

## DEBTS IN COLLAPSED FOREIGN CURRENCIES

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RATES of foreign exchange are ordinarily subject to fluctuation. It is always necessary, therefore, when a debt expressed in terms of a foreign currency must be translated into domestic currency, to know as of what date the computation is to be made. The rules of law governing the determination of that date are not settled. Difference of opinion persists, in particular, as to when the "breach-day rule," and when the "judgment-day rule," is to be applied.

When, however, the date of computation has been determined, another difficulty may arise, namely, that the value of the foreign money on that date does not reflect normal fluctuations of the rate of exchange, but, as may occur in consequence of monetary hyperinflation, has been in effect destroyed. Events now in progress are likely to make this difficulty a matter of considerable practical importance.

### I

In any major war the greater part of a nation's industrial production ceases to furnish goods for the market and supplies materials to be consumed on the battlefield. To the increased quantity of paper money which the government has to put in circulation, there corresponds not an increased but a diminished quantity of goods that may be purchased with this money. The more the money is used for purchasing goods, rather than for paying taxes, buying war bonds or making other savings, the more it depreciates and the more the price of goods tends to rise.

Whereas in the United States the inflationary process will presumably be kept in strict bounds, it will be otherwise in Europe. We need not speculate about the conditions that will prevail in Germany after it is defeated. They should eventually be worse than the conditions in those countries

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which are now or have been under the German yoke. It will suffice to glance at these.

France has paid Germany some 500 billions of francs as the alleged cost of the German occupation, a sum far exceeding the actual cost. A large part of this has been used by the Germans to acquire property, whether shares of stock or treasures of art, and to remove to Germany what could be carried away. Thus the French have been giving up their real values and receiving in return some of their own money. The continuous increase in circulation has gone hand in hand with growing impoverishment. As long as necessities of life are rationed, the measure of this impoverishment is to be observed primarily in the black market where a fowl in some places now costs more than a worker earns in a month. Clearly there is real danger that, sooner or later, the latent catastrophe must break through.

The situation in other countries occupied and looted by Germany is not substantially different. When the Allied forces entered Greece one dollar could buy 100 million drachmas,<sup>1</sup> and only recently it was reported that a pound of black bread was worth 45 billion drachmas.<sup>2</sup>

Planning concerning the restoration of the world's currencies looks to the future. It cannot undo the destruction of values that has been wrought in the past. It is possible, even probable, that the peace settlement will fix, as was done at Versailles, rates of exchange to be applied in specific cases; it may also be that jurisdiction over entire groups of controversies will be entrusted to international arbitration tribunals and that the consideration of many problems will thus be transferred from the ordinary courts to these or other specially created bodies. Other cases will, of course, remain outside the scope of the future treaties; Americans, for example, who lived and did business with one another in France, and contracted debts there in francs, and who have since come home, will desire, when the debts have fallen due, to see them settled here.

By whatever tribunal and process the cases may eventually be adjudicated, it is timely to examine the law concerning obligations expressed in terms of a currency which has collapsed. The amount of a claim will be important even when the debtor may be unable to discharge his obligations in full.

The problem is analogous to that which arose after the first World War. Lord Keynes once remarked that the memory of men is in general so short that they know the past hardly better than the future. Nor is it to be wondered that, especially here amid relatively stable economic conditions, there are few who have a vivid idea of the tremendous monetary catastrophes which took place at that time in Europe.

Germany furnishes the most striking example. In the twenties the issue of German paper money was abused to such an extent that the prices

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1. See *TIME*, Nov. 6, 1944, p. 79, col. 2.

2. See *LIFE*, Nov. 27, 1944, p. 26.

of goods not only doubled or trebled but soared so high that eventually the savings of a lifetime would not suffice to buy a box of matches and an American dollar was accepted as the equivalent of the fantastic sum of 4,200,000,000,000 paper marks. When Schacht's monetary reform of 1924 created the new reichsmark, which precisely like the mark of the German Empire had a statutory value of 358.42 mgr. fine gold, one reichsmark was declared equivalent to previously issued paper money of the face amount of one trillion marks.<sup>3</sup>

The fate of the Russian currency was not dissimilar. To the so-called Romanoff and Kerensky rubles was added an astronomical amount of different kinds of "monetary tokens" issued by the Soviets. Most of these various ruble notes were later simply annulled. The gold ruble recreated by the statutes of 1924 as the basis of the present Russian system, and theoretically amounting to the 774:234 mgr. fine gold which was the value of the Romanoff ruble, is not legally connected with the pre-revolutionary ruble. The measure of the antecedent inflation, however, is apparent from the fact that a single new ruble was at one time deemed worth 50,000,000,000 old ones.<sup>4</sup>

American and English courts, in dealing with debts expressed in marks, rubles or other utterly depreciated currencies, have been disposed to regard such debts as having vanished with the money in which they were expressed. *Anderson v. Equitable Life Assurance Society*<sup>5</sup> is a pertinent English case. An Englishman, who in 1887 was residing and carrying on business in Russia, procured there, through an agent of a German branch of an American insurance company, a semi-tontine life policy. By this policy, in consideration of the payment in London of an initial premium of 2,149.80 marks and of quarterly premiums of 570 marks for twenty years, the company undertook to pay, in London, 60,000 marks on the death of the insured. The policy became fully paid in 1907 when, as the trial judge pointed out, the company had received about £2377 in premiums. Periodical bonuses or profits to which the insured then became entitled, and which were paid until his death in 1922, were uniformly computed on the basis of the par value of the mark in complete disregard even of the extraordinary depreciation of German money during the latter years of his life. In an action to recover the amount of the policy, the insured's widow contended that this amount likewise should be computed on the par value of the mark. But Lord Justice Bankes, speaking for the Court of Appeal, felt "bound to give a decision which would work great hardship on the plaintiff"<sup>6</sup>; the policy having been contracted in marks, and the

3. See ELSTER, VON DER MARK ZUR REICHSMARK (1928) 433.

4. See SÉDILLOT, LE DRAME DES MONNAIES (2d. ed. 1937) 141 *et seq.*; HUBBARD, SOVIET MONEY AND FINANCE (1936).

5. 42 T. L. R. 123 (K. B. 1925), *rev'd*, 42 T. L. R. 302 (C. A. 1926).

6. 42 T. L. R. at 302.

value of 60,000 paper marks being now infinitesimal, the insurance company was not required to pay a penny.

In the United States, the federal courts have considered the question in several actions in which one Tillman has been the plaintiff. In *Tillman v. Russo Asiatic Bank*<sup>7</sup> the defendant, in September, 1918, in Russia, had dishonored a check for 72,000 rubles drawn by the plaintiff. The latter paid the amount to the payee and, years later, sought in this action to recover some \$37,000 on the theory that the value of one ruble was 51.4 cents in United States currency. This was the par value of the ruble established by the coinage law of czarist Russia and by the Soviet law which was in force when the action was brought. There being no proof that the bank was bound to pay its obligations in gold, the Circuit Court of Appeals for the Second Circuit, in an opinion by Judge Augustus N. Hand, took the position that the draft was originally payable "in old rubles" and, pointing out that the plaintiff had not shown that the Soviet decrees "established any ratio of exchange for the old currency," further observed that on the date of the judgment, which was held to be the decisive date, the old rubles, on the contrary, were "said to have disappeared and to have become worthless."<sup>8</sup> Judgment was thus given for the defendant.<sup>9</sup>

Among state court cases reference should be made to *Dougherty v. Equitable Life Assurance Society*,<sup>10</sup> a leading New York case dealing with a number of actions which arose out of Russian insurance contracts. In many of these actions, policy holders sought to recover back, on the ground of a rescission of their contracts, the premiums which they had paid over a period of years in rubles. In the view of the Court of Appeals it was the ruble recovery in Russia—what the assured would have received there—which was being sued for here. The court held that the obligations were payable, if at all, in worthless rubles and had, therefore, themselves become worthless.

7. 51 F. (2d) 1023 (C. C. A. 2d, 1931), *cert. denied*, 285 U. S. 539 (1932).

8. 51 F. (2d) at 1026.

9. This position was reaffirmed recently in *Tillman v. National City Bank*, 118 F. (2d) 631 (C. C. A. 2d, 1941), *cert. denied*, 314 U. S. 650 (1941). The plaintiff, this time as assignee of an Englishman, attempted to recover the balance of an account in rubles which in 1917 had been established in the branch office of the defendant bank in Russia and which had since remained unclaimed. Here, too, the court, speaking again through Judge Hand, held in practical effect that the defendant was discharged of any obligation whatsoever.

The American Consular Court in Shanghai, in 1926, in holding, after the collapse of the German currency, that a life insurance policy could still be paid in German marks, said: "The defendant has performed . . . its contract under this insurance policy when it tendered to the plaintiff German paper marks in the full amount specified in the cash surrender value for the fourth year of the policy." *Oliver v. Asia Life Insurance Co.* (1937) 66 JURISTISCHE WOCHENSCHRIFT 712.

10. 266 N. Y. 71, 193 N. E. 897 (1934).

The decided cases cannot be said to establish a general principle of law. Many of the opinions clearly show how troubled the judges were in choosing their way, the result seeming often to offend their sense of justice. This may be why they were disposed to place behind a shield of findings of fact the statements in which we are here interested or to include them in a *series* of arguments supporting the court's conclusion. The decisions contain most interesting dicta, but it is difficult to find in this field more than what Professor Karl N. Llewellyn would call a "third-water authority."

Some commentators, especially in foreign countries, have attributed significance to the fact that the Anglo-American courts have had mostly to deal with claims "imported" from abroad and asserted against nationals of the forum. Even if these courts were ever disposed to regard with favor the dangerous notion recently advanced in some quarters that justice in private litigations should be administered with a view to the advantage of nationals of the forum, this notion would scarcely afford any reason for continued adherence to the course which the courts have followed. Among the cases there are several in which the frustrated creditors were nationals of the forum;<sup>11</sup> and, at least in the case of the United States, it is obvious that, with its continuing shift from the position of a debtor to that of a creditor nation, the situation heretofore prevailing will be reversed. But the paramount fact is, of course, that it is not to be lightly assumed that American or English courts have been or may be influenced by a false doctrine leading them to depart from the sacred principle of equal protection of the law.

There are entirely different considerations in the light of which the decisions should be read. When the cases were litigated, the courts had at hand general rules for the computation of foreign debts in domestic currency which had been long accepted in ordinary cases and which, in practice, required but a glance at the exchange rates quoted in the daily market reports. The great monetary catastrophes originating in the first World War were regarded as strange and unique and were not deemed to warrant a departure from the long-established rules. This attitude of the courts may have been strengthened by the somewhat perplexing fact that they were scarcely ever urged by counsel in these cases to re-examine the basic elements of the problem in the light of vivid realities.

## II

Normally in any country it is the national money which fulfills all the functions of money, serving, in particular, as the medium of exchange and as the standard of value. Thus Americans in their own country make pay-

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11. See, *e.g.*, the Anderson case, discussed *supra*, pp. 3-4.

ments in dollars and state assets and liabilities in terms of dollars. In transactions involving more than one country, reference to the money of one of the countries can have a similar meaning. The intention may be that the obligation is to be performed and that its extent is to be measured in the particular kind of money although that money may change in value as compared with other national moneys.

