* note 105, giving full references of decisions and legal writings. The cases cited by the authors for their views hardly support their position. In *Morgan Brothers v. Dayton Coal and Iron Co.*, 134 *Tenn.* 228, 183 *S. W.* 1019 (1915) a debtor's waiver of "equitable defenses in the hand of an innocent holder" was held good. However, whether the holder would be in the same position as to defenses raised by the debtor, as he would be under the Negotiable Instruments Law, is open to doubt, and protection against former holders was not a point in the case. Similar is *Anglo-California Trust Co. v. Hall*, 61 *Utah* 223, 24 *Pac.* 991 (1922), where even a more limited waiver was involved. In *Gray v. Gardner*, 12 *Dist. & Co. Rep.* 449 (Pa. 1929), decided by a lower court, the note sued upon "met all requirements of negotiability," only a certain "shadow of doubt," was

Outside the United States no similar attempt has been made as far as the writer knows. In Germany during the inflation of 1921-23 and a few years following, public utilities and industrial corporations issued bonds stipulated in amounts to be determined by the market prices of certain commodities such as rye or coal.¹¹⁴ The German emergency legislation acknowledged the prices of rye, wheat, potash and of certain types of coal as standards of mortgage debts which, under the German public-recording system, must fit strictly into the forms provided by law, and must state the time for making the necessary computations.¹¹⁵ As a matter of fact "rye mortgages" were given to a considerable extent, mostly by agricultural mortgagors to special banking institutions which procured the mortgage money by the issue of "rye mortgage bonds." Within a few years the whole system proved to be a failure owing to the fluctuations of the rye price and because of the shortcomings resulting from the complicated and varying computations necessary for the determination of the payments due. Creation of "rye mortgages" and "rye bonds" then ceased. The still existent rye mortgages, by a long and difficult process, have more or less been transformed, through agreement of the parties, into ordinary gold-mark mortgages and the bonds are gradually disappearing in the same way or by call and redemption. A particular shortcoming of the "stabilizing" devices as applied to mortgages follows from the fact that if there is a "stabilized" first mortgage it would be difficult to obtain a second mortgage. The reason for this is that the prospective second mortgagee might be deterred by the uncertain dimension, in terms of money, of the first mortgage. For a similar reason the stabilized mortgage possibly would render the sale of the mortgaged property more difficult, since the would-be purchaser could not accurately compute what his net income would be.

The field in which variable money payments probably appear most frequently is agricultural tenancy where rents sometimes will be found articulated in terms of the value of the product to be raised by the tenant. This phenomenon is probably traceable to the ancient tithes.¹¹⁶ It has spread, in the monetary post-war troubles and uncertainties, to urban leaseholds, the agricultural product measure having been replaced for this purpose by reference to the living cost or other indices or to variables connected with the

eliminated, in the court's opinion, by the statement on the note that it should be held negotiable. Yet negotiability, because of its peril to innocent persons should be limited to definite and clear legal characteristics. The American majority view is against creation of negotiability by contract as can be seen in the citations of Professor Dawson and Mr. Coultrap. See also William R. White in A. A. BERLE, *CASES AND MATERIALS IN THE LAW OF CORPORATION FINANCE* (1930) 742 *et seq.* Conforming to the American majority view is Reichsgericht, 71 *Entscheidungen in Zivilsachen* 32 (1909); 101 *id.* at 297 (1921). The latter case gives an elaborate argument, noteworthy from the viewpoint of American law.

