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DAMAGES AS AFFECTED BY FLUCTUATIONS IN VALUE*

CHARLES T. MCCORMICK**

*Fluctuations in Market Value*¹

We should not get an exaggerated notion of the accuracy with which a recovery of market value places one who has been deprived of property in the situation he would be in if he had not been wronged. If a railroad engine has set sparks to a farmer's hay-rick and destroyed the hay, the value of the hay when destroyed may afterwards seem too much or too little to measure the financial benefit he would have had from the hay itself—an attempt which is little better than guess-work at best. Too much, for it may appear with certainty that even if it had not been burned, the farmer would have left the hay in the field where it would have been destroyed anyway by a flood which came a few days after the fire. Or again, it may certainly appear that the farmer would have stored the hay in his barn until the next spring and that then hay was worth only one-half the market value at the time of the fire. Too little, for it may be clear that the farmer would have held the hay if it had not burned, and would have sold it during a year of scarcity when hay became worth twice the former value. It is reasonably well established that as against the wrongdoer, the law is willing to disregard the possibility that an award of market value at the time of the wrong may be too much. Such an award is the normal measure of damages, both in contract and tort cases, and will be allowed despite the fact that the property would have later been damaged or destroyed from other causes,² or the fact that it would have depreciated in market value

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** Professor of Law, Northwestern University.

¹ For discussions of the doctrine of highest intermediate value, see 2 SEDGWICK, DAMAGES (9th ed. 1912) ch. XXII; McCormick, *Highest Intermediate Value and Damages for Lost Chances* (1924) 3 TEX. L. REV. 44. The cases are collected in Decennial Digests, titles "Trover and Conversion," §49, and "Brokers," §38 (7), and in the following notes: 18 ANN. C. 609; L. R. A. 1917 C. 747; 31 A. L. R. 1179; 40 A. L. R. 1282; 63 A. L. R. 305.

² This view finds acceptance in 1 SEDGWICK, DAMAGES (9th ed. 1912) §243. The only case cited, however, is *contra*: St. Louis R. Co. v. Yarbrough, 56 Ark. 612, 619, 20 S. W. 515.

in the owner's hands.³ Rough justice, but a convenient and reasonable standard, which the courts are not inclined to refine and complicate at the wrongdoer's instance.

The difficulties with the rough and simple standard of values as of the time of the wrong, arise in the other situation when the person wronged complains that this recovery is inadequate because of a later rise in market value of the kind of property of which he has been wrongfully deprived. One group of courts still stands steadfast and says that in actions for conversion and for breach of contract of sale, the rule not only is that one may recover the value of the property at the time it was converted, or at the time it should have been delivered under contract, but that the fact that the property is of fluctuating character, and has later risen in value gives no right to recover any later, higher value.⁴ In this group we may place the English courts⁵ and the courts of the following states:

³ *McIntyre v. Whitney*, 139 App. Div. 557, 124 N. Y. S. 234, affirmed without opinion, 20, N. Y. 526, 94 N. E. 1096 (1911).

⁴ These courts would, it is true, in claims in the nature of detinue or for restitution in chancery sometimes allow recovery of the value as of the time of trial. See *Elliott v. Hughes* (England) *post*, n. 5, or if the wrongdoer has sold the converted property for a high price he may be held accountable for the price he has received, (See *Ingram v. Rankin* (Wisconsin) *post*, n. 22), but not the highest intermediate value.

⁵ *Elliott v. Hughes* (1863) 176 Eng. Rep. 173 (Breach of contract for sale and delivery of hops—head-note states damages awarded "were highest price attained up to date of trial"; Value of goods had continuously risen to date of trial; judgment shows market price on day of trial was measure of damages and circumstance that such price was highest was not material—goods paid for at time of purchase: See the discussion of the English decisions in *Ames v. Sutherland*, 9 Ont. L. Rep. 631 (1905), affirmed in 11 Ont. L. Rep. 417 (1906); *Little v. London Joint Stock Bank* (1891) 1 Ch. 284 (Breach of contract for delivery of stock—market price at time of failure to deliver); *Simmons v. London Joint Stock Bank* (1891) 1 Ch. 284 (Conversion of stock—sums received from sale of stock and not highest market price since date of conversion); *Samuel & Escombe v. Rowe* (1892) 8 T. L. R. 488 (Breach of contract to purchase and sell stock—no general rule stated, but damages allowed were difference between contract price and price of securities at such time after breach as court considered reasonable for making new contract); *Mansell v. British Linen Co. Bank* (1892) 3 Ch. 163 (Injunction obtained vs. defendant shareholder and mortgagees restraining sale of shares claimed by plaintiff—difference between price when injunction was granted and price when summons asking for sale was issued,—or value at time of conversion apparently); *Ellis v. Pond* (1898) 1 Q. B. 426 (Breach of contract by broker to carry stock to certain settling day—action one for indemnity by broker, defendant counterclaims for damages—value of stock at settling day or day of breach was deducted from amount advanced by plaintiff for purchasing the stocks, instead of value of stock on day sold by plaintiff broker or the amount received by plaintiff from sale, which would seem to fix measure of damages at market value on day of breach); *Michael v. Hart & Co.* (1902) 1 K. B. 482 (Breach of contract for non-delivery of shares—difference between contract price and market price at date of breach).

Colorado
Idaho
Massachusetts

Mississippi
Missouri
Nevada

New Hampshire
Ohio
Wisconsin

Other courts, constituting the great majority in this country, have been more sympathetic in several situations; the traditional measure of recovery on a basis of value at the time of the wrong has impressed them as harshly insufficient. A stock, grain or cotton broker agrees to "carry" for the customer a certain amount of the stock or commodity. The chief purpose of the transaction is to secure for the customer the benefit of any rise in value. The broker wrongfully sells or converts the property at a time when it is unprofitable for the customer to sell. After this wrong such property rises sharply in value, and if the broker had maintained the account the customer would have had an *opportunity* to sell at substantial profit. To limit the customer in an action against the broker to the value at the time of the wrong is to deny damages altogether for the frustration of the speculation. Moreover, it enables brokers to disregard instructions of customers almost with impunity, so long as they sell at the market and hold the proceeds for the customer or apply them against his indebtedness to the broker. Similar considerations arise in cases of conversion of the customer's property by a warehouseman. Even stronger is the appeal of the owner where some stranger has wantonly converted or destroyed his property at a time when it was worth little, only to have such property go up rapidly in value after he has lost it. This is less common, for the kinds of physical property which actually run much risk to-day of conversion or destruction by strangers (such as household goods or used automobiles) are not usually of standardized price or highly fluctuating value. Closely approaching the conversion cases, are those of breach of contract by a seller to deliver the property sold, of fluctuating value.⁶ When the time comes for delivery under the contract, the value is low, but the seller anticipates a rise shortly and refuses to deliver. The buyer, perhaps, has paid the seller the price and has no funds with which to purchase similar property elsewhere.⁷ The anticipated rise comes promptly and the seller reaps the opportunity to profit which the buyer should have had. If the property

⁶ The type-cases are contracts to sell specified *quantities* of stocks, cotton, grain, etc. In cases of ascertained, identified property, title ordinarily passes of course when the contract is agreed on, and the seller's refusal to deliver is a conversion, so that the buyer need not sue on the contract but can resort to a tort action.