*Richard v. American Union Bank*<sup>12</sup> furnishes an example. An American bank undertook to establish a credit of two million lei in Bucharest for the plaintiffs. It failed to do so on the date specified and created the credit only after the leu had greatly depreciated in terms of dollars. The plaintiffs were held to have no right to recover in an action for breach of contract. The court pointed out that during the entire period in question the leu continued to be the same monetary unit, that the plaintiffs obtained on the deferred date the same number of lei to which they were entitled on the due date, and that "it is impossible to say that lei measured by lei had declined in market value."<sup>13</sup>

More frequently, however, a function is assigned to foreign money other than that which it has in the country of its origin. Americans may treat foreign money as a peculiar kind of merchandise; they so treat it when they buy it from a banker. The foreign money then is not intended to be a standard of value but, on the contrary, is itself measured in dollars at the current rate of exchange. On this theory the plaintiffs in the *Richard* case, after having lost their suit, brought a new action,<sup>14</sup> in which they stressed that they were dealers in foreign exchange and that the lei were bought for resale. The complaint was held to state a good cause of action: "The value of performance at the stipulated time of delivery was fixed by the price of lei at that time in the market here. . . . The allegations of the complaint in the present action show that the parties dealt in foreign moneys or credits as a commodity. . . . The fact that the commodity . . . might in a foreign country be used as a medium of exchange becomes irrelevant."<sup>15</sup>

If, in a particular transaction, money is not to serve as a standard of value, but is itself to be the object of valuation, it does not necessarily follow that it is to be valued in terms of the money of another country. It may, for example, be valued in gold. *Benners v. Clemens*,<sup>16</sup> decided in 1868 by the Supreme Court of Pennsylvania, involved an invoice of fruit amounting to \$896.95. The debt was contracted in England and it was testified that the account was made up on the basis of gold and that the charges were supposed to be paid in gold. Stipulations for payment in

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12. 241 N. Y. 163, 149 N. E. 338 (1925).

13. *Id.* at 167, 149 N. E. at 339.

14. *Richard v. American Union Bank*, 253 N. Y. 166, 170 N. E. 532 (1930).

15. *Id.* at 175, 170 N. E. at 535.

16. 58 Pa. 24 (1868).

gold were current at that time and were not prohibited by law.<sup>17</sup> The court accordingly held that the defendant had to pay in gold coin or to give so much more in paper currency as would make his payment in that medium equivalent to the balance due in gold. Paper money could serve as the means of payment; the obligation was to be measured in gold.

There can be still other situations. Thus the parties, although expressing an obligation in terms of a particular money, may lay principal emphasis on the purpose to be accomplished by the payment. In *In re Willing's Estate*<sup>18</sup> an American court had to convert from francs to dollars the annuities bequeathed in a French will. The intention of the testatrix, said the court, "was evidently to devote some stable and fixed sum for the life use of those whom she named as beneficiaries."<sup>19</sup> It concluded that the instalments should be computed in dollars according to the value of the franc when the will was made and not in accordance with its value at a later time when, in terms of dollars, the franc had greatly depreciated. An analogous problem came before the Cour d'Appel of Paris in the case of *Société des Cirages Français*.<sup>20</sup> The former manager of an industrial establishment in Russia owned by a French concern was entitled, by the terms of his contract, to an annual pension of 2,400 rubles. He left Russia after the Revolution. In a suit brought in France, he was met with the objection that the ruble in the meantime had become worthless. The French court, however, took the position that emphasis should be placed not on the fact that payment was stipulated in rubles, this having been for the obvious purpose of serving the convenience of the retired employee then living in Russia, but on the fact that the intention was to secure him adequate means of subsistence for the rest of his life. A sound interpretation of the contract, in the view of the French judges, would not permit the employer's obligation to be destroyed by the depreciation or disappearance of the kind of money contemplated for the payment of the pension earned by the employee. It was held that payment of the annuities should be computed in francs at the rate of exchange existing at the time the contract was made.

In these cases the foreign money was regarded as merely "money of account." In contrast, let us return to the *Anderson* case,<sup>21</sup> in which the Court of Appeal of England, because of the fantastic depreciation of the German mark, denied a widow the benefit of her husband's insurance. It would appear that the amount of the policy, which was payable in London, was

17. See *Bronson v. Rodes*, 7 Wall. 229 (U. S. 1868).

18. 292 Pa. 51, 140 Atl. 558 (1928); cf. *Bowditch v. Solytk*, 99 Mass. 136 (1863); *Matter of Lendle*, 250 N. Y. 502, 166 N. E. 182 (1929); *In re Illfelder's Estate*, 136 Misc. 430, 240 N. Y. Supp. 413 (Surr. Ct. 1930).

19. 292 Pa. 51, 57, 140 Atl. 558, 560 (1928).

20. Cour d'Appel, Paris, Nov. 28, 1927, (1928) 55 JOURNAL DU DROIT INTERNATIONAL (Clunet) 119.

21. Discussed *supra*, pp. 3-4.

stipulated in marks for the sole reason that it was an agent of the German branch of the American company who solicited the Englishman in Russia. It may safely be assumed that to the minds of the parties the choice of the particular money had no materiality whatsoever. At any rate, there is not the slightest indication that, in making the insurance contract, the parties ever intended to cast the risk of a destruction of the German currency on the party having the least possibility to hedge or otherwise to secure himself against such a risk. It is important, moreover, that for the purpose of computing contingent liabilities, the company itself continued to treat the mark as being of the same value of exchange as before 1914 even after a tremendous depreciation had taken place. If the judges had taken into consideration the variety of ways in which stipulations in foreign money may be regarded, they would perhaps not have needed merely to express "the hope" that the company "could see their way to do something to mitigate the hardship to the plaintiff."<sup>22</sup> On the facts of the case, it is submitted, the judges, treating the mark as money of account, could have awarded a judgment that conformed with their own sense of justice.

Judges have sometimes been tempted to indulge in general statements on how the courts are to treat foreign money, discussing, for instance, whether it should be considered as money at all or should be regarded in the same way as wheat that has been contracted for. It is easy to see that generalizations are here of no avail. There are dissimilar situations necessitating different solutions and often requiring learning, imagination and ability on the part of counsel if the case is to be presented in its proper setting.

The background of the various special situations and difficulties, only some of which have been here touched on, should, however, be kept in mind in the discussion which follows and which will be confined to the basic situation only, namely, that the foreign money in which the contract was expressed was intended as the measure of the obligation, that the money has lost its value to such an extent as "to shock the conscience and produce an exclamation,"<sup>23</sup> and that because of this collapse the standard of measure appears no longer to serve its intended purpose.

### III

The general nature of the questions arising in this basic situation makes it useful to turn first to the rules of law developed in countries which in our time have witnessed the collapse of their own currency.

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22. 42 T. L. R. 302 (C. A. 1926).

23. Savage, C. J., in *Seymour v. Delancy*, 3 Cow. 445, 521 (N. Y. 1824). Judges have spoken of a "fantastically depreciated" money [Mackinnon, J., in *Franklin v. Westminster Bank* (K. B. 1931), reported in MANN, *THE LEGAL ASPECT OF MONEY* (1938) 315], of "collapsed" exchanges [Sankey, J., in *Ivar & Christensen v. Furness, Withy & Co.*, 12 Lloyd's L. L. Rep. 288 (K. B. 1922), cited by SCHOO, *RÉGIMEN JURIDICO DE LAS OBLIGACIONES MONETARIAS INTERNACIONALES* (1940) 514, n. 1400] of a "catastrophic depreciation" [German Reichsgericht, Nov. 28, 1923, 107 *Entscheidungen des Reichsgerichts in Zivilsachen* (hereinafter cited as R. G. Z.) 78, 90].



In the German Civil Code, as in the books of other countries, no provision was made for the unforeseen emergency of a major inflation. When, soon after the first World War, numerous long term contracts for the sale of goods or for the performance of services became utterly ruinous because of the supervening extraordinary rise of prices, ways were sought to afford relief to the obligors. In 1919, after prices had risen to more than eight times their pre-war level, the German courts became disposed to hold that performance under the new economic conditions might be considered "essentially different" from the performance contracted for. The courts thus in effect redefined the concept of impossibility of performance to include economic as well as physical impossibility, permitting contracts, at least in cases of special hardship, to be dissolved.<sup>24</sup>

Soon other situations arose. There was, for example, a case in which a lessor of business premises in Berlin had agreed in 1912 to furnish steam heat until the expiration of the lease in 1920.<sup>25</sup> In consequence of the tremendous increase in the price of coal and labor, the lessor, in order to perform his obligation, had to pay a sum vastly in excess of what he was to receive. It seemed too drastic simply to permit the lessor to rescind the lease because of the difficulty relating to only one of its incidents. In this, as well as in analagous cases, it appeared more appropriate to arrive at a reasonable revision of the price term. The courts resorted to the general requirement that "good faith" must prevail in the relation between contracting parties<sup>26</sup> and to the various ramifications of the doctrine of "changed conditions" which have been developed as an offshoot of that requirement. There was a revival of the ancient maxim *clausula rebus sic stantibus*.<sup>27</sup> A theory of the "foundation of the transaction," or, as we should perhaps say here, of the "frustration of the venture," was also urged.<sup>28</sup> There was advanced, finally, a closely related idea with somewhat wider implications that in private contracts a certain "equivalence" can normally be required between the performances on either side and that judicial intervention becomes necessary when this equivalence is destroyed by supervening monetary inflation.<sup>29</sup> In cases such as that of the lessor who had agreed to furnish steam heat, the courts fixed a "reasonable" increase of the sum to be paid and by a kind of conditional decree ruled that

24. German Reichsgericht, Dec. 2, 1919, 98 R. G. Z. 18.

25. German Reichsgericht, Sept. 21, 1920, 100 R. G. Z. 129.

26. "The debtor is bound to effect the performance according to the requirements of good faith, ordinary usage being taken into consideration." GERMAN CIVIL CODE (Wang's trans., 1907) art. 242. See also arts. 133 and 157.

27. See Krueckmann, *Clausula rebus sic stantibus, Kriegsklausel, Streiksklausel* (1918) 116 ARCHIV FÜR CIVILISTISCHE PRAXIS 157.

28. See Oertmann, *Der Einfluss von Herstellungsverteuerungen auf die Lieferpflicht* (1920) 49 JURISTISCHE WOCHENSCHRIFT 476; OERTMANN, *DIE GESCHAFTSGRUNDLAGE* (1921).

