DEBTS UNDER INFLATION *

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I. THE IMMUTABILITY OF THE NOMINAL AMOUNT

A. The Principle of Immutability

A debt is defined by its monetary unit (dollar, pound sterling, etc.) and by the figure added, both together denoting the “sum” owed. Alterations in the monetary field which have no bearing either upon this unit or upon this figure do not affect the debt. Changes in the value of the unit, whether in terms of metal value, purchasing power or rate of exchange, are particularly irrelevant on this score. There is in continental literature a good deal of opposition to this “nominalistic” doctrine, but on closer examination it

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1. The theory underlying this rule has been developed by the writer in Basic Monetary Conceptions in Law (1937) 35 Mich. L. Rev. 865.

2. Thus by Hubrecht (later writing under the name of Hubert), La Dépréciation Monétaire et l’Exécution des Contrats. Stabilization du Franc et Valorisation des Créances (1928), a volume which, however, is very much at variance with actual French law and the great majority of French writers: WAHLE, Das Valorisationsproblem in der Gesetzgebung und Rechtsprechung Mitteleuropas (1924); Stampe, Das Deutsche Schuldentilgungsrecht des 17. Jahrhunderts (1925) Sitzungsberichte der Preussischen Akademie der Wissenschaften (Philologisch-Historische Klasse) 2, and a number of further studies published in (1926) Sitzungsberichte at 37 and in the Abhandlungen of the same Academy (and the same Klasse) 1928, 1931, and 1932, presenting ample material of monetary legal history, chiefly French. Unfortunately they partly misinterpret facts and lack clarity of legal analysis. See ASCARELLI, LA MONETA (1928) 293; JASTROW, Die Prinzipienfragen in den Aufwertungsdebatten (1937) 100; TAUROFF, Molinaeus’ Geldschuldelehre (1928) 34. In this country the publications by Eder, Legal Theory of Money (1934) 20 Corn. L. Q. 52, and The Gold Clauses in the Light of History (1935) 23 Geo. L. J. 359, 721, are basically anti-nominalist. Writings taking the nominalist point of view are numerous. Reference may be made to ASCARELLI, LA MONETA (1928); GIUSAN, La Dépréciation Monétaire et ses Effets en Droit Civil (1934); Geny, Cours Légal et Cours Forcé en Matière de Monnaie et de Papier-Monnaie (France, 1928) Revue Trimestrielle de Droit Civil 5; Henggeler, Die Abwertung des Schweizerfrankens und ihr Einfluss auf die Zivilrechtlichen Verhältnisse (Switzerland, 1937) Zeitschrift für Schweizerisches Recht 158a.
will be found that the existing controversies do not touch upon the basic
problem under discussion. No anti-nominalist has ever advanced the prop-
osition that the amount of circulating media to be paid by the debtor should
necessarily and exactly correspond to the daily, and sometimes hourly, fluc-
tuations of the market price of gold, or of the rate of exchange or of the
purchasing power of the monetary unit. Even in the German revaluation
movement the focal point was merely an equitable restoration of the debts
entirely destroyed through the collapse of the mark. After the eclipse of
the French assignats, there was also a reestablishment of vanished debts by
"scaling" statutes, and similar reestablishments have occurred in other
phases of monetary history. However, the fact of a fading debt is, in
itself, evidence of the truth of the nominalistic view. Revaluation can only
be remedial. As a matter of fact, it is the nominalistic view which makes
perceivable and measurable inflation and deflation, and generally, the alter-
ations of the economic value of debts.

During the middle ages a "metallistic" doctrine was applied to loans; that is, a definite quantity of silver or gold was considered to be the object
of a loan. But this was in a time of monetary imbroglio, characterized
by a multitude of coining potenates, by roughness, dissimilitudes, incessant
alterations and rerating of coins, by melting down and emigration of the
better types, and generally by monetary abuses committed by rulers as well
as subjects. There was nothing approaching a homogeneous modern sys-
tem efficiently organized and controlled by the government of a large ter-
ritory. Therefore, in making payment the money was frequently weighed,
particularly where considerable amounts were involved. At the same time
the object of major debts was customarily articulated directly or indirectly
in terms of a definite quantity of coined gold or silver. Under such con-
ditions it was a workable and fair rule to have the borrower return the
"intrinsic" value of the coin received, even in the absence of an explicit
stipulation to that effect. Thus the borrower, denied the use of capital by
way of interest under canonical law, was protected at least against loss
through monetary changes. This medieval proposition was in the nature

3. See infra p. 596.
4. This has particularly been demonstrated by HARTMANN, ÜBER DEN RECHtLICHEN BE-
GRiff DES GELDES UND DER INHALT VON GELDSCHULDEN (1868) and by TAEUBER, GELD UND
KREDIT IM MITTELALTER (1933). The Roman rule was "nominalist". ASCARELLI, LA
MONETA (1928) 4.
5. As early as 1200 Pope Innocent III adjudicated an ecclesiastical case on a metallistic
basis. See TAEUBER, op. cit. supra note 4, at 107 and 309. An old impost was running in
terms of a local type of "denars" which had long disappeared from circulation. Considering
the absence of "conversion rates", which in modern legislation regulate the transition from
one currency to another, the metallistic decision was a matter of course.
7. TAEUBER, op. cit. supra note 4, at 195; so even in England, CUNNINGHAM, THE
GROWTH OF ENGLISH INDUSTRY AND COMMERCE (5th ed. 1910) 326, n. 5.
8. Examples in TAEUBER, op. cit. supra note 4, at 96.
of a rule in connection with loans rather than an application of a general monetary theory. In a more advanced economy, it was refuted by the great French jurist, Molinaeus (1500-1566), who also opposed the ecclesiastical anti-interest rule. The metallistic tenet lost its ground as governments succeeded in having the monetary unit represented in appropriate fractions and multiples, with coins readily accepted by the community, which gradually became accustomed to rely, even in major payments, on the "name" of the coins. Under a modern monetary system, the medieval doctrine has no actual significance. The rule favoring nominal value was laid down in England, in a very distinct and impressive manner, as early as 1603 in the Case of Mixt Monies in Ireland. There it was held that the debtor, Brett, was entitled to discharge his debt of 100 pounds in debased coin of the same nominal amount, the debasement having been ordered by Queen Elizabeth subsequent to the establishment of the debt. “Although at the time of the contract and obligation made . . . pure money of gold and silver was current within this Kingdom . . . yet the mixed money, being established in this Kingdom before the day of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it.” The court expressly cites Molinaeus amongst others as authority for the rule applied. In England since then, no attempt has been made to question the nominalistic principle. This is true for depreciation of the pound during and its appreciation following the Napoleonic War as well as for developments during and after the World War. By now the very existence of a nominalistic-metallistic problem is far from the English imagination. In the United States “dischargeability” by depreciated money, of debts incurred before such depreciation, was, on broad grounds, judicially certified by the Legal Tender cases, which in this connection expressly rely on the Mixt Money case. The colonial and continental inflations

9. On this see Taeuber, op. cit. supra note 2, at 85 et seq.
10. Molinaeus, Tractatus Commerciorum (or Contractuum) et Usurarum (first published in 1546) is in point. According to Taeuber, op. cit. supra note 2, the historical significance of Molinaeus’ doctrine does not consist in his nominalistic tenet but rather in the fact that Molinaeus was the first to develop a doctrine of debts in terms of a general theory of money. This view seems to be strongly over-emphasized by Taeuber.
11. Brett v. Gilbert, Davis 18, 80 Eng. Rep. 507, 2 State Tr. 113 (1605). This case has been strongly criticized from a metallistic point of view by Eder, supra note 2, at 722, 731. However, the arguments advanced by Mr. Eder bear only on the King’s power to debase the coin, hence on a problem of old English constitutional law, and not on the question of how a valid devaluation reacts on existing debts. His arguments prove nothing more than that there was later a criticism of the Mixt Money case. Incidentally there is no disagreement as to the fact that debasement of coins is generally undesirable and that the English constitutional rule changed in the 18th century. For other expressions of the nominalistic doctrine in the common law see Pong against Lindsay, 1 Dyer, marginal note 71, 82b. And Scrutton, L. J., in The Baarn, [1933] P. 251, 265 (C. A.), “A pound in England is a pound whatever its international value.”
12. 12 Wall. 457, 548 (U. S. 1871). However, an explicit demonstration of the nominalistic principle with an eye to continentals is to be found in the early case of Hollingsworth v. Ogle, 1 Dallas 257 (Pa. 1788).
sufficiently illustrate the operation and efficiency of the nominalistic rule. A more recent application of the nominalistic doctrine is to be found in an Iowa case of 1934, where a mortgagee, although tendered the nominal amount, insisted upon foreclosing on the ground that the dollar had lost half its purchasing power since the time of the loan. The court, "while sympathizing with the appellant [the mortgagee]," overruled the claim, saying, "he has cited us no law, and we are unable to find any, through which we may grant him the relief which he asks." 

In France the nominalistic doctrine had been proclaimed with particular firmness and clarity by Pothier (1695-1722), who considers it to be "l'usage constant dans notre jurisprudence". It also dominated the revolutionary period and was incorporated in the famous Article 1895 of the French Civil Code. Although the rule, in accord with the old tradition, is couched in terms of loan and placed in the chapter on loans, there is no doubt of its applicability to all debts. There is some dispute, principally academic, as to whether the principle enunciated by Article 1895 applies only to a debasement of coin or rather encompasses any depreciation, including a depreciation of paper money. Actually, however, the second alternative is the valid one; and despite the repeated and tremendous depreciations of the franc, no noticeable attempt at revaluation, either judicial or legislative, has ever been carried through. The French model was literally taken over by the Italian, the Spanish, and other Latin Codes.

14. Id. at 351, 252 N. W. at 513.
15. Pothier, TRAITÉ DU PRÉT DE CONSOMPTION, n. 36; 5 Pothier, OEUVRES (Siffrein, 1821) 403.
16. Dalloz, Répertoire Méthodique 13 Verbo "Papier-Monnaie" (France, 1924) 2 REVUE DU DROIT BANCAIRE 77.
17. "The obligation resulting from a loan in money is always simply for the amount in figures indicated in the contract. If there has been an increase or diminution of species before the time of payment, the debtor must return the amount in figures lent and must return this amount only in the species current at the time of payment." CODES ET LOIS POUR LA FRANCE (Colin, 1924). On the genesis of art. 1895 see Geny, La Validité Juridique de la Clause-Or (France, 1926) REVUE TRIMESTRIELLE DE DROIT CIVIL 557; Hubrecht, op. cit. supra note 2, at 88.
18. See Lalou, Dalloz Périodique, 1924 II, 20, with references.
19. Hubrecht, op. cit. supra note 2, at 101, advancing the doctrine that nominalism is an "exceptional" rule. But certainly it is for paper money even more appropriate than for coin. The narrow doctrine was used by the Mixed Appellate Court of Alexandria, May 30, 1927 (France, 1928) 55 JOURNAL DU DROIT INTERNATIONAL 768, in interpreting art. 577 of the Egyptian Mixt Civil Code, CODES DES TRIBUNAUX MIXTES D'EGYPTE (1896) 117, which is almost literally taken from art. 1895 of the French Code. However, in the sense of Egyptian legislation, franc seems to indicate "gold franc".
20. See Professor Picard, a noted French commercialist, (France, 1924) 51 JOURNAL DU DROIT INTERNATIONAL 918. The decisions of the Cour de Cassation (Civ.) Jan. 23, 1924 are given id. at 685.
22. CODICE CIVILE DEL REGNO D’ITALIA (1923) art. 1821. The significance of the nominalistic conception within the Italian monetary system was pointed out by the Italian Court of Cassation, May 30, 1927, 1928 MONITORE DEI TRIBUNALI 91.
23. CÓDIGO CIVIL ESPAÑOL (Moreno, 1906) art. 1170; CÓDIGO DE COMERCIO ESPAÑOL (Moreno, 1906) art. 312.
24. Thus by the Belgian Code, CODES BELGES (1928) art. 1895, art. 2199.
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as well as by the Dutch Code. However, the last, in force since 1838, and the Italian Code, by special provisions, protect specie clauses stipulated in favor of money lenders who would have supplied the debtor with like coin; an exception clearly in confirmation of the general prevalence of the nominalistic principle.

