EXHIBIT 24

LLOYD'S LIST
LAW REPORTS

Editor:
E. S. MATHERS
of the Middle Temple, Barrister-at-Law

1962

Volume 2

PRINTED AND PUBLISHED BY LLOYD'S
AT LLOYD'S, LONDON, ENGLAND
1963

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Tuesday, May 29, 1962

CAMPOS v. KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

Before Mr. Justice McNair

Contract—Bonds—Gold value clause.

Practice—"Res judicata."

Conflict of laws—Class action—Whether plea or "res judicata" open — U.S.C.A., Title 28, Rule 23.

Bonds issued by defendant company in 1911, by which defendants promised to pay bearer £100

Sterling money of the United Kingdom . . . on the 1st day of January, 1961, with interest at 4½ per cent. per annum payable semi-annually in like gold coin . . .

Interest coupons (100) on bonds stating that defendants

WILL PAY TO BEARER TWO POUNDS AND FIVE SHILLINGS STERLING MONEY OF THE UNITED KINGDOM . . .

Claim by plaintiff bearer of 414 bonds against defendants for £8223 19s. 4d. (gold value of interest coupons Nos. 97, 98, 99) and £123,675 8s. 11d. (gold value of principal sums due on Jan. 1, 1961)—Plea by plaintiff that, in view of words "in like gold coin" appearing in provision as to payment of interest, and no gold coin having been referred to earlier in bond, the words "in gold coin" should be wirtten into provision as to payment of capital—Contentions by defendants (a) that only face value of interest coupons and bonds was payable; (b) that, in view of decision of U.S. Ct. of App., on bonds in identical form, doctrine of *res judicata* applied—Proper law of contract conceded by parties to be English law — Evidence that U.S. action was a class action commenced before plaintiff became bondholder; and that person who was not a member of the class when class action was commenced was not bound by ultimate decision — Admissibility of terms of mortgage deed referred to in bond, but not referred to in interest coupon, and of stockholders' resolution.

———*Held*, (1) (i) that, by the proper law of the contract at the time of the making of the contract (1911), a loan of £1000 in sterling money of U.K. could be discharged only by 1000 gold sovereigns or Bank of England notes convertible into gold sovereigns or partly in one and partly in the other; that the provision in bond that interest should be "payable in like gold coin" did no more than reflect the then existing legal position; that reconciliation of provisions as to payment of capital and interest did not require that words "in gold coin" should be written into contract, since, under law at that time, both obligations were dischargeable in same way, i.e., by gold sovereigns or Bank of England notes convertible into gold sovereigns; (ii) that, by proper law of contract at date of performance, a commercial obligation to pay sterling could not be discharged by tender of gold coins or Bank of England notes convertible into gold without breach of law; and that performance of that obligation could be made only by tender of Bank of England notes not convertible into gold; (2) *further*, in the circumstances, the terms of the mortgage deed and stockholders' resolution were not admissible as aids to construction of bond; (3) (*obiter*) (i) that defendants had failed to prove that U.S. action was a true class action or that, under U.S. law, that judgment was binding on anyone who was not an original party or did not intervene; (ii) that, assuming that U.S. judgment supported plea of *res judicata* in U.S. Courts against an absent member of the class, plaintiff was not a bondholder when U.S. action was commenced; was not a party to that action; and had not been served with process which led to U.S. Court's judgment; and that, therefore, plea of *res judicata* failed; and (4) that plaintiff was entitled to face value of bonds and interest coupons; that, as plaintiff's claim was for payment on a gold value basis, plaintiff's claim failed—Special order as to costs.

The following cases were referred to:

British & French Trust Corporation v. New Brunswick Railway Company, [1937] 4 All E.R. 516;

Coles v. Hulme, (1828) 8 B. & C. 568;

Feist v. Société Intercommunale Belge d'Electricité, [1934] A.C. 161;

Lemaire v. Kentucky and Indiana Terminal Railroad Company, (1956) 140 F. Supp. 82; (1957) 242 F. 2d 884;

Mourmand and Others v. Le Clair, [1903] 2 K.B. 216;

New Brunswick Railway Company v. British and French Trust Corporation, Ltd., [1939] A.C. 1;

Norman v. Baltimore & Ohio Railroad Company, (1935) 294 U.S. 240;

Oppenheimer *et al.* v. F. J. Young & Co., Inc., *et al.*, (1944) 144 F. 2d 387;
Ottoman Bank of Nicosia v. Chakarian, [1938] A.C. 260;
Perry v. United States, (1935) 294 U.S. 330;
Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft, [1937] A.C. 500; (1937) 57 Ll.L.Rep. 145;
Rossano v. Manufacturers Life Insurance Company, [1962] 1 Lloyd's Rep. 187;
Serbian Loans Case, Permanent Court of International Justice;
Syndic in Bankruptcy of Salim Nasrallah Khoury v. Khayat, [1943] A.C. 507;
System Federation No. 91 v. Reed *et al.*, (1950) 180 F. 2d 991;
Treseder-Griffin and Another v. Co-operative Insurance Society, Ltd., [1956] 2 Q.B. 127; [1956] 1 Lloyd's Rep. 377;
United States *et al.* v. Bankers Trust Company *et al.*, (1935) 294 U.S. 240;
Weeks *et al.* v. Bareco Oil Company *et al.* (1941) 125 F. 2d 84;
York v. Guaranty Trust Company of New York, (1944) 143 F. 2d 503.

In these two actions, which were consolidated, Miss Sonia Campos, of Paris, claimed £131,880 19s. 4d., being the gold value, principal and interest, alleged to be due to her in respect of 414 £100 first mortgage 4½ per cent. coupon gold bonds issued in 1911 by the defendants, Kentucky & Indiana Terminal Railroad Company, of Louisville, Kentucky, U.S.A.

The plaintiff claimed that upon the true construction of the bonds, which fell due for payment on Jan. 1, 1961, payment was to be made in current legal tender of the United Kingdom representing the gold value of the nominal amount of payment.

The defendants contended that the payment should be in current legal tender. The main issue before the Court was whether the bonds imported a gold value clause.

According to the plaintiff's case, by the terms of each of the bonds the defendants promised to pay to the bearer £100 sterling money of the United Kingdom of Great Britain and Ireland, at the office or agency of the defendants in the City of London, England, on Jan. 1, 1961, with interest thereon at the rate of 4½ per cent. per annum from Jan. 1, 1911, payable semi-annually in like gold coin, at the agency, on July 1 and Jan. 1 in each year, on presentation and surrender of the annexed coupons as they severally became due. By the terms of the bonds, payment was expressed to be secured by a mortgage or deed of trust dated Jan. 3, 1911, executed by the defendants to the Standard Trust Company of New York, which itself referred to a resolution of the stockholders of the defendants authorizing the issue of the bonds.

The plaintiff alleged that upon the true construction of the bonds:

(a) the interest payments and/or

(b) the capital sum payable thereunder on Jan. 1, 1961,

were such sums in current legal tender of the United Kingdom as represented the gold value of the nominal amount of each payment such gold value being determined in accordance with the weight and fineness established by the Coinage Act, 1870, namely, 0.23542 troy ounces of fine gold to the pound sterling; and that the bonds were, upon their true construction, governed by English law.

The plaintiff said that the defendants wrongfully contended that the sums payable in respect of both (a) interest and (b) capital under the bonds were the face amount of the bonds and coupons in current English legal tender of the same face amount.

The plaintiff duly presented the bonds and interest coupons at the agency of the defendants in London, namely, Morgan Grenfell & Co., Ltd., of London, in respect of which the plaintiff alleged that the sums properly payable to her amounted to £123,657 5s. 11d., and £8223 13s. 5d., respectively, but the defendants, in accordance with their contention referred to above, refused payment.

The plaintiff claimed (1) a declaration that upon the true construction of the bonds the amounts payable by the defendants to the plaintiff in respect of (a) interest and/or (b) capital were such sums in current legal tender of the United Kingdom as represented the gold value of the nominal amount of each payment, such gold value being determined in accordance with the weight and fineness established by the Coinage Act, 1870, namely, 0.23542 troy ounces of fine gold to the pound sterling; (2) The sums of £123,657 5s. 11d. and £8223 13s. 5d.; and (3) Interest thereon under the Law Reform (Miscellaneous Provisions) Act, 1934, at such rate and for such period as the Court should think fit.

By their defence, the defendants did not admit that the plaintiff was the bearer of the bonds. They admitted that the bonds were part of a series of 13510 First Mortgage 4½% Fifty-Year Guaranteed Sterling Bonds which were issued by the defendants under a first mortgage of Jan. 3, 1911, and which were offered to the public (pursuant to a prospectus to which was annexed a letter of Jan. 3, 1911, from the then President of the defendants to J. P. Morgan & Co., of New York) by Morgan Grenfell & Co., Ltd., of London, between Jan. 18 and 20, 1911, pursuant to a resolution of the board of directors of Dec. 30, 1910, acting under powers conferred on the board by a resolution of the stockholders of the defendants of Dec. 30, 1910, and further admitted that the bonds were 414 out of 859 bonds which had not been presented for payment since maturing on Jan. 1, 1961.

The defendants admitted the promise set out in the statement of claim and admitted that the bonds were, upon their true construction, governed by English law.

The defendants denied that, upon the true construction of the bonds, either the interest payments payable thereunder on presentation and surrender of coupons maturing from time to time or the capital sums payable thereunder on presentation and surrender of the bonds on or after Jan. 1, 1961, were such sums in current legal tender of the United Kingdom as represented the gold value of the nominal amount of each payment, such gold values being determined in accordance with the weight and fineness established by the Coinage Act, 1870, namely, 0.23542 troy ounces of fine gold to the pound sterling and denied that, upon that construction, any of the payments of interest or principal were any sums calculated by reference to gold of any weight and fineness or any gold value.