⁷ See *post*, n. 16.

at the time for delivery was worth no more than the contract-price, the buyer can recover only his money paid with interest, with no damages for loss of the speculation, under the traditional rule which limits such damages to the difference between contract price and market value on the day of delivery.

The difficulty is to depart far enough from the traditional standard of market value on the day of the wrong, so as to compensate for these deliberate frustrations of anticipated opportunities to profit, without losing our moorings altogether. Short of leaving it to a jury's guess, how can you compensate for a man's loss of *opportunities*, differing with market fluctuations from day to day, to sell 1000 bushels of wheat, after it has been wrongfully withheld by a seller, or converted? An early answer, given first by the New York courts, was extreme both in its simplicity and its possibilities of harshness upon the wrongdoer. It accomplished perfectly the desired purpose of compensating the claimant for the loss of his opportunity to profit by the rise in the market. It was this: to allow as damages the *highest* value which such property reached on the market during the period from the time of the wrong down to the date of the trial of the action. This is the rule of "*highest intermediate value*." It obtains, in varying degrees, in these jurisdictions:⁸

Alabama	Iowa	Pennsylvania
California (statute)	Kentucky	South Carolina
Georgia (statute)	Montana (statute)	S. Dakota (stat.)
Idaho	N. Dakota (stat.)	Texas
Indiana	Oklahoma (stat.)	Washington

Under this rule, as originally announced, the plaintiff has the cards stacked in his favor. The longer the trial is delayed, the longer the period in which the plaintiff may speculate for a rise in market. He runs no corresponding risk, for no matter how low swings the pendulum of prices, the plaintiff gets the peak-price. As an estimate of probabilities this would be absurd: it is in the highest degree improbable that the plaintiff with uncanny prescience would have waited until the market had reached its summit and would have sold at that moment. The vistas of injustice which the rule opened up forced the courts which adopted it to qualify. Some of them hedged by requiring that the plaintiff's action must be prosecuted with reasonable diligence.⁹ A few have modified the rule so as to give the high-

⁸ The cases are collected in note 22, *post*.

⁹ California, Iowa, Montana, North Dakota, Oklahoma, and South Dakota

est value only down to the commencement of the action, not the time of trial.¹⁰ Others have said that the rule applies only where defendant's wrong was wanton and deliberate or constituted a fraud or breach of trust.¹¹ Three states allow the jury to mitigate the severity of the rule by placing the amount of damages in the jury's discretion within its limits.¹² Several stipulate that in actions for breach of sale-contracts the plaintiff can get the benefit of the rule only if he had paid the price before the breach.¹³

New York, as the great commercial center, has furnished the experimental laboratory where the original plan to improve upon the traditional standard, by compensating the person wronged for lost opportunities to profit on a rising market, was devised. The leading New York case was decided in 1863.¹⁴ The New York courts continued to subject their new rule of highest value to the test of trial and error, and ten years later, in 1873, the decision in *Baker v. Drake*¹⁵ announced an improvement upon the improved rule itself. Not content with the rather halting and ill-devised qualifications with which other courts have sought to stem the sweeping possibilities of the highest value rule, the New York court drastically modified the time-period within which the highest price-peak was to be taken.

The doctrine which was used to furnish the mechanism for this modification, is the doctrine that damages cannot be recovered for injury which the plaintiff might by reasonable activity on his own part have avoided. It was suggested that when the plaintiff learns that his stock or grain is being withheld or has been converted by the defendant, he should replace himself on the market by purchasing a like quantity of the commodity with reasonable promptness. If he really does this, probably it would be in accordance with traditional practice to allow him to recover the cost of so replacing himself.¹⁶

¹⁰ Kentucky and Iowa.

¹¹ Pennsylvania and, probably, Texas.

¹² Alabama, South Carolina, and Wyoming. Compare also *Hogg v. Benito Farmers' Elevator Co.*, 2 Com. L. R. 778 (Man. C. A. 1923) a grain conversion case where the court appears to approve a pronouncement in *Greening v. Wilkinson*, 1 C. & P. 625 (1825) permitting the jury in its discretion to award as damages in trover the value at the time of conversion or at any subsequent time.

¹³ California, Indiana (except as to shares of stock), Montana, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas.

¹⁴ *Romaine v. Van Allen*, 26 N. Y. 309. See 2 SEDGWICK, DAMAGES (9th ed. 1912) §509.

¹⁵ 53 N. Y. 211, 13 Am. Rep. 507.

¹⁶ *Hamilton v. Schumacher*, 15 S. W. 715 (Tex. Ct. App., 1891); *New England Box Co. v. Tibbetts*, 94 Vt. 285, 110 Atl. 434 (1920); *Covington v. Ferguson*, 204 Ala. 192, 85 So. 726 (1920); *Kansas Flour Mills Co. v. Brandt*,

Actually, he seldom does, as he usually is financially hard hit, or feels reluctant to embark more money in a speculation where he is already involved in disappointment and controversy. But the New York court ingeniously seized upon this idea of replacement as the basis for the long-needed time-limit upon the one-sided speculation which was granted to the plaintiff by the older highest-value doctrine. Thus emerges the new standard: the plaintiff may recover the highest value which the commodity reaches from the time when the plaintiff first learns of the conversion or repudiation, until the end of the period within which the plaintiff might, acting with reasonable promptness, have replaced himself on the market. This may conveniently be labeled the rule of *highest replacement value*. Notice that the new rule assumes that the plaintiff would have replaced himself at the peak-price of this limited period. More in accordance with probabilities would be the taking of the *average* price for the period.¹⁷ Of course, the highest price for the limited period is really adopted as a compromise attempt to value the chance that the plaintiff might at some time have profited by a rise in value. Observe that, under the new rule, a period that might reach for several years, depending on such irrelevant circumstances as the state of congestion of the trial court's docket, or on whether continuances or new trials have been granted, has been cut down to a few weeks or at most a couple of months.¹⁸ The old period is clipped at both ends. The time for ascertainment of highest value no longer begins at the time of the defendant's wrong, but at the time the plaintiff learns of it, for it is certain that he did not want to take advantage of any rise that occurred before, as he made no attempt to do so.¹⁹ The "reasonable time for replacement" is kept from being extended too far by the jury, by the view, at least, in New York, that where the physical facts about the situation are undisputed, as they usually are, it is for the judge to say how long is a "reasonable" time.²⁰ This third

98 Kan. 587, 158 Pac. 1120, L. R. A. 1917A 1000 (1916); 35 Cyc. 640 n. 92. See also Decennial and Current Digests, title, "Sales," §418 (7).

¹⁷ This common-sense suggestion was made in a Louisiana case, see note 22 *post*.

¹⁸ "It has been held under varying circumstances that 30 days or 15 days or 60 days would be such reasonable period." *Mayer v. Monzo*, 221 N. Y. 442, 117 N. E. 948 (1917), *Bauer's Cases on Damages*, 593.

¹⁹ *In re Salmon Weed & Co. Inc.* 53 F. (2d.) 335, syl. 10 (C. C. A. N. Y. 1931).