Identity of the non-depreciated monetary unit with the depreciated has universally been recognized even where the unit was foreign; and this is true despite the fact that foreign money is much more closely related to commodities than is domestic money. In a case concerning German marks, Justice Holmes made this broad statement: "Obviously, in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same." The principle of immutability applies to both depreciations and appreciations of the monetary unit. Sometimes there have been sizable appreciations. Outstanding is the appreciation of about 60 per cent of the dollar from 1864 to 1878. A number of similar processes occurred subsequent to the World War. Thus the English pound had depreciated about 30 per cent in 1920, and the Dutch guilder fell about 25 per cent sometime in the same year; but they wholly recovered within a few years. The lire was stabilized in 1927 about 25 per cent over the average level held since 1922, and more than 50 per cent above its lowest level, which was reached in August, 1926. In all of these cases the burden of debtors who had contracted their debts in depreciated money was made heavier. However, as far as it is known, no attempt was made by debtors to derive a legal defense from the mere improvement of the currency. Practically, therefore, the problem of fluctuating currencies in a chapter on debts is almost entirely a problem of depreciation.

B. Adaptable Debts

Although the nominalistic principle has been theoretically and actually accepted, its boundaries are still to be charted. The most important prob-

25. Les Codes Néerlandais (1886) art. 1793.
26. Id. at art. 1794; Codice Civile Del Regno D'Italia (1923) art. 1822.
27. Particularly so in the opinion of American courts. See Nussbaum, Multiple Currency and Index Clauses (1936) 84 U. of Pa. L. Rev. 569, 574.
30. Illustrative of the effects of dollar appreciation is The Vaughan and Telegraph, 14 Wall. 258 (U. S. 1872). The debtor had to pay a much higher value as a result of his unsuccessful appeal, the Supreme Court having no power to change the dollar amount awarded by the lower court. See also Hus v. Kempf, 12 Fed. Cas. No. 6,944 (S. D. N. Y. 1879).
31. For discussion of the influence of fluctuating currencies upon accounting and balance-sheets, a matter not considered in this article, see Bresciant-Turbon, The Economics of Inflation (Trans. by Sayers, 1937) 274; Schkaff, La Dépréciation Monétaire et ses Effets en Droit Privé (1925) 241; Schmaenenbach, Dynamische Bilanz (4th ed. 1926) 217; Sweeney, Stabilized Accounting (1936); Wahle, op. cit. supra note 2, at 33.
lem is the determination of damages and other unliquidated claims under a fluctuating currency. There is a doctrine which understands the legal ratio between the monetary unit and the gold value to involve a fictitious stabilization of the unit disregarding its actual depreciation or appreciation in terms of gold value, purchasing power, etc.\footnote{32} Fluctuations of the unit in such terms are not given judicial cognizance under this doctrine which has been called the "theory of legal constancy of value".\footnote{33} A case decided by the Supreme Court of the United States is illustrative. When the holder of a gold certificate claimed damages from the Federal Government, incurred through the confiscation of the certificate on January 17, 1934, the Court dismissed the claim partly on the ground that on that day the statutory equation of one dollar to \(25.8\) grains of standard gold was still in force;\footnote{34} that devaluation of \(15\frac{5}{21}\) grains was decreed on January 31, 1934. Depreciation of the dollar, however, had reached the same level on January 17, enhancing the world market price of an ounce of fine gold to about \$35, and accordingly enhanced the value of the gold dollar coins in terms of the world market value about 60 per cent. Whether the holder of the certificate could avail himself of the world-market rate is a troublesome question; but admitting that he could, one can hardly deny that he suffered a loss of sixty cents on every dollar of the face amount. Suppose the case of a statute or a contract explicitly providing for payment in terms of the market value of a commodity. The use of the market value in the determination of the sum is then certainly not prevented by the fact that the old monetary ratio is still in the statute books. The market value will reflect, and is considered by the parties to reflect, all the fluctuations of the price of the commodity involved, regardless of whether these fluctuations are influenced by, or are independent of, changes in the monetary standard. The New York Court of Appeals, during the greenback period, was correct in taking into account the depreciation of the dollar in the determination of damages.\footnote{35} The same principle was recognized by the Reichsgericht.\footnote{36}

\footnote{32} See Nussbaum, \textit{supra} note 1, at 881.
\footnote{33} Hartmann, \textit{Internationale Geldschulden} (1882) 29; Knie\ss, \textit{Das Geld} (2d ed. 1885) 285.
\footnote{34} Nortz \textit{v.} United States, 294 U. S. 317 (1935) (one of the gold clause cases). Similar views were advanced by the English Court of Appeal in The Baarn, [1933] P. 251 (C. A.). In the United States during the greenback period a legal-constancy doctrine was used in computing damages. See cases collected in Dawson, \textit{The Gold Clause Decisions} (1935) 33 Mich. L. Rev. 647, 674, n. 54. Even a depositor of gold coin, claiming damages from his depository, was granted damages under the same theory for only the nominal dollar amount. Warner v. Sauk County Bank, 20 Wis. 492 (1866). See also Dawson and Cooper, \textit{Northern Inflation Cases} (1935) 33 Mich. L. Rev. 852, 882.
\footnote{35} Simpkins \textit{v.} Low, 54 N. Y. 179 (1873) and other cases cited by Dawson and Cooper, \textit{supra} note 34, at 887. In Simpkins \textit{v.} Low, \textit{supra}, at 185, the court said: "Why should a court be the only place where men must affect (sic) an ignorance of what all men know?"
\footnote{36} Reichsgericht, March 12, 1921, 101 Entscheidungen des Reichsgerichts in Zivilsachen 418 (dealing with loss of stored goods); Reichsgericht, June 13, 1921, 102 Entscheidungen des Reichsgerichts in Zivilsachen 363 (dealing with an injury wrongfully done to a horse).

Ed. Note: Entscheidungen des Reichsgerichts in Zivilsachen will hereafter be cited as R. G. Z.
and the highest courts of Austria and Belgium, sensibly distinguishing damages granted in terms of the depreciated currency from "revaluation" of debts. A general rule was established by Belgian legislation when Belgium in 1935 again devalued her franc; as regards damages, devaluation is to be considered only to the extent that in the pertinent field ("dans le domaine envisagé") the purchasing power of the franc has changed until the day of evaluation.

Similarly the nominalistic rule is not compelling with respect to unliquidated claims other than damages and, in some exceptional cases, not

37. Austrian Supreme Court, Assembled Senates, June 18, 1924, 6 Die Rechtsprechung 173. However, in a case where a private tutor had sold his service on the basis of the bread price, the Supreme Court surprisingly allowed only the price as of the time of the lessons given, despite the later depreciation of the money. Judgment of May 23, 1923, Coulon, 6 Mitteilungen des Verbandes Österreichischer Banken und Bankiers 250.


40. Louisville & N. R. R. v. Williams, 183 Ala. 138, 62 So. 679 (1925); Martin v. Pacific Gas & Elec. Co., 225 Pac. 284 (Cal. App. 1927); Posch v. Chicago Ry., 221 Ill. App. 241 (1923); Dole v. Orleans Pub. & Light Co., 225 La. 945, 46 So. 929 (1929); Valley v. Scott, 125 Me. 139, 128 Atl. 311 (1927). A collection of cases may be found in Notes (1929) 3 A. L. R. 610, (1929) 1 A. L. R. 179, (1922) 18 A. L. R. 564, (1929) 60 A. L. R. 1395. For an instance where the court took account of the increased purchasing power of money, see Johnson v. St. Paul Ry., 67 Minn. 269, 69 N. W. 900 (1897). But cf. Palmer v. Security Trust Co., 242 Mich. 163, 218 N. W. 677 (1928), modifying a verdict by which the jury had awarded to a wage-earner who had been seriously injured by a bus, $74,000 damages instead of $37,000 on the theory that the dollar had lost half its purchasing power. The court applied the dollar-for-dollar rule, advancing the obscure reason that the halving process should have been extended to the "wage-earned dollar" as well as to the "compensating dollar". However, the verdict was wrong inasmuch as it assumed that the wage-earner without the accident would have earned the double amount and that the then existing and actually temporary loss in purchasing power would persist.

41. Law of April 29, 1935, Bulletin Usuel des Lois 504; see (Holland, 1935) 33 Bulletin de l'Institut International Juridique 91; and Moreau, La Clause-Or (1935) 14. Previous to the Law of 1935 it had been held that in case of devaluation damages must be augmented in proportion to the degree of devaluation. Appellate Court of Liége, Mar. 27, 1934, 1935 PastORcRISE Belge II 148.

42. This principle has been applied under the German law to claims for recoupment of "unjust enrichment". Reichsgesetz, Oct. 4, 1925, 114 R. G. Z. 342, 344; Reichsgesetz, Oct. 11, 1927, 118 R. G. Z. 185, 188. The same rule was employed by the German-Belgian Mixed Arbitral Tribunal in Delcroix v. Fritzshe & Co., 3 Recueil des Décisions des Tribunaux Arbitraux Mixtes 291 (1923), and by the Roumanian-German Mixed Arbitral Tribunal in Direction Générale v. Schwartz, 7 id. 738 (1923). Contra: Austrian Supreme Court, Mar. 10, 1926, 8 Die Rechtsprechung 74. In rural leases cattle are frequently given to the lessee under the agreement that at the expiration of the contract the lessee has to restore to the lessor the cattle of the same value on a total estimate set out in the contract, a deficiency to be paid in cash. (Baux v. Cheptel, in German "Iron-Cattle" contracts, because an invariable stock of cattle has to be restored). When through the inflation the nominal prices for cattle soared, the question arose whether the cattle were to be restored only to the extent as to cover total value prefixed under entirely different market conditions by the contract. The French Cour de Cassation held for the lessee, extending the nominalistic principle to the prefixed valuation and rejecting the theory of "imprévision" (infra note 64) in its Judgment of June 6, 1921, Dalloz Périodique, 1921 I, 73, and other cases cited in Hubrecht, op. cit. supra note 2,
even as to liquidated claims. The principal examples are cases of main-
tenance and kindred claims purporting to supply a definite quantity of pur-
chasing power to the obligee. Those claims may fall into the "unliquidated"
category. But even if they are liquidated by agreement of the
parties, they may still be open to judicial reformation where serious change in pur-
chasing power would destroy (or unreasonably raise) the guaranteed
standard of living. Bequests of certain sums, too, might be subject to refor-
mation in the case of an entire depreciation of the money if such an inter-
pretation would be necessary in order to comply with the true intent of the
testator.