The defendants alleged that, upon the true construction of the bonds, the interest payments and the capital sums payable thereunder on presentation and surrender of the respective coupons and bonds were the face amount of the coupons, namely, £2 5s. each, and the face amount of the bonds, namely, £100 each in current English legal tender.

The defendants denied that their agents in the City of London had refused to pay the proper sum due in respect of any interest coupons against presentation and surrender of the relevant interest coupons, and contended that if, which was not admitted, the plaintiff presented any interest coupons and was not paid, that was due to her refusal to surrender her coupons unless paid more than the sums properly due.

The defendants alleged further, and in the alternative, that the United States District Court for the Southern District of New York, (1956) 140 F. Supp. 82, in an action brought by Sylvan Lemaire on behalf of himself and all other bondholders of the defendants similarly situated against the defendants and others, by a judgment determined, adjudged and decreed that:

(a) The defendants intended to have the obligation with respect to principal and interest dischargeable by payment in London, England, in sterling in such currency as should be legal tender at the respective times of payment without diminution or enlargement of the obligation by reason of any future fluctuation in the gold content of the English sovereign.

(b) The bonds and interest coupons were dischargeable in the specified number of units of account (pounds sterling) in such currency as was or would be legal tender at the respective times of payment, regardless of any change which might have occurred after 1911 in the gold convertibility or the purchasing power of that currency.

(c) The bond and interest coupons did not contain a gold value clause and did not call for a value in money fixed by a determined quantity of gold.

(d) The defendants' obligation to pay all future interest coupons attached to the bonds, as they should become due and payable and the defendants' obligation to pay the principal of the bonds due on Jan. 1, 1961, would be fully discharged by the defendants paying the specified number of units of account, i.e., pounds sterling, in currency which would be legal tender at the respective times of payment and without regard to gold and gold value.

Sylvan Lemaire's bonds were identical save as to their serial numbers to the bonds in this case. Sylvan Lemaire and the bearers of such bonds were similarly situated as regards their respective bonds.

The judgment referred to above was unanimously affirmed by the United States Court of Appeals for the Second Circuit, on Apr. 2, 1957, (1957) 242 F. 2d 884,

and, by the law of the United States of America, that judgment was a final and conclusive judgment.

The defendants said that, by the laws of the United States of America, they could rely upon that judgment as a complete defence to any action brought in the United States of America whether in a Federal or State Court by any holder of any bond similar to Sylvan Lemaire's bonds or holder of any interest coupon similar to Sylvan Lemaire's coupons in respect of any such bond or in respect of any such interest coupon even if such subsequent proceedings in America were to enforce a judgment of an English Court to the effect that payment of principal and interest against surrender respectively of such bond and coupon should be made with regard to gold value including a judgment of the Queen's Bench Division obtained in this action by the plaintiff giving her all the relief claimed by her in her writ of summons and statement of claim. Accordingly, the defendants relied upon the doctrine of *res judicata.*

By the terms of the mortgage deed pursuant to which the bonds, the subject-matter of this action were issued, the property of the defendants set out in the deed was transferred to the Standard Trust Company of New York, its successor or successors and assigns (hereinafter called the trustee) in trust for the equal *pro rata* benefit and security of all and every holder of the bonds and coupons issued under and secured by the deed and by the terms of the deed no holder of any bond or coupon should have the right to institute any suit, action or proceeding in equity or at law for any remedy, without first giving notice to the trustee of the fact that default had occurred nor unless such holder should have made request to the trustee and afforded the trustee a reasonable opportunity to institute such action, suit or proceeding in the name of the trustee and offered adequate security and indemnity to the trustee against the cost, expenses and liabilities to be incurred and such notification request and offer of indemnity were declared conditions precedent to any action or cause of action for any remedy, it being the express and declared intention that no holder of any bonds or coupons should have any rights other than as set out in the deed and that all proceedings at law, or in equity, should be instituted, had and maintained in the manner provided in the deed, and for the equal benefit of all holders of the bonds and coupons outstanding.

At the date of the commencement of these proceedings, the trustee was Morgan Guaranty Trust Company of New York of 140 Broadway, New York, the successor of the Standard Trust Company.

The defendants alleged that the plaintiff failed to notify, request, afford opportunity to, offer security to and offer indemnity to the trustee as set out above and that this action was not instituted and was not being maintained in the manner provided in the deed and was not for the equal benefit of all holders of the bonds and coupons which were outstanding.

Mr. John Foster, Q.C., Mr. Mark Littman, Q.C., and Mr. A. L. V. Lincoln (instructed by Messrs. Payne, Hicks Beach & Co.) appeared for the plaintiff; Sir Milner Holland, Q.C., and Mr. Owen Stable (instructed by Messrs. Slaughter & May) represented the defendants.

JUDGMENT

Mr. Justice McNAIR: The plaintiff in these two consolidated actions is Miss Sonia Campos, an Egyptian national, resident in Paris. She is the bearer of 414 coupon bonds issued by the defendant company, Kentucky & Indiana Terminal Railroad Company, in 1911, entitled "£100 First Mortgage 4½% Coupon Gold Bonds". These bonds were purchased for Miss Campos's account between Dec. 19, 1955, and Feb. 23, 1956. She claims against the defendant company, in the first action, the sum of £8223 13s. 5d., being, as she claims, the gold value of the interest payments due under the coupons of the series denoted by the numbers 97, 98 and 99, and, in the second action, the sum of £123,675 5s. 11d., being the gold value of the principal sums under the bonds which fell due for payment on Jan. 1, 1961. The basis of her claim in each case is that upon the true construction of the bonds the interest payments and the capital sums payable on the due dates were such sums in current legal tender of the United Kingdom as represents the gold value of the nominal amount of each payment, such gold value being determined in accordance with the weight and fineness established by the Coinage Act, 1870, namely, 0.23542 troy ounces of fine gold to the £ sterling.

The defendants, by their defence, deny that the basis contended for by the plaintiff is correct and assert that upon the true

construction of the said bonds the interest payments and the capital sums payable thereunder are for the face amount of the coupons, namely, £2 5s., and the face amount of the bonds, namely, £100 each in current English legal tender. The issue so joined may be stated simply: Do the coupons or the bonds on their true construction import a true "gold value clause", i.e., a clause which prescribes a measure for fixing the amount of the debt to be discharged and not merely the method by which a debt of fixed unvarying amount is to be discharged? See *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161. By way of additional defence the defendants rely upon a decision of the United States District Court for the Southern District of New York, in an action brought by one Sylvan Lemaire allegedly on behalf of himself and other bondholders of the defendants similarly situated against the defendants in which the Court in effect upheld the contention now made by the defendants in the present action, namely, that the bonds and interest coupons did not contain a gold value clause. This decision, affirmed by the United States Court of Appeals for the Second Circuit, is relied upon by the defendants as justifying a plea of *res judicata* against the present plaintiff. In the further alternative, the defendants rely upon the plaintiff's failure to notify the trustees of the mortgage securing due payment of the bonds of her intention to take proceedings against the defendants in accordance with a provision in the mortgage deed under which the bonds were secured.

The main issue to which I now turn is the question of the true construction of the bonds. Each of the bonds sued upon except for its serial number is in identical terms and provides as follows:

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY,

No. 1831.

First Mortgage 4½% Coupon Gold Bond. Payable January 1, 1961.

For value received, the Kentucky & Indiana Terminal Railroad Company, a corporation existing under the laws of the State of Kentucky (hereinafter called "the Company"), promises to pay to bearer, or if this bond be registered as hereinafter provided, to the registered owner, ONE HUNDRED POUNDS Sterling money of the United Kingdom of Great Britain and Ireland, at the office or agency of the Company in the City of London, England, on the 1st day of January, 1961, with interest thereon at the rate of four and a half per cent. per annum from the 1st day of January, 1911, payable semi-annually in like gold coin, at said agency, on the 1st day of July and January in each year, on presentation and surrender of the annexed coupons as they severally become due. Both the principal and the interest of this bond are payable without deduction for any tax or taxes which the Company or the Trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or County or Municipality therein. This Bond is one of an issue of coupon and registered bonds of the Company to an amount not exceeding in the aggregate the equivalent of Two Million pounds Sterling known as its First Mortgage 4½% Gold Bonds, secured by its mortgage or deed of trust dated the 3rd day of January, 1911, executed by the Company to The Standard Trust Company of New York, Trustee, conveying all the property of the Company upon terms and conditions therein set forth, to which mortgage or deed of trust reference is now made. In case default shall be made in the payment of any instalment of interest on this bond, the principal sum may be declared due and payable in the manner and with the effect provided in said indenture. . . . This bond shall pass by delivery, but the ownership of this bond may at any time, and from time to time, be registered at the office or agency of the Company in the City of London, England, the registration to be certified hereon; and thereafter no transfer shall be valid unless made upon the books of the Company and certified hereon by its transfer agent, until registration has been made to bearer, after which this bond shall pass by delivery until the ownership be again registered. The registry of this bond shall not restrain the negotiability of the coupons by delivery merely. The holder, also, at his option, may surrender for cancellation this bond with the coupons for future interest thereon, in exchange for a registered bond without coupons, as provided in said mortgage. This bond shall not be valid or become obligatory for any purpose until the certificate endorsed hereon shall have been signed by the Trustee under the said mortgage or deed of trust; and such signing shall be

conclusive evidence that the bond so signed has been duly executed in accordance with its terms and the terms of the said mortgage or deed of trust.

IN WITNESS WHEREOF the Kentucky & Indiana Terminal Railroad Company has caused its corporate seal to be hereto affixed and attested by its Secretary or Assistant Secretary, and this bond to be signed by its President or Vice-President, and has hereto attached coupons with the name of its Treasurer engraved thereon, as of the 3rd day of January, 1911.