²⁰ *Burhorn v. Lockwood*, 71 App. Div. 301, 75 N. Y. S. 828, affirmed in 177 N. Y. 539, 69 N. E. 1121 (1903); and cases cited L. R. A. 1917C, 757, n. 26; see also *Gervis v. Kay*, 294 Pa. 518, 144 Atl. 529, 63 L. R. A. 297, 304 (1928); *Miller & Co. v. Lyons* 113 Va. 275, 74 S. E. 194 (1912).

rule, of highest replacement value, seems the most equitable and practical of the three. It appears to be growing in favor, and would doubtless have been still more widely adopted but for the fact that the old rule of highest intermediate value was crystallized by early code provisions in California which have been widely copied. It has been approved in the Supreme Court of the United States,²¹ and seems to find sanction to a greater or less degree in the following states:

Arizona	Michigan	Tennessee
Arkansas	New York	Utah
Illinois	New Jersey	Virginia
Indiana	Pennsylvania (stock	
Iowa (contract cases,	cases, no deliber-	
sale price not paid)	ate wrong)	

A collection of representative cases, arranged by states, illustrating the holdings under the three rules, is appended in the note.²²

²¹ *Galigher v. Jones*, 129 U. S. 193, 200, 9 S. Ct. 335, 32 L. ed. 658, 661 (1888) (conversion of stock by broker). Is this a matter of "general" law as to which local state decisions will not be followed in Federal courts? The local decisions were held to govern as to highest intermediate value, in an action for cutting timber, on the ground that this was incidental to a dispute over land-title—a local matter—in *Mullins Lumber Co. v. Williamson*, etc. *Lumber Co.* 167 C. C. A. 21, 255 Fed. 645 (S. C., 1918). In cases arising from contracts relating to stocks or grain, it would seem more likely to be held to be matter of "general" or commercial law. Compare *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F. (2d) 488 (C. C. A. Okla. 1930) and see *Decennial and Current Digests*, title "Courts" §§265 and 272.

²² The following note is based upon a report made by Miss Naomi Alexander, Research Assistant in the University of North Carolina, to whom I acknowledge deep indebtedness for her careful collection and discriminating analysis of the cases:

Alabama: *Jones v. White*, 189 Ala. 622, 66 So. 605 (1914) (value at time of conversion, but if evidence shows fluctuation, jury may award highest value, in their discretion); *St. Louis & S. F. Ry. Co. v. Ga. F. & A. Ry. Co.*, 213 Ala. 108, 104 So. 33 (1925) (conversion of coal, highest intermediate value rule); *Dominey v. Johnson Brown Co.*, 123 So. 52 (Ala. 1929) (breach of contract to deliver 2 carloads of peanuts—difference between price and value at time of conversion, purchase price not paid in advance).

Arizona: *McFadden v. Shanley*, 16 Ariz. 91, 141 Pac. 732 (1914) (breach of contract of sale of beef cattle—damages difference between contract price and market value within reasonable time after breach).

Arkansas: *Newberger Cotton Co. v. Stevens*, 167 Ark. 257, 267 S. W. 777, (1925) (conversion of cotton—highest replacement value rule).

California: CAL. CIVIL CODE (Deering, 1927) §3336: For conversion of personal property detriment is presumed to be (1) value of property at time of conversion, with interest from that time, or, where action is prosecuted with reasonable diligence, highest market value of property at any time between conversion and verdict without interest, at option of injured party, (2) fair compensation for time and money properly expended in pursuit of property. Highest intermediate value rule followed: *Woltz v. E. F. Hutton & Co.*, 55 Cal. App. 741, 204 Pac. 248 (1921) (conversion of oil stock); *Kimball v. Swenson*, 51 Cal. App. 361, 196 Pac. 781 (1921) (conversion of corn); *Bell v. Central*

Bank of Imperial Valley, 89 Cal. App. 551, 265 Pac. 551 (1928) (conversion of cotton crop—highest market value within reasonable time, no reference made to statute); §3308, Detriment caused by breach of seller's agreement to deliver personal property, price of which not fully paid in advance, is deemed excess if any of value of property to buyer over amount which would have been due seller under contract if it had been fulfilled. *Las Palmas Winery & Distillery v. Garrett & Co.*, 167 Cal. 397, 139 Pac. 1077 (1914) (breach of contract for sale of 50,000 gal. of Alicante Port wine); §3309, Detriment caused by breach of seller's agreement to deliver personal property, price of which has been fully paid to him in advance is deemed to be same as in case of wrongful conversion. (No cases found).

Colorado: *Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256 (1915) (conversion of stock by administrator—value at time of conversion); *Continental Divide Mining Inv. Co. v. Bliley*, 23 Colo. 160, 46 Pac. 633 (1896) (conversion of stock by partner—value at time of conversion).

Connecticut: *Ling v. Malcolm*, 77 Conn. 517, 59 Atl. 698 (1905) (breach of contract for purchase and sale of stocks on margin); *Wiggin v. Fed. Stock & Grain Co.* 77 Conn. 507, 59 Atl. 607 (1905) (breach of contract for delivery of stock). Highest value in reasonable time allowed in both cases.

District of Columbia: *Gurley v. MacLennan*, 17 App. D. C. 170 (1900) (breach of contract by broker to purchase stock—value at time of breach); *Taylor v. Turner*, 2 Cranch C. C. 203, Fed. Cases No. 13770 (1820) (action of debt on bond conditioned to transfer stock—value at time of breach).

Federal: Highest value in reasonable time after breach is rule followed by: *Clements v. Mueller*, 41 Fed. (2d) 41, (Dist. Ct., Ariz., 1930) (breach of contract to resell corporate stock); *In re Swift*, 114 Fed. 947 (Dist. Ct., Mass., 1902) (breach of contract by broker to deliver stocks); *Isenberg v. Trent Trust Co.*, 31 Fed. (2d) 553, (C. C. A. 9th, Hawaii, 1929) (trustee negligently failed to reduce trust property consisting of stock to possession; trustee claimed liable only for value within reasonable time for replacement, after cestui's knowledge of wrong; court overruled this contention and held him liable for amount necessary to restore property to trust).

Florida: *Moody v. Caulk*, 14 Fla. 50 (1892) (trover for conversion of logs—value at time of conversion for ordinary merchantable property; dictum: highest value after conversion if jury is satisfied property would have been held until advance in value if property is stocks or of fluctuating value).

Georgia: GA. CODE ANN. (Michie, 1926) §4514: In estimating value of personalty unlawfully detained, plaintiff may recover highest amount which he can prove between time of conversion and trial. Rule followed in *Lucas v. Cornett*, 36 Ga. App. 50, 135 S. E. 510 (1926) (conversion of undescribed property); *Bank of La Grange v. Guinn*, 26 Ga. App. 411, 106 S. E. 308 (1921) (conversion of cotton by pledgee); *Farrar Lumber Co. v. Pickering*, 22 Ga. App. 404, 95 S. E. 1001 (1918) (conversion of undescribed property).

Idaho: *Averill Machinery Co. v. Vollmer-Clearwater Co.*, 30 Idaho 587, 166 Pac. 233 (1917) (conversion of crop of grain—value at time of conversion); *McCrea v. McGrew*, 9 Idaho 382, 75 Pac. 67 (1903) (conversion of wheat—highest value rule from time of conversion to time of trial held incorrect, but no rule laid down).