C. Limits of Adaptability

As suggested by the examples given, the courts will take cognizance of
only very serious changes in the purchasing power of the monetary unit.
This qualification is applicable to all "adaptable" claims including dam-

at 117 and 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DU DROIT CIVIL (11th ed. 1935) n. 1820 bis.
But see Italian Court of Cassation, Judgments of: Oct. 6, 1925; Sept. 26, 1925; Dec. 17, 1925;
1926 Corte de Cassazione 38, 41, 1115; also Judgment of May 12, 1927, 1927 Corte de Cas-
sazione 1727. The Reichsgericht first decided in favor of the lessor (Judgment of Feb. 13,
1926, 75 Seufferts Archiv 267); however, the Reichsgericht on June 27, 1922, 104 R. G. Z.
394, decided in favor of the lessee, following the trend towards revaluation. The latter case
as well as the Italian cases led to an arbitrary handling of valuation and payments involved.

43. We do not consider liquidation by judgment. The procedural law of the forum would
come in on this score.

44. Reichsgericht, May 26, 1921, 1921 J. W. 1080; Reichsgericht, Jan. 26, 1923, 106 R. G.
Z. 233. The same principle was acknowledged by the Austrian Supreme Court, April 20, 1926,
8 Die Rechtsprechung 135, and by the Supreme Court of Czechoslovakia, see WAHLE, op. cit.
supra note 2, at 169, n. 3, although these courts are opposed to the revaluation of debts.
Adaptability, at least, of familial maintenance claims, including liquidated ones, is recognized
also by Italian writers. Ascarelli, Währungsrechtliche Fragen in der italienischen Recht-
sprechung (Germany, 1928) 2 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRI-
VATRECHT 801; SCADUTO, DEBITI PECUNIARI E IL DEPREZZAMENTO MONETARIO (1924) 192.
Ascarelli calls the above theory "doubtless", without, however, citing decisions. Because of
the necessity of maintaining insurance reserves, life insurance debts and annuities, to be paid
by insurance companies, are business transactions which must be calculated on strict mathe-
atical principles. They are not adaptable like familial maintenance rights. Contra: Aus-
trian Supreme Court, April 20, 1926, 8 Die Rechtsprechung 135. Under German revaluation
law a partial reestablishment of life insurance claims was provided by a decree of August 28,
1924, Reichsgesetzblatt, 1924 I, 694.

45. The adjudication, of course, will depend on the circumstances. A German resident
of Switzerland who died in 1918 had bequeathed, in 1917, 50,000 marks to the University of
Heidelberg. When the mark had depreciated to one-thousandth, the Swiss Federal Tribunal,
April 26, 1923, 49 Entscheidungen des Schweizerischen Bundesgerichtes, II, 15, refused to
adapt the legacy to the new situation. Contra: Matter of Martha Lendle, 250 N. Y. 502, 166
N. E. 182 (1929). The New York Court of Appeals allowed the mark-legatee the nominal
amount in reichsmarks although the will was made in 1920 when the mark had already con-
siderably depreciated. The court erroneously took the new German monetary unit, called
by the court "mark" instead of "reichsmark", for a new "reestablished" mark unaware that
mark debts had been recast into reichsmark debts at a ratio of one trillion to one. Infra note 141.
The mistake cost the estate $105,355, or at least a considerable part thereof.

46. This is not true, however, where the obligation calls for the payment of a market
price of a definite commodity. The movement of the market price may reflect even minor
changes in the purchasing power of money.

47. In DAS GELD (1925), the writer suggested the term "Wertschuld" ("value-debt"),
which was adopted by the Reichsgericht, Oct. 4, 1926, 114 R. G. Z. 342. See July 5, 1918,
6 Zeilers' Aufwertungsfälle vom Reichsgericht, no. 1314; Reichsgericht, Nov. 28, 1930,
130 R. G. Z. 367. In English the term "value-debt" would probably appear out of place.
ages. Obviously it would be highly unsound policy, even within the limited field of "adaptable" debts, to make claims mathematical "functions" of purchasing power. A legal tie-up of important groups of claims with the fluctuating purchasing power of money will be workable only for relatively short emergency periods.\(^{48}\) There are also political reasons which obviate an immediate transposition of such changes into legal terms. In times of monetary crises, it would be dangerous for courts officially to admit a depreciation of the monetary unit of the country. This may engender disastrous effects. In war times and in other chaotic circumstances, the question may even become something like a national shibboleth. In 1811 when the English bank notes were at a discount of about 15 per cent, the House of Commons, on the motion of Mr. Vansittart, resolved that the notes "have hitherto been, and are at this time, held in public estimation to be equivalent to the legal coin of the realm, and generally accepted as such . . . ." Lord Canning felt that such a pronouncement was "carrying the license of exaggeration beyond pardonable limits, and defeating its purpose by the grossness of the caricature." Yet the resolution was passed by 151 to 75.\(^{49}\)

On the whole, therefore, it is quite understandable that thus far only a few jurisdictions have deemed it necessary to recognize a group of "adaptable" debts.\(^{50}\) The nominalistic principle has been extended to unliquidated debts even in countries such as France and Italy, which, after the World War, underwent depreciations definitely reducing the monetary unit to a fraction of its original value. And subsequently to the re-establishment of the German currency in 1924, the Reichsgericht, ardent champion of the general revaluation of mark debts, refused to indemnify the owner of expropriated land for a loss in purchasing power of the new "reichsmark". Germany was then on the gold standard and the court was certainly correct in asserting that if gold is the legal standard of the currency, fluctuations of the gold value as such must not be taken into account by the courts.\(^{51}\)

D. Executory Contracts

Hitherto we have been concerned only with the repercussion of fluctuating currencies on pecuniary obligations, severing them, in the case of a contract, from the other contractual obligations. However, in bilateral contracts, as long as they are executory, a problem arises with regard to

\(^{48}\) On index clauses see Nussbaum, supra note 27, at 592.

\(^{49}\) For the two quotations and the vote on the resolution see SUMNER, A HISTORY OF AMERICAN CURRENCY (1894) 271, 278, 279 respectively, wherein these debates are summarized. See also the Report of the Bullion Committee appended thereto.

\(^{50}\) The notion of adaptable debts (Wertschulden) is especially objected to by HUBRECHT, op. cit. supra note 2, at 242, for the obviously fallacious reason that "all debts are value debts". Contra: Ascarelli, supra note 44, at 800.

\(^{51}\) Reichsgericht, Nov. 28, 1930, 130 R. G. Z. 367, depicting revaluation as an abandonment of the rule "paper-mark for gold-mark" rather than of the rule "mark for mark". This formula, though questionable, reveals the court's consciousness of the nominalistic principle.
obligations for the future delivery of goods or services. Is the obligor liable to performance according to the terms of the contract if, after its formation, the currency stipulated for considerably depreciates, enhancing at the same time wages, prices of raw material and other elements of performance? The problem is particularly significant in connection with construction contracts and leases obligating the lessor to supply the tenant with gas, electricity or heat for the stipulated term. Under the nominalistic theory, there is a duty to perform the obligation in dollars of the decreased purchasing power. However, the situation somewhat differs from the case of a simple debt. Imposing a loss, through depreciation, upon a money creditor is one thing; compelling the obligor to deliver his goods or services for a consideration which has become only a fraction of what it was before is another thing. Courts, apart from any revaluation doctrine, are sometimes apt to treat these two problems differently; namely, to grant relief in the latter situation even though they refuse it in the first. For instance, in 1854, a lessee of premises in Washington, D. C., was given a ten-year option to purchase the premises at a fixed amount. In April, 1864, when the dollar had depreciated more than 40 per cent, the lessee exercised the option. The United States Supreme Court, in Willard v. Tayloe, refused to grant him specific performance against the lessor on the ground that it would be "inequitable to compel a transfer of the property for notes, worth when tendered in the market only a little more than one-half of the stipulated price." The Court held that the plaintiff should have tendered gold or silver coin. Although this view certainly suggests the attitude which was soon to be revealed in Hepburn v. Griswold, the line of argument and the unanimity of the Court in Willard v. Tayloe place it beyond doubt that the theory of the latter case is independent of the ruling on the unconstitutionality of the greenbacks. The reasoning of Willard v. Tayloe is not very forceful except for its broad development of an equitable specific performance doctrine. After the reversal of the Legal Tender cases, Willard v. Tayloe was pushed aside by an Ohio court. Even if this be error, the practical significance of the decision seems to be very slight, at least if damages are to be awarded to the vendee in terms of paper money. Still the case offers an interesting contribution to the legal theory of executory contracts during an inflationary period.

52. 8 Wall. 557 (U. S. 1869), which is thoroughly analyzed by Dawson and Cooper, supra note 34, at 863 et seq.
53. Willard v. Tayloe, 8 Wall. 557, 574 (U. S. 1869).
55. Humphrey v. Clement, 44 Ill. 299 (1867) and other cases cited by Dawson and Cooper, supra note 34, at 866, n. 189, held to the contrary.
56. See Nussbaum, supra note 54, at 1085.
57. Longworth v. Mitchell, 26 Ohio St. 334 (1875).
58. See supra p. 575.
Another instance may be taken from Austrian law. In the case of an executory sale of goods, the Austrian Supreme Court gave the seller relief against the purchaser who, immediately after the sale, although not yet in default, had not tendered the purchase price. The court held, on equitable grounds, that the purchaser has to bear the subsequent depreciation. However, the doctrine most often invoked in continental countries was the frequently resurrected and variously renamed rule of "clausula rebus sic stantibus", which had grown up in the middle ages and disappeared in the seventeenth and eighteenth centuries. According to this ancient rule, a tacit clause was generally read into contracts to the effect that the binding effect of the contract depends on the continuance of the basic conditions existing at the time of contracting. This doctrine was used by the German courts in the preliminary phase of the revaluation movement as a basis for rescission of executory contracts. It was cautiously employed in Switzerland where it is expressly recognized by the code, in connection with "work contracts" (e.g., construction contracts). In France the rule was applied in administrative law where it was named the theory of "imprévision" in order to emphasize the "unforeseeability" of the events set forth as a defense. However, suggestions by French writers for an extension of the "imprévision" theory to private contracts were rejected by the French and, after some hesitancy, by the Italian courts.