Kentucky & Indiana Terminal Railroad Company,

By

(sd) . . . . Arnold.
SECRETARY.

(sd) J. W. H. Campbell,
PRESIDENT.

On the face of each of the bonds there was superimposed a decorative device of which the word GOLD forms a prominent feature.

To each bond on issue there were attached 100 detachable coupons serially numbered from 1 to 100 to cover the half-yearly interest payments over the 50 years' life of the bonds.

These coupons were in the following form:

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY ON THE 1ST DAY OF JAN. 1961.

£2. 5s.

WILL PAY TO BEARER TWO POUNDS AND FIVE SHILLINGS, STERLING MONEY OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, AT THE AGENCY OF THE COMPANY IN THE CITY OF LONDON, ENGLAND, FREE OF ALL TAXES AS MENTIONED IN THE BOND, BEING SIX MONTHS' INTEREST ON ITS FIRST MORTGAGE GOLD BOND NO. 1043.

[Signed]
TREASURER

A perusal of these two documents reveals (1) that as regards the bond the obligation with relation to the payment of the capital moneys contains no express reference to gold or gold coins, but is expressed to be an obligation to pay £100 sterling money of the United Kingdom of Great Britain and Ireland whereas the obligation as to payment of interest as set out in the bond is stated to be to pay "interest thereon at the rate of four and a half per cent. per annum . . . semi-annually in *like gold coin*" [*] no gold coin having previously been expressly mentioned, and (2) that the coupon expresses the interest obligation as an obligation "to pay to bearer two pounds and five shillings sterling money of the United Kingdom of Great Britain and Ireland", without any reference to "gold coin".

It is common ground (1) that the bonds and coupons are governed by English law; and (2) that both the bonds and the coupons when detached from the bonds are negotiable instruments passing by delivery.

Before considering the question of construction more closely it is probably convenient to refer briefly to the mortgage deed and the documents therein referred to while postponing for further consideration the question whether any of this material is relevant or admissible on the question of construction.

The mortgage deed dated Jan. 3, 1911, is a complicated document running to 72 pages; but in essence it provides for a mortgage by the defendant company to the Standard Trust Company of New York of property of the defendant company in trust

> . . . for the equal *pro rata* benefit and security of all and every holder of the bonds and interest coupons issued under and secured by this indenture . . .

Nowhere in the operative provisions of the deed is any mention made of gold or gold coin; but, throughout the operative provisions, the issue of bonds secured by the mortgage is referred to in terms of sterling money of the United Kingdom of Great Britain and Ireland; the bonds to be issued are not to exceed the equivalent of £2,000,000 sterling money; the coupons are each to be for the principal sum of £100 (see Art. I); provision is also made in Art. II for the contingency that the defendants may wish to issue bonds payable both as to principal and interest in money of other governments (i.e., not in sterling) subject to the limitation that

> . . . the aggregate principal sum of all the bonds to be issued under and secured by this indenture . . . shall not exceed £2,000,000 sterling, the bonds payable in money other than sterling money being reckoned at the par of exchange thereof with sterling money. . . .

* Emphasis supplied by Mr. Justice McNair.

The recitals to the deed set out the resolution of the stockholders of Dec. 30, 1910, which (omitting immaterial words)

> . . . directed and empowered [the directors] to cause to be executed under the corporate seal . . . a mortgage or deed of trust of this company . . . to secure an issue of bonds for the aggregate principal sum of Two Million pounds sterling, the principal thereof payable in gold coin of the United Kingdom of Great Britain and Ireland . . . with interest thereon . . . at the rate of 4½ per centum per annum, payable semi-annually in like gold coin . . .

By the same resolution the stockholders approved the printed form of mortgage then submitted as sufficient compliance with their resolution.

There follows a recital of a resolution of the board of directors authorizing the execution under the company's corporate seal of the mortgage

> . . . to secure the payment of the bonds of this company to the amount of Two Million pounds sterling . . . the principal of such bonds to be payable on the 1st day of January, 1961, with interest from January 1, 1911, payable semi-annually . . . at the rate of four and a half per centum per annum; said bonds and coupons to be payable . . . in the City of London, England, in Sterling money of the United Kingdom of Great Britain and Ireland, or elsewhere, and in money of any other government as from time to time hereafter may be authorized by the board of directors.

There follows a further resolution of the board of directors that the said bonds payable in sterling money shall be in substantially the following form. There are then set out the forms of bonds and coupons above referred to.

Assuming, for the moment, that these documents are relevant and admissible the comment may at least be made that they are not models of consistent draftsmanship.

I now approach more closely the problem of the true construction of the bonds and the coupons. These particular bonds and coupons have not been considered by the English Courts before and I therefore bear in mind that any decisions of the English Courts upon other bonds are not authoritative upon the construction of these bonds unless (1) the variation between the bonds previously considered and the present bonds is so slight as to be immaterial, or (2) they contain certain principles of construction which are relevant to the instant bonds notwithstanding the variation.

As it seems to me, the first fundamental rule of construction must be that the Court's task is to determine what intention must be imputed to the parties from the actual words used and that in discharging that task the Court is entitled to look at the surrounding circumstances existing at the time of the execution of the document, but not (except where there is a plea of rectification, as there is not here) at preliminary documents of a negotiating nature. Further, there has been established by a decision of the House of Lords binding upon me that the gold value obligation should not be imposed unless by the terms of the documents it is imposed in clear or precise terms. (See *New Brunswick Railway Company v. British and French Trust Corporation, Ltd.*, [1939] A.C. 1, per Lord Maugham, L.C., at p. 18, and per Lord Wright, at p. 35.)

One other preliminary observation. It being conceded that the proper law of the bonds and coupons is English law, the nature of the obligation imposed by the bonds and coupons must be determined in the light of English law at the date of the contract whereas the nature of the required performance must be determined in the light of English law at the due date of performance.

In 1911, the City of London was the most important market in the world for raising capital. By virtue of the Coinage Act, 1870, sterling money of the United Kingdom consisted (1) of gold coins of a prescribed weight and fineness which were legal tender for any amount; (2) silver coins which were legal tender for amounts not exceeding 40s.; and (3) bronze coins which were legal tender for an amount not exceeding 1s. The Bank of England Charter, 1833, Sect. 6, which was in force in 1911, provided so far as is material that

> . . . a tender of a note or notes of the Bank of England expressed to be payable to bearer on demand, shall be a legal tender, to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount, for all sums above five pounds . . . so long as the Bank of England shall continue to pay on demand their said notes in legal coin. . . .

Accordingly, as at 1911, a loan of £1000 in sterling money of the United Kingdom could be discharged only by the tender of 1000 gold sovereigns or Bank of England notes convertible into gold sovereigns or partly in one and partly in the other. It would seem to me, therefore, unless the matter is concluded to the contrary by authority binding upon me, that the provision in the bond, that the interest shall be "payable in like gold coin" does no more than to reflect the existing legal position that an obligation in sterling money shall be discharged only in the manner required by law, namely, gold coins or sovereigns or Bank of England notes convertible into legal gold coins. To use Sir Milner Holland's words, it was, in 1911, a correct description of the obligation involved in the payment of debt expressed in sterling. On this view, the reconciliation between the obligation as to the payment of the capital in sterling and the obligation as to payment of interest in gold coin does not require that the words "in gold coin" should be written into the provision as to capital since properly construed in the light of existing legislation both obligations are dischargeable in the same way. Subject to the reservation made above as to binding authorities to the contrary, in my judgment neither the bonds nor the coupons imposed in 1911 any obligation other than to pay the amount of the capital and interest expressed in sterling by the means of current legal tender, i.e., gold sovereigns or Bank of England notes convertible into gold sovereigns. So much for the content of the obligation in 1911.

When one turns to the proper law of the contract as at the date of performance one finds of course that material changes have taken place.

In effect, the position at all material times since the plaintiff became the owner of the bonds was that sterling was off the gold standard; Bank of England notes which were substituted for the Treasury notes issued under the Currency and Bank Notes Act, 1914, were legal tender for the payment of a debt of any amount expressed in sterling and were not convertible into gold; gold coins though still legal tender were for all practical purposes no longer in circulation since under the Exchange Control Act, 1947, any holder of gold, which by Sect. 42 includes gold coin, is obliged to offer it for sale to an authorized dealer as defined in Sect. 42. In the result, a commercial obligation to pay sterling could not be discharged by the tender of gold coins or Bank of England notes convertible into gold without breach of the law. If I am right in my construction of the obligation as it existed in 1911, it follows that the only legal tender for the performance of that obligation which could be made at the date of performance in accordance with the proper law of the contract without breach of the law was by Bank of England notes not convertible into gold. The legislative changes which produced this result are conveniently set out in the judgment of Lord Justice Morris in *Treseder-Griffin and Another v. Co-operative Insurance Society, Ltd.*, [1956] 2 Q.B. 127, at pp. 151 to 152; [1956] 1 Lloyd's Rep. 377, at p. 384.

Performance in accordance with the proper law of the contract as existing at the date of the contract would be due performance of the original obligation.

As stated above, I have reached this preliminary conclusion as to the true effect of the bonds without considering the terms of the mortgage deed or the documents referred to in its recitals. But it is probably convenient that I should express my views as to the admissibility of these documents and, if so admissible, as to the effect. Sir Milner Holland, on behalf of the defendants, submitted that the mortgage deed was relevant and admissible, but not the resolutions recited in the deed. Mr. Foster, for the plaintiff, on the other hand, submitted that the resolutions of the stockholders were admissible, but neither the resolutions of the directors nor the mortgage were relevant. I was referred to Norton on Deeds, 2nd ed., at pp. 86 to 87, for the proposition that

> If the transaction between the parties is contained in more than one deed, all the deeds must be construed together, and one may be read to explain the others.

and to the notes at p. 87 to the effect that this rule applies whether the deeds be executed simultaneously or at different times.

