Michigan Law Review

Volume 33 | Issue 2

1934

EFFECTS OF INFLATION ON PRIVATE CONTRACTS: GERMANY, 1914-1924

John P. Dawson
University of Michigan Law School

EFFECTS OF INFLATION ON PRIVATE CONTRACTS: GERMANY, 1914-1924

*John P. Dawson**

THE German experience with inflation is unique not only in the magnitude of the ultimate disaster but in the wealth and variety of the record which it left behind. From that experience we may still learn much. The problems presented at successive stages of the German inflation differ in degree but not in kind from those which appear in any major shift in the general level of prices. The devices, legal and economic, for restoring an equilibrium thus destroyed must be essentially the same in any great country organized, as Germany was, for specialized, large-scale production. From a study of the German inflation we can expect to ascertain the point at which economic dislocation will lead to intolerable injustice and force courts of law to intervene. And by the success or failure of the methods used by German courts to meet unforeseen changes in money values we may measure our faith in legal safeguards against the hazards of uncontrolled inflation.

I

Economic Background of German Inflation

The currency of the German Empire was placed on a gold basis by an act of December 4, 1871, shortly after the formation of the federal government. This was merely the first move toward the broader objective of supplanting the existing gold and silver currencies of the German states with a unified national currency. On July 9, 1873, more elaborate provisions were made for smaller denominations of the Imperial currency and for the elimination of competing systems of coinage.[1] To the metallic base was later added a total of 240 million marks of Treasury notes, redeemable at the Treasury in silver or gold and circulating freely within the Reich, but not possessing the legal tender quality.[2] Far more important for the subsequent history of Germany

* Associate Professor of Law, University of Michigan. A.B., J.D., Michigan; D.Phil., Oxford.—*Ed.*

[1] Karl Elster, Von der Mark zur Reichsmark 1-3 (1928); Helfferich, Money 156-164 (1927).

[2] Elster, Von der Mark zur Reichsmark 6-7 (1928). The issue of Treasury

were the banknotes issued by the Reichsbank and certain designated private banks (of which there were four at the outbreak of the war). These banknotes were not made legal tender by the act of March 14, 1875, which authorized their issue. But in practice they were accepted at par and the legal tender quality was conferred on the notes of the Reichsbank by acts of June 1, 1909, and January 1, 1910.[3] It was chiefly by means of Reichsbank notes that the war and post-war inflation was accomplished.

On the outbreak of the war Germany, like the other major combatants, revised drastically and immediately the currency regulations then in force. Withdrawals of gold under the shadow of the impending conflict forced the Reichsbank, without statutory authority, to suspend specie payments on July 31, 1914. On August 4, 1914, this decision was confirmed by legislation, which was made retroactive to July 31. By other legislation of the same date the transfer from a gold basis was applied as well to the Treasury notes and the notes of private banks, and Treasury notes at the same time were made legal tender.[4] But these fundamental changes were not at once reflected in either the external or internal purchasing power of the mark. By the end of 1914 the mark had sunk in foreign markets from its par of 4.198 marks to the dollar, to 4.50. By the end of 1915 it had sunk further to 5.16. Efforts were made by the government to maintain the mark's position in the money markets of neutral countries, but they were increasingly ineffective, and its course was somewhat more unstable in the later years of the war.[5] At the Armistice the mark stood at 7.43 to the dollar, a fall from 23.82 cents to about 13 cents as compared with a negligible depreciation of the pound and franc.[6]

notes to the amount of 120 million marks was authorized by an act of April 30, 1874, and another 120 million on July 3, 1913. Treasury notes for sums up to 20 marks were redeemable in silver, those for larger sums in gold.

[3] ELSTER, VON DER MARK ZUR REICHSMARK 7-15 (1928). It is important to observe that no limit to the total issue of bank notes was fixed by statute. At the outbreak of the war it is estimated that of the 6 billion mark total of the German currency, 2¾ billion was in gold, ¾ billion in silver, 400 million in Treasury notes and notes of private banks, and 2 billion in notes of the Reichsbank. The central position of the Reichsbank in the German financial system gave its obligations a far greater commercial importance than even these figures would indicate.

[4] ELSTER, VON DER MARK ZUR REICHSMARK 50-51 (1928).

[5] ELSTER, VON DER MARK ZUR REICHSMARK 433 (1928). Through 1916 it dropped, with occasional rallies, from 5.35 to 5.72, and thereafter it fluctuated between 7.29 and 5.11.

[6] The pound was artificially maintained at $4.76 from early 1916 to March 1919,

Internal prices in Germany rose somewhat more sharply, largely as a result of governmental expenditures in the terrific efforts of the war period. Official price regulation was helpless to stem the tide. By December 1914 wholesale prices had risen to an average of 130, calculated on the basis of 1913 prices at 100. By December 1915 the ratio was 158; by December 1916, 159; by December 1917, 217. The highest point during the war period was 263, in August 1918, which was followed by a decline to 238 at the Armistice.[7] With these ratios should be compared the rise in wholesale prices in France to 367, on the basis of 1913 prices as 100,[8] and in the United States to 203.[9]

This is not the place to analyze the causes of Germany's subsequent disaster. It is perhaps enough to say that the greater strain of the war on German industry and the curtailment of foreign trade through the allied blockade had placed Germany at a decided disadvantage in the general effort to reach financial stability; but the prospect for German recovery was far from hopeless.[10] The public debt, vastly increased as in most of the combatant countries, was mostly owed internally. By a courageous effort a budgetary balance was attained early in 1920 between ordinary revenues and expenditures other than those on reparations account. The ultimate collapse of the German mark must be attributed chiefly to the pressure of reparations payments on mark exchange and government credit, and to the psychological repercussions of reparations within Germany itself.

Whatever the causes, the collapse of the German currency proceeded at an accelerated rate through 1919 and, after a brief halt in 1920 and early 1921, the drop was rapid until the bottom was

only 10 points below its pre-war parity of $4.86. It was not till the removal of official support in the spring of 1919 that the pound began to fall, reaching a low point of $3.20 in February 1920. UNITED STATES SENATE FOREIGN CURRENCY AND EXCHANGE INVESTIGATION 290-296 (1925). The franc fell from a parity of around 5.15 to the dollar in July 1914 to about 5.45 in November 1918. DULLES, THE FRENCH FRANC, 1914-1928, p. 480 (1929).

[7] ELSTER, VON DER MARK ZUR REICHSMARK 80-83 (1928). Figures which differ somewhat, in most instances indicating a more moderate degree of depreciation, will be found in GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, p. 7 (1930).

[8] DULLES, THE FRENCH FRANC, 1914-1928, p. 100 (1929).

[9] In January, 1919. See J. S. LAWRENCE, STABILIZATION OF PRICES 66 (1928). In the same place the rise in prices in England, from 1913 as a base, is stated to be in the ratio of 100 to 217 by January 1919.

[10] The remarks in the text are a brief summary, not inaccurate we hope, of the conclusions of GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 5-12 (1930).

reached.[11] Through most of this period German internal prices remained consistently higher than the mark exchange of foreign currencies.[12] But the lag was not so great as to reduce materially the hardships within Germany itself; indeed in one aspect it simply aggravated the disparity between different classes of commodities and increased the dislocation of German economy.[13]

Moreover, the collapse of the currency was aggravated by other factors. Germany's strength had been drained by war and famine, and much of its man-power lost. Shaken by political revolution, it was still tottering at the precipice of social revolution. When the normal channels of distribution were clogged, and finally nearly stopped by the collapse of the currency, the energies of the people turned feverishly to new forms of economic activity. Whole classes were ruined and their wealth transferred to other hands. In the general disaster not only economic, but social and moral values as well seemed to be destroyed. It is not surprising that the legal order gave way when the bonds of a whole society were being loosened. It was against this back-

[11] The following table represents the quantity of marks necessary for the purchase of a dollar in Berlin at monthly intervals after the Armistice (ELSTER, VON DER MARK ZUR REICHSMARK 433):

	1918	*1919*	*1920*	*1921*	*1922*	*1923*
January		8.20	64.80	64.91	191.81	17,972
February		9.13	99.11	61.31	207.82	27,918
March		10.39	83.89	62.45	284.19	21,190
April		12.61	59.64	63.53	291.00	24,457
May		12.85	46.48	62.30	290.11	47,670
June		14.01	39.13	69.36	317.44	109,996
July		15.08	39.48	76.67	493.22	353,412
August		18.83	47.74	84.31	1,134.56	4,620,455
September		24.05	57.98	104.91	1,465.87	98,860,000
October		26.83	68.17	150.20	3,180.96	
November	7.43	38.31	77.24	262.96	7,183.10	
December	8.28	46.77	73.00	191.93	7,589.27	

After September 1923, quotations were in billions of marks to the dollar, and ultimate redemption was at a trillion marks to one mark.

[12] GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, p. 13 (1930). In the last stages of the depreciation this gap was closed and the downward course of the currency proceeded at an approximately equal rate in these two directions.

[13] One of the most disastrous features of the German inflation was the wide disparity, not only between wages, rentals and retail prices in general, but between various classes of commodities, depending to a large extent on the degree to which they entered into foreign trade. Furthermore, the relations between the various price-groups were constantly fluctuating. A convenient statistical summary is given by GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 178-179 (1930).

ground of universal and mounting despair that German courts were forced to visualize the problems we are about to consider.

II

LEGAL DOCTRINE AVAILABLE FOR RESCISSION OR MODIFICATION OF CONTRACTS

The German Civil Code presented a bleak façade to the hardships of the early inflation. Its provisions offered little hope of indulgence to those whose calculations had not foreseen a national catastrophe of that magnitude. Neither the Anglo-American requirement of "consideration" in contract nor the French requirement of "cause" was to be found in the German Code,[14] though even these would not have provided much comfort.[15] The Roman law device for measuring the adequacy of consideration, *læsio enormis*,[16] had been expressly rejected by the framers of the German Code, under the influence of individualist economic theory then prevailing.[17] It is true that a broad definition of usury, rather close to the common law doctrine of undue influence, had been formulated,[18] but German courts had not developed the implica-

[14] 1 PLANCK, BÜRGERLICHES GESETZBUCH 382-384 (1913).