29. See STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH UND DEM EINFÜHRUNGSGESETZ (9th ed. 1925-31) art. 242 (V) (1) (b).

the lessor was released from his contract only if the amount as thus modified was not paid.<sup>30</sup>

The new ideas were further developed from case to case by a process familiar to lawyers in England and the United States but rather unusual in civil law countries. Outright revision of money obligations through rules of contract law became increasingly deep-rooted in the field of monetary claims for goods sold and services rendered. It was extended also to other cases, as, for example, those in which valuation was merely incidental to the primary purpose of specific performance. Said the German Supreme Court in 1922: "The gold mark, which was the basis for the original appraisal, and the paper mark, in which satisfaction must now be made, are . . . economically not comparable."<sup>31</sup>

The last and most important step was a generalization of the revisionary process to embrace simple money obligations and, in particular, those for repayment of money lent. This led to what may be considered revaluation proper of claims expressed in marks. It took place only in the last stages of the inflation. The situation had by then become intolerable. Extreme depreciation of the mark brought, on the one hand, untold hardships; claims of persons who had lent their money to their government or had deposited it with savings banks, or who had acquired insurance policies or mortgages, were practically wiped out, as were also the endowments of educational and charitable institutions. On the other hand, speculators who anticipated the course of events, and who found means to multiply debts to be later paid off in worthless marks, accumulated enormous wealth. Confusion in moral and legal notions was an inevitable consequence. In the presence of the mounting burden of injustice, the courts were not willing to admit that creditors should remain impoverished while debtors, in the same measure, unduly benefited merely because of an extravagant change in monetary conditions. They finally developed rules depriving debtors of the possibility of discharging their debts by the simple payment of an unaltered amount in a wholly depreciated money and requiring them, on the contrary, to pay a larger sum in order to be discharged.

In achieving this result the courts, it is true, were met with objections based on the German legal tender legislation. Here, too, resort was had first of all to the paramount principle of "good faith." In the leading case on the subject, decided in 1923 and involving a mortgage executed in 1913 on land in a former German colony, the German Supreme Court said:

"The legislature, in enacting these [legal tender] provisions, did not contemplate an essential depreciation of paper money, especially one so great as developed steadily after the . . . World War and the

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30. Compare German Reichsgericht, Feb. 3, 1933, 103 R. G. Z. 328.

31. German Reichsgericht, June 27, 1922, 104 R. G. Z. 394, 397.

Revolution. With the collapse of the paper mark there ensued a conflict between these currency provisions on the one side and, on the other, all these various legal provisions which were designed to prevent a debtor from being in a position to rid himself of his obligations in a manner which could not be reconciled with the requirements of good faith and with commercial usages, that is to say, with the overriding mandate of Article 242 of the Civil Code.<sup>32</sup> In this conflict this mandate must take precedence and the currency legislation must give way, because, as shown above, when the currency legislation was enacted it was not foreseen that such a collapse of the currency might occur that the results could not be reconciled with the basic rules of good faith and with fairness, it thus appearing that a strict application of its provisions in this situation was not contemplated."<sup>33</sup>

While the German Supreme Court was thus clearly prepared to declare the legal tender legislation inoperative, this was apparently not requisite for the view which ultimately prevailed in Germany. The position taken was that the courts, when they intervened to revalue claims, did not alter the contract, but, on the contrary, sought to carry out as far as practicable what they presumed the parties would have agreed on if they had foreseen the possibility of what actually occurred. A condition read into contracts thus permitted the courts, again on the basis of "general rules of law," to revise the amount of money that was specified as though the contract contained a stable-value clause.<sup>34</sup> The legal tender in which the debt, as thus revised, was to be discharged seemed then not to be involved at all.

The revaluation of mark claims effected by the courts was a so-called free revaluation. It was not bound by any uniform rule. Instead, like the revision previously arrived at of the price term in bilateral contracts, it was dependent on the special facts of each case, carefully weighed and balanced by the trial judge.<sup>35</sup> How was the judge, however, to distinguish between situations involving ordinary business risks and those calling for the extraordinary expedient of revaluation? With regard to claims found to be subject to revaluation, what amount should the obligor be required to pay in the particular situations of the various cases? Should the origin of the debt, the particular relation in which the parties stood to each other,

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32. See note 26 *supra*.

33. German Reichsgericht, Nov. 28, 1923, 107 R. G. Z. 78, 88.

34. This occurred as early as 1923. Oberlandesgericht, Cologne, Oct. 18, 1923 (1923) 52 JURISTISCHE WOCHENSCHRIFT 1048; German Reichsgericht, Jan. 16, 1924, 107 R. G. Z. 409.

35. See STAUBINGER, *op. cit. supra* note 29, at art. 242; STAUB, KOMMENTAR ZUM HANDELSGESETZBUCH (14th ed. 1932-33, annex to art. 374. For an interesting example of a somewhat analogous free adjustment of claims in English law see The Money-Lenders Act, 1900, c. 51, and cases cited in 35 E. & E. Dig. 166, 212-3.

or their respective pecuniary positions be taken into consideration and, if so, to what extent? How much weight should be given to the general "impoverishment factor"? Again the practical results were bound to vary according, for example, to whether the courts adopted the gold value of the mark or wholesale price indices or, say, cost-of-living indices as the standard of value to be used as a substitute for the abandoned paper mark.

The difficulties and uncertainties which attended the task of the courts hastened the enactment of legislation designed to establish a more definitive pattern for the revision of various kinds of mark claims. The most comprehensive and elaborate statute was the Revalorization Act of July 16, 1925,<sup>36</sup> which provided for the revaluation of several important classes of obligations, including mortgages and debenture bonds, at a flat rate to be computed on the original "gold value" of the claim.<sup>37</sup> In some cases it even permitted the reopening of closed transactions and thus assumed a retroactive character. On the other hand, some creditors, such as bank depositors, were wholly barred of relief. Equitable adjustment of the rights of individuals was reduced in importance, the statutory provisions being rather molded, as the promotion of the inflation itself had been, in conformity with what the groups in power chose to represent as the national interest of Germany.

The genesis of the Russian inflation differed from that of Germany. Whereas Germany repudiated foreign debts through the debasement of the mark, Russian foreign indebtedness was bluntly and directly annulled. The major Russian inflation had no relation to foreign politics. Its purpose was to serve as one of the means of destroying the economic forces within Russia itself against which the Soviet Revolution had been directed. It supplemented the confiscatory action which included, among other measures, a prohibition forbidding the courts even to take jurisdiction of monetary claims which had arisen before the Revolution.<sup>38</sup> A remark by Judge Crane in *Parker v. Hoppe* that in Russia "no account would have been taken of depreciation"<sup>39</sup> should not be unqualifiedly accepted. The claim there was for money paid in Russia before 1917 under a contract which had since been rescinded; it was one which the Soviets undertook wholly to extinguish and which, therefore, presented no occasion for considering whether Soviet law ever took account of depreciation.

Because of the legal and economic situation established in Russia there are only two classes of cases in which one may reasonably seek light on the Russian attitude to the problem of revaluation: those concerning rela-

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36. [1925] REICHSGESETZBLATT 1. 117.

37. For mortgages of land, for instance, the basic rate of revaluation was 25 per cent of the original "gold value" of the claim, and for debenture bonds 15 per cent.

38. Introductory decree to the Russian Civil Code of 1922, art. 2, 1 LES CODES DE LA RUSSIE SOVIÉTIQUE (Patouillet's and Dufour's trans., 1925) 121.

39. 258 N. Y. 365, 366, 179 N. E. 770 (1932).

tions between governmental agencies and those arising out of employment and other personal relationships. Illustrative of the first of these groups is a decision of the Supreme Commission of Arbitration in Moscow, rendered January 9, 1923, dealing with a delay by a governmental agency in the payment of 300 million rubles of the issue of 1922.<sup>40</sup> There it was said: "When there is a precipitate fall in the value of money, any delay in payment, if not appropriately compensated for, means not only a violation of the term prescribing the time for payment, but also an effectual reduction of the stipulated amount, since the nominal amount, which remains unchanged, represents much less in purchasing power. The debtor would thus derive a benefit from his delay and with no valid reason enrich himself at the expense of the other party." The governmental agency which was in default was required to pay a sum computed on the official general index of prices and exceeding the nominal amount of the debt. In cases involving claims for unpaid wages, and in other cases of the second group, similar considerations were applied and similar results reached.<sup>41</sup> When courts do not simply adjudge payment of the amount nominally due, with or without interest, but take into consideration without requiring proof of actual damage the decline in the purchasing power of the ruble, the rule "a ruble is a ruble" is gone and, it is submitted, revaluation becomes practically established.<sup>42</sup>

Poland, Rumania and Hungary likewise resorted to revaluation devices; Austria is an example of a country which refused to do so.

The problem of revaluation thus far considered arose in wholly internal situations in countries whose currency had become ruined. How would the courts of those same countries have treated claims in a depreciated currency other than their own? How, for example, would the German courts have dealt with claims expressed in Russian or in Polish or in Austrian money? The answer depends, in the first place, on whether the courts would hold their own law or foreign law to be applicable. The rule in this regard in revaluation cases is nowhere definitely settled. There is, on the one hand, the theory of "the law of the currency"; under it, for

40. See AUSLANDSRECHT, *BLÄTTER FÜR INDUSTRIE UND HANDEL*, Nos. 8-9 (1923).

41. The Civil Department of the Supreme Court of the Ukrainian Soviet Republic held, in 1923, that it would be an unpermissible exercise of right for a debtor, in the absence of a stipulation that the debt should be computed on a gold basis, to shift to the creditor the entire loss resulting from a progressive deterioration of currency. See MALIZHAI, *GRAZDANSKII KODERS SOVIETSKICH RESPUBLIK* (The Civil Code of the Soviet Republics) (3d ed. 1927) 31. A number of interesting Russian cases were cited, although not always correctly interpreted, in *Perry v. Equitable Life Assurance Society*, 45 T. L. R. 423 (K. B. 1929).

42. In theory, there is, of course, a marked difference between the two situations in which monetary depreciation may be taken into account, namely, that in which there is an outright redefinition of a debt and that in which damages are awarded for a default in payment.

example, claims in rubles would always be governed by Russian law. There is, on the other hand, the theory of "the law of the contract"; under it, claims in rubles would not necessarily be governed by Russian law. In the field disputed by these two theories there is a considerable twilight zone of uncertainty.<sup>43</sup>

There is no need to elaborate on the situation in which the courts apply their own law. Nor are there basic difficulties when the foreign law held applicable has developed rules of revaluation which are deemed fair by the forum. Difficulty arises only when the foreign law does not have rules which are so regarded. In countries which, after overcoming obstacles of all kinds, have worked out legal principles of revaluation, an adequate system of remedies for the victims of ruinous inflation has generally been considered an imperative requirement of justice. Illustrative is an extraordinary occurrence which took place in Germany when powerful forces, which had fostered the inflation and profited from it, were preparing legislative action expressly forbidding revaluation even by judicial decree. The Association of the Judges of the German Supreme Court issued a solemn warning pointing out that the maintenance of the nominal parity of the mark would result in widespread injustice, intolerable under a reign of law, and intimating that the proposed legislation, if enacted, would be held invalid because immoral, in conflict with good faith, and unconstitutional.<sup>44</sup> In this same spirit, judges who have espoused the cause of revaluation have repeatedly refused, on grounds of public policy, to apply foreign law and to enforce foreign judgments which denied relief that they regarded as mandatory. Thus the German courts refused to enforce a Danish judgment whereby a mortgage on property in Denmark, which was payable in marks, was permitted to be discharged by payment in paper marks in the nominal amount of the debt. The judgment was declared by the German Supreme Court to be based on "unethical grounds."<sup>45</sup>

#### IV

Most countries have been spared, at least for generations, the sad experience of a major monetary catastrophe. There is in such countries no uniform view as to the revaluation of claims in a currency which has collapsed.

Let us glance first at countries where the courts have readily followed the doctrine of revaluation. Switzerland is one example. Its courts, reputed for their high standing, had much to do with claims in depreciated marks. When

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43. See 3 NEUMEYER, *INTERNATIONALES VERWALTUNGSRECHT* (1930) pt. 2, 356-73, and authorities there cited.