60. HUBRECHT, op. cit. supra note 2, at 219 et seq.; RIFERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES (2d ed. 1927) n. 75 et seq.; Krückmann, Clausula Rebus Sic Stantibus, Kriegsklausel, Streikklause (Germany, 1918) 116 Archiv für Civilistische Praxis 157; Osti, La Cosiddetta Clausula "Rebus Sic Stantibus" nel suo Sviluppo Storico (Italy, 1912) 4 Rivista di Diritto Civile 1. For further references see 2 PLANIO, op. cit. supra note 42, at n. 1168.
61. Infra p. 579. A similar though somewhat confused doctrine was used by Polish Courts. See Przybowski (Germany, 1929). 3 Zeitschrift für Ostrecht 169.
62. The Swiss Code of Obligations, art. 373 in its first paragraph provides that the contractor in case his expenses or labor were greater than foreseen is not entitled to an increase in the compensation contracted for; but art. 373, § 2 then goes on to prescribe: "If completion is prevented or is made too difficult through extraordinary and unforeseeable events or through events which were excluded under the presuppositions made by both parties, the court, in its discretion, may award an augmentation of the price or rescission of the contract." In the post-war period the rule was extended somewhat to other types of contracts in case enforcement of the contract would result in the financial ruin of the obligor. Swiss Federal Tribunal, July 1, 1924, 50 Entscheidungen des Schweizerischen Bundesgerichtes, 1924, II, 256, 264; Oct. 9, 1927, 53 id. II, 53; April 3, 1930, 56 id. II, 189, 194. See Siegwart, Der Einfluss veränderter Verhältnisse auf laufende Verträge in Festgabe des juristischen Facultät der Universität Freiburg zur 59. Jahresversammlung des Schweizerischen Juristenvereins (Switzerland, 1924). The "ruin" rule was taken from German law, infra p. 587.
63. See infra note 69.
64. Particularly by RIFERT, op. cit. supra note 60, n. 391.
66. Italian Court of Cassation, April 7, 1923, Giurisprudenza Italiana, 1923 I, 458; Jan. 26, 1924, id. 1924 I, 156; April 26, 1926, id. 1926 I, 1128; April 30, 1926, id. 1926 I, 1130. The Italian form for the theory rejected is "presupposizione" leaning probably on the German "Geschäftsgrundlage", infra note 92.
As a matter of fact, it is the function of the legislature rather than of the judiciary to prepare emergency schemes necessary for the adjustment of pending private contracts to changed monetary conditions. Such emergency legislation, within definite limits, may, however, confer upon courts or judicial agencies discretionary power to rescind unduly burdensome contracts and to grant equitable relief to the party adversely affected by the rescission.67 Sometimes legislative authorization will include power to reform contracts and, particularly, to increase rents or other dues with an eye to the depreciation of the currency.68 This, then, would amount to revaluation.

E. The Public Utilities Situation

The rates for the supply of water, gas, electricity, railway fares, and the like, may be influenced by a depreciation of money, and generally by changes in its purchasing power. However, the legal type of regulation to take care of these changes varies. In Germany the regulation is considered a matter for the executive branch of the government, particularly for the city government, with no judicial interference whatsoever. In France, the administrative courts possess jurisdiction over this subject matter. In a controversy involving the City of Bordeaux Gas Company, the Conseil d'État, the highest administrative court of France, first applied the theory of "imprévision" to major monetary changes, awarding the company, on account of the inflationary rise of wages and prices an augmentation of its rates.69 Judicially, this meant a reformation of a public law contract in an effort to maintain the public service.70

In the United States public utility rate regulation is within the province of public service commissions, whose determinations are subject to judicial review.71 The courts are much concerned with protecting the rights of inves-


68. This way was chosen particularly in regard to lease contracts. As to the pertinent French legislation see 2 Planiol, op. cit. supra note 42, n. 1706 bis - 1706 quar. On German law see 2 Staudinger, Kommentar zum Bürgerlichen Gesetzbuch II (1928) 341, 502. All these enactments are subject to frequent changes.


70. In Italy revision of prices in contracts for public work was set by decree of July 21, 1927, n. 1316, 1927 Raccolta Ufficiale III 3366, transformed into statute by law of June 14, 1928, n. 1575, 1928 Raccolta Ufficiale III 2594.

tors from what the courts call confiscation. In 1898, when the leading case of Smyth v. Ames was decided by the Supreme Court, prices, due to the prolonged after effects of the panic of 1893, were considerably below the level of the preceding decades when most of the utilities were built. The public, therefore, urged that the reproduction cost rather than the higher original cost of construction be taken as the basis of rate regulation. The Court held that the basis for computing rates to be charged by the utility “must be the fair value of the property being used by it for the convenience of the public”, a theory commonly referred to as a “fair return on a fair value”. As to “fair value”, the Court pointed out that the original cost of construction, the amount expended in improvements, “the present as compared with the original cost of construction . . . are all matter for consideration.” This formula, an attempt to reconcile both the demands of the public and those of the utilities, left a broad leeway to the public service commissions. When in the following years prices rose, driving reproduction cost above original cost, the commissions began to take recourse to original cost, abandoning the reproduction cost theory with its hypothetical estimates. This procedure, however, was held unconstitutional in Southwestern Bell Telephone Co. v. Missouri Public Service Commission. The “reproduction cost” element had thus become prevalent; but since this practice was retained after a higher purchasing power of the dollar was restored it now operated toward giving the public utilities a smaller rate base. The doctrine, thus established, results in subjecting the public utilities, as to their rate bases, to the effects of the fluctuating purchasing power of the dollar, with a view to securing to them a certain stability in terms of purchasing power. In this connection, the use of index numbers in translating the purchasing power of the dollar of one year into that of another

has found favor with commissions, courts and advocates of the reproduction cost as a convenient means for avoiding the cost and delay of other methods.\textsuperscript{78} The purchasing power of the dollar has thereby become a significant factor in the law of public utilities, constituting probably the most important instance of the legal use of the purchasing-power concept.

As to the "fair return", the rule was established by the Supreme Court that "a public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures."\textsuperscript{79} This return obviously will depend rather on the capital market than on the money market.

II. Revaluation in Germany

A. General Remarks: Preliminary Phases

"The depreciation of the mark of 1914-23," says the London economist, Professor Robbins, "is one of the outstanding episodes in the history of the twentieth century. Not only by reason of its magnitude but also by reason of its effects, it looms large on our horizon. It was the most colossal thing of its kind in history; and next to the Great War itself, it must bear responsibility, for many of the political and economic difficulties of our generation. It destroyed the wealth of the more solid elements in German society, and it left behind a moral and economic disequilibrium, apt breeding ground for the disasters which have followed."\textsuperscript{80}

Such is indeed the background against which the "revaluation" (Aufwertung) of the destroyed mark debts has to be viewed. True, revaluation which may be broadly defined as restoration, entire or partial, of debts

\textsuperscript{78} In Indianapolis Water Co. v. McCart, 89 F. (2d) 522 (C. C. A. 7th, 1937), aff'd, 58 Sup. Ct. 324 (1938), the Wholesale Commodities Price Index of the U. S. Department of Labor in addition to a private index referred to by the parties was used by the Court practically to award the water works a 25\% increase in the rate base as of Nov. 1935 over the rate base as of April 1, 1933. On the other hand the use of index-numbers was discouraged by West v. Chesapeake and Potomac Telephone Co., 295 U. S. 662, 669 (1935). A state commission had started from original cost and translated them into an amount of equal purchasing power as of the time of the decree by means of price indices. For this purpose the commission had selected sixteen commodity price indices, had weighed them and derived from them a "fair value" index which was applied to the original cost. This very elaborate and careful proceeding was held unconstitutional by a divided court, partly because the reasons for weighing the indices had not been disclosed by the court. The dissenting opinion, with which Justices Brandeis and Cardozo concurred was written by Justice Stone. See also GRAHAM, op. cit. supra note 72, at 21; Dorety, The Function of Reproduction Cost in Public Utility Valuation and Rate Making (1923) 37 Harv. L. Rev. 173, 190-191. Courts may resort to official index numbers only if they are introduced in evidence, except perhaps for the statement on general price trends. Ohio Bell Tel. Co. v. Public Util. Comm., 301 U. S. 292 (1935).


\textsuperscript{80} See preface to BRESCHIANI-TURSONI, op. cit. supra note 31.
impaired by monetary depreciation has a history that goes back for centuries. Still, legal and economic sciences have not been aware of this fundamental concept and its implications until the German post-war revaluation. Being an elementary reaction against the most pernicious inflationary process the world has ever seen, it is in itself an event of historical grandeur, probably the greatest which ever occurred in terms of the law of contracts. Any discussion, legal or economic, directed towards the development of theoretical views on revaluation, is bound to envisage the German events.

The inflationary movement began during the war; in June, 1918, the dollar (parity 4.21 marks) had reached a level of 5.31 and by November, 1918, it was 7.43. In December, 1919, the dollar was quoted at 46.77; in December, 1920, at 73; in December, 1921, at 191; in July, 1922, at 493; in October, 1922, at 3180; in December, 1922, at 7589. On January 11, 1923, French and Belgian troops occupied the Ruhr territory, center of Germany's heavy industry, in pursuance of Mr. Poincaré's policy of "productive pledges". At once a monetary tornado broke out: dollar quotations averaged in January, 1923, 17,972; in February, 27,918; in March, 21,190; in April, 24,457; in May, 47,670; in June, 109,996; in July, 353,412. Then the dollar quotations soared to astronomical heights: 4.6 millions in August; 150 millions on September 18; 1.2 billion on October 9; 12 billions on October 19; the trillion limit was attained on November 14; on November 15 the newly created Rentenbank circulated the "Rentenmark" to be tied up to the dollar, but it was at once caught in the tempest. On November 23 the level of 4.2 trillions was reached; but the government in a last effort kept quotations of the dollar down to this level; it did not loosen its grip; suddenly the tornado subsided, followed by the murderous calm of strangling deflation.

81. Supra p. 572.
82. For information see commentators on the revaluation law, cited supra note 141. The only analytical history of the revaluation movement and a valuable one has been written by an American. Dawson, Effects of Inflation on Private Contracts: Germany, 1914-1924 (1934) 33 Mich. L. Rev. 171. For a critical interpretation of the revaluation movement see Klang, Geldentwertung und Juristische Methode (1925); Nußbaum, Bilanz der Aufwertungstheorie (1927). Annual reports, concerning cases and writings, are to be found, since 1924, in Jahrbuch des Deutschen Rechts. Ample literary material, on the whole without any lasting interest, is collected in 2 Staudeinger, Kommentar zum Bürgerlichen Gesetzbuch (1930) 49, 55, 59.
83. The most detailed tables of the depreciation of the mark in terms of foreign currencies are the Valuta-Tabellen 1914-1927 (Frankfurter Societats-Druckerei, 1927). Statistical material as to the depreciation of the mark is contained in Bresciani-Turroni, op. cit. supra note 31; Elster, Von der Mark zur Reichsmark (1928) (dollar quotations at p. 433); Graham, Exchange, Prices, and Production in Hyper-Inflation Germany 1920-1923 (1930). The dollar quotations do not exactly reflect the purchasing power of the mark, which after the war exceeded the respective dollar value. However, the dollar movement roughly gives a true picture of the mark development, and it was of the greatest psychological significance. It was followed tensely and apprehensively by practically the whole populace.
84. As to the history of the critical days see Baumgartner, Le Rentenmark (2d ed. 1925); Elster, op. cit. supra note 83, at 215 et seq.; Graham, op. cit. supra note 83; Schacht, Stabilization of the Mark (1927) 90.
85. See Bresciani-Turroni, op. cit. supra note 31, at 359.
Judicial counter-movement to this havoc started from the field of pre-war executory contracts. It set in as early as the war under the pressure of the Allied Powers' blockade. When sellers of foreign material or of goods containing such material refused delivery alleging impossibility of performance, the question arose as to whether there was really an "impossibility" or merely a temporary hindrance of performance. The Reichsgericht held for the sellers on the ground that inability to send the material through the blockade was to be treated in law as a permanent impediment, considering its long duration and the uncertainty—extreme indeed—of its termination.86 This doctrine, very cautiously qualified by the court,87 constituted merely an application of well settled rules, and was subjected to adverse criticism only in respect to the formula subsidiarily employed by the court, according to which the performance promised (e. g., the delivery of copper wire) had become, by force of events, an "economically different" one.88