[15] In Anglo-American law the refusal of courts, at least in legal as distinguished from equitable actions, to scrutinize contracts for adequacy of consideration would restrict the usefulness of this idea in such situations. The Anglo-American authorities must be left for consideration in a subsequent article. In France the requirement of "cause" was not seriously urged as a remedy in contracts dislocated by the French post-war inflation. See VOIRIN, DE L'IMPRÉVISION DANS LES RAPPORTS DE DROIT PRIVÉ 108-113 (1922); BRUZIN, ESSAI SUR LA NOTION D'IMPRÉVISION (1922).

[16] The rule, derived by France and other civil law countries from the Corpus Juris, allows rescission to a vendor where the consideration received by him was worth less than half the value of the property sold. The utility of such a mathematical rule in periods of monetary inflation was shown in post-war France, where the Civil Code authorized rescission of contracts for the sale of land if the price was less than 7/12 of the present value. PLANIOL ET RIPERT, TRAITÉ DU DROIT CIVIL, VI, sec. 214 (1930).

[17] MOTIVES OF THE FIRST DRAFT OF THE CIVIL CODE, II 321. The drafting commission explained that rescission for *læsio enormis* was "dangerous, controverted, provided for very differently in different countries, which the parties in practice almost always renounce, and in whose place, in case of fraud, other means can be substituted." The arguments *ab inconvenienti* which are included here find abundant support in the medieval history of *læsio*. See MÉMIN, LES VICES DU CONSENTEMENT DANS LES CONTRATS DE NOTRE ANCIEN DROIT 123-124 (1926). But it seems unlikely that those inconveniences alone would have led to complete rejection of the idea, if it had been consistent with the individualist assumptions of the Civil Code.

[18] Art. 138: "A juristic act is also void, whereby a person through exploitation of the necessities, indiscretion, or inexperience of another, causes pecuniary advantages to be promised to himself or to a third party; where these pecuniary advantages exceed the value of the counter-performance to such an extent as to be, under the circumstances, clearly disproportionate."

tions of this idea and in any event it would not have helped greatly to alleviate hardships which did not arise until some time after the making of the contract.[19] A possible opening could be found in the elaborate provisions for impossibility of performance.[20] But the framers of the German Code had indicated their intent that the provisions as to impossibility be narrowly construed. They had deliberately rejected the medieval doctrines which undertook to read into every contract a saving clause for supervening change of conditions, the so-called *clausula rebus sic stantibus*.[21] A relaxation of contractual terms, on sub-

[19] STAUDINGER, KOMMENTAR ZUM B. G. B., art. 138, II 3 a. There was some support among legal writers for the view that it was *contra bonos mores* to enforce contracts after inflation had brought an "obvious disproportion" in the performances on both sides, but this reasoning was rejected by the Reichsgericht in 1920 in an important case which gave relief on another theory. 100 R. G. Z. 130. (The DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS will here be cited by the abbreviation commonly used in Germany, "R. G. Z."). The inconvenience of applying art. 138 to such situations would have been increased by the legal consequence, absolute nullity, which was expressly provided by that article. Toward the last stages of the inflation there were writers who urged the application of art. 138 to money debtors who "exploited" the national disaster by attempting to pay off their debts in depreciated currency (BEST AND ROSENTHAL, JURISTISCHE WOCHENSCHRIFT, 1923, pp. 111 and 531). This view even found its way into lower court decisions (Darmstadt Court of Appeal on March 29 and May 18, 1923, JURISTISCHE WOCHENSCHRIFT, 1923, pp. 459 and 522). But this was the time when "all roads led to Rome"; when error, unjust enrichment, good faith, and changed conditions were all resorted to for relief against intolerable injustice.

[20] Art. 275: "The debtor is released from his obligation to perform insofar as the performance becomes impossible as a result of a circumstance, for which he is not responsible, arising after the inception of the obligation.

"An inability of the debtor to perform, arising after the inception of the obligation, is equivalent to impossibility."

Art. 280: "Insofar as the performance becomes impossible as a result of a circumstance for which the debtor is responsible, the debtor must compensate the creditor for the damages due to the non-performance.

"In case of partial impossibility the creditor may, by rejecting the part of the performance that is still possible, claim compensation for non-performance of the entire obligation, if he has no interest in the partial performance. . ." (art. 265 having allowed partial performance in ordinary cases of partial impossibility, i.e., where the creditor *has* an interest in securing the partial performance that is still possible).

Art. 282: "If it is disputed whether the impossibility of performance is the result of a circumstance for which the debtor is responsible, the burden of proof is on the debtor."

Art. 287 provides, however, that if the debtor is in default he is "responsible for impossibility of performance arising accidentally during the period of default, unless the injury would have occurred even if he had performed on the due date."

Additional provisions for impossibility are to be found in arts. 279, 281, 283, and 323-325. For a brief analysis in English of these various provisions see Neitzel, "Specific Performance, Injunction, and Damages in German Law," 22 HARV. L. REV. 161 at 166-171 (1908).

[21] This clause has a long and interesting history. Any rule which allowed rescission of contract too freely on this or other grounds conflicted with medieval notions, inspired

sequent change of conditions, was allowed in two exceptional cases, but the drafting commissions had made it clear that these exceptions were not the reflection of a general principle.[22] Beyond this there remained for harassed obligors or indulgent courts only the broad provisions of the Code to the effect that obligations must be performed in "good faith." [23] And it was finally to this generalized concept that German courts appealed in their desperate search for an alleviating principle.

largely by canonist presuppositions, as to the sanctity of plighted faith. The ingenious device suggested by Aquinas and from him very widely copied by glossators and post-glossators was to imply in every contract an agreement allowing its discharge on change of conditions. AQUINAS, SUMMA THEOLOGICA, 2.2. qu. 110, art. 3. This idea was carried along on the main stream of civil law doctrine until at least the time of Grotius who showed some frigidity toward it. During the eighteenth century it disappeared, to be revived again by court decision and legal doctrine during the post-war upheaval in Germany and France. For a brief discussion, with references to other writers on the subject, see VOIRIN, DE L'IMPRÉVISION DANS LES RAPPORTS DE DROIT PRIVÉ 45-52 (1922); BRUZIN, ESSAI SUR LA NOTION D'IMPRÉVISION 93-121 (1922).

[22] Motives of the First Draft of the Civil Code, II 199, referring to the article of the draft which later became art. 610; Protocol of the Second Drafting Commission, I 631 and II 47. These passages of the Protocol discuss the effect of articles 321 and 610 of the Civil Code. Article 321 allowed one party to a bilateral contract to demand security for performance on the other side wherever the contract required the first party to perform first and the likelihood of his securing the counter-performance was endangered by "an essential change for the worse in the financial condition of the opposite party." Article 610 allowed a party who had promised to make a loan to revoke his promise if there was "an essential change for the worse in the financial condition of the opposite party, through which his claim for repayment is endangered." The express statement of the Protocol was accepted by pre-war text writers and court decision at its face value, and the conclusion reached that the medieval doctrines had no place in the Civil Code, except for the specific provisions of articles 321 and 610, and one or two similar articles. DERNBURG, DAS BÜRGERLICHE RECHT, II 1, pp. 300-301 (1909); 50 R. G. Z. 257. But compare 60 R. G. Z. 56 (28 Jan. 1905), where the Reichsgericht allowed rescission of an insurance contract on the ground that a subsequent assignment of the insurer's assets to another company altered the identity of the opposite contracting party and produced an essential change of conditions.

For later developments in the *clausula rebus sic stantibus* see below, note 48. It should be noted that for certain special cases there were provisions in the Code that were or could be used to give relief for change of conditions, as in art. 552, below, note 28.

[23] Chiefly the general provision of art. 242: "The debtor is bound to carry out performance in the manner required by good faith, commercial usage being taken into account."

Of some utility in the later cases was the related rule of art. 157: "Contracts are to be interpreted in the manner required by good faith, commercial usage being taken into account." In connection with art. 157 it was also common to cite art. 133: "In the interpretation of a declaration of intention the true intention is to be sought without clinging to the literal meaning of the language."

III

JUDICIAL PROGRESS TOWARD REVISION OF MONEY OBLIGATIONS

1. *Earlier Stages of Inflation — 1915-1921*

The activity of the courts in the earlier stages of the inflation was no doubt retarded by restrictive views as to the judicial function which then prevailed. These views had been inherited from the nineteenth century,[24] and their survival may be partly explained by the fact that the German Civil Code, becoming operative in 1900, was not viewed in the perspective that was possible in France with a code a century old. It was only gradually, and reluctantly, that German courts undertook to formulate new doctrines, which were only remotely derived from the language of the Code. As the inflation progressed it became increasingly clear that the standards which were being applied to contracts were *judicial* standards, built up through judicial experience with a new and unforeseeable economic problem. The decisions of the Reichsgericht were recognized as the source of new rules of law, which could be imposed on lower courts by the methods familiar to courts and lawyers in England and the United States.[25]

The Third Civil Senate of the Reichsgericht [26] was faced in 1915

[24] See, for example, the theories of Gierke, which describe judicial decision as a subsidiary though peculiar form of customary law. The differences between German and common-law attitudes toward precedent are not so wide as even this form of statement would indicate, for Gierke proceeds to attribute a very high authority *in fact* to this type of law-formulation and to support this admission by references to German legal history. 1 GIERKE, DEUTSCHES PRIVATRECHT 177-180 (1895). A similar attitude is to be found in DERNBURG, DAS BÜRGERLICHE RECHT, I 83-84 (1906) and as late as 1926 in 1 ENNECCERUS, KIPP, UND WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS 88.

[25] This dramatic emergence of precedent as a primary source of law had, of course, a profound effect on the whole of German legal thought, but these repercussions cannot be traced here in detail. A full account would require more than one volume. Inflation was not the only influence at work. Well before the war there were to be found "free-law" theories which might have produced a movement of comparable magnitude without the impetus of the inflation. The progress that has since been made may be measured by the paper of Sauer, "The Basic Significance of the Jurisprudence of Appellate Courts for Legal Practice and Science" ("Die Reichsgerichtspraxis im deutschen Rechtsleben" (1929), I 122), analyzed by Llewellyn, "Präjudizienrecht und Rechtssprechung in Amerika," I 115-119. Contemporary evidence as to the effect of the inflation cases on German legal thought may be found in the papers of Bendix and Rosenthal, JURISTISCHE WOCHENSCHRIFT, 1923, pp. 916 and 102; and Karger, DEUTSCHE JURISTEN ZEITUNG, 1924, p. 137.