Illinois: *Sturges v. Keith*, 57 Ill. 451 (1870) (conversion of stock—value at time of conversion, no exception for stocks); *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842 (1886) (contract to recover money advanced for purchase of stock wrongfully sold by defendant broker—decision ambiguous, headnote recites highest replacement value, but decision does not state whether market value plaintiff is allowed to recover is highest within reasonable time or at time of conversion); *Hughes v. Barrell*, 167 Ill. App. 100 (1912) and *Schaefer v. Dickinson*, 141 Ill. App. 234 (1908) (conversion of stock—highest replacement value rule followed on ground it was approved or adopted in *Brewster v. Van Liew*, post); *Burns v. Shoemaker*, 172 Ill. App. 290 (1912) (conversion of stock by broker—value at time of conversion); *Farson v. Buder*, 187 Ill. App.

318 (1914) (breach of contract to deliver stock—value at time of breach—no exception made in case of stocks); *Bushnell v. Curtis*, 236 Ill. App. 89 (1925) (breach of broker's contract to buy corporate stocks for customer—highest replacement value).

Indiana: *B. L. Blair Co. v. Rose*, 26 Ind. App. 487, 60 N. E. 10 (1901) (conversion of stock—highest replacement value); *Citizens St. R. Co. v. Robbins*, 144 Ind. 671, 42 N. E. 916 (1896) (conversion of stock—highest replacement value); *Kent v. Ginter*, 23 Ind. 1 (1864) (breach of contract for sale and delivery of new corn—highest intermediate value, price paid in advance and action brought with reasonable diligence).

Iowa: *Bryan Co. v. Scurlock*, 190 Iowa 534, 180 N. W. 684 (1920) (stock conversion—allowed highest value during some period of time selected by plaintiff, although case recites rule in *Doyle v. Burns* governs, which is highest replacement value rule; rule followed in case really amounts to highest intermediate value rule); *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195 (1904) (conversion of stock—highest replacement value if stock is not paid for; highest intermediate value between conversion and time of bringing action, if not unreasonably delayed, if purchase price paid); *Gilman v. Andrews*, 66 Iowa 116, 23 N. W. 291 (1885) (contract to deliver corn—highest intermediate value between breach and commencement of action, purchase price paid in advance); *Cannon v. Folsom*, 2 Clarke (Iowa) 101, 63 Am. Dec. 474 (1855) (contract for sale and delivery of pine logs—general rule of value at time of conversion not applicable where price paid in advance, but highest intermediate value between breach and commencement of action, if brought in reasonable time).

Kentucky: *Ricketts v. Crittenden*, 2 Ky. Opin. 499 (1868) (conversion of stock—dictum: for wrongful conversion by broker highest intermediate value from conversion to bringing of action).

Louisiana: *Gragard's Succession* 106, La. 298, 30 So. 885 (1901) (conversion of cotton—average of prices during reasonable period after conversion); *Faraldo v. Ferdinand Gumbel & Co.*, 128 La. 287, 54 So. 821 (1911) (contract to hold cotton—value at conversion; true measure is that which will indemnify party injured); *Nat'l. Wholesale Grocery Co. v. Simon Rice Milling Co.*, 152 La. 1, 92 So. 713 (1922) (breach of sales contract to deliver 5 carloads of rice—value at time of breach, unfair to permit plaintiff to select remote date during rapidly rising market).

Maryland: *Andrews v. Clark*, 72 Md. 396, 20 Atl. 429 (1890) (conversion of stock—lays down general rule as value at time of conversion, but allows value at time stocks were charged as delivered); *Baltimore City Passenger Railway Co. v. Sewell*, 35 Md. 238 (1872) (breach of contract by corporation by refusal to issue its stock—value at time of demand and not at any subsequent time).

Massachusetts: *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153 (1916) (breach of contract to carry stock and deliver on demand—value at time of conversion; dictum: special circumstances might be shown which would entitle customer to prove special damage not exceeding price at which stock could be bought within reasonable time after accrual of right of action came to knowledge of injured party); *Koski v. Haskins*, 236 Mass. 346, 128 N. E. 427 (1920) (conversion of 572 bags of onions—"well settled" value at time of conversion although value fluctuates); *Maw v. Fay*, 248 Mass. 426, 143 N. E. 315 (1924) (breach of contract to purchase stock on partial payment plan—value at time of breach).

Michigan: *Chadwick v. Butler*, 28 Mich. 349 (1873) (contract of sale of crop of wool—value at time of breach); *Vos. v. Child, Hulswit & Co.*, 171 Mich. 595, 137 N. W. 209, 43 L. R. A. (N. S.) 368 (1912) (breach of contract to deliver stock—highest replacement value); *Wallace v. H. W. Noble & Co.*, 203 Mich. 58, 168 N. W. 984 (1918) (conversion of stock—highest replacement value); *Weaver v. Com'l. Sav. Bank*, 222 Mich. 337, 192 N. W. 578 (1923) (conversion of stock—highest replacement value).

Mississippi: *Whitfield v. Whitfield*, 40 Miss. 352 (1866) (conversion of slaves and other chattels—value at time of conversion except in cases of fraud

or malice where measure of damages is determined by jury); *Bickell v. Colton*, 41 Miss. 368 (1867) Assumpsit on contract to deliver cotton, price being paid in advance—rule in tort action prevails in action for breach of contract and is based on value at time of breach).

Missouri: *Ashbrook v. Mechanics Savings Institution*, 5 Mo. App. 597 (1878) (result of unreported case in appendix of volume—breach of contract to deliver stock—highest market value at any time between sale and commencement of suit); *Walker v. Borland*, 21 Mo. 289 (1855) (trespass for selling horse, cows, and other chattels of plaintiff—value at time of trespass); *Darling v. Potts*, 118 Mo. 506, 24 S. W. 461 (1893) (conversion of stock by trustees—value at time of conversion); *Fuller v. Presnell*, 250 S. W. 374 (Mo. Sup. 1923).

Montana: *MONT. REV. CODE* (Choate, 1921) §8689: Detriment caused by wrongful conversion of personal property is presumed to be (same as Cal. statute §3336, *supra*); *Klind v. Valley Co. Bank of Hinsdale*, 69 Mont. 386, 222 Pac. 439 (1924) (conversion of cattle—conversion rule followed by plaintiff's election); *Williams v. Gray, Sheriff of Gallatin Co.*, 62 Mont. 1, 203 Pac. 524 (1922) (conversion of wheat—statute provides plaintiff by waiving interest may elect any date on or between date of conversion and trial on which to lay his damages); *State for Use and Benefit of Broadwater Farms Co. v. Broadwater Elevator Co.*, 61 Mont. 215, 201 Pac. 687 (1921) (conversion of wheat—highest intermediate value); §8674, Detriment caused by breach of agreement to deliver personal property price not paid in advance (same as Cal. statute §3308, *supra*); §8675, Detriment caused by breach, etc., price fully paid (same as Cal. statute §3309, *supra*).

Nevada: *Dixon v. Sou. Pac. Co.*, 42 Nev. 73, 172 Pac. 368 (affirmed on rehearing 177 Pac. 14) (1918) (conversion of ore—value at time of conversion); *Torp v. Clemons*, 37 Nev. 474, 142 Pac. 1115 (1914) (conversion of stock—value at time of conversion).