This subsidiary formula, however, paved the way for the next phase of the development. There was submitted to the Reichsgericht a contract made in August, 1916, providing for the construction of a tug-boat to be delivered not earlier than fourteen months after the conclusion of peace. The constructor alleged that performance would drive him into bankruptcy since the expenditure for material and wages would triple the contractual price. No pre-war contract blockade, no nationalization of material could be pleaded in this case. The court, however, on December 2, 1919, in finding for the constructor, pointed out that under the alleged conditions the performances demanded would be essentially different from the performances contracted for.89 This was still a reasoning in terms of impossibility. However, it was in fact the "clausula-rebus-sic-stantibus" doctrine90 which was the basis for the decision. Before long the court, under the pressure of increasing economic troubles, proceeded outspokenly to resort to the "clausula" doctrine, which it had previously rejected as contrary to German law,91 rather than to an "impossibility-of-performance" theory. The term "clausula-rebus-sic-stantibus" later disappeared; but there still remained the doctrine under which the seller (entrepreneur, constructor, etc.) was entitled to rescind the contract if, subsequent to the time of contracting, the original financial "equivalence" between his performance and the consideration promised was, by the enhancement of prices, destroyed to such an extent that

88. See the cases cited supra note 86.
90. Supra p. 581.
insisting upon performance would appear unfair. This proposition was derived from the broad rule of the Civil Code [§ 242] according to which the debtor "is under a duty to carry out his performance as required in good faith taking into account ordinary usage" ["wie Treu and Glauben mit Rücksicht auf die Verkehrssitze es erfordern"]. The court, however, still made relief depend on the fact that maintenance of the contract would lead to the financial ruin of the obligor, thus preserving a relic of the impossibility doctrine. Finally this qualification was abandoned. The result in 1923 was that in executory contracts the seller (or any other party obligated to deliver goods or services) was held entitled to rescind the contract because of a radical change in the market. This was not an absolute rule, however, but was qualified by a weighing of the surrounding circumstances from the angle of "good faith". Generally the right of rescission was conditioned upon the vendor's offering the vendee an opportunity to concede a reasonable augmentation of the price in order to avert rescission. But there was, in these preliminary phases, no direct compulsion upon the vendee to pay more than the sum promised by him; hence there was no revaluation proper.

B. Judicial Revaluation

The deathblow inflicted upon the mark by the Ruhr invasion led to the finale of the monetary catastrophe. Debts worth millions and more had evaporated. Adhering to holdings of lower courts the Fifth Civil Senate of the Reichsgericht, through the epochal judgment of November 28, 1923, concerning an ordinary mortgage debt rather than an executory contract, ordered revaluation of debts. Previously the Fifth Senate, by a proceeding not provided for by law, had procured the consent of the other Civil

92. Reichsgericht, Feb. 3, 1922, 103 R. G. Z. 328; Reichsgericht, Jan. 6, 1923, 106 R. G. Z. 7. The doctrinal basis of the theory of the Court had been prepared in legal writing, particularly by Krückmann, supra note 60, at 157, and OERTMANN, DIE GESCHÄFTSGRUNDLAGE (1921).

93. See Reichsgericht, April 16, 1921, 102 R. G. Z. 98, 100, citing precedents.


97. In case the vendee should wish to carry on the contract, the court was authorized to determine a reasonable price binding upon the parties. Reichsgericht, Sept. 21, 1920, 100 R. G. Z. 129. In Reichsgericht, Nov. 10, 1923, 107 R. G. Z. 151, which presented very special circumstances, determination by the lower court of a reasonable rent for an elapsed period was approved. Contrary to Dawson, supra note 82, at 207, the decision of the Reichsgericht, Sept. 22, 1923, 1923 J. W. 984, does not hold that the lower courts were free to fix a reasonable rate and to refuse rescission, in the case of non-acceptance. The first two cases reveal the inevitable arbitrariness in the determination of the reasonable price (rent). Consideration by the court of the lessened purchasing power of the mark, in the case of damages and other "adaptable" claims likewise developed within this period, but this was no preliminary phase of revaluation. Supra p. 575.

98. Since a mortgage was involved the court ostensibly confined its judgment to mortgages, but under the theory announced this reservation had no practical significance.
It was again the conception of "good faith" to which the court resorted; and it was given preference over the legal tender rules. These rules having broken down, there was no longer any bar to the crushing superiority of the good faith principle. Previous payments, in depreciated money, were held not to have discharged the debt. This led, on a tremendous scale, to a revival of debts paid off and receipted; and this process was pushed on, with great force, to an overriding of waivers, of recognized account balances, of compromises, of statutes of limitations, and of judgments. In the name of "good faith", retroactivity was driven back through the past down to 1920. Thus in addition to all of the existing debts, past debts likewise became the subject of controversy between creditor and debtor with no direction for settlement. For there was no guidance except the broad announcement that the solution of the controversy had to conform to good faith. Revaluation was not carried out by the German courts along lines comparable to the Anglo-American equity law, that is, through distinct equitable rules of law; the Reichsgericht, acting consistently under the theory adopted, urged upon the lower courts the view that "revaluation is not a legally determined distinct concept" ("kein rechtlich bestimmter Begriff") and that the solution had to be sought by the

99. OERTMANN, DIE AUFWERTUNGSFRAGE BEI GELDFORDERUNGEN, HYPOTHEKEN UND ANLEIHEN (1924) 40.
100. This was the basis of the opinion which in many words offered little substance, and it was the only ground finally adhered to in the course of further development. The court, however, in this first judgment advanced also a "supplementary interpretation" of the intent of the parties who the court points out, would have decided for revaluation in case they had foreseen the depreciation of the mark. This puzzling argument getting out of the intent of the parties what the court had put in before was later abandoned by the court as was the reference to § 607 of the Civil Code.HECK, ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (Germany, 1924) 203, 208, remarks that the court did not mention its previous decisions, contrary to the new doctrine, nor pay attention to the public interest involved in the legal tender acts. The question whether revaluation was warranted by the currency situation was not touched upon by the court.

107. Reichsgericht, Jan. 16, 1925, 112 R. G. Z. 324; May 25, 1927, 1927 J. W. 183, n. 33, giving references; Nov. 22, 1927, 1928 J. W. 494 (condemnation damages paid in 1910) and Dec. 15, 1927, 1928 J. W. 155. (The judgment of Nov. 22, 1927 shows that retroaction was extended to "adaptable" debts.) At one time the Second Civil Senate of the Reichsgericht made a desperate effort to dam up the flood by setting up August 15, 1922 as a backward limit to retroaction, but this arbitrary demarcation was not approved by the other Senates and was finally abandoned by the Second Senate. So arbitrariness as to retroaction was reestablished, creative of thousands, perhaps hundreds of thousands of controversies. See NUSSBAUM, BILANZ DER AUFWERTUNGSTHEORIE (1929) 24 et seq.; Dawson, supra note 82, at 235 et seq.
108. Thus, the important decree of the Assembled Senates (Plenarbeschluss) of May 31, 1925, 110 R. G. Z. 377. "Objections" (against giving revaluation beyond dollar parity), the
judge exclusively with an eye to the individual circumstances of the case, considering "all of the interests" of the parties. On this swampy ground not only the "if" but also the "how much" of revaluation were to be determined. Sometimes the fact that the price had depreciated to a half or to a quarter of its former value at the time of contracting was held a sufficient justification for revaluation; but this would not hold good in other cases. As to the amount to be awarded, the Reichsgericht categorically refused to set up any standard. The lower courts were told to use, in their discretion, singly or in combination, chiefly or subsidiarily, the dollar value, the index of living cost, and of wholesale prices, the market prices of individual goods, or a special index elaborated by a member of the Reichsgericht (Zeiler); but none of these measures were to be conclusive. Among other facts the financial situation of the parties were to be considered, under the theory that the impecunious debtor should pay less than the moneyed debtor, and that the wealthy creditor should not be treated as favorably as the poor one. For this purpose the financial conditions of the parties had to be envisaged not only with respect to the end of the inflationary period, but also with respect to the subsequent financial fate of the parties. Thus the parties in ordinary debt litigation were compelled to disclose their financial status and its vicissitudes. To all of these difficulties of a more factual kind were added almost insoluble juridical problems. These originated chiefly in the conflicts of law field, in the necessity of giving the owner of mortgaged real


112. According to judgment of Jan. 5, 1925, 1925 J. W. 467, revaluation would have to take place where "the stipulated sum of paper-money, compared with the value of the consideration received, either is devoid of significance or is of minimum economic value."


117. This has frequently been pointed out. See, e. g., Assembled Senates, March 31, 1925, 110 R. G. Z. 379; Reichsgericht, Feb. 18, 1927, 115 R. G. Z. 201, 204; June 29, 1926, 1926 J. W. 2619, n. 3; Jan. 16, 1928, 1928 J. W. 1803.

118. Ordinarily financial conditions of the debtor were taken into account, but on principle, the situation of the creditor was to be considered. See, e. g., Reichsgericht, May 7, 1927, 116 R. G. Z. 313, 317; Dec. 15, 1927, 1928 J. W. 158; April 14, 1928, 1928 J. W. 1819.


120. To be discussed in the author's forthcoming volume.
estate recourse against his predecessor upon revaluation of the mortgage,\textsuperscript{121} and finally in the attempts of the Reichsgericht to curtail litigation by the development of an estoppel ("Verwirkungs") doctrine of an entirely novel type.\textsuperscript{122} Stipulations in contracts would sometimes be found to the effect that parties subjected themselves to a foreign jurisdiction "in order to escape revaluation."\textsuperscript{123} Some figures may illustrate what has been said. The Prussian Minister of Finance mentioned in his budget report of 1926 that as a result of revaluation more than three thousand officials, permanent and auxiliary, had to be appointed to the Prussian courts.\textsuperscript{124} A figure of five thousand for all of Germany is probably not an exaggeration. Litigation, as if it were imitating depreciation, rose to millions.\textsuperscript{125} Three reporter systems were created for revaluation cases alone;\textsuperscript{126} the Reichsgericht itself rendered considerably more than two thousand judgments on revaluation\textsuperscript{127} during a period of about ten years.\textsuperscript{128} Nearly half of them reversed the decisions of

\textsuperscript{121} On the implications of this so-called "Ausgleichanspruch" (indemnification claim) of the owner see 2 STAUDINGER, \textit{op. cit. supra} note 82, part 3, at 1668, and the succinct discussion of Flad in 1929 JURISTISCHE RUNDSCHAU 204.