[26] The Reichsgericht, with whose decisions this section of the article is chiefly concerned, is the highest court of the Reich. It sits at Leipzig and possesses a general appellate jurisdiction in public, private, and criminal matters (and also a very restricted

with a fairly typical question as to the effect of the war on private contracts.[27] Plaintiff in October 1913 became lessee of a circus building in Berlin for five years from September 1, 1914. The rent fixed was 100,000 marks a year, and there was in addition an obligation to give at least 150 performances a year, or else to pay 300 marks to the restaurant concessionaire and 60 marks to the check-room concessionaire for each performance short of the stipulated 150. Plaintiff used the building according to the contract from September 1, 1914, to August 31, 1915. He then sued for a declaration that he was released from the lease contract by conditions arising since the war. The court was not convinced that the operation of the circus had become wholly unprofitable, but declared that in any case the contract was not shown to be impossible of performance, and that a prospect of economic loss was not the same thing as impossibility.[28] In its whole approach the court

original jurisdiction which is unimportant here). It was founded in 1879, primarily with the object of unifying the widely divergent systems of law then in force in Germany. In the beginning it was divided into five civil and three criminal divisions called Senates. These act independently of each other except for rare convocations of the whole judicial personnel, the Plenum. One of the important functions of the Plenum is "the restoration of legal unity," where different Senates of the Reichsgericht have disagreed. Rather elaborate provisions for this situation are made in the Gerichtsverfassungsgesetz of January 27, 1877.

The total personnel of the Reichsgericht was successively increased from 60 to 91 regular judges, so that, as the former President of the Court has testified, many of the judges were not even personally acquainted with their colleagues. By 1922 the total number of Senates had been increased from 8 to 13. Later these totals were somewhat reduced. The effect of this (to American eyes) enormous concourse of judges was not what might have been expected — that is, confusion and divergence in judicial decision. Mutual respect for each other's views and informal consultation on questions of paramount importance have preserved uniformity to a surprising degree. Nevertheless, the departmentized structure of the Reichsgericht had important consequences in the development of judicial doctrines during, and immediately after, the inflation period.

The best available description of the Reichsgericht is that of its former President, Dr. Walter Simons, in MAGNUS, DIE HÖCHSTEN GERICHTE DER WELT 1-28 (1929). A brief summary of his comments will be found in R. C. K. ENSOR, COURTS AND JUDGES IN FRANCE, GERMANY, AND ENGLAND 62-66 (1933).

[27] 86 R. G. Z. 397 (May 4, 1915, Third Civil Senate).

[28] The court pointed out that circus performances had recently been put on either by the plaintiff himself or his brother. But at the same time it indicated that the lower court's finding of fact, that there was no impossibility of performance, could not be attacked by a showing that profitable operation was impossible.

The court likewise made short shrift of the implication which the plaintiffs sought to draw from article 552 of the Civil Code, which provided: "The lessee is not released from payment of rent by the fact that he is hindered in the exercise of his right to use the property by a cause personal to himself. . . ."

indicated an extreme reluctance to intervene in order to redress inequalities arising from war conditions.[29]

A still more important application of existing doctrine to war conditions is found in a decision of the Second Civil Senate of the Reichsgericht on March 21, 1916.[30] There the plaintiff had agreed on July 17, 1914, to buy from defendant 5000 kilograms of English tin, to be delivered in five installments between August and December 1914. The prices fixed ranged between 301 and 309 marks per 100 kilograms. After the outbreak of the war the defendant made delivery of two 1000-kilogram installments in August and September, but declined to make any further deliveries, on the ground that with the cessation of imports through Holland the price had risen to approximately 650 marks per 100 kilograms. The plaintiff purchased tin from other sources in November and December, and then sued for damages, based on the difference between the prices paid for a substitute and the contract price. The judgment for the plaintiff was affirmed, as against the defendant's contentions based not only on the Code provisions as to impossibility of performance, but also on article 242, the "good faith" clause on which courts were later to rely.

In a carefully reasoned opinion the court laid down doctrines that later proved embarrassing. It emphasized first the fact that the defendant's purchase of tin in the open market was not technically "impossible," since there was a supply available at more than double the contract price. On this ground it was able to distinguish an earlier decision in which the complete disappearance from the market of a

[29] The opinion fires an opening salvo: "Since by the provisions of positive law the power is not conferred on the judge to readjust contracts for the purpose of alleviating the hardships of the war. . . ."

Later the court says: "A right to abandon contracts on account of changed circumstances is not recognized in general in the Civil Code and could only be recognized here if it were to be considered as impliedly agreed to in the contract. . . . But it is necessary to agree with the lower court that it cannot be deduced from the contract, even by the widest interpretation of the rules laid down in articles 133 and 157, Civil Code, that the plaintiff was entitled to withdraw from the contract if he could not operate the circus building profitably as a result of the war. Good faith and commercial usage do not at all justify throwing onto the defendant the loss suffered by the plaintiff through the war."

The doctrines of this case were likewise applied by the same division of the Reichsgericht, the Third Civil Senate, in another lease case, in which reduction of the rental was sought on account of economic difficulties due to war conditions. Decision of July 3, 1917, 90 R. G. Z. 374. The same views appear in 87 R. G. Z. 349 (November 30, 1915, Third Senate), involving a contract of employment on a magazine whose publication had to be abandoned on the outbreak of the war.

[30] 88 R. G. Z. 172.

commodity sold by description had been held to release the vendor.[31] As to a mere increase in price, the court said that this did not result in an "inability" of the vendor to perform, within the meaning of the Code, since his discharge from the contract would merely throw the resultant loss over onto the purchaser. If he had already purchased the commodity called for by the contract, the subsequent rise in prices would not injure him. If he had agreed to sell a commodity which he did not own, and thus to gamble on a subsequent fall in the market, he should likewise bear the risk of a subsequent rise. The effort of legal writers and even of lower court decisions to set a limit to this risk, by means of the "good faith" test of article 242, was declared by the court to be wholly unacceptable for sales of goods by wholesale; the court said that such indulgence "would render impossible an orderly economic system in periods of disturbance." The only qualification of these views that the court would admit was in the case where the supply of the commodity in question was extremely limited, so that it could be secured only by paying a "fantastic" price.[32]

The first line of departure from these positions lay through an expansion of the idea of impossibility of performance. Article 275 of the Civil Code declared that an "inability" of the obligor to perform was equivalent to "impossibility" of performance. This language, somewhat more liberal than the general doctrines of Anglo-American law,[33] had not led to markedly different results in actual decision. But the dislocation of German foreign trade by war and blockade led soon to more liberal treatment of commercial contracts involving importation of foreign commodities. In two cases, decided during the war, new doctrines were announced. Both were cases in which a suspension of performance was justified by the technical rules of impossibility. But were the contracts to be completely rescinded or merely held in abeyance until the return of normal conditions? In declaring the contracts dissolved, the Second Senate of the Reichsgericht emphasized the uncertainty as to the possible duration of the war and the destruction

[31] 57 R. G. Z. 116 (Feb. 23, 1904, Second Civil Senate).

[32] The strict views here asserted were strongly reaffirmed by the Third Civil Senate in a decision of March 15, 1918, reported in 92 R. G. Z. 322. The latter case also involved a sale of tin, which the court construed as a "wholesale" transaction in spite of the work done by defendant on the raw material, in preparation for market.

It should be noted that as early as 1916 the doctrines of the Reichsgericht had provoked a strong protest from legal writers. Hachenburg in J. W., 1916, p. 831. (Decisions taken from the JURISTISCHE WOCHENSCHRIFT will here be cited by the abbreviation commonly used in Germany, "J. W.")

[33] 3 WILLISTON, CONTRACTS, secs. 1931 ff. (1920).

by war and blockade of most of the economic conditions assumed as the basis of agreement.[34] Both in language and attitude the court moved in these two cases some distance toward a broad theory of supervening change of conditions which might later be applied to contracts dislocated merely by monetary inflation.

As the war progressed the Reichsgericht struck out with increasing boldness to liquidate the whole structure of pre-war commercial contracts whose performance had been interrupted by the war. There were still some qualifications. An expressly declared intention that the contract survive a fundamental change in economic conditions would be given effect.[35] To some extent the result depended on the fact conditions known to or anticipated by the parties.[36] But in probing language for the probable intent of the parties, a very strong inclination was shown to release the obligor unless the survival of the contract was clearly intended or exceptional risks were deliberately assumed.[37]

Here for a brief period the course of development halted. After the Armistice, as late as February 25, 1919, the Reichsgericht still

[34] 88 R. G. Z. 71 (Feb. 4, 1916, Second Civil Senate). The plaintiff had agreed in two separate contracts to deliver bark from Madagascar to Hamburg, and had already shipped one consignment when the war broke out. The vessel was forced to take refuge at an intervening port, and further shipments from the French colony of Madagascar were of course out of the question. The defendant resisted the contention of the plaintiff that the contracts were not only suspended, but wholly rescinded. The court pointed to the great burden which would be imposed on the plaintiff if it were forced to preserve the cargo already shipped until the removal of the blockade, and concluded that, as to both contracts, performance after the end of the war would "in essence and significance" be different from that contracted for by the parties.

In 90 R. G. Z. 102 (Mar. 27, 1917, Second Civil Senate), the contract called for delivery in Hamburg of Chilean nitrate in February and March, 1915, and expressly provided that in the case of *force majeure*, including earthquake, strike, war, and blockade, the performance should be postponed to a date to be agreed upon by the parties. In October 1914 the plaintiff notified the defendant that postponement would be necessary and on April 1, 1916, demanded a release from the whole contract. This the Reichsgericht eventually decreed, pointing out that the seizure of some of the plaintiff's cargoes by the enemy, the cancellation of freight agreements by German shipping lines, and the general change in economic conditions made the performance by the plaintiff at the end of the war "quite different" from that originally contracted for.

[35] J. W., 1917, p. 899 (July 12, 1917, First Civil Senate); 92 R. G. Z. 87 (Jan. 22, 1918, Second Civil Senate); J. W., 1919, p. 444 (Mar. 11, 1919, Seventh Civil Senate).

[36] 92 R. G. Z. 423 (Apr. 27, 1918, First Civil Senate).