New York: *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79 (1888) (conversion of stock by pledgee); *Mullen v. J. J. Quinlan & Co.*, 195 N. Y. 109, 87 N. E. 1078 (1909) (conversion by broker of shares of stock and quantity of wheat); *In re Dickinson*, 171 App. Div. 486, 157 N. Y. Supp. 248 (1916) (breach of customer's contract by broker by unauthorized sale of stock); *Mayer v. Monzo*, 221 N. Y. 442, 117 N. E. 948 (1917) (conversion of stock by wrongful sale of broker); *D'Aprile v. Turner-Looker Co.*, 204 N. Y. Supp. 566 (1924) (conversion of whiskey); *Langford v. Fessenden*, 208 App. Div. 315, 203 N. Y. Supp. 301 (1924) (breach of contract to purchase stock on margin).

North Carolina: *Arrington v. Wilmington and Weldon R. R. Co.*, 51 N. C. 68 (1858) (action on case vs. common carrier for wrongful delivery of cotton—cites with approval *Marfield v. Douglas*, 1 Sanf. 360 (N. Y.) holding that a factor is liable in damages for difference between price got by him and highest price article brought in market before suit was brought, if commenced in reasonable time: Held suit in instant case was brought in reasonable time but as there was no material difference between value of cotton at time plaintiff received notice of sale and time suit was brought not necessary to decide plaintiff could recover to time of trial, but held he was entitled to price at time he received notice of sale which was over month after conversion. No discussion of different rules of damages).

North Dakota: *N. D. COMP. LAWS ANN.* (1913) §7168: Detriment caused by wrongful conversion of personal property is presumed to be (same as Cal. statute §3336, *supra*). The two following cases cite the statute and allow the highest intermediate value: *First State Bank of Kief v. Osborne-McMillan Elevator Co.*, 53 N. D. 551, 207 N. W. 37 (1926) (conversion of grain); *Littler v. Halla*, 46 N. D. 180, 180 N. W. 717 (1920) (conversion of grain). §7153, Detriment caused by breach of seller's agreement to deliver personal property, price of which not fully paid in advance (same as Cal. statute §3308, *supra*); *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026 (1902) (agreement to exchange equal number of bushels of wheat—difference between value of seed wheat

at time and place it was to be delivered by defendant and market value of plaintiff's wheat at time of refusal of defendant to accept). \$7154, Detriment caused by breach, etc., price fully paid (same as Cal. statute §3309).

New Hampshire: *Pinkerton v. Manchester & Lawrence R. R.*, 42 N. H. 424 (1861) (assumpsit for refusal to deliver certificate of shares of stock—value at time of demand; dictum—same rule would apply to actions of trespass, trover or replevin); *Frothingham v. Morse*, 45 N. H. 545 (1864) (action for money had and received, gold coin pledged as security for becoming bail—measure of damages restricted to value of gold at time it ought to have been returned).

New Jersey: *Dimock v. U. S. Nat'l. Bank*, 55 N. J. L. 296, 25 Atl. 926 (1893) (conversion by pledgee of securities pledged for payment of note—no damages awarded, but dictum to effect that in transactions between broker and customer dealing in stocks when unauthorized sale is act of conversion proper measure of damages is highest replacement value).

Ohio: *Cincinnati Finance Co. v. Barth*, 111 O. S. 261, 145 N. E. 543 (1924) (conversion of stock by corporation refusing to transfer it on its books—market value of stock at time cause of action accrued).

Oklahoma: OKLA. COMP. STAT. ANN. (Bunn, 1921) §5999: Detriment caused by wrongful conversion of personal property (same as Cal. statute §3336, *supra*). The three following cases cite the statute and allow the highest intermediate value: *Funk v. Hendricks*, 24 Okla. 837, 105 Pac. 352 (1909) (conversion of wheat); *Clark v. Slick Oil Co.*, 88 Okla. 55, 211 Pac. 496 (1922) (conversion of oil); *U. S. Cities Corp. v. Sautbine*, 126 Okla. 172, 259 Pac. 253 (1927) (conversion of stock). §5984, Detriment caused by breach of agreement to deliver personal property price not paid in advance (same as Cal. statute §3308, *supra*). §5985, Detriment caused by breach, etc., price fully paid (same as Cal. statute §3309). *Frey v. Failes*, 37 Okla. 297, 132 Pac. 342 (1913) (action for purchase price of carriage sold by defendant to plaintiff—highest intermediate value between delivery and trial, purchase price paid in advance).

Oregon: *Livesley v. Krebs Hop Co.*, 57 Ore. 352, 107 Pac. 460 (1908) (breach by purchaser of contract to purchase 100,000 lbs. of hops; seller held hops and sold them at decreased market price and recovered judgment for damages; purchaser seeks an accounting based on value of hops at time of delivery, refused—dictum: if seller had acted wrongfully in holding hops it would have been liable for highest market price between date of delivery and time of actual sale).

Pennsylvania: *Gervis v. Kay*, 294 Pa. 518, 144 Atl. 529 (1928) (conversion of stock—follows rule of highest replacement value and restricts rule of highest intermediate value to cases involving deliberate wrong or breach of trust); *Bangor Silk Knitting Co. v. Wise*, 277 Pa. 387, 121 Atl. 308 (1923) (conversion by pledgee of collateral consisting of mortgage bonds, stock, and raw silk—value at time of conversion, rule being different with regard to stocks); The three following cases apply the highest intermediate value rule: *In re Berberich's Estate*, 264 Pa. 437, 107 Atl. 813 (1919) (conversion of stock); *Sproul v. Sloan*, 241 Pa. 284, 88 Atl. 501 (1913) (conversion of stock); *Bank of Montgomery v. Reese*, 26 Pa. 143 (1856) (breach of contract for refusing to allow plaintiff to subscribe to bank stock—purchase price paid in advance).

South Carolina: The three following cases allowed in the discretion of the jury the highest value of the property converted up to the time of trial: *Jordan v. Hudgens*, 146 S. C. 209, 143 S. E. 811 (1928) (conversion of cotton); *Cooper-Smith Co. v. Bell*, 137 S. C. 1, 134 S. E. 658 (1926) (conversion of cotton by pledgee); *Birt v. Green & Co.*, 127 S. C. 70, 120 S. E. 747 (1924) (conversion of cotton).

South Dakota: S. D. COMP. LAWS (1929) §1987: Detriment caused by wrongful conversion of personal property (same as Cal. statute §3336, *supra*); *Kennel v. Atlas Elev. Co.*, 34 S. D. 101, 147 N. W. 272 (1914) (conversion of flax—plaintiff at his option chose value at time of conversion). §§ 1987 and 1972 stating measure of damages for breach of contract (same as Cal. §§3308 and 3309).

Fluctuations in the Value of Money

We have considered in the next previous section the question of how far one who has been wronged by a tort or breach of contract may recover for the opportunity to benefit by a rise in the market value of a commodity subsequent to the wrong. Obviously, such a

Tennessee: *Hedges v. Burke*, 147 Tenn. 247, 247 S. W. 91 (1923) (conversion of stock, rule of highest replacement value applies); *Morris v. Wood*, 35 S. W. 1013 (Ct. of Ch. App. 1896) (conversion of stock—highest replacement value); *Turner v. Jackson*, 63 S. W. 511 (Ct. of Ch. App. 1899) (breach of contract to deliver stocks and bonds in new corporation—highest replacement value).