Assuming, but not deciding, that this rule applies to instruments such as bonds or interest coupons, it seems to me that the rule can have no application where the parties to the bond or coupons are not the same as the parties to the mortgage deed. Furthermore, it seems to me to be very difficult to accept that the holder of a

negotiable instrument can be affected in his primary rights against the obligee by the terms of a mortgage deed to which he is not a party, even though this mortgage deed is referred to in the bond; *a fortiori* in the case of a holder of an interest coupon which has no reference to the mortgage. Nor do I consider that the terms of the stockholders' resolution is relevant or admissible. If the bonds conformed with the authority, *cadit quaestio*; if they did not, the holder would not be affected by any lack of authority in the directors or be entitled to say against the company that the directors ought to have issued bonds in a different form. I would, accordingly, reject the whole of this material as an aid to the construction: but would also say that if admitted it gives no clear guidance as to the true construction. As I have observed above, the only reasonable comment that can be made is that there was considerable confusion in the draftsmanship.

Before dealing with the English decisions on gold value clauses I should deal with one further point on construction.

On behalf of the plaintiff it was submitted that by reason of the use of the words "in like gold coin" in the interest provision there must be written into the provision as to payment of principal the words "in gold coin" after the words "Sterling money of the United Kingdom of Great Britain and Ireland". It is not sufficient for the purpose of the argument advanced on the plaintiff's behalf that the words "sterling money" mean gold coin: for as will appear later when I come to examine the authorities it is the express use of the word "gold" which will in the conditions specified in these authorities import the gold value clause. Assuming for the moment that a plea of rectification could be raised by the holder of a negotiable instrument, I would accept that if there had been such a plea and an examination of the preliminary documents showed that the bond did not, without the addition of those words, accurately represent the prior agreement, it would be legitimate to insert the words as indicated. But, in the absence of any such plea, the power of the Court is limited. In this connection I was referred to the cases of *Coles v. Hulme*, (1828) 8 B. & C. 568; and *Mourmand and Others v. Le Clair*, [1903] 2 K.B. 216, in which the word "pounds" without a plea of rectification was written in the first case into the condition of a bond for the payment of "7700" *simpliciter* and in the second case into a bill of sale for £70 in which there was a stipulation that the principal and interest should be repaid by monthly instalments of "seven" *simpliciter*.

These cases, however, seem to me merely to indicate corrections of drafting slips in conditions which otherwise would be meaningless. I would not as at present advised be disposed to hold that apart from rectification it would be permissible to write in the words "in gold coin" in the provision as to the payment of the principal moneys if the effect would be to give to that provision a meaning other than that which the provision bears without the addition of those words. It is to be observed that in *New Brunswick Railway Company v. British and French Trust Corporation, Ltd.*, [1939] A.C. 1, the House of Lords, while applying the *Feist** construction to the provision as to payments of principal expressed in the form of "to pay . . . 'the sum of one hundred pounds sterling gold coin of Great Britain of the present standard of weight'", declined to apply that construction to the interest provision expressed as follows:

> ". . . with interest at the rate of five pounds sterling per centum per annum . . ."

I now turn more closely to the English authorities relied upon by the plaintiff. Mr. Foster, on her behalf, submitted that the decision of the House of Lords in *Feist's case, sup.*, was an authority for the broad proposition that whenever the word "gold" or "gold coin" or gold qualifying a unit of currency is used in a bond of this nature it connotes a true "gold value clause". In *Feist's case, sup.*, the bond provided for payment of

> . . . £100 in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928.

and to pay interest thereon

> . . . at the rate of 5½ per cent. per annum in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928, by equal half-yearly payments . . .

* *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161.

Condition 4 of the bond provided that

> This Bond is one of an authorized issue of Bonds of the Company of an aggregate principal amount not exceeding £500,000 in sterling in gold coin of the United Kingdom at any one time outstanding.

Lord Russell of Killowen, in whose opinion Lord Atkin, Lord Warrington and Lord Wright concurred, stated (*ibid.*, at p. 168) that the decision of the Courts below that the company were entitled to satisfy the principal moneys and interest secured by the bond by tendering whatever might be at the due date of payment the nominal amount of the bond or coupon

> . . . deprives of all effect the words which occur in clauses 1 and 2 of the bond, viz.: "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928." These words (which merely for convenience I will call the gold clause) need in this view never have been inserted at all.

Lord Russell of Killowen refers to the fact that at the date of issue of the bonds (*ibid.*, at p. 171)

> . . . The country was on the gold standard but the notes were inconvertible and gold coin was substantially no longer in circulation.
>
> . . . it is not, I think, improper or hazardous to make two surmises, (1.) that the gold clause was inserted in clauses 1 and 2 of the bond in contemplation of the contingency of this country going (as it did in 1931) off the gold standard at some future date; and (2.) that neither party to the bond can have contemplated payment under the bond being actually made in gold coins.

After examining Clauses 1, 2 and 4 and coming to the conclusion that they could not "have been intended by the parties to carry their literal interpretation", Lord Russell of Killowen posed the following question (*ibid.*, at p. 172):

> . . . If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it.

After examining Clauses 4 and 6 in which reference was made to "gold coin", Lord Russell of Killowen stated his conclusion as follows (*ibid.*, at p. 172):

> . . . I would construe clause 1 not as meaning that £100 is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of £100 if paid in a particular way, in other words I would construe the clause as though it ran thus (omitting immaterial words) "pay . . . in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928."

In my judgment, the whole tenor of Lord Russell of Killowen's speech up to this stage points to the conclusion that in Lord Russell's view it was the existence of the words "in gold coin . . . of . . . standard of weight and fineness existing on the 1st day of September, 1928" which was of critical importance as indicating a measure of indebtedness. It is true that at the end of his opinion Lord Russell of Killowen refers to the judgment of the Permanent Court of International Justice in the *Serbian Loans case* (Permanent Court of International Justice Series A, Nos. 13 to 24. Collection of Judgments. Judgment No. 14, p. 32) as stating happily and succinctly the considerations and principles which had influenced him in reaching his conclusion. In that case, the loan issued by the Serbian Government was for "95,000,000 *gold francs* [*]". If the judgment is referred to, it becomes quite plain that in the Court's view (at p. 33)

> The "gold franc" thus constituted a well-known *standard* [*] of value to which reference could appropriately be made in loan contracts when it was desired to establish a sound and stable basis for repayment.

The "gold franc" was not used as denoting a particular gold coin circulating in any of the three countries, France, Belgium or Switzerland, in which a payment could be made.

I do not regard this decision as authority for the broad proposition for which it was cited. In my judgment, the critical element in the case was the specification of the

* Emphasis supplied by Mr. Justice McNair.

weight and fineness of the gold which was held to import a standard or measure of value. In this view, I am fortified, if not strictly bound, by the decision of the Court of Appeal in *Treseder-Griffin v. Co-operative Insurance Society, Ltd.*, [1956] 2 Q.B. 127; [1956] 1 Lloyd's Rep. 377. See per Lord Justice Denning (*ibid.*, at pp. 148 and 379 of the respective reports) and Lord Justice Morris (*ibid.*, at pp. 152 and 383 of the respective reports). Both these learned Lords Justices seem to me to distinguish *Feist's case, sup.*, from the case before them which concerned the payment of rent "in gold sterling" on the ground that in *Feist's case, sup.*, there was a specification of gold of a particular weight and fineness.

I next turn to the case of *The King v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500; (1937) 57 Ll.L.Rep. 145. The bonds in question in this case obliged the British Government to pay 1000 dols. in gold coin of the United States of the standard weight and fineness existing in February, 1917, or in London in sterling money at the fixed rate of 4.86½ dols. to the pound. The House of Lords, agreeing with the Court of Appeal, applied the *Feist* construction to the bonds, but, differing from the Court of Appeal, held that as the proper law of the bonds was American law and, as by the due date of performance the law had been changed by the Joint Resolution of Congress having the effect of law so as to require the bond to be discharged upon payment of dollar for dollar of the nominal amount, the bondholder could only require payment of that amount. The importance, however, of this decision from the point of view of the plaintiff's case lies in the observation of Lord Maugham, L.C., which was as follows (*ibid.*, at pp. 562 and 166 of the respective reports):

> . . . Ever since the year 1870, or thereabouts, nearly all important obligations of the nature of bonds and mortgages in the United States have contained a gold clause, the result of which, according to the legal tender decisions (so called), was that although paper money, commonly called greenbacks, were legal tender in payment of ordinary debts, that did not apply to obligations containing a gold clause. Such clauses, according to the decision of the Supreme Court of the United States in *Norman v. Baltimore & Ohio Railroad Company*, (1935) 294 U.S. 240, "were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed."

In *Norman v. Baltimore, sup.*, as in the case then before the House the bond provided for the payment in gold coin of the United States of the *standard weight and fineness* as also did the mortgage in *St. Louis Iron Mountain & Southern Railway Company** which was heard at the same time. As to these clauses, Chief Justice Hughes, in the paragraph from which Lord Maugham (*sup.*, at pp. 562 and 166 of the respective reports) cited, says ((1935) 294 U.S., at p. 302):

> We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. . . . We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by payment of lesser value than that prescribed. . . .

For my part, I do not consider that Lord Maugham, L.C., having before him a clause containing a reference to a particular standard of weight and fineness, was intending to lay down any principle relating to gold coin clauses which did not contain any such reference, or that the passage from Chief Justice Hughes's judgment which he cites was on a fair reading intended to refer to clauses without a specification of weight and fineness. See, too, *Perry v. United States*, (1935) 294 U.S. 330, which was argued at the same time, where Chief Justice Hughes in relation to a bond for the payment "in United States gold coin of the present standard of value" says (*ibid.*, at p. 348):

> This obligation must be fairly construed. The "*present* standard of value" stood in contradistinction to a *lower* standard of value. The promise obviously was intended to afford protection against loss. That protection was sought to be secured by setting up a standard or measure of the Government's obligation. . . .