[37] The desire to liquidate pre-war contracts suspended by war appears as early as January 4, 1916 (J. W., 1916, p. 487), and became constantly more pronounced as the war progressed. See J. W., 1916, p. 1017 (May 23, 1916); 93 R. G. Z. 341 (Feb. 8, 1918); 94 R. G. Z. 68 (Oct. 22, 1918). The clearest expression of this point of view was that of the Third Senate in 94 R. G. Z. 46 (Oct. 15, 1918).

clung tenaciously to the views previously expressed, denying relief for a rise in prices on sales of goods by wholesale.[38] A similar lack of sympathy was expressed for short-sellers of basic commodities who contracted to sell after the war had started and whose calculations were upset by governmental price regulations.[39] Lower appellate courts had already begun to show some indulgence,[40] but all branches of the Reichsgericht seemed determined to refuse relief for a mere rise in prices, apart from other obstacles constituting a technical "impossibility" of performance.

But the events of 1919 were such as to shake the most resolute courts and undermine the most firmly entrenched legal doctrines. Domestic wholesale prices, steadily rising after the Armistice, moved upward rapidly through the summer and autumn of 1919. In the course of a year they nearly quadrupled.[41] The depreciation of the mark in terms of foreign currency went even further.[42]

[38] 95 R. G. Z. 41 (Feb. 25, 1919, Second Civil Senate).

[39] J. W., 1918, p. 552 (Feb. 18, 1918, Sixth Civil Senate). Compare also J. W., 1920, p. 373 (Oct. 30, 1919), where the Seventh Civil Senate reiterated the sweeping propositions of the war-time cases, to the effect that courts had not the power "to bring about readjustments between the parties for the purpose of alleviating hardships caused by the war."

[40] The Munich Court of Appeal refused to enforce a 10-year contract to supply beer to beer-hall proprietors when it appeared that the cost of producing the beer had risen more than 50 per cent. J. W., 1917, p. 776 (June 18, 1917). Other decisions of the same period by lower courts, adopting similar reasoning, are cited by STANDINGER, KOMMENTAR ZUM B. G. B., art. 242, V 1 b, p. 41.

[41] The index of the monthly average of wholesale prices after the Armistice set out by GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 105-106, is as follows:

(1913 = 1)

	1918	*1919*	*1920*	*1921*	*1922*
January		2.62	12.56	14.39	36.65
February		2.70	16.85	13.76	41.03
March		2.74	17.09	13.38	54.33
April		2.86	15.67	13.26	63.55
May		2.97	15.08	13.08	64.58
June		3.08	13.82	13.66	70.30
July		3.39	13.67	14.28	100.59
August		4.22	14.50	19.17	192.00
September		4.93	14.98	20.67	287.00
October		5.62	14.66	24.60	566.00
November	2.34	6.78	15.09	34.16	1154.00
December	2.45	8.03	14.40	34.87	1475.00

[42] Between January and December, 1919, the price in marks of an American dollar rose from 8.20 (the mark then possessing slightly more than half the purchasing power of the pre-war gold mark) to 46.77. See the tables copied above, note 11.

Legal writers had already begun to inquire whether a wholly unpredictable rise in prices should not be given the same effect as governmental requisition or physical force in releasing a vendor from his obligations.[43] The first major step in this direction was taken by the Seventh Senate of the Reichsgericht, on December 2, 1919. The decision did not involve the acceptance of so clear-cut a proposition. In form the decision was merely a further extension of ideas developed during the war as to contracts whose performance had been suspended by technical impossibility. In the particular case the contract, executed in 1916, called for the construction of a tug-boat for the price of 574,000 marks, delivery to be made 14 months after the conclusion of peace. The defendant alleged that in the meantime the cost of manufacture had risen to 1,500,000 marks. The court gave a respectful salute to the principle that a rise in prices was not in itself enough to discharge the contract, but went on to emphasize the general dislocation of industry and trade during the later stages of the war and as a result of the revolution. Particular weight was laid on the allegation by the defendant that performance of this and similar contracts would force it into bankruptcy. The case was then sent back to the lower court for further findings on the question whether performance under existing conditions would be "essentially different" from that contracted for.[44]

The extension of these ideas over a wider area was not to be long postponed. By September 1920 the general rise in internal wholesale prices had been arrested at a point about 14 times the average of wholesale prices in 1913, and that approximate level of prices was to be maintained until the summer of 1921.[45] But the effects of this terrific shock to the whole economic order had already become apparent. On September 21, 1920, the Third Senate of the Reichsgericht suddenly

[43] Plum, in J. W., 1919, p. 340; Oertmann, J. W., 1920, p. 476.

[44] 98 R. G. Z. 18 (Dec. 2, 1919). The court still held fast to the position that a rise in prices, intervening between contract and performance, would not justify judicial intervention. But it did impose on the lower court the duty to ascertain how far conditions in the labor market and in manufacturing industry generally had changed to the detriment of the vendor. It then announced that if those conditions were fundamentally altered, the case was to be decided by the tests already evolved for war-suspended contracts.

[45] See the tables above, note 41. From the relative stability of wholesale price indices in this period it cannot of course be inferred that the effects of the sudden rise of 1919 on retail prices, rents, wages, etc., had been fully spent. There was a persistent lag of retail prices in general and of wages to a still greater degree throughout this period. See GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 197-208 (1930).

proposed a new and radical approach to the whole problem. Its decision was rendered in a dispute between lessor and lessee of business premises in Berlin. The lessor had agreed in 1912 to supply the lessee with steam until the expiration of the lease in March 1920. The annual rental was 9362 marks. As a result of the colossal increase in the price of coal the lessor had paid out for coal and labor in the period between September 1, 1917, and the end of July 1919 a total of 89,000 marks more than the sum stipulated in the lease as compensation for the steam supplied. Faced with a result so shocking, the court frankly admitted its recantation of doctrines recently announced.[46] With equal candor it confessed its desire to find in existing legislation some basis for judicial relief against the wholly unpredictable and pitiless sweep of economic forces.[47] The legal doctrine to which it appealed was primarily

[46] 100 R. G. Z. 129 (Sept. 21, 1920). The decision was all the more remarkable because the same Senate had refused relief on very similar facts two and a-half months before. 99 R. G. Z. 258 (July 8, 1920). In the earlier case the lessor had agreed to supply electric power, rather than steam heat, and had urged the increased cost of materials as a ground for release from the contract. The court denied that the *clausula rebus sic stantibus* (see below, note 48) was a recognized part of German contract law. It also refused to extend the principles developed in war-suspended contracts to contracts not directly affected by the war. The only qualification it would admit was in cases where continued performance by the party in distress would be "immediately ruinous"; it found no evidence to support such a conclusion in the particular case.

[47] The court said (p. 132):

> "It is true that this Senate in a decision of May 4, 1915 [86 R. G. Z. 398] and again in a later one of July 3, 1917 [90 R. G. Z. 375], has declared that the judge could not readjust the terms of a contract for the purpose of alleviating the hardships of the war. However, the first and highest duty of the judge in his decisions is to respond to the imperative needs of life and to let himself be guided in this regard by experience. This doctrine can no longer be maintained in its strict generality, according to the present conviction of this Senate; it has been overridden by the experiences which this court has had during the further course of the war and particularly through its unforeseen outcome and the resultant upsetting of all economic conditions. These conditions clearly require the intervention of the judge in existing contract relations when a situation would otherwise result which would contradict every command of justice and fairness and would be simply unbearable. If a basis in positive law is considered desirable or necessary, it is provided by the above mentioned provisions of the Civil Code . . . [arts. 157 and 242, above, note 28]. Furthermore the notion can be utilized that if a performance has become economically impossible through change of conditions, a gap in the contract thus arises which the judge must now fill by his decree, as in the case of other gaps in contracts. . . ."

The court also resorted to the *clausula rebus sic stantibus* as an independent device for achieving the same objective. (On the close connection between the "good faith" clause (art. 242), economic impossibility, and the *clausula rebus sic stantibus* see the next note.)

the requirement of "good faith" in the performance of contracts, a requirement that had already been freely invoked in regard to contracts suspended by war and later rescinded for "change of conditions." Side by side with the "good faith" clause and pointing to the same result, the court proposed, second, a redefinition of impossibility of performance to include economic as well as physical impossibility; and third, the revival of the ancient *clausula rebus sic stantibus* which had been ceremoniously buried in the drafting of the Civil Code.[48]

The decision of September 21, 1920, was a distinct advance, not only in its reformulation of legal doctrine but in the type of relief it authorized. In earlier cases the objective of judicial action had been complete rescission. In this case the lessor expressed its willingness to continue the supply of steam if a "reasonable" price could be fixed for its past and future performance. The lessee had continued to accept the steam furnished, while insisting that the contract rate should still control. Rescission of the whole lease for the miscarriage of only one of its provisions must have seemed too drastic. With obvious doubt and elaborate safeguards the Third Senate ordered a revision of the price term according to standards to be formulated by the trial court for the particular case.[49] German courts thus reluctantly took up what was

[48] The appearance at this point of three alternative grounds of decision, all aiming at the same result, is to be explained by the diversity of theories offered by legal writers to meet the problem of "changed conditions." The *clausula rebus sic stantibus* itself had a long and complicated history, lasting well into modern times. (See above, note 21.) It was reformulated in the nineteenth century in Windscheid's theory of contractual "presupposition" (*Voraussetzung*), which was based largely on Roman law texts. Both drafting commissions which prepared the Civil Code of 1900 rejected these formulas, and restricted relief in general to cases of impossibility of performance or "inability" to perform. (See above, note 22.) The reconstruction of the *clausula rebus sic stantibus* had been urged as early as 1916, under the pressure of war conditions (Cohen, J. W., 1916, p. 109). Its full rehabilitation was due chiefly to the labors of Krückmann, who demonstrated in a paper published in 1918 [116 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (1923)] that the Code was shot through with the notion which Locher later described as "die Zweckgebundenheit des Rechtsgeschäftes" (to be translated inadequately as "the affiliation of the legal transaction with its purpose"). The last attempt to formulate the law of "changed conditions" was that of Oertmann, whose work appeared in 1920 and 1921 and had great influence on the subsequent course of judicial decision. (See below, n. 67.) For an excellent discussion of the intimate relations between these theories see Locher, "Geschäftsgrundlage und Geschäftszweck," 121 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 1.