\textsuperscript{122} The creditor was held excluded from retroactive revaluation unless he had demanded it within a reasonable time after the retroaction-ruling had become generally known. This had happened, according to various judgments, in 1924 or in 1925 or in 1926 or in 1927. 2 STAUDINGER, \textit{op. cit. supra} note 82, at 656; NÜSSBAUM, \textit{op. cit. supra} note 107, at 39.

\textsuperscript{123} Reichsgericht, May 16, 1926, 1926 J. W. 1336. The contract was between a German and a foreigner, but the court acknowledged that the German party also might have had an interest to exclude revaluation.

\textsuperscript{124} Among those appointees there must have been considerably more than a thousand judges. The "revaluation departments" (see \textit{infra} note 125) alone were tenanted, on May 1, 1927, by 849 judges which number was reduced, on Jan. 1, 1928, to 442.

\textsuperscript{125} Special revaluation departments (Aufwertungsstellen) were instituted with the lower courts of general jurisdiction (Amtsgericht). Revaluation Law of July 6, 1925, 1925 REICHSGESETZBLATT I 117, 130, § 69 et seq. They had to adjudicate in a summary proceeding certain controversies turning on the amount and other terms of statutory revaluation. Their main business consisted in adjudicating motions for individual reduction or augmentation of the 25% standard revaluation of mortgages and, later on, in adjudicating motions of mortgagors for the granting of a moratorium. On January 20, 1928, 2,864,217 cases had been brought before the Prussian revaluation departments, 2,773,595 of which were then disposed of, of a tremendous achievement of the Prussian judicial bureaucracy. In Bavaria, on December 31, 1927, 98.17% of the revaluation-department cases, totalling 522,656 had been disposed of. NÜSSBAUM, \textit{op. cit. supra} note 107, at 17. Ordinary lawsuits on revaluation, particularly those involving "free revaluation" were dealt with by the ordinary law courts. There are no statistics thereon, but it is certain that these proceedings which engrossed the courts up to 1932 and even later were the most stirring and burdensome part of the revaluation business. See \textit{infra} note 127.

\textsuperscript{126} Die Rechtsprechung in Aufwertungssachen; Die Aufwertungspraxis; Aufwertungsfälle beim Reichsgericht (edited by Zeller, member of the Reichsgericht, 11 volumes). There were, in addition, An Aufwertungs-Kartei using a loose-card system and a more popular weekly, \textit{Die Aufwertung}.

\textsuperscript{127} In Zeiler's reports there were collected under 2327 divisions about 2000 revaluation judgments of the Reichsgericht up to 1930 inclusive. The reports were then discontinued.

\textsuperscript{128} The number of revaluation cases decided in 1932 was still considerable, see JAHRBUCH DES DEUTSCHEN RECHTS for the year 1932, 313 (1933). There are even pertinent cases in the JAHRBUCH for 1936, at 376; however, the figures since 1933 are no longer comparable, considering the formidable decline of judicial litigation since the establishment of the national-socialist government (a fact, which cannot be developed here, although of greatest interest in political science).
the lower appellate courts, thus reflecting the complete bewilderment of the judiciary.  

It would be difficult to find in the legal history of the great countries of western civilization a similar instance of such thoroughgoing judicial aberration and confusion. A prominent German lawyer, at the 1925 meeting of the German Lawyers Association, accurately characterized the situation when "with the tumultuous applause of the audience" he exclaimed, that "the courts, under the revaluation doctrine, are running into the danger of becoming institutions to distribute the goods of life under ethical points of view." And the Supreme Court of Austria, in rejecting judicial revaluation, stated that its effect consists in making the personal notions of the court on equity and on the most intricate general conditions the law of the land, and that the courts thereby would "lose the ground under their feet."  

Still the Reichsgericht was fortunate in a very important aspect. Obviously revaluation presupposes a previous currency reorganization and a restoration of stable money. As mentioned above the new rentenmark was issued not earlier than November 15, 1923, and the stabilization level was attained on November 23. But the extreme uncertainty as to the success of the stabilization persisted for several months, as reflected by unheard of interest rates. On November 28 when the Reichsgericht handed down its sentence, the soil still trembled, ready to open once again as at the time when the "assignats" of the French Revolution were replaced by the "mandats territoriaux". The imminent danger and the stabilization problem in general apparently were not taken into account by the court, which never mentioned these points; obviously the court, after deliberations which must have begun a considerable time before November 23, had made up its mind to start revaluation regardless of any stabilization as it had been done in some lower courts.

129. ZEILER, AUFWERTUNGSFÄLLE VOM REICHSGERICHT (1931) (preface to vol. II).
130. 1926 J. W. 232, annex p. 14 (Address of Mr. Hoeck of Hamburg). German writers opposed to the doctrine of the Reichsgericht are listed in NUSBAUM, op. cit. supra note 107.
131. Judgment of March 12, 1930, 1930 Die Rechtsprechung 105, referring to the objections to judicial revaluation raised by NUSBAUM, DAS GELD (1925) 125.
132. See SCHACHT, op. cit. supra note 84, at 151.
133. The following rates were held reasonable and "very moderate" by the Reichsgericht, see HARGREAVES, RESTORING CURRENCY STANDARDS (1926) 34.
134. Considering the previous negotiations by the Fifth Civil Senate with the other Senates, supra at n. 99.
135. Particularly by the Court of Darmstadt, March 29, 1923, and May 18, 1923, 1923 J. W. 459, 552.
C. Statutory Revaluation

The course of the Reichsgericht placed the German government in a serious situation. The government was aware that, during the Ruhr invasion and the inflation, there was no chance for legislative revaluation. Its proper place would have been a carefully defined "recasting" rule in a law creating a new and stable currency. However, through the proceeding of the court, a sweeping and economically inconsiderate policy was going to be forced upon the country, which was to become, in addition to other troubles, a judicial battleground. Obviously, legislation had to counteract. However, when it became known that the government intended to take countermeasures, the board of the "Association of the Judges at the Reichsgericht" on January 8, 1924, publicly protested with a remarkable declaration. Astonishment, the high justices declared, was raised within the Reichsgericht by the views of the intended legislation. The "good faith" principle on which the decision of November 28, 1923, rests, the declaration asserted, was superior to any "individual statutory rule". The judges warned the government that future reliance on the planned legislative measures might be rejected by the court as a violation of good faith, and that possibly such legislation in itself might be considered as a violation of good faith, as "immoral", and as unconstitutional, even if the government should forbid revaluation only partially. The court's feeling of responsibility as revealed by the judgment of November 28, 1923, was contrasted by the justices with the apparent moral insensibility of the government and the apprehension of the declarants that the government might yield to powerful and "selfish" interests.

The declaration is all the more impressive in view of the fact that the German judiciary has always been subordinate to the legislature. In a long and bitter struggle, the epoch of liberalism had secured to the courts independence from the commands of the monarch. However, subordination of the judiciary to legislation had evolved as a well-settled rule, constitutional under the constitutions of the several states and actually followed without

137. 1924 Deutsche Richterzeitung 7; 1924 J. W. 90. The association was of a private nature, yet doubtless representative of the body of the Reichsgericht's judiciary. No objection to the declaration which was signed by Mr. Lobe, President of a Senate of the Reichsgericht, was ever voiced by a member of the court. On January 1, 1925, President Lobe published an article, passing strictures upon the government, under the suggestive title Der Untergang des Rechtstaates (Decay of the Government by Law) (Germany, 1925) DEUTSCHE JURISTENZEITUNG 15. However, it was certainly not the democratic government which wrought the end of the government by law; on the contrary, never in German history were the functions and authority of the courts so extended as they were by this government. The entire misappreciation by the high judge of real conditions reveals his bias and passion, and it is important to note that a similar mental attitude prevailed within the judiciary and the non-judicial bureaucracy.

138. This is translation of "Befremden" which, however, has a connotation of reserved blame not exactly translatable.

139. See, however, supra note 100.
hesitation. There was neither a Chief Justice Marshall nor a due-process clause. On the other hand, the democratic German government of 1924 possessed little authority. Arisen from defeat and revolution, and incessantly humiliated by foreign powers, formers of world opinion, it failed to impress very much the justices who were educated in the proud tradition of centuries-old and monarchic bureaucracy. They were hardly convinced of the continuity and, perhaps, of the legitimacy of German democratic government. At the same time this government, by virtue of its principles, not only refrained from infringements upon the personnel of the court but also felt bound to impart much significance to the voice of judicial authority. Certainly it did not plainly and simply surrender in face of the threatening declaration of the judges; on the other hand, it did not dare to encroach upon the principle of judicial revaluation, henceforth by legislation called "free" revaluation because it was not put under any definite limits as was "statutory" revaluation. Statutory revaluation was confined, by various enactments and decrees, to investments which comprised particularly mortgages (revaluation rate 25 per cent); mortgage bonds, life insurance and savings bank accounts were revalued, by appropriate proceedings, to the extent of the reserves held by the debtors for the protection of such right-holders. As to mortgages, by far the most important revaluation item,

140. Recently a national-socialist writer, FRANZEN, GESETZ UND RICHTER NACH DEN GRUNDSATZEN DES NATIONALSOZIALISTISCHEN STAATES (1935) 33 states that the course of the Reichsgericht was brought about by the Court's "distrust of democratic legislation." He exclaims, however, that "such attempts of courts to correct the legislature, are incompatible with the principles of a national-socialistic Fiihrer-state!" (Exclamation point by Mr. Franzen.) On the other hand, Prof. Pergament of Leningrad in (Germany, 1930) ZEITSCHRIFT FUR OSTERREICH 87, hails the "revolutionary" proceeding of the Reichsgericht, revolution being the ultimate remedy against unjust and oppressive legislation. But this is probably not the Russian government's theory of the functions of the judiciary. The political science problem involved is ably discussed by DESSAUER, RECHT, RICHTERTUM UND MINISTERIALBÜROKRATIE (1928); and by Grau, Rechtsprechung oder Gesetzgebung zur Anpassung des Privatrechts an die Veränderten Verhältnisse (Germany, 1924) 122 ARCHIV FÜR ZIVILISTISCHE PRAXIS 318.

141. Legislative revaluation was inaugurated by the Third Emergency Tax Ordinance (Dritte Steuernotverordnung) of Feb. 14, 1924, 1924 REICHSGESETZBLATT I 74. An attempt was made here to keep revaluation within bounds and to use the profits of the real estate owners and of other "disburdened" debtors for taxation purposes with an eye to the necessary balancing of the budget. But this scheme was soon defeated by the revaluation party. The Third Emergency Tax Ordinance was replaced by the Revaluation Law (Aufwertungsge- setz) of July 16, 1925, 1925 REICHSGESETZBLATT I 117, which became the center of a large body of legislation purporting revaluation of investments. The leading commentators of the Revaluation Law are, Michaelis, Quassowski, Schlegelberger, Harmening and Neukirch. More systematic is Mügel DAS GESAMTE AUFWERTUNGSRECHT (5th ed. 1927). These all include pertinent material outside the Revaluation Law proper. For a survey, see 2 STAU- DINGER, op. cit. supra note 82, at 55 et seq.

Back of revaluation was the "recasting rule" of the German Coinage Laws of August 30, 1924, 1924 REICHSGESETZBLATT II 254, § 5, ¶ 2, providing, in accord with the actual level of stabilization (supra note 84), that in the payment of debts a trillion marks should be equal to a reichsmark. It has been estimated that 65,000 to 70,000 freight cars, amounting to about 1,000 freight trains, loaded with one mark notes would have been necessary to pay a reichsmark. JASTROW, op. cit. supra note 2, at 61.