44. See (1924) 16 *DEUTSCHE RICHTERZEITUNG* 7.

45. German Reichsgericht, June 25, 1926, 114 R. G. Z. 171. Cf. Philonenko, *Notes sur les jugements allemands refusant l'exequatur aux jugements étrangers de valorisation* (1930) 57 *JOURNAL DU DROIT INTERNATIONAL* (Clunet) 1064-82.

applying Swiss law, they arrived at a free revaluation similar to that arrived at by German courts and similarly based on the paramount principle of good faith and fairness. When resorting to the German law, they sometimes, it is true, held particular provisions of German statutes to be contrary to Swiss public policy; on the whole, however, they enforced those statutes.<sup>46</sup> The proposition that "a mark is a mark" was incidentally but bluntly characterized by the Swiss Federal Court as an "absurd" and "senseless" fiction.<sup>47</sup>

On the other side of the world, the courts of China, striving more directly than western courts to apply basic notions of natural justice, have dealt with a series of ruble cases. The highest court of Peiping, Ta Li Yuan, repeatedly took the position that a loss resulting from an extraordinary depreciation of money, unforeseen by the parties, should not be cast on the creditor alone. In a case involving the balance of a bank account in rubles this court held that the loss should be equally divided and thus granted the creditor revaluation to the extent of fifty per cent.<sup>48</sup> This result may be compared with that in an analogous case discussed at the beginning of this article and dealing with liabilities of the same defendant, the Russo Asiatic Bank, in which an eminent United States Circuit Court of Appeals denied the creditor relief.<sup>49</sup>

France, on the other hand, is an example of a country which has not readily accepted the principle of revaluation. The importance of France and the community of ideas which in many respects links it with the United States justify further elaboration. The monetary incidents of the French Revolution, with the endless flood of *assignats* and of *mandats territoriaux*, brought about in France a determination to avoid in the future any similar inflationary experience.<sup>50</sup> The legal provisions of the Code Napoleon subscribed to the sacrosanctity of the monetary system and the immutability of the franc.<sup>51</sup> The importance of this dogma grew as the masses of the French people, confident in the stable purchasing power of money, strove more and more to put their francs into savings so that they might become "rentiers" in their old age. The dogma was ineffectual,

46. See cases cited in GUISSAN, *LA DÉPRÉCIATION MONÉTAIRE ET SES EFFETS EN DROIT CIVIL* (1934) 159 *et seq.*

47. Hinrichsen & Cie. v. Braun A. G., Swiss Trib. Fédéral, June 3, 1925, 51 *Recueil Officiel* II. 303, 310.

48. The cases are reported and commented on by Professor Escarra in [1923] *RECUEIL PÉRIODIQUE ET CRITIQUE* (Daloz) 2, 93, n. 1.

49. *Tillman v. Russo Asiatic Bank*, 51 F. (2d) 1023 (C. C. A. 2d, 1931).

50. An Attorney General of France said in 1816 that "repayments made in assignats were an outright theft," that "to pay with paper is not to discharge the debtor's obligation but to deprive the creditor of his right." See Mater, *Des règlements en monnaies effondrées ou tendant à zéro* (1925) 3 *REVUE DU DROIT BANCAIRE* 2, 5.

51. Of special interest is Article 1895 of the Code Civil, which provides in substance that the obligation created by a loan of money is always the numerical sum named in the contract.

however, in preventing the depreciation of the franc; in the course of twelve years, from 1914 to 1926, the year of the de facto stabilization of the franc, it was reduced to a fifth or a sixth of its pre-war purchasing power.<sup>52</sup> The law permitted rescission of pending contracts in special cases only.<sup>53</sup> Relief from hardships caused by the depreciation was primarily arrived at in findings of fact by the lower courts, which, in so far as they were the basis of awards of damages, were not subject to review. When in an action for damages an increase in the price of goods or services contracted for was traceable to a change in the value of money, the lower courts simply refused to believe that the purchaser of the goods or services in question had suffered substantial damage. They felt that by paying a sum which was nominally larger, but which had the same actual purchasing power, he could secure a substitute whose economic value was intrinsically the same.<sup>54</sup> Outright revision of prices, and *a fortiori* of simple debts, remained barred, however, on the whole. The experience of all countries shows that such revision does not become available until inflation is greatly advanced. The breaking point was not reached in France; there was nothing there comparable to the German or Russian inflation.

Application of French law was not limited to claims expressed in francs. It so happened that the French courts had to apply French law in cases involving depreciated marks or rubles. The great majority of mark cases, in so far as they were not disposed of by the treaty of Versailles, originated in Alsace-Lorraine and were governed by the law that France chose to keep or to introduce in her recovered provinces.<sup>55</sup> Ruble cases, on the other hand, called for the enforcement of Russian statutes which in effect confiscated or destroyed the very rights upon which the courts had to pass; the French courts were not willing to permit these statutes any legal effect in France and, therefore, resorted once more to their own law.<sup>56</sup>

This background must be borne in mind for an understanding of decisions which were inimical to the trend towards revaluation already de-

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52. See DULLES, *THE FRENCH FRANC* (1929) 265 *et seq.*, 511 *et seq.*

53. Compare CODE CIVIL, arts. 887, 1674 *et seq.* Special legislation permitting rescission is treated in 6 PLANIOL AND RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* (1930) 549 *et seq.*

54. See, *e.g.*, Trib. Comm., Seine, June 15, 1915, [1917] *RECUEIL GÉNÉRAL DES LOIS ET DES ARRÊTS* (Sirey) 2. 49; French Cass. Req., March 15, 1920, [1920] *id.* 1. 117.

55. See, in particular, the monetary decrees for Alsace and Lorraine, *BULLETIN OFFICIEL D'ALSACE ET DE LORRAINE*, 1918, p. 8; 1919, p. 530.

56. Compare, *e.g.*, the *Ropit* case, French Cass. Req., March 5, 1928, [1929] *RECUEIL GÉNÉRAL DES LOIS ET DES ARRÊTS* (Sirey) 1. 217; [1928] *RECUEIL PÉRIODIQUE ET CRITIQUE* (Daloz) 1. 81, and see Note, Savatier, in *id.* 2. 49, 50 with further references.



veloping elsewhere. In a test case in which the Société Générale Alsacienne de Banque attempted to secure a revaluation of mark bonds of the City of Strasbourg issued in 1901, the Cour d'Appel of Colmar took the position "that the disappearance of mark money involves the destruction of a claim expressed in marks and that, in the absence of any legal provision and in the present state of the law, the courts are powerless to make good the loss suffered by the creditor in consequence of manœuvres which have caused the complete depreciation of the mark."<sup>57</sup> Language similar to this, it will be recalled, has been used by American and English courts.

In France, as in other countries, the position thus taken eventually proved unsatisfactory. Text writers, whose influence in France is great, soon advocated a bolder approach to revaluation problems even with regard to francs and, of course, more emphatically with regard to moneys which were more depreciated than the franc or which had wholly collapsed. They presented an elaborate set of legal devices which would enable the courts, if they desired, to give relief. Mention should be made especially of books and articles by Professor Edouard Lambert, Director of the Institute of Comparative Law in Lyons,<sup>58</sup> by André Mater, editor of the *Revue du Droit Bancaire*,<sup>59</sup> and by Georges Hubrecht<sup>60</sup> and other lawyers associated with the *Revue Juridique d'Alsace et de Lorraine*<sup>61</sup> which was particularly concerned with the subject. Their work did not remain without result. The French government itself seems to have anticipated the possibility of an outright revaluation even of claims expressed in terms of francs. A Franco-German treaty, expressly dealing with revaluation to which France might resort, included a "most-favored-nation" clause to the effect that with respect to this revaluation citizens of no country should be more favorably treated than those of Germany.<sup>62</sup>

Illustrative of the evolution in the attitude of the French courts are, in particular, the mark cases with which local courts in Alsace-Lorraine had

57. Cour d'Appel, Colmar, Oct. 21, 1928, (1929) 10 REVUE JURIDIQUE D'ALSACE ET DE LORRAINE 25.

58. See LAMBERT, *Dettes fixées en monnaie étrangère-Règles du droit commun international sur leur paiement* in UN PARÈRE DE JURISPRUDENCE COMPARATIVE (1934) 9.

59. See MATER, *TRAITÉ JURIDIQUE DE LA MONNAIE ET DU CHANGE* (1925) and *Des règlements en monnaies effondrées ou tendant à zéro* (1925) 3 REVUE DU DROIT BANCAIRE 2.

60. See HUBRECHT, *LA DÉPRÉCIATION MONÉTAIRE ET L'EXÉCUTION DES CONTRATS: STABILISATION DU FRANC ET VALORISATION DES CRÉANCES* (1928).

61. See Wilhelm, *Stipulations en monnaie dépréciée-Garantie contre les fluctuations du change* (1924) 5 REVUE JURIDIQUE D'ALSACE ET DE LORRAINE 145; Gaudu, *Valorisation en Lorraine des comptes en marks, débiteurs ou créateurs* (1927) 8 *id.* at 289.

62. See (1927) JOURNAL DU DROIT INTERNATIONAL (Clunet) 1272; Degand, *Change, Cours Forcé, Monnaie de Paiement, Valorisation* in 3 RÉPERTOIRE LE DROIT INTERNATIONAL (De Lapradelle and Niboyet, 1929) 231, § 226.

to deal. In effecting outright revaluation of legacies,<sup>63</sup> leases,<sup>64</sup> and taxes,<sup>65</sup> they sometimes followed closely in their reasoning the doctrine of revaluation. Thus a court in Strasbourg, in a case involving instalment payments stipulated in marks, pointed out "that, in the absence of scaling laws, resort should be had to the principles of general law; that, where no rule of law expressly covers the case, the court, to arrive at a satisfactory solution, should decide *ex aequo et bono* . . . and should look for a principle which in some measure will protect both the interests of the debtor and those of the creditor; that in 1924 the old mark was abolished in Germany; that since that time it has been, therefore, impossible to establish a relation in value between the old German mark and the French franc; that for reasons of equity one cannot say that, because of the abolition of the old mark, the debtor should be completely freed of his obligation."<sup>66</sup> The court accordingly revalued the litigated claim on the basis of the par value of the mark.

Assimilation of the concept of revaluation was accelerated in the years preceding the present war. It was as though the shadow of the impending catastrophe brought to the French judges a more vivid understanding of and feeling for the misfortunes and injustices caused by catastrophes which previously had stricken other nations. The suggestion can perhaps be ventured that an analogous psychological factor is now contributing to bring about in the United States a greater awareness of the problem dealt with in this article.

## V

American law concerning collapsed foreign currencies must be viewed in the light of cases arising from monetary inflations which this country itself has experienced.

As to inflation in the colonial period it may suffice to refer to *Deering v. Parker*,<sup>67</sup> decided in 1760 by the Privy Council on an appeal from the province of New Hampshire. The action was on a bond calling for payment in bills of the Massachusetts Bay Colony "or current lawful money of New England." Since the bills of the Massachusetts Bay Colony had in the meantime suffered severe depreciation and had been withdrawn, the

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63. See, *e.g.*, Cour d'Appel, Colmar, Nov. 2, 1926, (1927) 8 REVUE JURIDIQUE D'ALSACE ET DE LORRAINE 144.