Texas: *San Antonio & A. P. Ry Co. v. Busch*, 21 S. W. 164 (Civil Appeals 1893) (breach of contract to issue first mortgage bonds on R. R., consideration paid in advance—highest intermediate value); *Johnson v. Miller*, 163 S. W. 592 (Civil Appeals, Amarillo 1914) (breach of contract to deliver chattels—dictum: highest intermediate value); *Early-Foster Co. v. Mid-Tex Oil Mills*, 208 S. W. 224 (Civil Appeals, Austin 1919) (conversion of 400 bales of linters—highest value between conversion and filing of suit, all plaintiff asked for, conversion being attended by fraud, willful wrong, or gross negligence); *Thrift Oil & Gas Co. No. 2 v. Newton*, 227 S. W. 495 (Civil Appeals, Amarillo 1921) (breach of contract to deliver stock—value at time of conversion, purchase price not paid in advance; dictum: highest intermediate value between breach and trial if purchase price paid in advance and suit brought in reasonable time); *Burmarsal Co., Inc. v. Lake*, 272 S. W. 582 (Civil Appeals, El Paso 1925) (innocent conversion of oil well casing—value at time of conversion; dictum: where trespass is willful, fraudulent, etc., and property is of fluctuating value, plaintiff may recover highest intermediate value to date of trial).

Utah: *Western Securities Co. v. Silver King Consol. Mining Co. of Utah*, 57 Utah 88, 192 Pac. 664 (1920) (conversion of stock; dictum: highest replacement value rule correct).

Virginia: *Miller & Co. v. Lyons*, 113 Va. 275, 74 S. E. 194 (1912) (breach of contract to purchase stock on margin—approves highest replacement value rule and selects as measure of damages the value of stock on a day within a reasonable time after notice of breach, but does not state that value on that day was highest during the period for replacement).

Washington: *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363 (1912) (conversion of stock without market value by trustee—value at time of conversion; dictum: as manner and conditions of the conversion vary, so the measure of damages vary from nominal to highest value of stock; in general, courts incline to rule of value at time of conversion, or a reasonable time after); *Fish v. Nethercutt*, 14 Wash. 582, 45 Pac. 44 (1896) (conversion by sheriff of undescribed personal property—highest intermediate value if taking was wrongful).

Wisconsin: *John Ingram v. Edward Rankin*, 47 Wis. 406, 2 N. W. 755 (1879) (conversion of quantity of hay, wheat and oats—general rule in action on contract for non-delivery of goods, or for conversion: (1) value at time of breach or conversion (2) in conversion if chattels were sold by wrongful taker plaintiff may recover amount for which sold (3) if still in possession of defendant may recover value at time of trial at place where and in form when converted; instruction to jury to apply highest intermediate value rule held error); *Sloan v. Brown County State Bank*, 174 Wis. 36, 182 N. W. 363, (1921) (conversion of stock by pledgee—value at time of conversion, no discussion of any other measure).

Wyoming: *Hilliard Flume & Lumber Co. v. Woods*, 1 Wyo. 400 (1878) (conversion 3000 R. R. ties—in jury's discretion highest value between conversion and trial).

rise in market value may be a rise merely in the value of the particular commodity. Due to an unusual demand, because of a foreign war, or due to an unusual scarcity caused by a drought, wheat may rise sharply in value though the price-index of commodities generally remains stationary. Often, however, the rise in wheat may be coincident with a general upward current of prices of land, stocks, steel, cotton, and other commodities. In such event, we say that the value of money, the medium which is used in the exchange of other things, has fallen. In either event, we have seen that there are legal devices which enable the person wronged to cast the risk of a rise in the value of the commodity upon the wrongdoer. If the defendant has taken the plaintiff's wheat, the plaintiff, if the market goes down, can insist upon the value at the time of the taking. The fact that wheat has declined, or that dollars have increased in value, since the taking, will not lessen the recovery. If wheat goes up, alone or in company with commodity prices generally, the plaintiff in an action of the nature of *detinue*, may recover the value at the time of the trial,²³ or if the defendant has sold it to a third person at an advance, may secure judgment for the proceeds, as money had and received for the plaintiff's use.²⁴ Moreover, in most of the states, in cases of tort or of failure to deliver goods under contract, the doctrines of *highest replacement value*, or of *highest intermediate value*, offer opportunity to the plaintiff to recoup for profits which he might have secured from a rise in value.²⁵ The former doctrine, which considers only fluctuations within a relatively short period, will usually not indemnify for a fall in the value of money, which is generally gradual, but only for the sharp rises in the value of the specific commodity. The latter, however, which gives the highest value down to the time of trial, will often serve to protect him against loss from a fall in the general purchasing power of money.

There are other instances, apart from claims measured by the value of property, where protection against a fall in the value of domestic money has been extended by the courts. Thus, one who sought specific performance of an option-contract to sell land where the price was fixed before the passage of the Legal Tender Acts by Congress, making the depreciated green-backs legal tender, was required to do equity by tendering the price in coin, since that was con-

²³ See *supra* n. 4.

²⁴ See *Ingram v. Rankin* (Wisconsin), *supra* n. 22.

²⁵ See next preceding section.

templated by the seller when the option was given.²⁶ In actions for unliquidated damages such as claims for personal injuries, likewise, the jury may properly fix their award in the light of the purchasing power of money at the time of the trial,²⁷ and hence, presumably, they may give more (where general prices have risen) than would have been compensatory at the time of the tort. In general, however, the courts do not attempt to give indemnity for changes in the value of domestic money. In the enforcement of contracts to pay specific sums of money, indeed, the policy of the legal tender laws requires them to treat a dollar in 1932 when the debt is due, as satisfaction of a promise to pay a dollar at an earlier day, whether it was then worth more or less.²⁸ The same attitude is taken, moreover, as to changes in the value of money after the breach of the promise to pay, and after the judgment is rendered.

Other considerations, however, come into play when the courts are dealing with duties to pay debts or damages in foreign money.²⁹ When such a duty is sought to be enforced in our courts, they must give their judgment for the recovery not of francs, marks, pounds, but of dollars. Consequently, the foreign money must be expressed in terms of its worth in dollars. As of what date, shall the foreign money be translated into dollars? Before the World War, the currencies of most countries with which we did business were relatively stable, and little difficulty arose, as the values at the time of the breach of contract or tort were the same as at the time of delivering judgment, but during or shortly after the war, the currencies of most of the European belligerents dropped violently in value, in some cases almost to the vanishing point. A dollar which in 1913 would buy about 4 German marks, 5 French francs, and 5 Italian lire, in 1923 would purchase about 20 francs, or 22 lire, and on November 15, 1923, the dollar would buy the astronomical number of two and one-

²⁶ *Willard v. Tayloe*, 8 Wallace 557, 19 L. ed. 501 (1870).

²⁷ *Halloran v. New England Tel. & Tel. Co.*, 95 Vt. 273, 115 Atl. 143, 18 A. L. R. 554 (1921). Compare *Palmer v. Security Trust Co.*, 242 Mich. 163, 218 N. W. 677, 60 A. L. R. 1392 (1928).