114. MAUS, *ANLEIHEFORMEN UNTER DEM EINFLUSS DER GELDENTWERTUNG* (1925).

115. Decrees of June 29, 1923, and Oct. 5, 1923 (1923) I *REICHSGESETZBLATT* 482, 933.

116. Hubert (1930) *RECUEIL SIREY I ANN.*

construction business.¹¹⁷ It is remarkable that the same trend also appears in Australia.¹¹⁸ During the German inflation, and subsequently, property and liability insurance sometimes has been made on the basis of index figures, but this device turned out to be too cumbersome and costly. Furthermore, the insurance companies did not succeed in covering their risk by corresponding investments.¹¹⁹

As a whole, business practice has not adequately responded to the recommendations of the index enthusiasts.¹²⁰ We are contemplating, of course, merely the contract field. The use of indices for the purposes of government or business policy is another matter.¹²¹

In so far as the parties to a contract decide to make their rights and obligations depend on an index, application of the index figures ought not to be mechanical, because such a use of the index would turn out to be more or less unworkable. First of all, minor fluctuations have to be eliminated from legal consideration. Therefore in various countries, independent of each other, supplementary clauses appear to the effect that alterations of the index figures become operative only when exceeding a certain percentage, ordinarily 10 per cent.¹²² Such a clause, to use coinage terminology, also occurs in connection with gold clauses. In the German gold-mark mortgages the following tolerance clause is customary: "The debtor has to pay one reichsmark for each gold mark, unless the price of a kilo of fine gold either exceeds 2820 reichsmarks¹²³ or declines below 2760 reichsmarks." The

117. Market price of brick, French Cour de Cassation, Dec. 22, 1930 (1931) I GAZETTE DU PALAIS 57.

118. In Watts, "Inflation" *Clauses in Mortgages and Leases* (1931) 4 AUSTRALIAN L. J. 315, 318, cited in Dawson and Coultrap, *supra* note 105, at 694, the following clause is reported to have been inserted in a deed of lease: "And this deed further witnesseth and it is hereby agreed and declared that . . . the rent thereby reserved shall be varied so that if the index number (weighted average for food, groceries and rent for all houses for the six capital cities) set out in the Quarterly Summary of Australian Statistics for any quarter of the year during the period of such variation of rent varies twenty per cent. or more above or below the index number for the quarter of the year in which the commencing date of the said lease occurs, then the rent payable during any such quarter shall be the sum as would be otherwise payable under the said lease as rent multiplied by a fraction of which the numerator shall be the index-number for the quarter immediately preceding the quarter in which the rent is payable and the denominator shall be the index-number for the quarter in which the commencing date of the said lease occurs."

119. See MANES, *VERSICHERUNGSLERIXON* (1924) 1446.

120. They exist also outside this country. See *e. g.*, Nogaro (1925) REVUE TRIMESTRIELLE DE DROIT CIVIL 28, who makes reservations only as to short time contracts.

121. An important example is wage policy based on index figures. It has been made a duty of the federal government in determining the wage scale of government employees. ECONOMY ACT OF 1933, 48 STAT. 8 at 13 (1933). When the price level rises labor hails index wages; in the contrary case difficulties will arise. See FISHER, *STABLE MONEY* (1934) 388; Dawson and Coultrap, *supra* note 105, at 694.

122. This limit was used by the Rand Cardex Corporation and in the Société Biarritz-Carlton Hotel case, decided by the Appellate Court of Paris, March 1, 1931 (1931) II GAZETTE DU PALAIS 886 (long term lease contract). In the Australian case quoted *supra* note 118, the limit was as to 20 per cent.

123. "Reichsmark" is the official term for the new German monetary unit, created in 1924 after the cataclysm of the old "mark". As a matter of fact, the new unit frequently is spoken of as "mark", particularly in this country.

same "tolerance" which amounts to approximately only three per cent has been prescribed for certain gold mortgage bonds by legislative act,¹²⁴ and it is favored by the courts. Thus, it has been held that after the registration of a gold mortgage becomes effective, a tolerance clause subsequently may be inserted without the assent of the junior mortgagees, although such assent is generally required concerning changes which possibly affect their interests. The tolerance clause may affect their interests because a shrinking of the first mortgage, due to the decline of the gold price, will be prevented by the clause within the limits of the tolerance. Under the adjustment scale of the Rand Cardex bonds the "tolerance" principle was well developed, allowing for only ten per cent deflections, thus neglecting minor deflections not only as to the first ten per cent, but also as to higher percentages above or below the original level,¹²⁵ *e. g.*, nineteen per cent would be treated the same as ten per cent.