142. This rule developed a considerable importance in the international field. Before the War several leading American life insurance companies, under a license of the German government, had established German branches which issued their policies on a mark basis. After
retroactive revaluation was expressly allowed, provided payments were made within a certain period (June 15, 1922 to February 14, 1924) or else under protestation by the creditor who was thus rewarded for his disregard of the legal tender law.\textsuperscript{144} Revalued debts were declared to be gold mark debts in order to protect them (as far as words could) from the influence of another inflation. Special and very reserved provisions were enacted for the revaluation of the public debt. Ordinary bank accounts were excluded from revaluation, since they are not secured as are savings bank accounts by revaluable reserves. Through this legislative system of elaborate restrictions a comparatively clear and distinct regulation was wrought, which, although limited to investments, sufficiently narrowed the field of litigation. In this connection it might also be mentioned that the judgment of November 28, 1923 had announced the necessity for distinguishing with regard to revaluation as to mortgages on agricultural, industrial and urban real estate, to take into consideration the various public charges upon real estate, the statutory emergency protection of lessees, etc.—differentiations which were eliminated by the legislature. It is difficult to imagine what the result would have been had the government not succeeded on this score.\textsuperscript{145}

\textbf{D. Sociological Aspects}

Envisaged from a sociological point of view the revaluation movement was chiefly put through by the middle class which included the upper strata of the bureaucracy, judicial as well as non-judicial. They all felt deceived and distressed by the entire destruction of their savings and their inherited fortunes, and saw no chance for even a partial restoration of their standard of living except through revaluation. Workers, peasants, and industrialists

\textsuperscript{143}Mortgages on German real estate totaled, before the war, more than 60 billion marks, amounting to about 20\% of the whole national wealth. \textsc{Nussbaum, Lehrbuch des Deutschen Hypothekenwesens} (2d ed. 1921) 201.

\textsuperscript{144}The attitude of American legislatures and courts after the collapse of the continental currency was entirely opposite. "It was decided that the creditors who had refused or evaded payment were not entitled to receive the metallic value of their debts," \textit{i. e.}, they lost the privilege of revaluation. \textsc{Hargreaves, op. cit. supra} note 134, at 12, 21. In Germany, likewise, the preference given to repudiating creditors had been strongly gainsaid. \textsc{Quassowski, Kommentar zum Aufwertungsgesetz} (5th ed. 1927) 217.

\textsuperscript{145}Attempts were made to challenge statutory limitation of "free revaluation" as unconstitutional. They were rejected by the Reichsgericht, March 1, 1924, 107 R. G. Z. 370; Reichsgericht, Nov. 4, 1925, 111 R. G. Z. 320. In the first case the court held justifiable the concern of the government that revaluation would lead "to a multitude of litigation hard to overcome" and would result in long lasting uncertainty and jeopardy to real-estate credit [a mortgage situation was involved in the case]. The court concludes therefrom that legislative intervention was reasonable. Such discernment had appeared neither in the judgment of Nov. 28, 1923, nor in the pronunciamento of the judges' association. It implies a belated recognition of the incompetence of the judiciary. Remarkable is the "due-process" language of the court, which had no basis in the "Weimar" constitution of the German Republic.
DEBTS UNDER INFLATION

then supporting the government were not interested in revaluation; but the middle class, through the Reichsgericht, succeeded in imposing its will upon the government. Partisans of the revaluation doctrine repeatedly sought its justification in a theory of "revolutionary emergency law" (revolutionäres Notrecht), and this phrase was occasionally referred to, with no objection, by the Reichsgericht itself. However, an emergency situation does not confer revolutionary powers upon ordinary law courts. On the contrary, it is during this very emergency situation where the law has to be cherished and defended by the courts. The conduct of the Reichsgericht comes distinctly into relief when contrasted with the procedure of the courts of other countries. Thus, the depreciation of the Austrian crown, of which 1/14,400 was left, meant to crown creditors practically entire expropriation just as the depreciation of the mark did to mark creditors. And Austria is a German country, with a law which on the whole has developed along lines similar to the law of the German Reich. Moreover, Austria had a large middle-class with a particularly broad and deeply rooted bureaucracy. Nor did Austria lack advocates of revaluation. However, the Austrian middle class did not develop a political energy similar to that demonstrated by corresponding German groups. To be sure Germany's national economy was based to a much greater extent than that of Austrian on a credit substructure, and therefore explains why a certain revaluation was bound to come after the restabilization of the German monetary system.

146. The industrialist group was represented in the government through the populist party (Volkspartei) under the leadership of Stresemann.

147. This notion was first advanced by Abraham, 1925 JURISTISCHE RUNDSCHAU 235, and was adopted by other writers.

148. Judgment of Jan. 23, 1926, 80 SEUFFERTS ARCHIV 103. The "revolutionary" violent mood of the Reichsgericht burst out when a Danish Court held the German mortgagee of formerly German real estate liable to discharge the Danish owner who had tendered the nominal amount of the debt. The Reichsgericht denied the Danish judgment enforcement, pointing out that the judgment was resting "on unethical grounds" ("auf unsittlicher Grundlage") and that it offered an "ethically wicked argument" ("es begründe die Forderung in sittlich verwerfelcher Weise"). Reichsgericht, June 25, 1926, 114 R. G. Z. 171. It would have been entirely unobjectionable to allege that enforcement of the Danish judgment was contrary to German public policy, but the court was in the spirit of combating an unintelligent world. Still more aggressive, of course, were the partisan writings on revaluation. E. g., Professor Stampe, leading sponsor of revaluation (see supra note 2) entitles his review of the present author's book DAS GELD, Stricken with Blindness, intimating that "international big finance" is behind nominalistic developments and that the "augurs in London, Paris and New York" would find it hard to suppress their "shouts of joy" seeing an "honest German scholar" [the present writer] advocating nominalism. Die Aufwertung, June 19, 1925. An irrational though not unimportant undercurrent of the revaluation movement comes to light in such utterances.

149. This ratio between the Austrian crown and the new Austrian "shilling" was adopted by the law of Dec. 20, 1924, 1924 BUNDESGESETZBLATT 1767, corresponding to the depreciation of the crown to 1/14,400, the crown being fixed at 0.387 grams gold, the shilling at 0.235 grams. On the fate of the Austrian crown see VAN WABRE DE BORDES, THE AUSTRIAN CROWN (1927), particularly tables p. 114 et seq.

150. The Chief President of the Austrian Supreme Court, Dr. Roller, in his pamphlet (1924) Geldentwertung, Rechtsprechung und Gesetzgebung. The most ardent Austrian advocate of revaluation, however, was Wahle. His volume, DAS VALORISATIONSPROBLEM IN DER GESETZGEBUNG UND RECHTSprechUNG MITTELEUROPAS (1924), is valuable though the ample references to Austrian and Czechoslovakian cases and writings. A survey on the attitude of Austrian legal literature is presented by NUSSEBAUM, op. cit. supra note 82, at 10.
It is not the German revaluation in itself, but its process and shape which form, from a sociological point of view, the characteristic feature of the movement. What happened was a judicial manifestation of the "desequilibrium" described by Professor Robbins, and, in ostensible legal terms, an ominous deviation from, if not a distortion of, a great law and a great tradition.\(^1\)

III. REVALUATION IN GENERAL

A. Scaling Laws. Debts in Continental and Confederate Dollars

The rational scheme of revaluation, as indicated in the preceding discussion, would be a law reorganizing the national currency and, at the same time, recasting in terms of the new currency debts articulated in terms of the former depreciated monetary currency.\(^2\) Since the recasting is ordinarily done by scaling the debts on a time basis (normally the time of contracting) the expression, "scaling law", frequently employed in American technical language, seems appropriate. They appear as early as the middle ages.\(^3\) However, the most famous scaling laws are probably those which were enacted in France following the breakdown of the paper currency of the Great Revolution,\(^4\) the scaling laws of the several American states after the experience with the Continentals,\(^5\) the laws adopted after the Civil War by various southern states for the regulation of Confederate cur-

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1. Kant, in his *Metaphysical Elements of Legal Theory* (1797) 40, discusses the case of a servant who at the end of a year was paid his annual wages in debased coin which would not give him the same purchasing power as the coin had at the time of contracting. Kant decides that in law the servant would not be entitled to relief, in the absence of a contractual provision to the contrary: a court being without authority to adjudicate a case on undeterminable grounds.

2. An effect similar to revaluation of debts may be reached by devaluation of paper money. The resourceful colonial legislators did not overlook this attractive device. Fisher, *The Tabular Stand in Massachusetts History* (1913) 27 Quarterly Journal of Economics 417, discusses the laws enacted in 1742 under Governor Shirley and making a novel sort ("new tenor") of bills of credit legal tender. In case of depreciation of these notes it was provided that judgments should be rendered either in terms of silver or in the bills with due allowance for depreciation. Under a law of 1747, Mass. Laws 1747, c. 1, it was further prescribed that in determining the allowance regard should be had not only of the price of silver and of bills of exchange, but of the prices of provisions and other necessities of life. This amounts to a pre-planned revaluation, independent of currency reconstruction. Still the system seems not to have functioned. Fisher, *supra* at 426. Furthermore, when Maryland in 1780 decided to exchange, at a ratio of 100 : 3 Continentals held by her citizens for new Maryland bills, the legislature provided that in case of depreciation of the new bills a judicial body should be authorized to fix for certain periods the rate at which the new bills must be taken in payment. Md. Laws 1780, c. 8, § 18.


currency debts, 156 and the Austrian scaling laws of 1811-1813. 157 But revaluation may also be achieved by a classification of the transactions involved rather than by a consideration of the time of contracting, or by a combination of both classification and scaling. In more recent times the scaling scheme seems to have fallen into desuetude. The German scheme of revaluation, through equitable judicial case-to-case appraisal of the surrounding circumstances of the contract, was used in Poland and Hungary, but essentially on legislative grounds and within much narrower ambiguities. 158 No revaluation was provided with regard to rouble debts, the objective of Communist legislation having been rather the destruction of the creditors’ rights. 159


157. HARGREAVES, op. cit. supra note 134, at 73; WINIWARTER, HANDBUCH DER JUSTIZ UND POLITISCHE GESETZE (1829) 3, § 13 et seq.; Hoffmann, Die Devalvierung des Oesterreichischen Papiergeldes in den Jahren 1811-1813 (1923) 165 SCHRIFFEN DES VEREINS FUR SOZIALPOLITIK.