²⁸ See 31 U. S. Code Ann. §457: "The gold coins of the United States shall be a legal tender in all payments at their nominal value. . ."; see also, *id.* §§451-461 as to other legal tender coins and currency; also Oliphant, *Money in Commercial Instruments*, 29 Yale L. J. 606 (1920); *Legal Tender Cases*, 12 Wallace 457, 20 L. ed. 287 (1871).

²⁹ Among the numerous discussions of this subject in legal periodicals, these are of outstanding value: Rifkind, *Money as a Device for Measuring Value*, 26 Col. L. Rev. 559 (1926); Drake, *The Proper Rule in Fluctuating Exchanges*, 28 Mich. L. Rev. 229 (1930). Notes upon various phases of the subject appear in 11 A. L. R. 363; 33 A. L. R. 1285, 43 A. L. R. 520.

half billion marks! The current disturbance in monetary values caused by the Austrian and German financial disorganization and by the English abandonment of the gold standard, may revive these difficulties.

Most of these controversies arise in connection with contract actions. An English lady, at the outbreak of the war, leaves a French hotel without paying her bill. After the collapse of the franc she is sued by the hotel-keeper in England.³⁰ An American deposits money in a German bank, where he is credited with marks, and later demands payment and it is refused.³¹ Then the mark collapses and he sues the bank in an American court, attaching funds belonging to the bank in this country. An American bank receives funds from a customer to establish a credit for him in Roumanian money in a Roumanian bank.³² Less frequently, similar problems arise in tort cases, mostly claims for damages to ships in foreign ports.³³

The solution of these cases imposes upon the courts an extremely difficult balancing of opposing considerations of policy and justice. Who shall bear the risk of a fall in the value of the foreign currency? If the claim were asserted in the courts of the foreign country whose money is involved, there is little doubt that those courts—as we have seen that our courts do in dealing with claims for dollars—would disregard the fall in the exchange value of the local currency and thus place the loss upon the claimant. Nevertheless, this makes the actual benefit realized from the claim depend upon the accidental circumstances which hasten or delay the trial, and upon the time consumed in new trials or appeals.³⁴ It is true, the claimant must bear in the other country, these risks of loss in the value of money while seeking a remedy there, because of the necessities of local administration (analogous to our Legal Tender Acts) in dealing with their domestic currency, but our courts in adjudicating claims measured in foreign money, are under no such necessities. On the other hand, if our courts, from supposed considerations of fairness to the claimant, relieve him of the risk of the depreciation of the foreign

³⁰ *Société des Hôtels v. Cummings*, [1921] 3 K. B. 459, 461.

³¹ *Die Deutsche Bank v. Humphrey*, *infra*, n. 38.

³² *Richard v. American Union Bank*, *infra*, n. 46.

³³ See the cases, *infra*, notes 48, 49.

³⁴ "To take the date of judgment for determining the value is to adopt for the measurement of a loss a test resting upon the fluctuating chances of a court calendar instead of upon an event already fixed; that is, to put aside certainty for uncertainty." Sutherland, J., dissenting in *Die Deutsche Bank v. Humphrey*, *infra* n. 38.

currency, and award him his debt or damages on the basis of the dollar's worth of his claim at the time it first arose, it relieves him, if he lives in the foreign land, of a risk which he, in common with all his countrymen, would bear at home in his ordinary business dealings. This advantage, likewise, depends upon another accidental circumstance, unrelated to the merits; to-wit, that he has been able to secure jurisdiction upon his adversary, personally or by attaching his property, in this country.

In contract cases three main lines of opinion may be identified. First is what we may call the New York rule⁸⁵—the breach-day rule. Under this view, the claimant is protected against the risk of a fall in the value of the foreign currency, and, correspondingly would gain no advantage from its rise. His claim, whether it be a deposit or other debt or for the value of a commodity sold, is first assessed in foreign currency as of the date of the breach; that is, when the obligation became due, and judgment is given for the value of that sum in dollars according to the rate of exchange which obtained on this same breach or due-date. In case of a deposit the due-date is the date when payment was first properly demanded. An account matures when it is first stated and presented. This breach-date rule seems to command the assent of the English courts,⁸⁶ and probably is supported by the greater number of American decisions.⁸⁷

A second view, which we may call the Federal rule, or the "local-law" rule, rests upon the recent and leading case of *Die Deutsche Bank Filiale Nurnberg v. Humphrey*.⁸⁸ In previous cases, the Supreme Court of the United States had applied the breach-day rule

⁸⁵ *Hoppe v. Russo-Asiatic Bank*, 235 N. Y. 37, 138 N. E. 497 (1923) (deposit by American in Paris bank, to be repaid in sterling in London branch: judgment for value of sterling in dollars on day of refusal of demand for payment); *Sokoloff v. National City Bank of New York*, 250 N. Y. 69, 81, 164 N. E. 745, 750. "The contract was broken, as of September 1, 1918, when the Petrograd branch ceased to function. On that date, he was entitled to 120,000 rubles in Petrograd. He wanted them and did not get them. His damages are to be measured according to the value of rubles as of that date in Petrograd, measured in dollars in New York City, where he has sought his remedy"; *Parker v. Hoppe*, 257 N. Y. 333, 178 N. E. 550 (1931) (contract in Moscow in August 1917 for purchase of wax; buyer paid 100,000 rubles, but the wax was never shipped, but was sold to other parties in 1918; held buyer may recover value of 100,000 rubles in dollars, not as of date of his payment, but as of date of seller's breach of buyer's notice of rescission).

⁸⁶ *Di Fernandino v. Simon Smits & Co.*, [1920] 2 K. B. 704; s. c. [1920] 3 K. B. 409 (Ct. App.), 11 A. L. R. 358, and see discussion of English cases in opinions in *S. S. Celia v. S. S. Volturmo*, *infra* n. 49.

⁸⁷ *Simonoff v. Granite City Bank*, 279 Ill. 248, 254, 116 N. E. 636 (1917); *Rasst v. Morris*, 135 Md. 243, 108 Atl. 787 (1919).

⁸⁸ 272 U. S. 517, 47 S. Ct. 166, 71 L. ed. 383 (1926).

when the obligation was to pay foreign currency *in this country*.³⁹ In the *Deutsche Bank* case, however, an American citizen had deposited money in a German bank in Germany, and demanded its payment there. It was refused, and thereafter the mark collapsed. The obligation, consequently, clearly accrued in Germany. Mr. Justice Holmes, speaking for a five-to-four majority, while approving the application of the breach-day rule to obligations to pay foreign currency payable in this country, announced that it was necessary to apply a different rule where the money was originally due in the foreign country itself. "In this case," he said, "at the date of the demand the German bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. It has incurred no additional or other one since. A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. . . . Here we are lending our Courts to enforce an obligation (as we should put it, to pay damages,) arising from German law alone, and ought to enforce no greater obligation than exists by that law at the moment when suit is brought."⁴⁰

Mr. Justice Holmes's view that the right sued on was *created* by the foreign sovereign and therefore as a logically compelled deduction, the right at the time of suit in this country must be no greater in value than if asserted in the foreign court, should be compared with this language of Judge Learned Hand, in which he discusses the torts cases as a prelude to a decision in a contract case: "When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. And, if this were true, it would seem to follow that the obligation should be discharged in the money of the sovereign in whose territory the tort occurred, and that the proper rule would be to adopt the rate of exchange as of the time of the judgment. However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized

³⁹ *Hicks v. Guinness*, 269 U. S. 71, 46 S. Ct. 46, 70 L. ed. 168 (1925); see also *Sutherland v. Mayer*, 271 U. S. 272, 46 S. Ct. 538, 70 L. ed. 943 (1926) which Holmes, J., in the *Deutsche Bank* case distinguished as involving a claim arising under American law.