See also Lord Russell of Killowen (*sup.*, at pp. 556 and 163 of the respective reports).

* *United States et al. v. Bankers Trust Company et al.*, (1935) 294 U.S. 240.

I now turn to the case of *New Brunswick Railway Company v. British and French Trust Corporation, Ltd.*, [1939] A.C. 1. The bonds there in question were issued in 1884 and contained a promise

> . . . to pay to the bearer . . . " the sum of one hundred pounds sterling gold coin of Great Britain of the present standard of weight and fineness . . . "

The bonds having been issued in 1884, the argument which had influenced Lord Russell of Killowen, in the *Feist case, sup.*, based upon the recent changes made by the Currency and Bank Notes Act, 1928, was not relevant, nor were there provisions corresponding to Clauses 4 and 6 in that case.

Lord Maugham, L.C., says (*ibid.*, at p. 18):

> . . . It is clear that the gold clause contained in the bonds was intended as a clause to protect those who acquired the bonds against a depreciation of the currency in the Province of New Brunswick, and, since the judgment of this House in *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft, sup.*, it is not possible to confine the decision in the *Feist case, sup.*, to contracts not only containing a gold clause but also possessing indications in the same sense as those which were contained in the *Feist case, sup.* . . .

Lord Russell of Killowen says (*ibid.*, at p. 26):

> . . . One may well repeat what was said in the *Bondholders' case, sup.*, namely, that while the features here pointing to the *Feist* construction, *sup.*, are fewer and less powerful than in the *Feist* bonds, uniformity ought to prevail in regarding gold clauses as clauses framed for the purpose of protecting lenders against depreciation of currency, and construing them accordingly. As Scott L.J. has pointed out in his judgment in the present case, the question depends primarily on the wording of the alleged gold clause itself.

In my judgment, in both these passages " gold clause " is used in the sense in which that clause was used by Lord Russell of Killowen in the *Feist* clause, namely a clause referring to gold of a particular standard of weight and fineness. See the judgment of Lord Justice Scott in *British & French Trust Corporation v. New Brunswick Railway Company*, [1937] 4 All E.R. 516, at p. 535.

The remaining English case to which I need refer is the case of *Treseder-Griffin and Another v. Co-operative Insurance Society, Ltd.*, [1956] 2 Q.B. 127; [1956] 1 Lloyd's Rep. 377. This is a very special case and there are many grounds of distinction stated in the majority judgments between that case and the decision in *Feist's case, sup.* It is sufficient to say that it is the only case in which an obligation to pay " in gold sterling " without any specification of weight and fineness has been before the Courts as a matter for decision and the conclusion reached was that this formula without a specification of weight and fineness did not import a gold value clause. See, too, the judgment of Lord Justice Morris (*ibid.*, at pp. 152 and 383 of the respective reports) as to the uncertainty as to the weight and fineness of gold coins if they came into circulation again in the future.

Before referring to the decisions of the American Courts upon these particular bonds it is right that for completeness I should refer to the decision of the Privy Council in *Syndic in Bankruptcy of Salim Nasrallah Khoury v. Khayat*, [1943] A.C. 507. The document there under consideration was in the following form:

> On May 23, 1930, I shall pay at Haifa to the order of Mrs. Mary Khayat of Jezzin [Syria] the sum specified above, i.e., two thousand gold Turkish pounds. . . .

Two questions were involved: (1) whether the document was a promissory note within the meaning of the Palestine Bills of Exchange Ordinance, 1929; (2) as to the proper rate of exchange (the latter point is not material for present purposes).

As to (1), the Board held that it was a promissory note as being a promise to pay in currency, i.e., the currency of Turkey and Syria albeit not the currency of Palestine where the note was drawn.

Lord Wright says (*ibid.*, at p. 511):

> Nor were the notes any the less negotiable instruments because of the word " gold." That word does not here import an obligation to deliver gold or pay in gold. What it does is to import a special standard or measure of value. . . . It is equivalent to a gold clause. . . .

It appears, however, from the case of *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260, at p. 270, to which Lord Wright refers (*sup.*, at p. 512), that by virtue of currency changes in the law of Turkey

> . . . At all material times since the commencement of the war [—i.e., August 1914—] the paper notes have been legal tender and although the gold £ is still legal tender, the paper currency has, in accordance with Gresham's Law driven out from circulation the gold currency, so that in practice gold has ceased to circulate as legal tender. The Turkish gold coins are now, for all practical purposes, only dealt with as a commodity or bullion.

In these circumstances, it is easy to understand that in construing a document coming into existence in 1930, Turkish gold pounds *simpliciter* can be construed as importing "a special standard or measure of value."

I now turn to the decision in the case of *Sylvan Lemaire v. Kentucky and Indiana Terminal Railroad Company*, (1956) 140 F. Supp. 82, decided in the United States District Court for the Southern District of New York upon bonds in the identical form of the bonds now in issue. The judgment was given by District Judge Cashin on Mar. 12, 1956. After a review of the cases referred to above (other than *Khayat's case, sup.*), the learned Judge held (*ibid.*, at p. 86):

> . . . that the English cases . . . do not support the proposition that whenever the words "gold coin" are used a gold value clause must inevitably be inferred. Rather, it is our view that English law, as evidenced by these cases, requires that a reference to gold in a payment clause be not ignored but be given full effect if it clearly expresses the intention to fix a money value equivalent to a certain quantity of gold.
>
> . . . . . .
>
> [3] The plaintiff seeks a construction which would require us not only to imply the standard of weight and fineness of the gold but also the language of equation. The language of equation, we feel, is the essence of a gold value clause unless there exist extrinsic circumstances such as supply the defect. . . .
>
> [4] It is our opinion, therefore, that even reading in the words "gold coin" with respect to the principal, that this bond does not contain a gold clause under the law of England. We think after examining the bond, the interest coupons attached, the mortgage to which the bond refers, the stockholders' resolution contained in the mortgage, the directors' resolution also contained therein, the prospectus and the monetary laws of England as they existed in 1911, that no gold value clause was expressed or intended.
>
> . . . . . .
>
> . . . The plaintiff would have this Court construe from the words "like gold coin" their prior use as to the principal, then that the quality of gold referred to was that contained in the sovereign and, lastly, that the value of the principal and interest to be paid was equated to it. In our opinion neither justice nor English law (we presume they are synonymous) permits such extensive redrafting of a contract by a court.

This judgment was affirmed by the United States Court of Appeals for the Second Circuit, whose judgment is reported in (1957) 242 F. 2d 884. I need not set out here the detailed reasoning which led the Court to the conclusion that the bond in question did not contain a true gold value clause. Though some of the steps in the reasoning of these two Courts might not commend themselves to English lawyers brought up in and applying a different code of procedure, these decisions seem to me to be a clear determination by a competent Court of jurisdiction as to the proper construction of these bonds.

Had my own consideration of the problem led me to a different conclusion I should have hesitated to give effect to it in view of the desirability of uniformity in decisions by the Courts of different countries, especially in the case of bonds whose obligations cross international frontiers. But, as I have myself reached the same ultimate conclusion, I welcome the reinforcement of my judgment which I receive from their judgments.

In view of the conclusion in favour of the defendants which I have reached it is not necessary for me as a matter of decision to state my views on the alternative defence of *res judicata* raised by pars. 7 to 11 of the defences in the two actions. But, as much time was spent in considering the American decisions relevant on this point, it is probably convenient that I should

state my conclusions as to the effect of this evidence and as to its applicability to the plea of *res judicata* raised in these actions.

Mr. Carson, an experienced American lawyer who had acted for the defendants in the *Lemaire* action, was called before me on behalf of the defendants. Mr. Ten Eyck, an experienced lawyer now engaged in the practice of American law in London, was called on behalf of the plaintiff.

Mr. Carson's thesis may be summarized as follows:

(i) The *Lemaire* action was properly brought as a class action under Rule 23 of the Federal Rules of Procedure (U.S.C.A. Title 28),

(ii) Rule 23 provides as follows:

> **Rule 23. Class Actions**
>
> **(a) Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(iii) A true class action properly brought under this rule is binding upon and gives rise to a plea of *res judicata* against all members of the class whether or not they took part in the action and whether or not they were served with notice of the action or whether or not they had knowledge of the proceedings.

Subject to the reservation of the question of the position of a person who was not a member of the class at the date of the initiation of the proceedings or at the date of the judgment, Mr. Ten Eyck agreed with this formulation of the law; but in this respect differing from Mr. Carson he maintained that the *Lemaire* action was not a true class action but was, to use the nomenclature used in many of the American decisions, a "spurious class action" the judgment in which did not give rise to a plea of *res judicata* against absent parties.

I was referred to a number of decisions of Federal Courts in different Districts in which the distinction is drawn between true class actions falling within sub-rule (1) and giving rise to *res judicata* and spurious class actions, namely, actions brought under sub-rule (3) from which no plea of *res judicata* arises. Thus, in the judgment of the Court in *Oppenheimer et al. v. F. J. Young & Co., Inc., et al.*, (1944) 144 F. 2d 387, at p. 390, the following passage occurs:

> [3, 4] We see no reason for going farther than to hold that on the face of the complaint the plaintiffs have brought themselves within the provisions of Rule 23 (a) (3). Inasmuch as persons who do not become parties cannot be affected by the decision, we need not go further as to the adequacy of plaintiffs' representation of others in the class. A stricter rule as to the adequacy of representation ought to obtain where the judgment is held binding on members of a class who do not intervene. . . .