64. See, *e.g.*, Trib. Sup., Colmar, May 28, 1923, (1924) 5 REVUE JURIDIQUE D'ALSACE ET DE LORRAINE 31.

65. See, *e.g.*, Conseil d'État, Nov. 27, 1925, (1926) 7 REVUE JURIDIQUE D'ALSACE ET DE LORRAINE 122.

66. See RÉPERTOIRE PRATIQUE DE DROIT ET DE JURISPRUDENCE D'ALSACE ET LORRAINE (Niboyet, Supp. for 1927, 1928) 17 *et seq.*

67. 4 Dall. xxiii (P. C. 1760).

court, through Lord Mansfield, confessed that it was "at a loss" to determine the measure of recovery, and it finally decreed that the loss through depreciation should be equally divided between the parties. It is interesting to observe that the position of this great English judge was similar to that taken in our day by a high Chinese court with respect to depreciated and ultimately annulled Russian rubles.<sup>68</sup>

With regard to the great depreciation of paper money issued during the Revolution, it should be noted that statutory scales for the adjustment of public and private debts were established by the Continental Congress and by several of the states.<sup>69</sup> These scales were general in character and were based primarily on current prices of gold. They did not take into account the variable and diverging price relationships of a dislocated economy. The statutes themselves, therefore, often permitted departures from the scales to permit fair results in particular cases. The Virginia scaling act of 1781,<sup>70</sup> for instance, authorized courts of equity to intervene and to render "such judgment as shall appear to them just and equitable" whenever the application of the general statutory scale would be "unjust"; the Pennsylvania<sup>71</sup> and Maryland<sup>72</sup> statutes provided for resort to official or private arbitrators.

The main body of American inflation cases originated in the Civil War inflation with its two different aspects, the Northern and the Southern.

The Northern inflation occurred between 1862 and 1879, that is, in the period between the suspension and the resumption of specie payments. The legal tender notes issued in 1862 and 1863, the so-called greenbacks, soon depreciated,<sup>73</sup> their value as compared with gold reaching its lowest point in July, 1864, when \$100 in gold was equivalent to \$285 in the paper money. In the greater part of the inflationary period, however, the price of gold as well as of other commodities did not even double.<sup>74</sup> The inflation was thus a relatively moderate one.

The question relating to bilateral contracts calling for specific performance, which arises everywhere in time of inflation, soon arose also in the North. How far should unforeseen depreciation of money affect the right of the obligee to require the performance contracted for? How far,

68. See note 48 *supra*.

69. See HARGREAVES, *RESTORING CURRENCY STANDARDS* (1920) c. I.

70. Act of November, 1781, c. XXII, VA. STAT. (Henning, 1822) vol. 10, p. 471 [quoted in *Watson & Hartshorne v. Alexander*, 1 Wash. 340 (Va. 1794)].

71. Act of April 3, 1781, PA. LAWS (1812) c. 924, § 4, p. 519. See Hargreaves, *op. cit. supra* note 69, at 13. See also *Levan v. Frey*, 2 Yeates 320 (Pa. 1798); *Kennedy v. Kennedy*, 3 Yeates 15 (Pa. 1800).

72. See HARGREAVES, *op. cit. supra* note 69, at 14.

73. See MITCHELL, *A HISTORY OF THE GREENBACKS* (1903).

74. See MITCHELL, *GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD* (1908) 288 *et seq.*

in other words, may the obligor take advantage of changed conditions resulting in an inadequacy of consideration and refuse the performance for which he has bound himself?

The answer given in actions for specific performance by courts of equity is familiar law. In the leading case of *Willard v. Tayloe*,<sup>75</sup> the complainant exercised in 1864 an option to purchase contained in a lease of hotel property in the city of Washington which had been executed in 1854. His tender being rejected by the defendant, he filed a bill for specific performance, submitting to the judgment of the court the amount he should pay. The defendant objected that the complainant's offer had been made in greenbacks and not in gold, and also asserted that, because of a great increase which had taken place in the value of the property, enforcement of the contract would be inequitable. The decision, in the view of the majority of the Supreme Court, turned on the power of courts of equity to refuse specific performance on grounds of hardship and the correlative power to attach conditions to the grant of specific performance when hardship or injustice can thereby be prevented. The Court held that the parties must be "considered as having taken upon themselves the risk of subsequent fluctuations in the value of property."<sup>76</sup> The Court, however, took a different position with regard to the subsequent fluctuations in the value of money, pointing out that, when the option was given, gold and silver coin were the only currency recognized by law as legal tender, that the contract must have had reference to such currency, and that it would be "inequitable" to substitute for it paper money worth only a little more than half its value. "Such a substitution of notes for coin," said the Court, "could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution."<sup>77</sup> A decree was directed for a conveyance upon payment by the plaintiff in gold or silver coin. Although the courts today may be more readily disposed to hold that changes in the value of money lie within the risks assumed by the parties to a contract, *Willard v. Tayloe* is still authority for a "conscientious modification" of contractual terms when monetary depreciation has taken place.

In some countries, as in Germany for example, specific enforcement is at least in principle the primary form of relief for breach of contract.<sup>78</sup> The question whether inadequacy of consideration caused by an intervening depreciation of money may excuse the obligor from specific perfor-

75. 8 Wall. 557 (U. S. 1869).

76. *Id.* at 571.

77. *Id.* at 574.

78. "A person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred." GERMAN CIVIL CODE (Wang's trans. 1907) art. 249, § 1.

mance is there regularly equivalent to the question of whether he may be permitted to rescind. The award of damages thus becomes a collateral question and presents no basic difficulty. If the contract can be rescinded by the obligor, he need not perform and there can be no claim against him for damages. If it cannot be rescinded and is not performed, he is, of course, liable in damages, and, if money has meanwhile fallen in value, it is only reasonable that the damages in the depreciated currency be in an amount which will enable the obligee to secure a substitute for the performance contracted for.<sup>79</sup>

The situation under American law is quite different. Here specific enforcement of a contract is considered an "exceptional" remedy which lies in the discretion of the court. Its grant or refusal does not depend simply on the question of whether the contract stands or falls. Specific performance can be denied though no ground exists for rescission.<sup>80</sup> It follows that an action for damages for the breach of a contract may, as a rule, be brought though specific enforcement in equity is barred by hardship. The hardship may be no less, however, if in a case like *Willard v. Taylor* the purchaser, unsuccessful in equity, is permitted to pile up damages in an action at law. This is one aspect of the fact that in the United States as well as in countries such as France, where damages are the normal remedy for breach of contract,<sup>81</sup> the efficacy of relief against the results of monetary depreciation must depend greatly on how far changes in the purchasing power of money are taken into account by courts which assess damages.

Situations thus arising are twofold. It may be desirable on the one hand to enhance, or on the other to reduce, the nominal amount of damages awarded.

79. See cases discussed by Zeiler, *Deckungskauf in der Inflationszeit* (1929) 55 JURISTISCHE WOCHENSCHRIFT 687.

80. "Indeed, in American law, although the creditor cannot enforce specific performance in such a case [*Willard v. Taylor*], he can recover the value of his bargain in an action at law." POUND, LAW AND MORALS (1926) 99. See cases cited in Note, *Equitable Contract Remedies—Denial of Both Specific Performance and Rescission* (1934) 32 MICH. L. REV. 518.

Incidentally, at the time when *Willard v. Taylor* was decided, rescission because of intervening depreciation would not have been permitted anywhere. The doctrine of frustration in Anglo-American law, which seems to have originated in the language of Blackburn, J., in *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. R. 309 (1863), had not yet been sufficiently developed. Cf. the so-called coronation cases, 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1954, and Page, *The Development of the Doctrine of Impossibility of Performance* (1920) 13 MICH. L. REV. 589, 600 *et seq.* As to foreign law, see, *e.g.*, Krueckmann, *supra* note 27.

81. "Every obligation to do or not to do resolves itself in damages, in case of non-performance on the part of the debtor." CODE CIVIL (Cashard's trans. 1930), art. 1142. Articles 1143 and 1144 modify only partly this sweeping provision.

Among the cases in which the amount was enhanced is *Cushing v. Wells, Fargo*,<sup>82</sup> where a carrier failed to deliver a bag of double eagles received by it in Mexico to be carried to the plaintiff in Massachusetts, and the problem presented was whether the plaintiff's damages should be in the amount of the gold coin or in the larger amount representing its value in notes. Another illustration is *Simpkins v. Low*,<sup>83</sup> an action for the conversion of bonds of the San Francisco Water Works Company. The bonds did not express in what kind of money they were to be paid, but the plaintiff offered to show that, in conformity with the usage in California, the company paid its bonds in gold. The question was whether the difference between gold and paper currency could be recognized and damages awarded in an amount higher than the face amount of the bonds. In *Spencer v. Prindle*<sup>84</sup> an action was brought by attorneys for the reasonable value of services rendered. Witnesses estimated the value of the services both in gold and in notes, raising the issue of whether the jury was at liberty to take the difference into consideration and to base its verdict on the higher estimate which had been given in notes. The legal tender acts provided, it is true, that the notes whose issue was authorized should be "lawful money and a legal tender in payment of all debts, public and private, within the United States."<sup>85</sup> Nevertheless the courts felt in the cases just cited and in many others, as did later the courts of other countries,<sup>86</sup> that the process whereby the amount of an obligation was determined was another matter and was not governed by such a provision. "While in legal contemplation there is no difference in value between the different kinds of lawful money, there is a difference, in fact, recognized in the commercial world."<sup>87</sup> The technique of valuation which in actions for damages subjects the standard of value itself to scrutiny and permits enhancement of the plaintiff's recovery in a period of progressive decline in the purchasing power of money was widely adopted.

The question not of enhancing but of reducing the amount of damages may arise when an action for damages is brought by a purchaser of land or goods after a depreciation in the value of money has caused a great discrepancy between the contract price and the present value of the subject matter. This question would, for example, come up in an action at law by the purchaser in a situation like that of *Willard v. Tayloe*. Although with the crystallization of the rules of damages the "equitable powers" of juries decreased, it is still true that, in some measure, "a jury, in a court

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82. 98 Mass. 550 (1868).

83. 54 N. Y. 179 (1873).

84. 28 Cal. 276 (1865).

85. Exceptions were made with regard to duties on imports owed to the United States and interest on bonds and notes due from the United States. 12 STAT. 345, 532, 709 (1862-63).

86. Compare *supra* p. 10 *et seq.*

87. *Spencer v. Prindle*, 28 Cal. 276, 277-8 (1865).

of law, can mitigate the damages according to equity and good conscience."<sup>88</sup> This process applied outside the frame of any strict legal rule seems to have proved as a practical matter to be adequate. It will be recalled that in France the depreciation suffered by the franc some twenty years ago was more than twice as great as the depreciation of the greenbacks and that there, too, no other avenue of relief was in general available.<sup>89</sup>

From the Northern inflation cases it is at any rate clear that in the adjustment of difficulties resulting from a depreciation of money as moderate as that of the greenbacks the American courts were in no respect less efficient, and in some respects more efficient, than the courts of other countries. These cases, however, do not show the resources of American law for coping with a more advanced inflation or with an inflation ending in a total collapse of the monetary standard which might require an outright revision of monetary obligations. Light is thrown on that subject by the Southern inflation cases.