There are still other recommendable and customary adjustments of index and similar clauses. Obviously the day of maturity cannot be made decisive for the computation of the sum to be paid. A date has to be agreed upon prior to the maturity date in order to have index figures (or commodity prices) available at maturity and to have sufficient time to make the necessary computations. Moreover, where the amount due is measured by commodity prices, then the price as of a single day ought not to be the measure but rather the average price of a definite period in order to eliminate casual fluctuations. In a case decided by the German Reichsgericht,¹²⁶ a German agricultural mortgage bank had issued rye mortgage bonds of the type mentioned above¹²⁷ with payments adjusted to the market price of rye; the interest due July 1 depended on the average price of March 15 to April 14 and the interest due January 1 on the average price of October 15 to November 14. Inevitably

124. Decree of July 28, 1926 (1926) REICHSGESETZBLATT I, 423.

125. This scale was stipulated as follows (Annalist of Nov. 13, 1925, at 604):

"(b) The quarterly payment of any due date shall be:

\$19.25, if index is as large as	\$173.25, but not as large as	\$189.00
21.00, " " " " " "	189.00, " " " " "	204.75
22.75, " " " " " "	204.75, " " " " "	220.50
24.50, " " " " " "	220.50, " " " " "	236.25
26.25, " " " " " "	236.25, " " " " "	252.00
28.00, " " " " " "	252.00, " " " " "	267.75

and so forth for still higher price levels.

"(c) The quarterly payment at any due date shall be:

\$15.75, if index is as small as	\$141.75, but not as small as	\$126.00
14.00, " " " " " "	126.00, " " " " "	110.25
12.25, " " " " " "	110.25, " " " " "	94.50
10.50, " " " " " "	94.50, " " " " "	78.75
8.75, " " " " " "	78.75, " " " " "	63.00
7.00, " " " " " "	63.00, " " " " "	47.25

and so forth for still lower price levels."

126. Judgment of Nov. 13, 1924, 109 Entscheidungen des Reichsgerichts in Zivilsachen

174.

127. More strictly speaking "rye-annuities-bonds" (Roggenrentenbriefe) were involved, giving the holder no claim as to the principal.

protection to creditors will be diminished by a proceeding of this kind. In 1923 the breakdown of the German mark was so precipitous that the creditors received, on the coupons due July 1, 1923, for the gold quantity indicated in the coupons, a payment of one-eighth of the gold value of rye as existing at that date, and on the coupons due January 1, 1924, one-thirteenth of the corresponding value. In the case of index bonds the result would have been virtually the same. However, on regular mark bonds the bondholder would have received nothing.¹²⁸ Of course the German events of 1923 are unique in world history, far exceeding even the *assignats* experience of the French Revolution. In cases of less violent inflations the regressing process will not have a similarly reductive effect.

After all, from a merely technical viewpoint, index clauses and similar provisions, when warily drawn, would not seem unworkable at least in special situations, even one of an investment character. Yet the question arises as to the extent to which index (and similar) clauses are menaced with invalidity by the Joint Resolution or by other¹²⁹ legal doctrines. Here again, French law furnishes valuable suggestions, since in France these clauses have been employed on a large scale in the post war period, giving rise to numerous discussions in courts and in legal writings.¹³⁰

First of all, there has evolved a perfectly well settled rule that agricultural leases may be made by stipulating rents in terms of grain or of grain value.¹³¹ Furthermore, it has been recognized by several recent appellate decisions that in urban lease contracts the rent may be based upon a (living cost) index.¹³² The rule is sound and can be generalized to this effect: that wherever on a long term contract, periodical or other recurring payments have to be made in return for continuous or recurring performances by the

128. See the judgment cited *supra* note 126. The dollar was quoted, in terms of marks, in 1923: March 15: 20875; April 14: 21110; July 1: 74750; Oct. 15: 3,760,000,000; Nov. 14: 12,600,000,000; 1934, Jan. 1: 4,000,000,000,000. See VALUTA—TABELLEN 1924/1927 Frankfurt a. M., 1927.