[49] The limitations fixed by the court to revision of the price term were as follows: (1) the parties must have continued in the contract relation "voluntarily" (but query whether the lessee's acceptance of steam at the old contract rate amounted to consent to the new terms about to be imposed); (2) the circumstances must be very exceptional, and the mere fact that the change of conditions was unforeseeable would not be enough; (3) the interests of the opposite party must be considered and "the loss must

to be their heaviest task, the task of finding substitutes for monetary standards that progressively lost their meaning as the inflation proceeded at an accelerated rate.

But a large-scale revision of commercial contracts by no means followed from this decision. Particularly in the case of short-term contracts were courts reluctant to shift the risk of price fluctuations or other economic disturbances, which by 1921 had become the common experience of German business men. Indeed, German industry had to a great extent adapted itself to the prevailing uncertainties. Vendors of goods and services had resorted on a large scale to various legal devices for postponing the accrual of fixed liability to the last possible moment. The open price contract of sale was widely used.[50] On the other hand, the pressure of events had not yet destroyed the faith of courts and lawyers in the underlying stability of the German economy. The Third Civil Senate itself, one month after the decision of September 21, 1920, revealed the essential conservatism that still prevailed.[51] The case involved a contract for the sale of an automobile, made in February 1919, for delivery in April 1919 at a price of 12,000 marks. The defendant vendor, general agent in South Germany for the manufacturer, made the contract on his own private account, without any reservation for a price increase by the manufacturer. By July 1919, when the automobile was received from the factory by the defendant, the list price of 11,250 marks had been raised by the manufacturer to

be fairly divided between both parties." As a specific rule for guidance of the trial court the Reichsgericht supplied nothing more specific than the statement: "The correct attainment of this balance is a matter for the experience of the judge and for his discriminating evaluation of the situation of both parties."

[50] The legal device commonly used for this purpose was the insertion of the word "*freibleibend*" with appropriate qualifying language. Before the war such provisions had been used in exceptional cases, where an offer to sell the same goods had been made to two or more parties. After the war they had become very common, their object being to leave the vendor free to abandon the contract or to demand a modification of some of its terms. The exact meaning of such clauses was for some time exceedingly uncertain, not only among lawyers but among the commercial groups that resorted to them. Starke, J. W., 1920, p. 472. By 1922 the Reichsgericht asserted that the open price contract had "become typical in present-day commerce," the reason being that "the uncertainty and unreliability of all conditions, existing at the time of the contract and still prevailing," made it unwise for a vendor to commit himself for future delivery at a fixed price. 103 R. G. Z. 414 (Feb. 14, 1922). In the abundant litigation that followed as to the legal effect of "*freibleibend*" clauses the Reichsgericht struggled to preserve the binding force of legal obligations, which vendors of goods or services sought to evade in the face of the accelerating collapse of the currency. 103 R. G. Z. 312 (Dec. 20, 1921); 104 R. G. Z. 114 (Jan. 26, 1922); 104 R. G. Z. 170 (March 7, 1922); and especially 105 R. G. Z. 368 (Nov. 17, 1922).

[51] 100 R. G. Z. 134 (Oct. 22, 1920).

13,292.25 marks. The plaintiff sued to enforce delivery at the contract price of 12,000 marks, and the lower court held the defendant to be excused. In reversing the decision the Third Senate of the Reichsgericht denied that mere interpretation of language could release the defendant, where the essential ground was an unexpected increase in the manufacturer's price. The court said, "On this reasoning every seller who considers himself misled in his expectations by price changes could be given the privilege of withdrawing from his contract," and this "would destroy the security of commercial relations." Encroachments on the sanctity of contract obligations were to be admitted only where the performance demanded did not "reasonably" correspond to that contracted for, and where insistence on performance would violate good faith.

The most interesting point in the decision was the suggestion that the grant or refusal of rescission should depend on whether performance would lead to the defendant's "economic ruin." The Civil Code provided no basis for such a test. It was derived by the Third Senate from the language of two earlier cases, in neither of which had the element of "economic ruin" been the real ground of decision.[52] For the moment it seemed to offer a possible compromise between general rescission or revision of commercial contracts and strict enforcement. It permitted the court to consider the whole economic position of the particular defendant and to relieve him in special cases of extreme hardship. At the same time it left unimpaired the great bulk of money obligations which inflation had thrown out of balance; it applied only to executory contracts for the sale of goods or services, a class of cases where the effects of the inflation had been most startling; [53] even in

[52] The Seventh Senate in 98 R. G. Z. 18 (Dec. 2, 1918) had emphasized that if the vendor in that case were forced to perform that and similar contracts it would be forced into bankruptcy. But in that case performance had been interrupted by the war and rescission could be justified by the "change of conditions" doctrine already developed. The "economic ruin" formula appears more prominently in the decision of the Third Senate on July 8, 1920 (99 R. G. Z. 258), but there relief for change of conditions was denied and the court merely fortified its conclusion by pointing out that the obligor had not shown performance to be "immediately ruinous" to him.

[53] The rapid rise in the cost of labor and materials during 1919 and 1920 had created a striking disproportion between the value of money payments and the expenditures required for the manufacture of goods or the performance of services. The decision of October 22, 1920, discussed above in the text, provides an excellent illustration. The limitations of the "economic ruin" test were clearly shown in other types of contracts, such as the contract for the sale of land involved in 102 R. G. Z. 98 (April 16, 1921). The contract in that case resulted from the exercise on March 31, 1920, of an option to purchase, given to a lessee as an incident to a lease in 1913. In the option agreement the purchase price was fixed at 18,400 marks, with a provision that in case

this class of cases it confined relief within very narrow limits.[54] The criticism it very soon received was based on two radically different points of view. On December 20, 1920, the First Senate of the Reichsgericht repudiated it as too liberal, and declared it a threat to "the security of transactions." [55] The Fifth Senate, on the other hand, after expressing its qualified approval of the "economic ruin" test, began to urge an even more liberal treatment of contracts disturbed by currency depreciation.[56] In this the Fifth Senate was supported by writers in legal periodicals, who were unwilling to focus attention on the economic situation of the particular obligor and demanded a more generalized rule.[57] It is not possible to say which of these views might have prevailed if the German currency had been stabilized at the levels of 1920 and 1921. The calculations of courts and legal writers were all upset by the renewed descent of the mark and a concurrent rise in internal prices, commencing in the autumn of 1921.[58] It is probably no coinci-

of a considerable increase in the value of the property the price should be increased to 19,000 marks. By March 1920 the value of the land in paper money was 52,000 marks. The Fifth Senate, after indicating a qualified approval of the "economic ruin" test, refused relief to the vendor on the ground that a mere conveyance of the land would not involve any additional expenditure or economic outlay, so that the case was merely one of extreme inadequacy of price.

[54] The Third Senate itself made this clear in 102 R. G. Z. 272 (June 7, 1921). The case involved a sale of an automobile in 1917 for delivery immediately after the war. By the end of 1919 the cost of production had so far risen that defendant vendor would lose between 20,000 and 30,000 marks if forced to sell for the agreed price of 27,030 marks. The court declared that it was nevertheless necessary to examine defendant's whole economic position and financial resources, and particularly to inquire whether defendant had made other similar contracts whose performance would drive it out of business and thus lead to "economic ruin."

[55] 101 R. G. Z. 74 (Dec. 8, 1920).

[56] 102 R. G. Z. 98 (April 16, 1921). In the meantime the Seventh Civil Senate had swung over to the views of the Third Senate, and expressed its approval of the "economic ruin" test. 101 R. G. Z. 79 (Dec. 10, 1920), and unpublished decision of April 15, 1921, quoted in 102 R. G. Z. 272.

In cases of divergence between different Senates of the Reichsgericht, such as that arising over the "economic ruin" test, the remedy was to assemble all the Civil Senates in a Plenum. But it was difficult in this case to show that differences in doctrine had actually influenced decision (see 102 R. G. Z. 272), and the usual reluctance to convoke the Plenum (*horror pleni*) prevailed. See Rosenthal in J. W., 1921, p. 833.

[57] Particularly Oertmann, writing in J. W., 1921, p. 1512. Other writers are referred to by Locher in 121 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS, 93 n. (1923).

[58] Up until July 1921 the mark had fluctuated on foreign exchange considerably more than in terms of internal wholesale prices, which had remained relatively stable. But from July 1921 the dollar price rose steadily from 76.67 to 262.96 in November. It dropped to 191 in December 1921, and then rose again with accelerating speed through 1922. The index of wholesale prices showed less fluctuation, but rose steadily from 14.28 in July 1921 to 34.87 in December 1921 and by regular stages thereafter in 1922. See tables above, notes 11 and 41.

dence that the Second Senate joined the First Senate in rejecting the "economic ruin" test in November 1921, when this new movement of prices had become pronounced.[59] The stage was set for a new phase in which the courts by the creation of new legal devices tried desperately to keep pace with an accelerating collapse of the currency.

2. *Limited Revision of Money Obligations Through Rules of Contract Law*

The influence of purely monetary factors on the German economy was thrown into clearer light by the renewed depreciation of the mark in the autumn of 1921. Before that time the dislocation of German trade and industry could be attributed to numerous factors of which the fall of the mark was by no means the most important. During the war Germany had suffered, like the other belligerents, from shortage of labor and materials, disruption of foreign trade, and diversion of resources and energy to the purely destructive purposes of war. The continuation of the allied blockade until July 1919 served to prolong and aggravate the war-time shortage of food and raw materials. With the revolution began a period of acute internal disorder. Strikes, organized violence, and civil war spread paralysis through German industry. Of these conditions the courts took judicial notice. Their effects on commercial contracts were spread over the pages of the law reports. The tremendous rise in internal prices, a further aggravation, seemed to be the result rather than an independent cause of the general confusion. But when the mark on foreign exchange resumed its steady descent, with no pronounced change in internal conditions, it was easier to regard the concomitant general rise of prices from its reverse side, as a depreciation in the value of money. The most important consequences followed from the penetration of this idea. A gross inadequacy of price could then be ascribed, not to a general disruption of economic life from which all Germans suffered alike, but to a change in the standard of value selected by the parties in the particular case. The creditor in a money obligation might fairly be required to forego the substance of his claim for the sake of the national interest or to preserve the sanctity and certainty of contract. It was quite another thing to

[59] Decision of November 29, 1921 (103 R. G. Z. 177). The Third Senate had clung to the "economic ruin" test as late as July 8, 1921 (J. W., 1921, p. 1597), but by October 13, 1922, it had reached the point of explaining that "economic ruin" was by no means indispensable for rescission, and that an unforeseeable rise in prices, making the performance "essentially different" from that contracted for, could be of itself sufficient. J. W., 1923, p. 753. The final interment of this illegitimate offspring of the inflation is recorded on June 7, 1924 (J. W., 1924, p. 1366 — Seventh Senate).

require that he bear the risk of blind and capricious changes in the purchasing power of money.