Citing *Weeks et al. v. Bareco Oil Company et al.*, (1941) 125 F. 2d 84, in *York v. Guaranty Trust Company of New York*, (1944) 143 F. 2d 503, at p. 529, the judgment of the Court uses these words:

> . . . Since, in a class suit under clause (3), a judgment will not be *res judicata* for or against those of the class who do not intervene, we suggest that if, after trial, the court finds against the defendant, appropriate steps be taken to notify all such noteholders to intervene (if they have not theretofore done so), judgment to be entered in favor only of those who do so within a reasonable time. . . .

Mr. Carson, while asserting that the material passage was *obiter*, agreed that the general language used had not been dissented from by any Court of co-ordinate or superior jurisdiction. Mr. Carson's main argument against the view of the Court expressed in these two decisions was based (i) upon his reading of the case of *System Federation No. 91 v. Reed et al.*, (1950) 180 F. 2d 991, which Mr. Carson stated to be his only authority for the proposition that a judgment in a class action under sub-rule (3) gave rise to *res judicata*. He also maintained secondly that the *Lemaire* action involved the enforcement of

a "common right" within the meaning of sub-rule (1) inasmuch as the bond was secured by the mortgage and therefore was a true class action within sub-rule (1).

As to (i), it appears on an examination of the *System Federation case, sup.*, that the Court in fact held that it was a true class action under sub-rule (1) and accordingly *res judicata* applied. Mr. Carson's view however was that, if the proceedings were properly analysed, the Court should have held it to be a class (3) action but nevertheless that *res judicata* applied.

As to this, it seems to me to be illogical to argue that because the Court held (wrongly in Mr. Carson's view) that it was a class (1) action and therefore the *res judicata* applied, the Court, if it had held, (as Mr. Carson says it should have held) that it was a class (3) action, would have held that *res judicata* applied. I prefer Mr. Ten Eyck's view that the *System Federation case, sup.*, is no authority for the proposition that a judgment in a class (3) action involves *res judicata* against absent members and I conclude that I should follow the earlier statements of principle to which I have referred.

As to Mr. Carson's second line of reasoning I find difficulty in following how it can be said that the *Lemaire* action was a true class (1) action because the judgment involved or might involve the enforcement of the mortgage or create preferential rights between different bondholders, since it seems to me that though the equity jurisdiction was involved in order to justify the claim for a declaration the claim was in substance a common-law claim for the enforcement of the several rights of the bondholders involving a common question of law and so within class (3), and involving no question arising under the mortgage. I prefer on this point the evidence of Mr. Ten Eyck that the *Lemaire* action was a class (3) action. But it is sufficient for me to say that the burden of proof of the relevant law being upon the defendants, they have not satisfied me that the *Lemaire* action was a true class action or that in accordance with American law the judgment in that case bound anyone who was not an original party or did not intervene.

But even on the assumption that the effect of the judgment in the *Lemaire* action was to give valid support for a plea of *res judicata* in an American Court against an absent member of the class, there are still difficulties in the defendants' way.

First, it must be recalled that Miss Campos was not a bondholder at the date of the initiation of the *Lemaire* proceedings.

I refer in this connection to three questions and answers at the end of Mr. Carson's cross-examination:

> Mr. Justice McNAIR: Before Sir Milner re-examines, may I just raise this question: Have you any authority which says that a person who was not a member of the class at the time when the suit was initiated is bound by the ultimate decision? A.: No, my Lord; by definition, as I understand it, there could not be such decision.
>
> Q.: That seems to be the crux of this matter, because, according to the evidence I have had, this lady, Miss Campos, was not a holder of the bond when the suit was initiated. A.: I suspect that is primarily for Counsel to observe upon, unless your Lordship wants to ask me that question?
>
> Q.: You have no authority? A.: I have no authority on the proposition as your Lordship put it. There undoubtedly is authority that the taker of a bearer bond is bound by prior transactions in respect thereto, but I cannot put my hand on it. I might address your Lordship's attention to the fact that the Judge in the New York Court thought it important, in paragraph 1 of his order, to terminate——
>
> Mr. Justice McNAIR: I think you are going on to another point.

To be quite certain that there was no misunderstanding I caused the first two questions and answers to be read back by the shorthandwriter. The result of this evidence seems to me to be fatal to the defendants' plea.

Furthermore, I think there is great force in Mr. Foster's contention that in accordance with English private international law a foreign judgment could not give rise to a plea of *res judicata* in the English Courts unless the party alleged to be bound had been served with the process which led to the foreign judgment. I had recently to rule on a somewhat similar point in the case of *Rossano v. Manufacturers Life Insurance Company*, [1962] 1 Lloyd's Rep. 187.

Finally, though the point was not fully argued before me, as at present advised it seems to me to be contrary to the whole conception of negotiability that the holder of a negotiable bond should be prejudicially affected by a judgment on a similar bond in an action in which he was neither plaintiff nor a party who had been duly served.

I can deal shortly with the defences raised in pars. 12 and 13 of the defence (which were not seriously argued before me) by saying that in my judgment the provision as to giving notice to the trustee is not a condition precedent to the enforcement of the bond.

As a result of those conclusions there will be judgment for the defendants.

Sir Milner Holland: I ought formally to ask, I think, for judgment for the defendants, with costs.

Mr. Littman: My Lord, there are two matters upon which I would address your Lordship and I may have to take a few minutes over it, because they are both directed primarily to the question of costs, which is a pretty substantial issue in this case. The first is the question of the judgment which your Lordship ought to give in this case.

Mr. Justice McNair: That is the form of the judgment?

Mr. Littman: The form, my Lord, yes. In my submission, the plaintiff is entitled to judgment for the sterling amount of the bonds and the certificates, and closely linked up with that, of course, is the question of what would be a proper order for costs. I imagine your Lordship would normally deal with these issues separately, but as they are so closely linked perhaps your Lordship would allow me to address you upon both at the same time.

Mr. Justice McNair: Certainly.

Mr. Littman: May I remind your Lordship of the course this matter has taken. Before the writ was issued in this action the bonds and the coupons were tendered and the payment on the gold basis was refused—I am summarizing the correspondence, but I will refer your Lordship to it if necessary. But before the writ was issued those presenting the bonds on behalf of my client asked that in any event they should be paid the sterling amount of the bonds and the coupons, stating that they were making it quite clear that they were prepared to tender and hand over the bonds and the coupons although, of course, without prejudice to their right to claim in the Court the balance. The attitude which was taken up on behalf of the defendants was that they would only pay the sterling value if it was accepted in complete satisfaction, a condition which, in my submission, the defendants were not entitled to impose.

The plaintiffs thereupon stated, before issuing the writ, that if this attitude was persisted in it would be necessary to claim the full amount. It was persisted in and the writ was issued, initially the writ for the interest and subsequently the writ for the capital sum, and the two actions were consolidated. The defendants put in a defence, and it was a defence to the whole claim. The claim, of course, was for the whole amount and pleaded that there had been presentation of the bonds and coupons and complained that neither the sum nor any part of it had been paid. The defence did not take the course, as it might have done, of admitting the sterling debt and raising a defence as to the balance. If that had been done, of course, the plaintiffs could have signed judgment for the sterling amount, but the defendants did not take that course, for reasons which no doubt seemed good to them, they put in a defence to the whole claim raising, firstly, a denial that the plaintiff was the bearer of these coupons and bonds, a matter which they had refused to admit right up to the hearing of this case although they were pressed to do so on a number of occasions, and refusing even to allow the plaintiff's evidence to be given by affidavit to prove it, it thus becoming necessary for the plaintiff to come over especially to do that. But, in any event, it was a defence to the whole claim.

The second defence to the whole claim was a denial that the coupons and bonds had been presented. There was raised what, in my submission, was a plea wholly disproved by the correspondence that she had only tendered them upon the basis that she was willing to surrender them if she got the full value. The correspondence shows that she was quite willing to surrender them and to get the lesser sum provided it was without prejudice to her claim to recover the balance.

The third defence to the whole claim was, of course, the defence that the action was brought without the consent of the mortgage trustees, and again it was a defence to the whole action.

There was continued correspondence at an early stage in which requests for payment of the sterling sum were made and it was only a year after the action was started that the defendants said that they would pay to my client the sterling sum less a sum of £10,000 to be paid into a joint account, which they desired to be retained as security for costs. My client protested against that and said that there could not really be any doubt that the sterling sum was due, and that, as regards security for costs, that was a matter which should be left to the decision of the Court as to what would be the appropriate sum, and she asked that the matter should be dealt with in that way. The defendants would not agree to that and said that was the only thing they were prepared to do. We had to submit to that, but we pointed out in a letter of Jan. 15, 1962:

> As we pointed out to you in our last telephone conversation, we would have thought that the proper way of dealing with the question of security for costs would have been for you to take out a summons, and leave it to the Court to decide what amount should be paid, rather than to ask for the retention on deposit of the sum of £10,000—which in our view is quite excessive. Since however you refused to consider this proposition and maintained the contention you had adopted throughout, namely that your clients are not under any legal obligation to pay to our client any part of the amounts claimed in the action, we must reserve our client's right to ask the Court in any event that the whole of the costs of the action be paid by your clients.

Then the amounts of the bonds and coupons are set out at the end and I do not think there is any dispute about that.

The answer to that is:

> We do not accept the third paragraph of your letter as accurate and reiterate that the contention which the Defendants have adopted is that payment at the sterling face value could only be made against the delivery up for cancellation of the Bonds and Coupons.

Then they go on to refer to the £10,000.

Your Lordship has been referred to the letters in which we have made it clear time and time again that we are quite prepared that the bonds should be surrendered to them. We suggested that they should not be destroyed before the action was heard, but that was a matter for the defendants. The only thing we did refuse to do was to agree that payment should be accepted in full satisfaction.