For more than a year, the notes issued by the Confederate government clung closely to their parity with gold. Thereafter they depreciated, in successive six-month intervals, to one-half, one-fourth and one-twelfth of their pre-war gold value, sinking, by January, 1865, to less than one-fiftieth. Four months later, with the defeat of the Confederacy, they were wholly worthless.<sup>90</sup>

Some of the reconstruction courts reasoned that all contracts in which Confederate money was used for any purpose were illegal and unenforceable,<sup>91</sup> but this doctrine was rejected by the Supreme Court of the United States. In 1868, in *Thorington v. Smith*,<sup>92</sup> the Court declared that the Confederate currency was imposed on the community by irresistible force throughout the vast territory in which the Confederate government exercised de facto power and that contracts stipulating payment in this currency were transactions "in the ordinary course of civil society" and were "without blame" except when proved to have been entered into with actual intent to further the insurrection. "We cannot doubt," concluded the Court, "that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation."<sup>93</sup> How was "the extent of their just obligation" to be ascer-

88. See Savage, C. J., in *Seymour v. Delancy*, 3 Cow. 445, 504 *et seq.* (N. Y. 1824).

89. See *supra* p. 16.

90. See SCHWAB, *THE CONFEDERATE STATES OF AMERICA* (1901) 167 and app. I.

91. See, *e.g.*, *Lawson v. Miller*, 44 Ala. 616 (1870); *Carllee v. Carlton*, 27 Ariz. 379 (1872); *Baily v. Milner*, 35 Ga. 330 (1868); *Laughlin v. Dean*, 1 Duvall (62 Ky.) 20 (1863); *Denney v. Johnson*, 26 La. Ann. 55 (1874); *Robertson v. Shores*, 47 Tenn. 164 (1869); *Brown v. Read*, 33 Tex. 629 (1870); *Calfee v. Burgess*, 3 W. Va. 274 (1869).

92. 8 Wall. 1 (U. S. 1868).

93. In *Delmas v. Insurance Co.*, 14 Wall. 661 (U. S. 1871), the Supreme Court even held that state legislation invalidating Confederate-money contracts was an impairment of their obligation and was therefore violative of the Federal Constitution.

tained, however, in currency of the United States when this had again become the only currency in the land? Debts contracted in Confederate dollars were not required to be paid in an equal amount of dollars of the United States. Parties were permitted to show, by parol or other evidence, that "dollars" meant Confederate dollars. But it did not follow that a great mass of debts were now dischargeable in wholly worthless notes.

Statutes were enacted in the greater part of the Southern states which called for a process essentially the same as that of the revaluation undertaken more recently in Germany and in other countries.<sup>94</sup> Most of these statutes conferred broad discretion on the trial courts. In Georgia, for instance, either party to a suit involving a Confederate-money contract was at liberty to "give in evidence the consideration and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time," the statute adding that the "verdict and judgment rendered shall be on principles of equity."<sup>95</sup> In states where there were no statutes on the subject,<sup>96</sup> courts proceeded on the basis of general principles of private law, as did also, on occasion, the federal courts.<sup>97</sup>

Neither legislatures nor courts undertook to reopen executed transactions. Debts which originated before the war and which were paid during the war were regarded as discharged;<sup>98</sup> if they remained unpaid they were enforceable in accordance with their terms. The problem was thus narrowed to an adjustment of Confederate-money debts which at the end of the Civil War remained unpaid in whole or in part. Most of the cases involved promises to repay loans,<sup>99</sup> or to pay for land,<sup>100</sup> goods sold,<sup>101</sup> or services rendered.<sup>102</sup>

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94. Compare especially Alabama Ordinance No. 26 of Sept. 28, 1865, § 3, REV. CODE (1867), p. 59; Florida Ordinance No. 8 of Nov. 7, 1865, Acts 1865, p. 153 [quoted in *Fife v. Turner*, 11 Fla. 289, 291 (1867)]; Georgia Ordinance of Nov. 8, 1865, in JOURNAL OF THE GEORGIA CONVENTION (1865) 232; South Carolina Ordinance of Sept. 27, 1865 [quoted in headnote of *Rutland v. Copes*, 15 Rich. Law 84 (S. C. 1867)]; Virginia Act of March 3, 1866, Acts 1865-66, c. 71.

95. Georgia Ordinance of Nov. 8, 1865, *loc. cit. supra* note 94.

96. Kentucky, Louisiana, Mississippi, Tennessee.

97. In *Thorington v. Smith*, 8 Wall. 1 (U. S. 1868), and in *Stewart v. Salamon*, 94 U. S. 434 (1876), where actions had been brought in Federal District Courts for Alabama and Georgia, respectively, it was nowhere suggested that the scaling acts in force in those states would have any bearing on the decisions.

98. *Ponder v. Scott*, 44 Ala. 241 (1870); *Van Hoose v. Bush*, 54 Ala. 342 (1875); *Glenn v. Case*, 25 Ark. 616 (1869); *Roggers v. Gibbs*, 25 La. Ann. 563 (1873); *Pope v. Chafee*, 14 Rich. Eq. 69 (S. C. 1868); *Binford v. Memphis Bulletin Co.*, 57 Tenn. 355 (1872); *Jones v. Thomas*, 45 Tenn. 465 (1868); *Ritchie v. Sweet*, 32 Tex. 333 (1869).

99. See, *e.g.*, *Rives v. Duke*, 105 U. S. 132 (1881); *Taylor v. Turley*, 33 Md. 500 (1870); *Wooten v. Sherrard*, 71 N. C. 374 (1874).

100. See, *e.g.*, *Slaughter v. Culpepper*, 35 Ga. 25 (1866); *Herbert & Gessler v. Easton*, 43 Ala. 547 (1869); *Austin v. Kinsman*, 13 Rich. Eq. 259 (S. C. 1867).



The decisions were by no means uniform, but the differences, on the whole, did not result from the presence or absence of a statute. The fact that many of them were based on statutes had, however, the important consequence that, when the constitutionality of these statutes was challenged, the Supreme Court had to deal with two questions, decisive in the revision of debts expressed in the collapsed currency: what was to be taken as the standard when the original standard, the Confederate dollar, had become inoperative, and as of what date was that standard, and consequently the obligation, to be evaluated?

The import of the first question must be considered in the light of the economic conditions which had prevailed in the South during the war.<sup>103</sup> There was traffic in notes of the United States, but for long periods this was secret as well as illicit. There was traffic in gold, but this, although lawful, was also greatly distorted, for gold was itself the principal object of speculation. The prices of commodities moved in separate courses. The prices of cotton, tobacco and rice, which because of the blockade could not be exported, rose slowly. The prices of other products, particularly those coming from abroad, rose enormously. Owing to deficiencies in transportation there was also wide disparity in the prices of basic commodities between one district and another and between city and country in the same district. In these circumstances it proved extremely difficult to redefine after the war in terms of lawful money an amount contracted for in Southern currency.

As a matter of fact, the greater part of the indebtedness left over from the Confederate period and liquidated in the state courts was adjusted on the basis, not of the amount of Confederate dollars promised, but of the value of the consideration which had been given.<sup>104</sup> An example of this is *Effinger v. Kenney*.<sup>105</sup> A tract of about one hundred acres of land in Virginia was sold in March, 1863, at \$210 per acre in Confederate money. One-third of the price was made payable two years after the date of the sale. In an action for this balance of the purchase money the Virginia courts, as authorized by a Virginia statute, held that the fair value of the property "was the most just measure of recovery" and, disregarding the price fixed by the parties, awarded judgment for one-third the value of

101. See, *e.g.*, *Calbreath v. Virginia Porcelain and Earthenware Co.*, 22 Gratt. 697 (Va. 1872); *Maxwell v. Hipp*, 64 N. C. 98 (1870).

102. See, *e.g.*, *Fife v. Turner*, 11 Fla. 289 (1867).

103. See SCHWAB, *THE CONFEDERATE STATES OF AMERICA* (1901) 161 *et seq.*

104. The value of the consideration was even expressly adopted by some state statutes as the measure of recovery. ALA. REV. CODE (1867), p. 59, § 3; Fla. Acts 1865, Ord. No. 8, p. 153; Ga. Ord. of Nov. 8, 1865, *loc. cit. supra* note 94; N. C. Pub. Acts 1865-66, c. 39; S. C. Ord. of Sept. 27, 1865, *loc. cit. supra* note 94; Va. Act of Feb. 28, 1867, Acts 1865-67, c. 270.

105. 115 U. S. 566 (1885).

the land, which on the basis of tax assessments and other factors was estimated to be \$80 an acre in lawful currency.

This "consideration test" would probably not have been questioned if creditors could have rescinded and proceeded on the theory of *quantum valebat* or *quantum meruit*. The test was bound to arouse objections since there was no rescission, creditors, on the contrary, standing on their contracts. The Supreme Court took the position in *Effinger v. Kenney*, as it had done earlier in *Wilmington & Weldon Railroad v. King*,<sup>106</sup> that to use the "consideration test" in determining the value of a contract and computing damages for its breach was "nothing less" than to "put a different value upon the property from that placed by the parties" and to "make for them new and different contracts." The Court declared that state statutes which permitted recovery of the fair value of the consideration given whenever the court might think that this would be "the most just measure of recovery" sanctioned the impairment of contracts and thus violated the Federal Constitution. It was held that, within the ordinary rules of the law of contracts, creditors could only be permitted to recover the value, in lawful money of the United States, of the Confederate money promised. The Court did not attach decisive importance to the difficulties which the trial courts might encounter in determining this value.

If the valuation was thus to be based not on the consideration given but on the amount of Confederate money promised, the question of the date as of which the valuation was to be made became of paramount importance. The ordinary rules of damages would seem to require that the value of the Confederate money be measured as of the date on which the debt was made payable by the terms of the contract. From this it would follow, of course, that the creditor would have to bear the entire loss arising out of any supervening depreciation of money. Since the depreciation of Confederate notes was rapid and eventually complete, this frequently would amount to a denial of any recovery. This, however, was precisely the result which, it was generally felt, was to be avoided. Governed by this feeling, the overwhelming majority of the state courts took, not the maturity date, but the date of the inception of the debt as the date of the valuation.<sup>107</sup> The Supreme Court, far from barring this innovation as it had barred the "consideration test," sanctioned the choice of the earlier date. *Thorington v. Smith*,<sup>108</sup> the first case in which the Court touched on the subject, involved a promissory note given as a part of the

106. 91 U. S. 3 (1875).

107. See, e.g., *Darcey & Wheeler v. Shotwell*, 49 Miss. 631 (1873); *Cowan v. McCutchen*, 43 Miss. 207 (1870); *Mathews v. Rucker*, 41 Tex. 636 (1874); and cases cited *supra* notes 99-102.

108. 8 Wall. 1 (U. S. 1868).

purchase price of land and made with reference to Confederate currency. The note, as it happened, was payable one day after the date of the contract of sale and consequently the choice between the date of the maturity and that of the inception of the debt was, for practical purposes, immaterial. This may explain why the Court did not elaborate on its statement, by no means self-evident and in reality far-reaching, that a party entitled to be paid in Confederate dollars could recover their actual value "at the time and place of the contract."<sup>109</sup> Some of the Southern courts took up this statement<sup>110</sup> and in the Supreme Court itself the date of the contract was subsequently adopted without further discussion in several cases.<sup>111</sup> In one of these there was a period of a year between the making of the contract and the maturity of the debt,<sup>112</sup> with the result that the choice of a date was material.