At the outset the path to a general revision of money obligations seemed closed. Reichsbank and Treasury notes had been declared legal tender at their nominal value by legislation before and at the outbreak of the war.[60] These provisions had been supplemented by a decree of the Bundesrat on September 28, 1914, expressly abrogating the gold clause in contracts made prior to July 31, 1914, and authorizing payment in paper money.[61] Even in the face of these provisions some legal writers were willing to revive medieval currency theories, according to which the real purchasing power of money, rather than its nominal value, was the measure of performance of a money obligation.[62] Orthodox economic theory and considerations of convenience prevented the acceptance of these views in court decisions. Even when the purchasing power of money was eventually substituted for the nominal par as a standard of value, the result was achieved only by indirection. And

[60] Above, notes 3 and 4.

[61] The Bundesrat decree did not purport to invalidate obligations to pay in gold coin in contracts made after July 31, 1914. It was accordingly held in a later case (108 R. G. Z. 176, May 24, 1924) that a gold clause confirmed by subsequent agreement, in 1919, was valid.

[62] For example, Mügel, in DEUTSCHE JURISTEN ZEITUNG, 1922, p. 72. Other authors are referred to and their views briefly criticized by STAUDINGER, KOMMENTAR ZUM B. G. B., art. 242, V, 1, c.

The conflict between the "nominalistic" and the "valoristic" theories of the money obligation goes back very far and is related to some fundamental economic and legal conceptions. The prevailing view among medieval glossators and post-glossators required repayment of a debt in coin of equal "intrinsic" value, without regard to the expressed nominal value. It is doubtful how far this theoretical analysis penetrated into court decision, and by the sixteenth century there had been a sharp reaction against it among legal writers such as Dumoulin (see TAEUBER, MOLINAEUS' GELDSCHULDLEHRE) and Grimaudet (THE LAW OF PAYMENT, trans. Maude, N. Y., 1900). But Savigny refined and restated the earlier theories, integrating them with his own fundamental views of law and society. He defined money for legal purposes as an abstract purchasing power, whose extent was determined not by legislative fiat but by the voluntary consent of the community, evidenced by the common acceptance of money in general circulation. He did make, however, one important concession, that where the legal tender quality had been expressly conferred by legislation all agencies of the state must defer to the legislative will. SAVIGNY, OBLIGATIONENRECHT, secs. 40-48, especially sec. 42. During the nineteenth century Savigny's theory of money was rejected by lawyers and economists alike, the extreme reaction being in Knapp's "state" theory of money which declared that money was purely "a creation of the legal order." Rosenfelder, "Die zivilrechtliche Bedeutung der Inflation," 71 JHERINGS JAHRBÜCHER, pp. 237, 257-68; NUSSBAUM, DAS GELD, 14-21, 64-72. Quite apart from the theoretical difficulties with Savigny's system, it assumed such a constancy and unity in the conception of value and such simplicity in ordinary economic processes as to make it untenable in a complex economic order.

for the time being both the legal tender and gold-clause legislation were enforced by the courts.[63] Express reference in private contracts to more stable standards of value, such as gold or foreign currencies, was still permitted, and in fact as the inflation progressed this practice became increasingly common.[64] Nor was it forbidden after July 31, 1914, to contract by long-term obligation for payment in gold coin,[65] although the legislation of the war and post-war periods made literal performance difficult.[66] In any event, a direct attack on the legal tender attribute of the paper was not yet seriously proposed. The efforts of courts to restore the balance in the field of private contract were diverted into other channels.

These channels had been prepared in advance by German legal theorists, whose services throughout the inflation period cannot be overestimated. The first and most convenient device was a further expansion of the idea of "changed conditions" for which rescission could be decreed. This was supplied chiefly by Oertmann, with his theory of the "foundations of the transaction" (*Geschäftsgrundlage*).[67] The second device was intimately connected with the first, but it carried far wider implications — the idea that in private contracts a certain "equivalence" could normally be required between the performances on either side. Such an "equivalence" was said to be an essential attribute of all bilateral contracts. When it was destroyed by supervening events, in which depreciation of the currency must be included, then judicial interven-

[63] The chief decisions on the validity of the gold clause were those of the Fifth Senate on December 18, 1920, and January 11, 1922 (101 R. G. Z. 141 and 103 R. G. Z. 384). Both cases held that the Bundesrat decree invalidated a provision for payment of gold coin, so that the same sum in paper money would discharge the obligation.

[64] The quotation of prices in gold or in relatively stable foreign currencies was first resorted to on a large scale in foreign trade, but by 1923 had begun to spread through all types of purely internal transactions, including finally retail trade and wages. The Government itself in 1923 issued obligations payable in gold and United States currency. Perhaps the most remarkable standards of value used were agricultural commodities, chiefly rye, and also coal, wood, and electric current. GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 70-73 (1930).

[65] Decision of May 24, 1924, above, note 61.

[66] Dungern, "Das Währungsrecht," J. W., 1923, p. 97.

[67] Oertmann's views were first developed in briefer form in his paper, "Der Einfluss von Herstellungsverteuerungen auf die Lieferpflicht," J. W., 1920, p. 476; subsequently in his book, DIE GESCHÄFTSGRUNDLAGE (1921). Oertmann's theories, particularly their relation to Windscheid's "contractual presuppositions" and the *clausula rebus sic stantibus*, are carefully analyzed by Locher, "Geschäftsgrundlage und Geschäftszweck," 121 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 1 (1923).

tion was required.[68] The juridical basis for both these doctrines was still found primarily in the Code requirements of "good faith" in the interpretation and performance of contracts.

The pressure of shifting economic conditions was quickly reflected in the decisions of 1922. On February 3 the Second Senate of the Reichsgericht opened up new avenues for judicial intervention in a case which, on its facts, was somewhat complicated and unusual.[69] The defendant and one *B* were partners in a textile manufacturing enterprise. Anticipating a future dissolution of the partnership, the defendant on May 21, 1919, entered into a formal contract with the plaintiff, with the object of insuring a fair price to himself on any sale of the partnership assets that might take place. The contract expressly stated that the value of the partnership assets was assumed to be 600,000 marks, and the defendant's share therein 300,000 marks. The contract then provided that if the defendant himself bought the assets for less than 600,000 marks, then the plaintiff would take over defendant's share for 300,000 marks. On the other hand, if the defendant's partner, *B*, purchased the assets for *more* than 600,000 marks, then the defendant was to receive only 300,000 marks of the proceeds and the balance would go to the plaintiff.[70] Through the general rise in prices, commencing in the spring of 1919 and renewed in 1921, the assets of the partnership were enormously increased in nominal value. By the terms of the contract all or most of this increase would accrue to the

[68] The theory of equivalence was in its main outlines prepared for judicial use by Krückmann, in his monumental study of the *clausula rebus sic stantibus*, 116 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 157 (1918). The word "equivalence" does not seem to be used at any point in this very important and scholarly paper, but throughout Krückmann emphasizes the idea of proportionality between performances and attributes it to the deepest and most essential nature of the bilateral contract. *Ibid.*, pp. 198, 357, 444, and at numerous other points.

The theory of "equivalence" in bilateral contracts, derived from their essential nature and purpose, is first advanced in court decision by the Second Senate of the Reichsgericht, in the case in which it definitely rejected the Third Senate's test of "economic ruin." 103 R. G. Z. 177 (November 29, 1921). It played an increasingly important rôle in later decisions (103 R. G. Z. 328; 106 R. G. Z. 7; and other cases cited by STAUDINGER, KOMMENTAR ZUM B. G. B., art. 242, V, 1, b).

[69] 103 R. G. Z. 328 (Feb. 3, 1922).

[70] The contract further provided that if the defendant himself acquired the assets for more than 600,000 marks he would turn over his share to the plaintiff for 300,000 marks; the plaintiff, however, agreed to pay the defendant's partner for the latter's share at whatever rate was agreed upon. In this case, then, the plaintiff would gain through an increase in the value of the assets only as to the defendant's own share, which he would be able to purchase at the contract rate of 300,000 marks. This curious arrangement combines features of an ordinary sale of a partnership interest with features of a hedging operation.

plaintiff. The obstacle to rescission or modification of the contract lay in the fact that the defendant was not required to incur additional expenditure or engage in additional economic activity, which the change of conditions would make more onerous. Reduced to its simplest terms, the hardship through the enforcement of the contract was due merely to a rise in the value of the subject-matter, traceable primarily to the depreciation of the mark. Less than a year before, this had been held insufficient for rescission or modification of a contract to purchase land.[71] But the Second Senate pointed out that this decision had been criticized at the time in legal periodicals, and that in any event it could not mean that a catastrophic rise in prices would *never* serve as a ground for rescission. The court expressly declared that a change in the value of money could undermine "the foundations of the transaction" (citing Oertmann), and further found that the "equivalence" between the performances on either side had, *prima facie* at least, been destroyed. In sending the case back to the lower court for further findings of fact, the court attached the significant qualification that the defendant would not automatically be entitled to a rescission. The lower court was instructed to determine whether a "reasonable" increase in the purchase price, acceptable to the plaintiff, could be fixed. And in so doing it was also instructed to distinguish between an increase in the value of the partnership assets due solely to the depreciatian of money, and an increase due to other causes, such as the operation of supply and demand. Only if the plaintiff refused to pay the price as thus modified would the defendant be released from the contract.