That arrangement having been made, there was no amendment to the defence. All these pleas were maintained; indeed, one of them has been maintained right up to the judgment in this action, namely, the defence about the consent of the trustees——

Mr. Justice McNair: It was not taken very forcefully.

Mr. Littman: No, but it was there. The reason for it, the advantage which the defendants got by raising this, of course, was that they secured for themselves the advantage that for a year they did not pay any part of the sum, and, equally, they got the advantage that they were able to decide for themselves rather than leaving it to the Court how much should be retained by them as security. That is the position. The defence was not amended and, in my submission, so far as the sterling sum is concerned the defence has not succeeded and my client is entitled to judgment for the total of those two sums, which is £44,194 10s. Of course, I quite accept that, having had part of that, we could not execute for the whole amount although, in my submission, we are entitled to judgment for it, and I would ask that on that sum we should have interest under the Law Reform (Miscellaneous Provisions) Act, 1934, at any rate your Lordship thinks appropriate. Your Lordship might think the rate in the bond was the appropriate rate, 4½ per cent.——

Mr. Justice McNair: I had written down a better figure than that.

Mr. Littman: I do not know whether your Lordship thought six per cent?

Mr. Justice McNair: No, five per cent.

Mr. Littman: I would ask for interest on the whole of that sum for one year—and I say "one year", because that was the period before we got any money. The whole of that was due at least a year before any part of it was paid; in fact, I am being slightly ungenerous to my client because in fact the interest was due a little earlier, but to simplify it I say one year. On the balance of the £10,000——

Mr. Justice McNair: Is your £10,000 included in the £44,194 10s.?

Mr. LITTMAN: Yes, my Lord, it is part of it. As I have had the rest I cannot ask for it after that date, but I ask for interest on the £10,000 at the same rate from Feb. 9, 1962 (which is the time payment was made), until judgment.

Mr. Justice MCNAIR: I suppose you have had your deposit interest.

Mr. LITTMAN: In fact it is on a joint account.

Mr. Justice MCNAIR: I hope it is on deposit.

Mr. LITTMAN: I suppose that is right, my Lord, assuming we get it. It depends rather what is going to happen to the money.

May I now turn to the question of costs. There are three factors here: In the first place I entirely accept that the defendants have succeeded here upon an important issue; they have succeeded upon the issue as to whether this is a gold value clause——

Mr. Justice MCNAIR: They have really succeeded on the main point which you were arguing.

Mr. LITTMAN: That is correct, my Lord, but it is not necessarily the point which has involved all, or substantially all, the costs; that is one matter.

The second point to be taken into account is this: In my submission, my client is the successful plaintiff in this action. She is entitled to the judgment for which I have asked and so she is a successful plaintiff and, *prima facie*, entitled to her costs. I am not disputing that the defendants should have the costs of and occasioned by the issue of the gold clause, but, in my submission, the plaintiff is entitled to the general costs of the action.

The third factor is this: The defendants failed here upon the defence of *res judicata*. Now, I quite agree that where a successful defendant sues upon a number of points one does not necessarily apportion costs between the issues, but different considerations apply, and have been held to apply, where quite a separate issue is raised by the defendants and persisted in and where that has failed.

Mr. Justice MCNAIR: Unless I am persuaded to the contrary, I should have thought you were clearly entitled to the costs of and occasioned by the plea of *res judicata*.

Mr. LITTMAN: Your Lordship appreciates that is quite substantial, because it was substantially the whole of the oral evidence.

Mr. Justice MCNAIR: It took a long time, yes.

Mr. LITTMAN: We estimate that something like three days of the hearing was devoted to evidence and argument upon this point, and that is something between one-third and one-half of the hearing.

The order which I would submit to your Lordship is the appropriate order in this case is that the plaintiff should have the costs of the action including the costs of and occasioned by the issue of *res judicata*. The defendants to have the costs of and occasioned by the claim for a declaration of a gold value clause apart from the plea of *res judicata*. In my submission that is the fair and proper order to make.

Sir MILNER HOLLAND: Quite plainly I have a certain way to go on the question of the issue as to *res judicata*, but may I set that on one side for one moment. I heard what your Lordship said, and it did not surprise me, but may I just draw your Lordship's attention to the pleadings.

Setting aside the *res judicata* issue for the moment and treating the action as though it was not there, I am asking your Lordship to consider whether, as a matter of common sense, if it had not been for the claim that these bonds were gold value bonds, persisted in throughout and which failed, we would have been here.

It is instructive to see what the claim is for. On the first writ (that is action No. 4370) what is claimed is a declaration that, on the true construction of the bonds, gold value is the right measure and, secondly, £8223 13s. 5d. for interest, of course on that basis. The second writ (action No. 2523) claims principal moneys due on Jan. 1 on the mortgage bonds, interest and a declaration, but the actual claim in the statement of claim is, of course, a sum of money based wholly on the gold value of the bonds, namely, £123,657 5s. 11d.

The defence in the first action—and I think there is no distinction between the two defences—by par. 5, is:

> Upon the true construction of the said Bonds the interest payments and the capital sums payable thereunder on presentation and surrender of the respective Coupons and Bonds are the face amount of the coupons namely

£2 5s. 0d. each and the face amount of the Bonds namely £100 each in current English Legal Tender.

There is no issue at all that the amount due on the bonds is the face value of principal and interest.

Mr. Justice MCNAIR: And there is no claim for payment of the sterling face value.

Sir MILNER HOLLAND: That is the next point I wanted to make. Where is the claim for payment on the sterling basis? The whole action was on the footing of payment on a gold value basis. What is complained of is the fact that we were not willing to pay the sterling value to someone who was persisting throughout in claiming something quite different, but I submit that, remembering of course that the plaintiff was not in this country, I was right at the time to say: "Your bonds are sterling bonds. If you surrender them, that is the end of the matter and we pay you; but so long as you go on claiming something different we will not". In the end, the line taken was: "Very well, we will pay you, but we say that something ought to be retained and we say £10,000"—and my friend says that is unreasonable, but I do not know—"as security for costs". In our submission there is no foundation for the first part of my friend's submission that this is an action in which he is entitled to succeed in something he never asked for.

On the second question, of course, it is undoubtedly true that one of the defences raised your Lordship has indicated is not a good defence. In that respect the position is somewhat different from the position where the Court has to consider a case in which the plaintiff has lost and the defendants won. It is often said, and I will not say with complete accuracy, that if an action is brought against a defendant and wholly fails, the fact the defendant gave several grounds for resisting the action and only succeeded on one should not alter the *prima facie* position that the plaintiff has brought an action which has wholly failed. The matter is entirely in your Lordship's discretion. Of course I cannot challenge it if your Lordship thought the costs had been quite wrongly increased by taking a particular defence——

Mr. Justice MCNAIR: I do not know in what sense you mean "wrongly".

Sir MILNER HOLLAND: Wrongly in law.

Mr. Justice MCNAIR: In law you are entitled to raise any defence you like. You may fail or succeed, but it is a defence on which you have wholly failed and it seems to be quite a separate issue, and I should have thought the ordinary rule must apply that the plaintiff gets those costs.

Sir MILNER HOLLAND: If your Lordship was looking for the proposition that costs are entirely in the discretion of the Judge, my friend has been good enough to assist me to find p. 1839 in the 1962 Annual Practice. There your Lordship will see, half-way down the page (Supreme Court Costs Rules, 1959, Rule 2 (5)):

> The powers and discretion of the Court as to costs under section 50 of the Supreme Court of Judicature (Consolidation) Act, 1925 (which provides that the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that the Court shall have full power to determine by whom and to what extent the costs are to be paid), and under the enactments relating to the costs of criminal proceedings to which these rules apply, shall be exercised subject to and in accordance with these rules . . .

Then your Lordship will see the heading "Discretion as to Costs", and in the second paragraph:

> . . . "the Court or Judge shall have full power to determine by whom and to what extent the costs are to be paid," . . .

Then

> **Discretion to be Exercised Judicially.**—Wide though the discretion is, it is a judicial discretion, and must be exercised on fixed principles, that is according to rules of reason and justice, not according to private opinion (*Sharpe v. Wakefield*, [1891] A.C. 173); or even benevolence (*Kierson v. Joseph L. Thompson & Sons, Ltd.*, [1913] 1 K.B. 587), or sympathy (*Bevington v. Perks*, [1925] 2 K.B., p. 231), and the exercise of discretion even by a Judge sitting alone must be justifiable (*Ritter v. Godfrey*, [1920] 2 K.B. 47); for instance, where a party successfully enforces a legal right, and in no way misconducts himself, then he is entitled to costs as of right (*Cooper v. Whittingham* (1880), 15 Ch. D. 501; *Jones v. Curling* (1884), 13 Q.B.D., p. 265; *Upmann v. Forester* (1883), 24 Ch. D. 231; *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756, C.A., explained and distinguished in *Donald Campbell & Co., Ltd. v. Pollak*, [1927] A.C. 732 . . .

Mr. LITTMAN: If it assists my friend, there is a passage which deals with the question on p. 1889, under Rule 9.

Mr. Justice MCNAIR: I think this is the principle*:

> . . . This discretion must be exercised judicially, and the Judge ought not to exercise his discretion against a successful party on grounds wholly unconnected with the cause of action. . . . But when the Judge, intending to exercise his discretion, has acted on facts connected with or leading up to the litigation, the Court of Appeal is prohibited by statute from entertaining an appeal from his decision . . .

Sir MILNER HOLLAND: The passage to which my friend referred is at the top of p. 1889:

> Where defendant succeeds generally, he is entitled to general costs of the action, even in respect of some defences in which he has failed, but not to the costs of a distinct issue raised by him unsuccessfully . . .