The rule became firmly established. Yet when in *Effinger v. Kenney*, seventeen years after *Thorington v. Smith*, the question was seriously controverted, the Supreme Court had some difficulty in justifying the rule. The Court based its decision on the fact that Confederate notes were not lawful currency nor even a recognized subject of property. "Their intrinsic value," said Mr. Justice Field, who delivered the opinion, "was nothing but their exchangeable value by reason of their enforced circulation. . . . Persons . . . parting with lands and goods for Confederate notes, or for the promise of them, attached to them this exchangeable value, and expected to receive it then or afterwards. They did not intend to surrender . . . their property without any consideration, if the . . . notes [should] lose this exchangeable value. They expected an equivalent in any event. Therefore, as having the value thus given to them at the time and place of their receipt, or the promise of them, the National courts will treat them, but not as having a value at any other time or place."<sup>113</sup> Whatever may be said of this reasoning, the result of all the decisions was that Confederate-money debts were computed in terms of the value they had when they arose. They were, in other words, subjected to revaluation, and, it should be noted, to a more radical revaluation than has since been arrived at in any other country.

In the cases dealing with the revaluation of Confederate-money debts, there was, of course, no occasion for ruling on questions which might arise out of an extreme depreciation of lawful money. In *Effinger v. Ken-*

109. *Id.* at 14.

110. *Neely v. McFadden*, 2 S. C. (N. S.) 169 (1870); *Brightwell v. Hoover*, 7 W. Va. 342 (1874).

111. *Wilmington & Weldon R. R. v. King*, 91 U. S. 3 (1875); *Stewart v. Salamon*, 94 U. S. 434 (1876); see also *Bissell v. Heyward*, 96 U. S. 580 (1877).

112. *Stewart v. Salamon*, 94 U. S. 434 (1876).

113. 115 U. S. 566, 576 (1885).

ney, before stating the doctrine adopted by the Court with regard to money issued by "an insurgent and revolutionary organization," Mr. Justice Field, it is true, remarked, by way of dictum, that "where a contract is payable in a specified currency, the rule is . . . clear that such currency [if lawful] is demandable and receivable at the maturity of the contract, whatever change in its value by increase or depreciation may have taken place in the meantime" and that in such a case "the damages recoverable for a breach of the contract are to be measured by the value of the currency at its maturity."<sup>114</sup> It is a peculiar feature, however, of the law dealing with inflation that rules appropriate at an early stage of inflation become wholly impracticable when the inflationary process is greatly advanced. Mr. Justice Field's statement, it is submitted, must have been made with reference to the then prevailing moderate fluctuations in American currency and the then common practice of specifying a particular kind of currency in contracts, and by no means with reference to such an eventuality as an utter collapse of lawful money. To regard his statement as applicable to this latter situation would, indeed, be at variance with a further observation which he made. After reaffirming the revaluation rule with respect to contracts made payable in Confederate money, he remarked that "any other rule . . . would be inconsistent with justice in determining the value of contracts thus payable where they matured near the close or after the overthrow of the Confederacy."<sup>115</sup> Clearly, if the collapsed currency were a lawful and not an unlawful currency, any other rule would be no less inconsistent with justice. The equities as between private parties engaged in transactions "in the ordinary course of civil society" are in both situations the same; if there be any difference, it is rather in favor of one who contracted for money of a lawful and not a merely de facto government. The dicta of the Supreme Court, viewed in their entirety, should therefore be regarded as intimating that, whenever monetary depreciation becomes catastrophic, the ordinary rules of apportionment of risks between the parties become inadequate, and different rules must be devised if justice or good faith or fairness—whatever the term that may be used—is to prevail.

If, for the sake of argument, a collapse of the American dollar could be assumed, the resources of American law no less than those of the law of other countries would afford ample means for giving creditors appropriate relief. There is hardly a device used in this field in a foreign country which could not also be fitted into the American legal system. It may suffice, however, to rely on a doctrine which has been more fully developed in the United States and in England than anywhere else—the doctrine of constructive conditions. Parties frequently stipulate in a contract that

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114. *Id.* at 575.

115. *Id.* at 576.

the extent of the obligation shall be adapted in a specified manner to changing circumstances, that, for example, the nominal amount of a debt shall be increased with a rise in prices. It may therefore be permissible to hold that a proviso making a particular event such as a rise in prices operative as a condition should be implied by law when "the court believes that the parties would have intended it to operate as such if they had thought about it at all."<sup>116</sup> The law "has thus in every country supplied the shortsightedness of individuals by doing for them what they would have done for themselves if their imagination had anticipated the march of nature."<sup>117</sup> This process, it should be noted, is quite distinct in principle from the theory, frequently adopted by the Southern courts but condemned by the Supreme Court of the United States, that courts may be empowered by statute to disregard contractual stipulations made by the parties and, independently of their intention, express, presumed, or implied, to "make for them new and different contracts."<sup>118</sup>

Legal tender legislation would interpose no obstacle to revaluation. Such legislation, properly construed, can scarcely be held to require that dollar notes shall still be legal tender for the payment of debts even if, contrary to all expectation, they actually are no longer worth the paper on which they are printed. Legal tender acts of other countries have already been construed as precluding the possibility of such an intention.<sup>119</sup> Moreover, a contrary construction of American legislation, forcing creditors to give up their claims in return for wholly worthless "dollars," might perhaps be regarded as depriving them of property without due process of law. The decisive point, however, is that legal tender legislation deals only with the discharge of debts and not with the fixing of their amount and is, therefore, not the controlling factor in the process of revaluation.<sup>120</sup>

If the problem of a revaluation of dollar claims became acute, relief would depend, not on whether means of relief can be found, but on whether American courts, as a matter of policy, would deem it appropriate to proceed with the remedy of revaluation. An uninhibited revision of monetary obligations is not to be expected. The prevailing nominalistic concept of money, rooted as it is in economic as well as legal considerations, would permit a debtor, regardless of any change in the value of money, to discharge his obligation by paying the nominal amount of the debt. Those,

116. See Corbin, *Conditions in the Law of Contract* (1919) 28 YALE L. J. 739, 744.

117. BENTHAM, *A General View of a Complete Code of Laws*, in 3 WORKS OF JEREMY BENTHAM (1843) 155, 191, speaking of "adjective" obligations, i.e., those turning on "events which they [the parties] could not foresee."

118. *Wilmington & Weldon R. R. v. King*, 91 U. S. 3, 4 (1875); *Effinger v. Kenney*, 115 U. S. 566, 572 (1885).

119. See *supra* pp. 10-11.

120. "The legal tender acts do not attempt to make paper a standard of value." *Knowlton v. Lee* (the second legal-tender case), 12 Wall. 457, 553 (U. S. 1870).

however, who would rely on this concept to bar revaluation even in an extreme situation might be compared to natives of North Africa whom Professor Huger W. Jervy saw gathered in a market place in Marrakech seeking in the Koran the answer to practical questions of aviation. As a matter of fact, no theory of nominalism was ever formulated with reference to emergency situations arising out of a monetary collapse. The theory of nominalism, as was observed by Sulkowski, a Polish scholar, in his lectures at the International Academy of the Hague, "is in reality justified only in cases where variations [in the value of money] are not substantial. Whenever they exceed certain maximum limits—limits which are unstable and which vary according to time and circumstances—un-deviating application of nominalism must be rejected as contrary to the principles of equity and justice."<sup>121</sup> Special rules must then be applied, as was done after the Southern inflation, which take account of realities and restore, in whole or in part, the original value of debts.

Troublesome difficulties may arise in border situations.<sup>122</sup> In the event, however, of an utter collapse of money, in which contracts, in the words of Mr. Justice Field, could not otherwise be enforced "with anything like justice to the parties,"<sup>123</sup> it is reasonable to suppose that a revaluation device of some kind would be adopted by the American courts.

## VI

Unlike the hypothetical situation arising from a collapse of the dollar, future cases involving claims in collapsed foreign currencies will force the courts of the United States to decide to what law they will look in determining the extent of the obligation of contracts expressed in terms of the vanished currency. No doctrine in this regard having been developed in the United States, it can only be said that this question goes to the substance of the obligation, and not to its performance, and that the courts, according to the varying circumstances of the particular cases, will in effect apply sometimes their own law and sometimes the foreign law. Both possibilities, therefore, must be considered.

Under American law, as has already been shown, the American courts could be expected to give creditors appropriate relief if there were a collapse of American money. The grounds on which that conclusion was

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121. See Sulkowski, *Questions juridiques soulevées dans les rapports internationaux par les variations de valeur des signes monétaires* (1929) 29 RECUEIL DES COURS (Académie de Droit International) 5, 26.

122. Difficulty may arise especially from the necessity of distinguishing between a mere depreciation and a collapse of the currency. The distinction, like most questions of degree, is hazy in theory; in actual practice, there can rarely be any question as to where a case falls. See, e.g., cases cited in NUSSBAUM, *MONEY IN THE LAW* (1939) 291, n. 33.

123. *Wilmington & Weldon R. R. v. King*, 91 U. S. 3, 4 (1875).

reached are not at all peculiar to a domestic monetary catastrophe; they are wholly applicable to claims in a collapsed foreign currency. Indeed, in the balancing of conflicting interests any disposition to maintain nominal parity would have less weight in the latter situation, and the considerations demanding an equitable adjustment of contractual rights and obligations would have greater weight. Courts are naturally disposed to uphold as far as possible the nominal parity of the money of their own country when they believe that to do so would conform with some national policy. A moderate debasement of money is generally brought about for purposes of policy; it may, for instance, be designed to facilitate the competition of a nation's products in foreign markets. An extreme depreciation of money, although bound to bring about results which, as to private relations, are completely at variance with justice, may still be sanctioned by the state. A state which sends its soldiers into battle may demand that contractual rights be sacrificed if this is deemed to be required by superior interests. Yet, as the state drafts for military service only those who owe allegiance to it, so the extraordinary exigencies which demand a sacrifice of contractual rights will appear less imperative outside the nation's domain. When, on the other hand, courts have been disposed to adjust contractual obligations, it has been because of the extent to which they have been shocked by the damage resulting to individuals when money loses its value. Such damage does not, in general, fall equally on domestic and on foreign creditors. The money, although diminished in its foreign exchange value, may still retain its purchasing power at home. Thus, in one of the gold clause cases,<sup>124</sup> the Supreme Court pointed out that the plaintiff, the owner of a Liberty Loan bond, had not shown that he suffered any loss by reason of the devaluation of the dollar and the abrogation of the gold clause. In the event of a depreciation which unquestionably results in widespread and ruinous losses, claims for revaluation asserted by creditors outside the country may still be properly regarded as more meritorious than claims of persons who belong to the country and who may be supposed to have derived at least some indirect benefit therefrom. Why, for example, in litigation in an American court between two Americans who contracted in francs, should the result be controlled, not by rules of private law relating to the assumption of risks, but by rules rooted in French public law concerned with the circulation of franc notes in France? From all this it follows that, if American law governs, relief should be more readily available to holders of claims in collapsed foreign money than it would be to holders of claims in collapsed American dollars.