Less than two months later the full implications of this decision were developed by another Senate of the Reichsgericht in a more common type of legal transaction, an agricultural lease.[72] The lease in question had been executed in 1913, the rent of 5500 marks being expressly declared to be payable in "current gold coin." The lease was to last until March 31, 1928, with an option of renewal in the lessee for another five years. The dispute arose as to the rent payments due on April 1, 1920; the lessee claimed that the sum due could be paid in paper marks at their nominal value, the lessor demanded the paper-money equivalent of gold coin. The court held the gold clause in the lease to be invalid, as a result of the Bundesrat decree of September 28, 1914, following in this respect earlier decisions of the Reichsgericht.[73]

[71] Decision of the Seventh Senate, April 16, 1921 (102 R. G. Z. 98) discussed above, note 53.

[72] 104 R. G. Z. 218 (March 24, 1922, Third Civil Senate).

[73] Above, note 63.

But a revision of the rent clause was held to be justified, indeed required, by the "good faith" article of the Civil Code (art. 242), and its offshoot, the *clausula rebus sic stantibus*. The court emphasized the lessor's contention that the depreciation of money, coupled with the increase in taxes and cost of repairs, had wiped out any balance in his favor and had made the property a liability rather than an asset. The court then declared that the lessor was entitled to some return for the surrender of his land to the lessee, and that the proportion between performances on either side had been destroyed. The case was returned to the lower court with instructions to fix a fair rental, after consideration of the interests on either side.

Still more remarkable was the decision of the Third Senate on June 27, 1922, in the great case of the *Pachtinventar* (literally "lease inventory"). The problem arose out of the common form of agricultural lease, in which the animal stock, goods, and machinery attached to the leased premises were transferred to the lessee who agreed to restore them in the same condition at the end of the term. Specific restitution was the primary obligation of the lessee,[74] but a difficult problem in valuation almost inevitably arose. Some fluctuations in the value of the movable goods could normally be expected, through use and depreciation of machinery or through disease, age, and death of animals. It was accordingly provided in the Civil Code that in the event of either increase or decrease in the appraised value of the inventory the lessor or lessee should pay in money the resultant difference. During the inflation period the question soon arose whether the lessor should be required to pay the lessee for a nominal increase in value

[74] That this was the legal effect of the *Pachtinventar* agreement was not universally admitted. The only conclusion that was fairly clear was that the risk of destruction or deterioration of the goods would ordinarily fall on the lessee. An ancient tradition had expressed this conclusion in the maxim, "The iron cow never dies." Beyond this, it was understood that the lessee would be privileged to use the goods in the inventory for the ordinary operations of agriculture, and any increment in value, such as that arising through natural increase in animal stock, would accrue to the lessee's benefit. But these consequences were consistent with a sale-and-resale analysis, into which lawyers trained in the Roman tradition had tried to make the transaction fit. See HAAG, DAS PACHTINVENTAR ZUM SCHÄTZUNGSWERTE UND DIE GELDENTWERTUNG, 20-39 (1926). If the sale-and-resale analysis were adopted it would of course be more difficult to relieve the lessor in the event of an intervening increase in value. The important provisions of the Civil Code on the *Pachtinventar* were arts. 586-589, especially art. 589, sec. 3.

It is interesting to note that an institution very similar to the German *Pachtinventar* had been taken over from ancient Germanic law into the French Civil Code (arts. 1800-1817), and had provided the setting for an important judicial skirmish with the French inflation problem. DALLOZ 1921.1.73 (Cour de Cassation, June 6, 1921). Relief to the lessor was there refused.

which did not correspond to a substantial change in the use-value or even in the real market value of the goods, if deduction were made for the decreased purchasing power of money. Since the device of valuation was merely incidental to the primary purpose of specific restitution, the situation presented a peculiarly strong case for judicial relief. At the same time it illustrated in dramatic and convincing form the failure of the paper mark to perform one of the principal services of money in the field of private contract — that of providing a measure of value. Here the mark was not dealt with as a commodity and was not primarily a medium of payment. Its original and principal function was to provide a standard for comparing objects similar in type and in economic purpose, at two different points in time.

The widespread use of the *Pachtinventar* and the important economic interests at stake led early to acrid debate in legal periodicals.[75] In the spring of 1922 a test case was presented to the Third Civil Senate, which had refused two years earlier on similar facts to take account of the depreciation of the mark.[76] The parties in the particular case were reinforced by organized groups of lessors and lessees, who secured a formidable array of legal talent for the argument before the court.[77] In a preliminary opinion the court recognized the importance of the problem but indicated its reluctance to decide a question which it described as essentially economic in character. It therefore resorted to the unprecedented device of an arbitration before a committee of economic experts, to which were joined some members of the court itself.[78] But

[75] A complete collection of all the literature on this question has not been attempted. Some of the articles are those of Richter, J. W., 1921, pp. 1195 and 1348; Breme, Krückmann and Leonhard, *ibid.*, 1922, pp. 65 ff.; Richter, *ibid.*, 1922, p. 434; Heinsheimer, DEUTSCHE JURISTEN ZEITUNG, 1921, p. 670.

[76] Decision of February 13, 1920, SEUFFERTS ARCHIV, 75, p. 267. Here the situation had been aggravated by a government requisition for war purposes of 11 out of the 15 horses included in the inventory. The four remaining horses were worth 8100 marks at the date of restoration to the lessor, as against an original valuation for the whole 15 of 14,200 marks. It was held that the lessee had to pay only the difference between 8100 and 14,200 marks, the intervening "rise in prices" being immaterial.

[77] Nipperdey, DEUTSCHE JURISTEN ZEITUNG, 1922, p. 659. As the Reichsgericht itself pointed out in the preliminary decree of May 26, 1922 (see below, note 78), the case represented primarily a contest between organized interest-groups. More clearly than in ordinary legal controversies the inflation cases generally reflect an underlying conflict of interest between the beneficiaries and the opponents of economic change. The legal issues were usually formulated in terms of strict and free law ("security of legal transactions" as opposed to general considerations of fairness), but their peculiar difficulty arose from the varying incidence of inflation on different economic groups. On this whole question see Oertmann, "Veränderte Umstände," GESETZ UND RECHT, 1921, p. 101.

[78] Decree of May 26, 1922, J. W., 1922, p. 910.

the parties, supported no doubt by the organizations which financed the appeal, refused to accept the result of these deliberations and the court was forced to announce its own decision.[79] As was to be expected, recovery based on the difference in paper-money values was refused. To justify this result, it was perhaps enough to refer to the peculiar nature of the lessee's obligation; this the court did indeed discuss at considerable length. But the court felt obliged to declare that fluctuations in gold-mark prices, characteristic even of the most stable economy, would normally be ignored. This declaration made it necessary to emphasize the catastrophic and unprecedented effects of the mark depreciation at that date and led further to the significant statement that "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, in spite of their being placed on an equality by statute." From the postulate that the depreciation of the mark had produced a new and wholly unforeseen situation, unprovided for by statute or by private contract, the court drew the still more remarkable conclusion that the path had been opened for free judicial legislation. The judge's "plenitude of power" (*die Machtvollkommenheit des Richters*) was to be exercised in the first instance by the Reichsgericht. Accordingly the court proceeded to lay down a complicated set of economic tests for the guidance and control of lower courts.[80]

The decisions of the Reichsgericht in the spring and early summer

[79] June 27, 1922 (104 R. G. Z. 394).

[80] The language of the opinion on this point is significant. The court in effect admitted that it had already retreated from the position that the Reichsgericht could not formulate "economic" rules. After conceding that many of its rules were not "purely legal" but "economic-legal" in character, it asserted that "In cases where the factual and legal considerations are so intimately fused, the Reichsgericht asserts the right not only to decide the particular case but also to draw up authoritative rules for the judge of the facts. The above economic-legal rules are therefore binding in character and are to be observed by the lower court."

The economic tests formulated by the court commenced with the statement that valuation was to be guided primarily by the relevant economic considerations; that it was in particular to aim at the use-value rather than the market value of the stock; and that the internal purchasing power of the mark rather than its position on foreign exchange was to control, because foreign exchange rates were influenced by world market conditions and by the pressure of reparations payments. Any increase in the value of the stock through the lessee's own improvements or expenditures was of course to accrue to his benefit. The court expressly rejected the common argument that the lessor should pay the lessee enough to enable him to purchase a stock of goods elsewhere. It did concede that if the lessee had been forced by war-time requisition to surrender some of the stock without any equivalent return, this factor could in exceptional cases be taken into account. But the court asserted that any such uncompensated losses would in most cases be more than offset by the general prosperity of the agricultural industry since the war.

of 1922 bring to a close what might be called the second phase in judicial treatment of money obligations affected by inflation. Commencing in the war period with a rigid and uncompromising attitude, the courts had first opened avenues to judicial relief through the conception of "changed conditions." With the continued expansion of this idea there filtered in the notion that changes in price relationships could serve as a "change of conditions," to justify the rescission, and in exceptional cases the modification, of executory contracts. By 1922 it had become plain that the changes in economic conditions then occurring were *primarily* changes in price relationships, resulting from the depreciation of the mark. As soon as this was fully realized the set of ideas already developed in court decisions were used over wide areas for the purpose of substituting new standards of value for monetary standards which had been adopted in private contracts but which had proved illusory.

The result of the Reichsgericht decisions to that date was to permit this substitution of new standards in money obligations of certain types. Economically the most important type was the obligation of the purchaser in executory contracts for the sale of land,[81] goods, or services. Here the vendor could secure rescission of the contract if the purchaser would not agree to revision of the price term. Outside the field of commercial contracts certain familial obligations could be reached, such as the obligation of a divorced husband to pay alimony.[82] The reasoning of this last group of cases applied as well to most agreements to pay annuities for the purpose of support and maintenance, though it

[81] Contracts for the sale of land were clearly within the reasoning of the 1922 decisions, though it was not until January 6, 1923, that the Fifth Senate reversed its own earlier decision of April 1921 (see above, note 53), and held that the revision of the price term was permissible in a long-term contract for the sale of land. 106 R. G. Z. 7. In the 1923 case the value of the land in paper money had risen to 150,000 marks, as compared with a purchase price of 41,500 marks. The court made some effort to preserve the illusion of continuity in judicial decision by distinguishing the earlier case, but the ratio of present value and contract price was only slightly greater (value in the earlier case of 52,000 marks as compared with contract price of 19,000 marks) and the opinion clearly reflects the profound shift in judicial attitude that had taken place since 1921.