Subject to anything my friend wants to say, what we submit to your Lordship is that this is a case where your Lordship should give the defendant the general costs of the action, but it is a matter for your Lordship's discretion whether your Lordship feels that we should have the costs, following exactly those words, of a separate defence unsuccessfully raised. The plaintiff says we ought to pay the general costs of the action and your Lordship has my submission on that; that, in my submission, is wrong. If your Lordship is with me on that, then my friend may wish to say that he should pay my costs in relation to the issue on which I have succeeded and I should pay his costs in relation to the issue on which we have not succeeded, but in my submission that would be wrong. The wording of the passage I have just read to your Lordship leads to this conclusion, that a wholly successful defendant (which we are) should in no circumstances pay any costs. It may well be that he should not get—and it is a matter which I shall have to leave to your Lordship—the costs occasioned by a defence in respect of which he failed, but to order him to pay the costs of an unsuccessful plaintiff in respect of a defence which was unsuccessful would, in my submission, be wrong.

Mr. Justice MCNAIR: Do you say it would be wrong if I were to order that the defendants should have the general costs of the action, the plaintiff to have the costs of and occasioned by the plea of *res judicata*, such costs to be set off one against the other?

Sir MILNER HOLLAND: I think it would be difficult for me to say it would be wrong in law, but it would be contrary, in our submission, to the general practice that a defendant against whom a plaintiff is wholly unsuccessful should pay any costs in respect of an unsuccessful defence.

Mr. Justice MCNAIR: If my judgment is right, I do not see why you should not pay for Mr. Ten Eyck's attendance. I am not saying there was anything wrong in raising the plea of *res judicata* at all, it is a perfectly proper plea to raise, but in point of fact it failed.

Sir MILNER HOLLAND: I would like to carry that particular thought a little further, my Lord, though this may or may not affect your Lordship's mind at all. This is a case into which the plaintiff went with her eyes open, knowing of the American decision; the letter before action says "We are well aware of the *Lemaire* decision." She took the risk that the defendants, who are an American corporation, would rely on the American judgment, as of course they did in two senses——

Mr. Justice MCNAIR: I did not require Mr. Carson's attendance to prove the American law as a matter merely of persuasive authority.

Sir MILNER HOLLAND: No, my Lord. There is also this, perhaps from your Lordship's point of view not very important, consideration which moves the defendants: Had there been judgment against them which could only have been enforced in America, then it would have been vital, I should have thought, to plead that the American judgment is *res judicata* in case the American Court, in considering whether to enforce the English judgment, might have said: "Well, you never pleaded that the American judgment is *res judicata*".

Mr. Justice MCNAIR: Could not the judgment have been enforced against Morgan Grenfell & Co., Ltd., in London, the paying agent in London?

Sir MILNER HOLLAND: I should have thought not, my Lord: they are not personally bound by the bonds.

Mr. LITTMAN: It depends whether they had any money. If they had money there could have been a garnishee, possibly.

* 1962 Annual Practice, at p. 1841.

Sir Milner Holland: Lastly, may I put this approach to your Lordship: Separate costs of separate issues is never a very satisfactory matter from the point of view of taxation. The common practice to-day is to adopt a rough and ready approach and where defendants have raised a defence which involved a lot of costs, to deprive them of some of their costs; in other words, to order the defendants to pay only a proportion of the plaintiff's costs. It saves a great deal of trouble and expense in segregating out the material before the Taxing Master. On p. 1859 in the 1962 Annual Practice, under the heading "Issue", your Lordship will see:

> The practice of awarding "costs of issues" is now discouraged . . . Although there is no apportionment of costs in issue cases it is the duty of the Taxing Master to consider whether there should be a division of items common to each issue but which related in part to one issue and in part to another. . . .

showing obviously how difficult it is to do it.

Mr. Justice McNair: I know it is always very unsatisfactory.

Sir Milner Holland:

> Instead of awarding costs of issues, the Judge will sometimes make a plaintiff who is only partially successful bear some of his own costs. So where judgment is given for part of a claim the defendant can be ordered to pay half or some other portion of the plaintiff's costs as agreed or taxed.

I merely say that if your Lordship takes the view that a substantial amount of costs was involved in the issue on which the defendants have not been successful, it may well be the right order would be to order the plaintiff to pay a proportion (whatever proportion your Lordship thinks right) of the defendants' costs. Then all that happens is that the costs are taxed and the defendants will not get them all, they will only get a proportion.

Mr. Justice McNair: Just following that line of thought, with regard to the time occupied by the Court, I should have thought the time actually occupied both in hearing the evidence of the American law and the submissions on American law might easily be two-thirds of the time the case has taken.

Sir Milner Holland: It is very difficult to be sure about that. As I recall, my friend Mr. Foster opened the case for two and a half days and my argument to your Lordship on the substantial issue was one and a half days; that is four days, and the rest of the case took four days, so one can see there might be an argument for saying that the plaintiff should pay half the defendants' costs. Of course a great deal of the rest of the matter in the presentation of the case, the pleadings and so forth, would be the same whether the defendants raised this issue or not. It is never easy to make submissions where a matter is something entirely in your Lordship's discretion, but we do press your Lordship, if you are minded not to give the defendants the whole of their costs, to make an order giving them a proportion of their costs rather than having segregated issues with the very complicated business that involves.

Mr. Littman: My Lord, the first question I apprehend is whether the plaintiff is entitled to judgment in this action. On that I understand the point troubling your Lordship is that there is no claim for the sterling sum. In my submission, there is a claim. I entirely accept there is not a separate claim, but there is a claim for the total amount and, in my submission, the greater sum includes the lesser. Your Lordship sees, if you look at the claim for principal, there is a plea that the defendants have not paid the sum of £123,000 or any part thereof. Then when we come to the defence, the claim is treated as a claim for the whole sum and there is a defence to the whole sum. Any doubt there may have been about that, in my submission, must have been removed by the correspondence, in which we made it clear beyond all possible doubt that if we did not succeed on the gold clause point we would ask for judgment for the sterling amount, and in my submission it was not essential to put in the words "Alternatively we claim the sterling sum". We claim for a certain sum of money and if some lesser sum is due, then in my submission the plaintiff's claim covers that. I would submit to your Lordship that this claim does raise a claim for the whole of the moneys and that the plaintiff is, therefore, entitled to judgment for that sum; and if that is right then the order for costs which I suggested to your Lordship would, in my submission, follow subject to this, that the defendants should have the costs of the issue relating to the gold clause.

If your Lordship is against me on that, then the assumption is that there will be judgment for the defendants in the action.

Mr. Justice McNair: Yes.

Mr. Littman: I think my friend was inclined to concede, subject to your Lordship's discretion in the matter, that it might be right that I should not be ordered to pay the costs occasioned by the issue of *res judicata.*

With regard to the suggestion that there should be a proportion taken: There cannot in principle be an objection to this, but of course the difficult thing to know is what the proper and just proportion should be.

Mr. Justice McNair: I am not sure it would be more difficult for me than for the Taxing Master. The Taxing Master is quite at sea, experienced as he is, in determining how much time has been spent on a particular issue.

Mr. Littman: I apprehend the way the Taxing Master would proceed would be this: He would say: The defendants do not get the costs of Mr. Carson, but the plaintiff gets her costs of Mr. Ten Eyck. Then I think the practice is for the trial Judge to give him some indication of the rough proportion of the general costs which are attributable to that issue, and the Taxing Master would then have to form a view as to what might be the common costs and relate those to that issue. That is one way to proceed. The other way to proceed is to follow my learned friend's suggestion and direct an overall proportion. The difficulty there is that one does not know to what extent the equation is going to be weighted by the costs of Mr. Carson, because if an overall proportion of costs is to be taken, of course, Mr. Carson's fees would be much greater——

Mr. Justice McNair: I should have thought it highly likely that Mr. Carson would be here anyhow.

Mr. Littman: The defendants may say that Mr. Carson came from America and Mr. Ten Eyck did not, and they might seek to say that Mr. Carson's presence put them to great expense for this case and that might weigh the equation against my client.

My learned friend suggested that perhaps it could be dealt with upon the basis that, say, 50 per cent. of the time was spent on this issue, but that does not mean that justice would be done by directing that we should pay 50 per cent. of the defendants' costs, because if 50 per cent. of the costs have been incurred on that issue, not only ought the defendants not to have them, but they ought to pay our costs. So the right order as to costs, if one was dealing with it by proportions, would be that there should be no order as to costs, because if 50 per cent. of the costs were incurred on an issue on which the defendants have failed, it means that 50 per cent. of the costs are due to them and 50 per cent. to us. Therefore, I would submit that if that is the appropriate way the right order is perfectly simply "No order as to costs". Failing that, I would ask your Lordship to say that if the defendants are to have judgment they should have the costs subject to this, that the costs of the issue of *res judicata* should be paid by the defendants to the plaintiff and set off, and that your Lordship should give some direction or some indication of approximately what, in your Lordship's view, was the proportion of the general costs as distinct from those specifically allocatable to that issue which were to be treated as going to that issue. That is a matter entirely for your Lordship.

Mr. Justice McNair: Having heard this discussion on the form of the judgment and costs, I have come to the conclusion that inasmuch as in the action itself the only claim by the plaintiff is a claim for payment on a gold value basis and as she has failed, according to my judgment, on that issue, there should be judgment for the defendants in the action.

As regards costs, here again the main issue litigated between the parties has been the gold value clause. There has been a secondary issue raised by the defendants on the plea of *res judicata* which occupied a great deal of time and certainly, no doubt, involved the employment of expensive witnesses, and on that issue the defendants have failed. I am rather tempted by the suggestion that, while giving the defendants the general costs of the action, I should limit their recovery to a certain proportion, but I am afraid I have not got the material before me on which I could base the proper proportion. Accordingly, my judgment will be that the plaintiff is to receive the costs of and occasioned by the plea of *res judicata.* These two sets of costs to be set off one against the other and the balance paid in whoever's favour the ultimate figure works out.