129. The Appellate Court of Douai, judgment of Nov. 27, 1928, (1930) REVUE DU DROIT BANCAIRE 176, held invalid a lease clause based on the Paris living cost index pointing out that this index, being but approximately fixed, is too uncertain. Apparently no general importance can be attributed to the decision. Still it is a warning against resorting to an ill-defined standard in a desire to adapt the contract closely to local conditions.

130. See Demogue, *De quelques clauses tendant à se prémunir contre les variations de la valeur du franc* (1923) JOURNAL DES NOTAIRES 101; and the article of Nogaro, cited *supra* note 120. Further references are given by Hubert, 1 RECUEIL SIREY (1930) 4 (ann.) and at 41 (ann.).

131. Cour de Cassation, Feb. 18, 1929, and March 8, 1929, (1930) 1 RECUEIL SIREY 2. The court, to be sure, alleges the French statutes of July 13, 1905, as amended Jan. 1, 1926, and June 9, 1927 [(1905) II GAZETTE DU PALAIS 690 (1926) I *id.* 781, (1927) I *id.* 1070] concerning the jurisdiction of the "juges de paix" where reference is made to agricultural lease contracts providing for a rent wholly or partly payable in grain. However, the court particularly emphasises the fact that the grain price is subject "to all economic fluctuations, the rate of exchange being but an element of them."

132. Appellate Court Paris, cited *supra* note 122, Dec. 21, 1932 (1932) I GAZETTE DU PALAIS 447; Appellate Court of Colmar, Feb. 2, 1926, REVUE JURIDIQUE D'ALSACE ET DE LORRAINE (1932) 524. Prior decisions of lower courts had been contradictory, see Hubert, *loc. cit.* *supra* note 130.

other party, adjustment to changing values of the payments due is perfectly legal. Such agreements indeed would not constitute a danger to the national monetary system even though the practice be general. Index and similar clauses then would also seem unobjectionable in patent license contracts. It is not so certain, however, that an index (or similar) clause can be legally entered into for the exclusive benefit of one party, usually the lessor. A French appellate court held the agreement good¹³³; however, its effect is not so very far from that of a gold clause. This was felt by the parties in another French case where the Société Biarritz-Carleton-Hotel, renting certain rooms for 25,000 fr. annually, consented to have the rent adjusted to the alterations of the living cost index providing, however, for a minimum rent of 22,000 fr. The minimum was agreed upon with regard to mortgage interest and other fixed liabilities of the lessor. The agreement was held valid.¹³⁴ No matter what the fact situation was in this case it seems justifiable to limit under an index rule possible reductions of the rent due with an eye to the creditors' fixed liabilities related to the contract matter. Still, it is very dubious whether an obligation of an investment character (bond, mortgage, *etc.*) can validly be stipulated by reference to an index.¹³⁵ Suppose provisions of this type (perhaps requiring minimum payments) would become common. The effect upon the national economy and the monetary system might be similar to the gold clause situation as exploded in 1934, and if the index clause is generally recognized there would be no reason for not customarily inserting it in long term contracts. This objection probably will appear weighty enough to impede the making of such index agreements unless the courts should definitely decide the other way. However, it is not very likely that the courts will do so; the decisions rendered so far reveal rather a tendency to an extensive interpretation of the Joint Resolution.¹³⁶

133. Appellate Court of Colmar, *supra*. *Contra*: Tribunal civil de la Seine, Nov. 21, 1928, (1929) *REVUE DU DROIT BANCAIRE* 211, demanding "reciprocity" of the index reference.

134. Decision cited *supra* note 122.

135. The question was answered in the affirmative by the Tribunal civil of Strasbourg, court of first resort, judgment of June 14, 1933, (1933) *REVUE JURIDIQUE D'ALSACE ET DE LORRAINE* 535.

136. See the Bethlehem Steel case, 244 App. Div. 634, 280 N. Y. Supp. 494 (1st Dep't 1935); and the Industrial Mortgage Bank of Finland case, 269 N. Y. 22, 198 N. E. 617 (1935), cited note 37, *supra*.