In cases in which the foreign law is held applicable, three situations are conceivable: first, that the foreign law gives adequate relief from hard-

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124. *Perry v. United States*, 294 U. S. 330 (1935).

ships arising out of a monetary collapse; second, that it gives inadequate relief; third, that it gives no relief at all.

If, in the foreign law, rules for revaluation have been developed which are deemed fair, the American courts should have no basic difficulty in applying them. In an English case<sup>125</sup> which was held to be governed by German law, the plaintiff was entitled to an annuity of 8,000 marks under a compromise between legatees which had been approved in 1905 by the German courts. Meanwhile the German currency had collapsed and had been re-established. The Chancery Division found as "a fact that the result of the German law is that the sum which has to be paid under a contract of this sort is such a sum as a man would feel himself under an obligation to pay, having regard to the original liability, having regard to the circumstances, and assuming the man to be honest and acting in good faith, and taking all proper circumstances into consideration."<sup>126</sup> The court held that the plaintiff was not entitled to 8,000 reichsmark of the new German currency (which would have been worth £646) but was entitled, under the principles of free revaluation, to £500 per annum.

If the revaluation rules of the foreign law are deemed so unfair as to be against the public policy of the forum—if, as Mr. Justice Cardozo put it, they violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"<sup>127</sup>—we may well assume that the courts will refuse to apply them. It is rather to be expected that the courts will, instead, consider the foreign law as though it did not contain the objectionable rules and will, in some circumstances, project domestic rules into the foreign legal system.<sup>128</sup> The desirability of using the exclusionary device of public policy in other than exceptional cases has sometimes been disputed by those striving for the "illusion of certainty" to which Mr. Justice Holmes has so frequently referred. Still, the notion of public policy is no less definite than is, for example, the concept of reasonableness, the importance of which in the legal technique is beyond question. It would be strange, moreover, if the courts, although permitted to determine whether their own statutes are at variance with guaranties of the Constitution, were, nevertheless, forbidden to consider, in the language of Mr. Justice Story, whether, "in a moral or political view," foreign laws which they are asked to enforce are "incompatible" with the nation's "own safety or happiness or conscientious regard to justice and duty."<sup>129</sup> Even one who puts a coin in a slot machine

125. *Kornatzki v. Oppenheimer* [1937] 4 All Eng. 133 (Ch.); see also *In re Schnapper, Westminster Bank Ltd. v. Schnapper* [1936] 1 All Eng. 322 (Ch.).

126. *Kornatzki v. Oppenheimer* [1937] 4 All Eng. 133, 139 (Ch.).

127. *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 111, 120 N. E. 198, 202 (1918).

128. For a fuller discussion of the exclusionary device of public policy and of its application in related fields, see Rashba, *Foreign Exchange Restrictions and Public Policy in the Conflict of Laws* (1943) 41 MICH. L. REV. 777, 1089.

129. STORY, *CONFLICT OF LAWS* (7th ed. 1872) 24.



can ordinarily ask for replacement if what he receives is unfit for use. Should the judges who operate the mechanism of the conflict of laws have to accept, "as is," what the mechanism yields? <sup>130</sup>

How necessary it may be to apply the test of public policy in the field of revaluation is illustrated by a provision in the comprehensive German statute of July 16, 1925.<sup>131</sup> This statute, after providing specifically for the revaluation of mortgages, debenture bonds, savings bank deposits, and claims against insurance companies, states in Title Nine that other obligations shall be governed by general principles of law,<sup>132</sup> that is to say, by the principles of so-called free revaluation. Yet in the same title, by way of exception, holders of claims against commercial banks are wholly excluded from the benefit of revaluation.<sup>133</sup> Although German banks were substantially indebted to Americans there appears to be no case in which American creditors sought revaluation of their claims.<sup>134</sup> Unless they simply overlooked the possibility of revaluation in general, this can be explained only by their having acquiesced in what the Germans themselves called the "Bankenprivileg." When this special privilege was discussed in the Reichstag, however, and several deputies protested that German public opinion would not understand why the banks, which in time of inflation had charged exceedingly high interest rates and had erected magnificent edifices, should be specially favored, the German Minister of Economy repeatedly made it clear that one of the principal reasons for the exemption was that any revaluation of bank claims would, in greater part, profit foreigners.<sup>135</sup> Such an enactment, if its true nature were once shown, would probably be disregarded by an American court.<sup>136</sup>

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130. It may also be noted that in judicial opinions, as well as in the teaching of the subject, the basic differences between the interstate and the international situations have not always been taken fully into account. It is one thing to advocate that public policy, in Professor Goodrich's phrase, be "cast out altogether" in the area of interstate conflicts; it is another thing to do so when laws of foreign nations are involved.

131. [1925] REICHSGESETZBLATT I. 117.

132. *Id.* at arts. 62-6.

133. *Id.* at arts. 65-6.

134. As to cases before the Mixed Claims Commission, see Report of Robert W. Bonyngé, Agent of the United States, before the Mixed Claims Commission, United States and Germany (1934), especially pp. 82 *et seq.*; *Hearings before a Subcommittee of the House Committee on Ways and Means on H. R. 10820*, 69th Cong., 1st Sess. (1926), especially pp. 234 *et seq.*

135. See WUNDERLICH, DIE RECHTSPOLITISCHE UND WIRTSCHAFTLICHE BEDEUTUNG DES AUFWERTUNGSGESETZ; Protocols of the 18th commission, Documents of the Reichstag, Nos. 804, 1125, especially p. 26; LEHMAN-BOESEDECK, KOMMENTAR ZUM AUFWERTUNGSGESETZ 310 *et seq.*

136. The Reichsgericht itself disregarded the bank privilege of Article 65, and granted free revaluation, in an action against a non-German bank in which, although the debt was expressed in depreciated Austrian kronen and was governed by non-German law, it undertook to apply German law. *Cf. supra* p. 14. The Reichsgericht remarked "that the decisive motives for the provision of Article 65 of the Revalorization Act could not be determined with certainty." (1932) 61 JURISTISCHE WOCHENSCHRIFT 1048, 1049 n.

The third possibility, somewhat related to the second, is that the law of the foreign country does not permit any revaluation of claims in its collapsed money. Monetary collapse can probably never be regarded simply as an extralegal event, a sort of natural catastrophe. It cannot occur unless the state has permitted an over-issue of paper money or has otherwise taken away its value.<sup>137</sup> Let us imagine, for the sake of illustration, that an American government, with a view to liquidating the onerous obligations incurred during the war, were to bring it about that only obligations in some kind of "new" dollars should thenceforth be valid whereas obligations in "old" dollars should be worthless; such an imaginary domestic situation may perhaps present more vividly than situations which have actually occurred in foreign countries the fact that when a state deprives its money of all value, and does not take reasonable measures for relieving holders of claims expressed in the vanished currency, its action amounts to a confiscation of such claims.<sup>138</sup> Confiscatory measures have repeatedly been adopted in

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137. Recent major inflations, at any rate, were even deliberately organized. Schacht's predecessor in the office of president of the Reichsbank, von Havenstein, suggested in secret meetings with German political leaders that the Allied occupation of the Ruhr should be countered with a destruction of the German currency and that this incidentally would enable Germany to get rid of a large part of its private debts to foreign creditors. [Professor Georg Bernhard, who was a member of the Reichstag and of the Reichswirtschaftsrat and who participated in the meetings, told these facts to the writer and authorized him to publish them.] Indeed, the German commercial banks would scarcely have granted to industrialists and others practically unlimited credits in a steadily depreciating money, and inundated the country with paper, if they had not been certain that the Reichsbank, that is to say, the Reich itself, would by rediscounting save them from loss. Cf. GRAHAM, EXCHANGE, PRICES AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923 (1930) 61 *et seq.* Similarly Russian inflation was moulded under the banner of communism which presupposed a destruction of vested rights and, in particular, of monetary values. See *supra*, p. 12.

138. In actions on contracts which were made in Russia before the revolution, the courts have often been content simply to say that "old rubles" have become "worthless" and that consequently there can be no recovery. See, *e.g.*, Augustus N. Hand, J., in *Tillman v. Russo Asiatic Bank*, 51 F. (2d) 1023, 1026 (C. C. A. 2d, 1931); Crane, J., in *Dougherty v. Equitable Life Assurance Society*, 266 N. Y. 71, 90, 100, 193 N. E. 897, 903, 907 (1934), discussed *supra* pp. 4-5. "Old rubles" had, indeed, now become mere collectors' items. But the parties, when they contracted in rubles, had not had in mind mere colored pieces of paper. Being no longer a standard of value or a medium of exchange, "old rubles" had ceased to be the rubles stipulated in the contracts. It is not sufficient, therefore, simply to observe that the "old rubles" have disappeared. In determining the bearing of the "disappearance" of "old rubles" on old contracts in rubles, the courts must not shut their eyes to circumstances attending the "disappearance" which disclose that it was a part of a confiscatory action. Cf. *Rashba*, *supra* note 128, at 1100 *et seq.*

Confiscation is "an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government; though the proceeds may not, strictly speaking, be brought into its treasury." *Ellenborough, L. J.*, in *Levin v. Allnut*, 15 East 267, 269, 104 Eng. Rep. R. 845, 846 (K. B. 1812).

revolutionary periods and frequently have "actually attained such effect as to alter the rights and obligations of parties in a manner" which the courts "may not in justice disregard."<sup>139</sup> There is, however, no rule unqualifiedly requiring that such measures, particularly in regard to intangibles, be given extraterritorial effect. The traditional view has been that confiscation is "condemned by the enlightened conscience and judgment of modern times" and is "contrary to the practice of civilized nations."<sup>140</sup>

## VII

If the courts undertake to revalue claims contracted in a foreign currency, they may have to deal with difficult and complex questions: What shall be the measure of revaluation, what factors shall be taken into account, and what weight shall be given to each factor? To what extent shall secured claims be revalued as against subsequent purchasers and lienholders? To what extent shall relief be accorded to assignees who bought claims at a discount? In what circumstances, if any, may closed transactions be reopened?

Judges, driven by a desire to do justice, though, as was Lord Mansfield, "at a loss" as to how to measure the recovery, may deem it preferable, as he did, to make a rough approximation at justice<sup>141</sup> rather than simply to hold that nothing can be done. The difficulties which have been mentioned are not insurmountable, however, and have been in some degree overcome in various countries where claims in collapsed currencies have been the subject of much litigation.

But the primary question, of course, is whether in American courts revaluation is permissible at all. This is the question which this article has attempted to answer. On principle and also, it is submitted, on authority, there is no warrant for the view<sup>142</sup> that for loss resulting from unrestricted inflation of a foreign currency "our law furnishes no remedy."

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139. *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 225, 186 N. E. 679, 681 (1933).

140. *Hanger v. Abbott*, 6 Wall. 532, 536 (U. S. 1868). *Cf. supra* notes 50, 56.

141. See *Deering v. Parker*, 4 Dall. xxiii (P. C. 1760), discussed *supra*, pp. 18-9.

142. See Lehman, J., concurring, in *Dougherty v. Equitable Life Assurance Society*, 266 N. Y. 71, 113, 193 N. E. 897, 913 (1934), discussed *supra*, p. 4.