158. In Poland, the Polish “mark” instituted during the war by the German occupational authorities and taken over by the Polish government after Germany’s defeat depreciated to 1,800,000th and was, on this basis, converted into the “zloty” by a decree of Jan. 20, 1924 (1924) 65 Dziennik Ustaw R. P. 88. Since 1922 the Polish Supreme Court has given relief to creditors of “adaptable” debts and to the debtors of executory contracts. Moreover, the court had, by a judgment of Feb. 25, 1922, 1923 J. W. 332, dismissed the claim of a mortgagee to have the mortgage stricken out in the landbook upon paying-off the nominal amount of the debt. However, the court did not claim the power of determining the amount to be paid; it rather pointed to a future legislative recasting rule promised by a law of May 9, 1919. No. 296. 1919 Dziennik Ustaw 489. This rule, then, was set by the decree of 1924. Leaning somewhat on German legislation it extends standards of revaluation so as to include loans and commercial credits of any kind, and it allows revaluation of paid-off debts only where the creditor had reserved his rights. Although much narrower than under the German law the powers conferred upon the courts still were very large and arbitrary. Kuratowski, Les Problemes de la Baisse du Mark Polonais dans le Domaine du Droit Privé (Paris, 1923) BULLETIN DE LA SOCIETE DE LEGISLATION COMPAREE 95; W. Müller (Germany, 1926) ZEITSCHRIFT FUR OSTERREICH 1046. How the law operated in practice the writer was unable to ascertain. Rukser in (Germany, 1930) ZEITSCHRIFT FUR OSTERREICH 321, mentions “the prudent self-restriction of the Polish courts in the administration of the revaluation provisions.” In Hungary, where the crown had depreciated to 1,400,000th, the courts, on a large scale, granted compensation for loss through depreciation in the case of adaptable claims, including claims for “delay” damages but did not proceed to a general revaluation of debts. See the cases translated in (Germany, 1926) ZEITSCHRIFT FUR OSTERREICH 111. Definite regulation was directed through an act of April 1, 1928, rejecting “free” revaluation and strictly limiting statutory revaluation. 2 RECHTSVERGLEICHENDES HANDWORTERBUCH art. Aufwertung 304 (1929); Sarrazin, Ungarns Stellung zur Aufwertung (Germany, 1928) 27 BANKARCHIV 414.

159. Although in some special cases courts seem to have arbitrarily granted a creditor an equitable compensation. Still the importance of the cases is uncertain and they do not affect the basic principle of annihilation of debts. Non-Russian courts have almost invariably recognized the absence of revaluation in the Russian law. See Tillman v. Russo-Asiatic Bank, 51 F. (2d) 1023 (C. C. A. 2d, 1931); Parker v. Hoppe, 258 N. Y. 355, 179 N. E. 770 (1932); more distinctly, Dougherty v. Equitable Life Assurance Soc., 286 N. Y. 71, 193 N. E. 897 (1934); Klochkov v. Petrogradski Bank, 239 App. Div. 687, 268 N. Y. Supp. 433 (1st Dept, 1934), aff’d, 266 N. Y. 596, 195 N. E. 216 (1935); Perry v. Equitable Life Assurance Soc., 45 T. L. R. 468 (K. B. Div. 1929); Mixed Court of Alexandria, June 23, 1927 (France, 1928) REVUE DU DROIT BANCARE 356; French Court of Cassation, Feb. 25, 1929 (France, 1929) 56 JOURNAL DU DROIT INTERNATIONAL 1306; Appellate Court of Paris, May 23, 1931, 59 id. 441; Superior Court of Zurich, Dec. 18, 1928, 57 id. 1159. German courts, too, held rouble debts not revaluable under Russian law. Reichsgericht, Dec. 13, 1929; 1929 Warnyers Rechtsprechung 78; Appellate Court of Kiel, May 10, 1930, 1931 J. W. 156.
The American scaling laws of the continentals' period take as a basis the value of the continentals in terms of silver at the time of contracting, ordinarily fixing for each month a single ratio.\textsuperscript{160} The French revolutionary legislation, however, besides differentiating the ratios of revaluation according to the various "departments", did not rely solely on the price of specie, but set out, as the basis of revaluation, average figures freely computed from prices paid for specie, for real estate, and for goods and wares.\textsuperscript{161} It is remarkable that in the United States likewise a tendency appeared to overcome the strict metal-value rule. Chief Justice Marshall in \textit{Faw v. Marstellar} \textsuperscript{162} interpreted "true value in specie" used by the Virginian scaling law to the effect that the difficulty in obtaining gold and silver coin at the time should be disregarded, and "the real value of property" employed. Although the affirmative part of this ruling is not very clear, an anti-metallic attitude is distinctly present.

The scaling acts of the post-Civil War period are of only limited interest. Enacted under heavy pressure by the then more or less bewildered and incompetent legislatures of the defeated Confederate states\textsuperscript{163} they had to remain within the boundaries of Article I, Section 10 of the Federal Constitution, preventing the states from impairing the obligation of contracts. Literally taken this meant a canonization of the whole body of the judge-made law of contracts, and even the impossibility of restoring obligations vanished through the annihilation of the Confederate currency. Practically, the fate of the scaling laws was entrusted to the discretion of the courts, particularly to the Supreme Court of the United States.\textsuperscript{164} The test most frequently used by the acts in determining the extent of revaluation was the value of the consideration furnished by the confederate-dollar creditor to his debtor, looking toward the time of the inception of the transaction.\textsuperscript{165} This doctrine certainly impaired the contract by substituting for the price negotiated between the parties something like a fair value of the object contracted for, and it was held unconstitutional by the Supreme Court

\textsuperscript{160} Hargreaves, \textit{op. cit. supra} note 134.

\textsuperscript{161} Hargreaves, \textit{op. cit. supra} note 134, at 49; Caron, \textit{Tableaux de Dépréciation du Papier-Monnaie} (1909) and the other writers cited in note 154.

\textsuperscript{162} 2 Cranch 10 (U. S. 1804).

\textsuperscript{163} Dawson and Cooper, \textit{supra} note 156, at 715. The conditions surrounding those legislatures have been described by historians. See 2 Fleming, \textit{Documentary History of Reconstruction} (1907) 33.

\textsuperscript{164} Some states did not even possess any debt-regulation acts, or the latter were held invalid by the courts. Dawson and Cooper, \textit{supra} note 156, at 753.

\textsuperscript{165} Id. at 732, 747.
in 1875, at a time when the work of liquidation and revaluation had practically been consummated. More important are the affirmative contributions of the Supreme Court to the revaluation problem. In *Thorington v. Smith*, the Court held that under an executory contract calling for payments in Confederate dollars the creditor was entitled to recover their actual value at the time and place of the contract, thus clearly granting revaluation, on the ground of the general law of contracts apart from any scaling law. And in *Bissell v. Heyward*, determination of the value of the Confederate dollar by reference to the United States dollar rather than to gold was held conclusive. *Thomas v. Richmond*, treating the same question, likewise fits very well into a revaluation doctrine since the one and two dollar notes of the City of Richmond, held invalid by the Court, constituted paper money, unfit for revaluation for obvious reasons.

The process of restoration of debts was limited to this development. Debts incurred before the Civil War, of course, did not need to be revalued, and contracts discharged by payment or otherwise remained closed. Revaluation had been started by legislation; its views, on the whole, were dominant in the actual regulation of the problem. Apart from the "consideration" test, the legislative position was basically adopted by the Supreme Court. Revaluation, then, was attained by a mixed legislative-judicial proceeding, under the guidance of the legislative branch of the government.

B. Judicial versus Legislative Revaluation

In the last analysis, there cannot be an exclusively judicial revaluation. That legislation must cooperate was acknowledged even by the German courts. Nevertheless, German revaluation was principally judicial. Examining it from the viewpoint of legal theory, we may leave aside the extremeness of the German rulings and especially their sweeping retroaction, which were the result of historically unique political and economic conditions. At any rate, the German example impressively illustrates the innate incom-

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166. In Wilmington & Weldon R. R. v. King, 91 U. S. 3 (1875). It may be mentioned that the Supreme Court of Alabama in *Kirtland v. Molton*, 41 Ala. 548 (1868) held unconstitutional the Alabama act which had adopted the "consideration" test; after a reorganization of the court the act was upheld in *Herbert & Gessler v. Easton*, 43 Ala. 547 (1869). See Dawson and Cooper, *supra* note 156, at 734. This is, in addition to *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Pet. 257 (U. S. 1837), and the *Legal Tender* cases, the third American instance of a reversal, by a newly tenanted highest court, of a decision on the constitutionality of a monetary law.
167. 8 Wall. 1 (U. S. 1869).
169. 12 Wall. 349 (U. S. 1870).
170. This was recognized by the Reichsgericht, June 20, 1929, 125 R. G. Z. 273, and Nov. 25, 1926, 69 Gruchots Beiträge zur Erläuterung des Deutschen Rechts (1928) 369. It is remarkable how the sound result was reached by both American and German courts from an entirely different point of departure and through a wholly different kind of reasoning. For a brief analysis of the German cases see *Nussbaum*, *op. cit. supra* note 82, at 42.
172. See *supra* note 145.
petence of courts to set up a revaluation law of their own through a mere application of broad jural principles. As a matter of fact, revaluation means revamping the economic structure of the country. Courts are called upon to decide an individual controversy from very limited viewpoints. They have neither the data, the training, nor the facilities to cope adequately with a situation, which includes, besides its judicial aspects, so many relations to the monetary system, taxation, banking, the conditions of farmers and urban real property owners, and the like. It is the function of the legislature to accomplish the final allotment among the various interests involved.\footnote{173}

Moreover, under any modern legal system, there are hindrances of substantive laws which will stand in the way of an independent judicial revaluation. Legal tender acts rest on strong reasons of public policy which, weighty in themselves, become still more vital in emergency situations. Legal tender laws distinctly require sacrifices from the individual when, within their range, the interests of the individual collide with the interest of the community. Those peremptory rules of law cannot be pushed aside by considerations of equity even if equity be recognized as an independent legal system. It has been suggested\footnote{174} by American authors that in an extreme depreciation the due-process clause may be successfully invoked against the legal tender laws by injured dollar creditors. Yet in the situation presupposed it is not the legal tender laws which are to be blamed but their abuse through unsound politics. And there is no constitutional protection from unsound politics. The government may be charged with inaction in connection with increasing injury to creditors, particularly for not having changed the legal tender laws. But such inaction is hardly a ground for constitutional relief. Moreover a change of the legal tender laws may just precipitate the disaster. Obviously the legislative and political problems involved cannot adequately be handled by the courts. Thus, not even the Supreme Court of the United States with its unrivalled power, would be authorized to ordain and shape revaluation. For technical reasons, too, this Court would be unable to master the formidable task. One has to remember that the Reichsgericht, a court embracing seven Civil-Senates, had to adjudicate more than two thousand revaluation claims.\footnote{175} And surrendering the development of the law, in a matter of national economy, to lower courts would be even worse than having a poor, but uniform law.

It is apparent that the lesson contributed by the German judiciary to a general theory of revaluation is essentially of a negative nature. In fact, despite the numerous collapses of monetary systems in the post-war period,
it has not been followed anywhere.\textsuperscript{176} The Hooge Raad, highest court of the Netherlands, and a tribunal inferior to no other, has stated a principle of universal validity by these forceful phrases: "The will of the legislature being the law of the parties, the court has no power, on the strength of its own opinion as to equity and good faith, to discard and to supersede the rule which the legislature, in considering all of the interest involved, has ordained as the fairest and the most just one." \textsuperscript{177}

\textsuperscript{176} As to Poland, Hungary, and Russia, see \textit{supra} notes 158, 159.
\textsuperscript{177} Jan. 2, 1931, Nederlandsche Jurisprudentie 274.