⁴⁰ 272 U. S. 518, 519, 520.

by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But since, apart from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose; that is, when the loss occurred. Hence a foreign court is as little concerned with the changes in the value of money in the territory where the tort arose as are the courts of that territory itself. Each court is enforcing a different obligation, imposed by different sovereigns, necessarily defined in the terms of its own money."⁴¹

It is suggested that, since a "right" is not a "thing" that is "created" but is merely a recognition or prediction that a given claim will be given judicial protection by judgment, no great aid toward a wise or useful result can be given by deductions based upon the "locality" of the "right." If, however, we are to deal in such metaphors, it would seem more natural to think of the right as created by the sovereign whose court is called on to enforce it and consequently that the extent and measure of that right is to be determined by that sovereign so as best to promote fairness and convenience.⁴²

How may these ends best be promoted? The New York rule fixing breach-day as the time of valuation of the foreign currency is advantageous for its clearness and simplicity. It is generally equitable, also, in cases where an American seeks recovery of money deposited in a foreign bank when it appears that he would probably have removed the money to this country if he had been allowed to withdraw it. For disputes between foreigners its fairness is not so apparent. On the whole, however, it seems preferable to the Federal rule which makes the time of valuation depend upon a factor only remotely related to compensation or to fairness of apportionment of risk of currency-fluctuations—the factor of the *place* where the duty should have been performed. If performable in this coun-

⁴¹ *Guinness v. Miller*, 291 Fed. 769, 770 (1923) affirmed as *Hicks v. Guinness*, see n. 39 *supra*.

⁴² The opposing views upon this fundamental problem of conflict of laws are presented in Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L. J.* 457, 469 (1924), and in an editorial note, *Fluctuating Rates of Exchange and the Conflict of Laws*, 40 *HARV. L. REV.* 619, 623, n. 26. (1927).

try, the Federal rule clearly coincides with the New York rule and fixes breach-day as the time of valuation. If performable abroad, the leading Federal case, the *Deutsche Bank* decision, mentioned above, declines then to adopt breach-day as the time. Most courts which decline to follow breach-day, choose the day when the judgment or decree is rendered as the date of which exchange will be reckoned.⁴³ Whether by inadvertence or deliberation, the *Deutsche Bank* opinion adopts the "moment when the suit is brought."

It has been forcibly suggested in recent discussions of the problem⁴⁴—a suggestion with which the present writer is inclined to agree—that neither breach-date, suit-date, nor judgment-date be accepted as a mandatory time for valuation, nor should choice of these rest solely upon the question of whether the contract was performable in this or a foreign country; all of these are too inflexible. Rather should the courts, by a realistic consideration of the particular transactions and relationships involved, seek to work out doctrines which would be attuned to these situations and correspond at least roughly to what the parties in these situations might reasonably expect. For example, in cases where Americans have deposited money in European banks, and payment has been refused, if it appears that the deposits were intended to be used for current expenses in Europe, or were to be withdrawn for transmittal elsewhere, the breach-day valuation should be applied and the depositor thereby protected against a fall in the value of the local currency. Even if the deposit was originally intended as an indefinitely continuing location of the depositor's funds, while it might be argued that the judgment should reflect the loss in value which the continuance of the deposit, intact, down to the date of judgment would have entailed,⁴⁵ yet it would still seem that the depositor, who lives in another country, has by demanding payment evidenced an intention to withdraw his funds from this risk, and should get the benefit of the breach-day valuation. This willingness to adjust the measure of recovery, to the probable risk to which the plaintiff's funds would have been subjected if the contract had been carried out, seems to be manifested in an important recent New York case. In that case the defendant, a New York bank, ac-

⁴³ *Marburg v. Marburg*, 26 Md. 8 (1866); *Hawes v. Woolcock*, 26 Wis. 629, 636, (1870); Gluck, *Rate of Exchange in the Law of Damages*, 22 COLUMBIA L. REV. 217, 225 (1922).

⁴⁴ Especially by Mr. Rifkind and Prof. Drake, in their articles, cited n. 29, *supra*.

⁴⁵ Perhaps this argument would be supported by the doctrine that only those risks known to the defendant at the time of the original making of the contract, are assumed by him. See *Hadley v. Baxendale*, 9 Ex. 341 (1854).

cepted \$72,500 from the plaintiff and agreed to establish a credit for the plaintiff of 2,000,000 *lei* in a Roumanian bank. The defendant delayed in carrying out its agreement for more than a year, and when it notified the plaintiff that the credit was finally established, the value in American money of 2,000,000 *lei* had diminished by about \$48,000. The plaintiff sued in New York setting out these facts. The court held that no cause of action was shown,⁴⁶ and said: "Presumably the plaintiffs, when they made a contract to obtain foreign money or credit abroad, intended to use it as money in the country where it is the recognized medium of exchange. Fluctuations in the value of the money, when measured by currency of this or any other country, may not affect the use for which plaintiffs are presumed to have intended it." The plaintiff then amended his complaint by adding the allegation that as was known to the defendant bank, he was in the business of buying and selling foreign exchange in New York, for which purpose the foreign credit was necessary, and that he did not intend the deposit for use in Roumania. The court held⁴⁷ that the amended complaint stated a cause of action, and said: "If the contract had been performed according to its terms and the foreign moneys or credit delivered at the stipulated time, the buyer would have assumed the chance of profit and the risk of loss from fluctuations in the market price thereafter. By delay in delivery the seller has retained the profit created by intervening fluctuations and has imposed a loss upon the buyer. For the loss so imposed the buyer is entitled to damages."

Similar problems arise, but much more rarely, in tort cases. Where the action is for a tort committed abroad, if the damages are wholly unliquidated, as for pain and suffering, or have not been fixed in terms of the foreign currency, no problem of translation arises,—the court merely fixes them in the first instance in its own money. Occasionally, however, especially in ship-collision cases, the injured party incurs expenditures in foreign money for repairs or the like,⁴⁸ or is deprived of payments in the foreign money for hire of his vessel⁴⁹, and in such cases the time for valuing the foreign money is the time when the obligation to repay it was first incurred,—a rule closely analogous to the breach-day rule in contract cases.

⁴⁶ *Richard v. American Union Bank*, 241 N. Y. 163, 149 N. E. 338, 43 A. L. R. 512 (1925).

⁴⁷ *Richard v. American Union Bank*, 253 N. Y. 166, 170 N. E. 532, 535, 536 (1930); comment, 43 HARV. L. REV. 1307 (1930).

⁴⁸ *The Verdi*, 268 Fed. 903 (S. D. N. Y. 1920).

⁴⁹ *S. S. Celia v. S. S. Volturno* [1921] 2 A. C. 544 (House of Lords); 20 A. L. R. 884.