[82] An alimony decree had been revised on account of the intervening depreciation of money as early as May 26, 1921 (J. W., 1921, p. 1080). Some aid was derived in accomplishing this result from art. 323, Code of Civil Procedure, which allowed modification of decrees operating *in futuro* where there was "an essential change of conditions." But since the decree itself had been based on a contract between husband and wife, the court was forced to resort to an "interpretation" of the contract, relying on art. 157, Civil Code, which required that contracts be interpreted in accordance with "good faith." For a similar case reaching the same result see J. W., 1923, p. 45 (May 22, 1922).

was not until 1923 that this principle was established in general terms.[83] Finally, there remained the important field of tort obligations, which were redefined in terms of the current purchasing power of money by means of the original provisions of the Civil Code, without the aid of "change of conditions" or other specially constructed machinery.[84]

At this point the creative activity of the Reichsgericht was arrested, except for the inclusion of other types of transactions within the main areas already mapped out.[85] There were some important details left to be settled, such as the treatment of a vendor in default, who claimed a revision of the price term on account of a depreciation of money intervening since the date of his default.[86] For a time there was some embarrassment with the tests of foreseeability which underlay the theories

[83] 106 R. G. Z. 233 (Jan. 26, 1923). A special situation, to which the reasoning of other annuity cases was not applied, was the agreement between father and illegitimate child for the future support of the child. 106 R. G. Z. 396 (Mar. 23, 1923). The course of decision in lower courts had for some time been in favor of revision of agreements for the support of illegitimate children. See J. W., 1921, p. 1091; 1923, pp. 133 and 460 (but *cf.* the Berlin Kammergericht in J. W., 1921, p. 1086).

[84] The leading principle being specific reparation for the fault, the date when the reparation was to occur could be looked to rather than the date of the original wrong. This was taken to be the date of the decree, even in cases where specific reparation was impossible and money damages were awarded as a substitute. 98 R. G. Z. 55 (Jan. 17, 1920, Fifth Senate); 101 R. G. Z. 418 (Mar. 12, 1921, First Senate); 102 R. G. Z. 383 (June 13, 1921, Sixth Senate).

[85] As in the decisions extending to contracts for the sale of land and for the payment of annuities the rules for price-revision worked out in the 1922 cases. Above, notes 81 and 82.

[86] Before the conception of "changed conditions" had expanded very far beyond its primary source in the codified law of impossibility, the Reichsgericht had held that a change of economic conditions would be no defense if it occurred after the date when the obligor could and should have performed. 103 R. G. Z. 3 (Sept. 30, 1921, Second Senate.) It is intimated in a decision of April 1, 1922, that default would not necessarily preclude an appeal to the *clausula rebus sic stantibus* (J. W., 1922, p. 1513, Fifth Senate). As the inflation progressed it became increasingly plain that a refusal to revise the purchase price for a vendor in default was to inflict a disproportionate penalty. The terms and conditions for such revision being essentially discretionary, lower courts commenced in 1923 to relax this requirement, some months before the Reichsgericht had expressly consented to the change. Mar. 2, 1923 (J. W., 1923, p. 530); May 11, 1923 (*ibid.*, p. 692); May 29, 1923 (*ibid.*, p. 947); June 16, 1923 (*ibid.*, p. 938); and other decisions in the same periodical (*ibid.*, pp. 940, 947, and 949). But *cf.* J. W., 1923, pp. 939, 944. Permission to ignore default in granting or refusing revision was finally given by the Reichsgericht on August 6, 1923 (106 R. G. Z. 422), and in later decisions (J. W., 1923, pp. 983, 984; 1924, p. 174; 107 R. G. Z. 19, 124). The result was much more easily achieved after it was clearly realized (as in 107 R. G. Z. 19) that the alteration of the price term did not increase the real weight of the purchaser's obligation but merely offset the continuing depreciation of money. When this idea appeared the Reichsgericht was approaching the broader conception of general revision of money debts, the word "revalorization" having indeed appeared in the

of "change of conditions." [87] But the further course of the inflation removed most of this difficulty by accelerating the depreciation of paper money and thereby increasing the disproportion between money price and other types of performance.[88]

Perhaps the most important limitation on judicial relief, implied

decision in 107 R. G. Z. 19 (Oct. 2, 1923). The movement toward general revalorization is discussed below, section 3.

The revision of the price term in favor of a vendor of goods or services must be kept distinct from the problem of default in payment of a simple money debt, discussed below, notes 94-98.

[87] Courts and writers agreed that where the risk of currency fluctuation was deliberately assumed no relief could be given for a change of conditions within the range of that risk. 102 R. G. Z. 238 (June 6, 1921); 106 R. G. Z. 177 (Jan. 9, 1923); other cases cited by STAUDINGER, KOMMENTAR ZUM B. G. B., art. 242, V, 1, b; Oertmann, J. W., 1920, p. 476; *ibid.*, 1921, p. 1512. In determining the range of risk assumed, not only the form of the contract but the facts known to the parties at the time would be relevant. A purely subjective test at this point would, however, have encouraged negligence and recklessness. Courts therefore undertook to apply a somewhat more objective test — what change of conditions should reasonably have been foreseen by a normally prudent business man at that time? J. W., 1921, p. 1597 (July 8, 1921); *ibid.*, 1922, p. 1723 (April 28, 1922); *ibid.*, 1923, p. 983 (Sept. 17, 1923); Oertmann, *ibid.*, 1921, p. 1512; Lahusen, *ibid.*, 1922, p. 1180. As the inflation progressed it became increasingly difficult to determine the degree of risk that should have been anticipated at any particular stage, especially when the matter was viewed in retrospect. In 1923 it was held that there was no reason in May 1918 to foresee the loss of the world war, the humiliating terms of the treaty of peace, and the subsequent collapse of the currency. J. W., 1923, p. 983 (Sept. 17, 1923). Even after the terms of the treaty of peace had been published, in August 1919, the depreciation of the mark was held not to be foreseeable by the parties to an annuity agreement (106 R. G. Z. 233, Jan. 26, 1923). The same was true of a contract for the sale of an automobile, where delivery was expected within six months but was excusably delayed by labor difficulties and shortage of raw materials (J. W., 1922, p. 481, Nov. 22, 1921). But the opposite result was reached in a contract of August 1919, which called for the repair of electric batteries over a 10-year period (J. W., 1922, p. 1723, April 22, 1922). By the summer of 1921, after the first great upward leap of prices, some further disaster could undoubtedly have been foreseen, and it could be said that any commercial contract executed with a fixed-price clause imposed the risk of further depreciation on the money creditor. (See, for arguments to this effect, Solbrig and Lahusen, J. W., 1922, pp. 1001 and 1180; but held otherwise in J. W., 1924, p. 907, March 7, 1924). But the depreciation which ultimately occurred was far beyond that anticipated, even as late as 1922. It was exceedingly difficult to determine by ordinary tests of risk-assumption how far a vendor of goods or services should be penalized for continued faith in national recovery.

[88] Simple arithmetic usually sufficed to demonstrate, in contracts which survived unexecuted into 1923, that the assumed foundations of the transaction had been destroyed by the sickening drop of the mark through 1922-23. Accordingly, in the decisions of that period there is increasing emphasis on the mathematical test of "equivalence" and a corresponding abandonment of "foreseeability." This appears clearly, for example, in the decisions of October 25 and October 30, 1923 (J. W., 1924, p. 535), and February 20, 1924 (*ibid.*, 1924, p. 1138).

in what has been said above, was the consistent refusal of the Reichsgericht to overhaul completed transactions.[89] It was not till the final and complete collapse of the currency had produced a revolutionary shift in judicial attitude toward the whole field of money obligations that a retroactive revision of executed transactions was permitted.[90] While the way was being prepared for such a shift, it seemed that the principles of contract law had been stretched to their utmost limit. For the rest, the ingenuity of lawyers and laymen, operating under a flexible system of free contract, had to be relied on to choose substitutes, in newly framed transactions, for monetary standards that were in process of disintegration.[91]

3. *General Revision of Money Obligations*

The storm center of dispute in the deepening shadows of the late inflation was the simple money obligation based on an original loan of money. The best illustration of this important type was the long-term loan of money secured by a mortgage of land. For long it seemed that this last stronghold was impregnable, for it was fortified by legis-

[89] J. W., 1922, p. 1576 (March 31, 1922); J. W., 1923, p. 457 (Jan. 5, 1923); 107 R. G. Z. 140 (May 4, 1923); 108 R. G. Z. 156 (Apr. 29, 1924). A decision of January 6, 1923 (106 R. G. Z. 11) refused relief to the vendor in a contract for the sale of land where he had already accepted 260,000 marks of the 322,000 mark purchase price, although by a decision of the same date (106 R. G. Z. 7, above, note 81) the same Senate had ordered rescission of a wholly *executory* contract unless the price term was modified. The distinction thus drawn between executory and partially executed contracts was of course exceedingly hard to maintain. What, for example, if the vendor had accepted only one-third of the price? The Seventh Senate in 101 R. G. Z. 79 (Dec. 10, 1920) had given relief in such a case. In a later decision of November 21, 1924, the vendor of machinery was allowed a supplement to the agreed purchase price, though he had accepted 2000 marks of the agreed 7600 mark total. 109 R. G. Z. 222. But by that date the Reichsgericht was on its way to a general and retroactive revalorization of all money debts. See below, section 3.

[90] See below, part IV, section 5.

[91] Contemporary writers testify that the widespread adoption of stable currencies, commodities, and sliding scales based on price indices had in practice supplanted the paper mark as a standard of value. Süskind, J. W., 1923, p. 107; also GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 70-73. This fact will undoubtedly serve to explain the absence during 1922 and 1923 of litigation over the effects of inflation on wholesale transactions, as to which the Reichsgericht had earlier shown the utmost severity. (See above, notes 30 and 32.) These earlier decisions had long before been distinguished on the ground that wholesale transactions constituted a "special and peculiar field," because of their purely "speculative" character. J. W., 1920, p. 434 (Feb. 24, 1920); 99 R. G. Z. 115 (May 19, 1920). It was not till the very last stage of the inflation that wholesale transactions reappeared in litigation before the Reichsgericht. 107 R. G. Z. 156 (Nov. 12, 1923). After the return to a stable currency a few unexecuted sales of goods at wholesale remained behind as scattered wreckage cast up by the flood. See below, part IV, section 5.

lation making the paper mark legal tender in the payment of money debts. Without direct attack on the legal-tender quality of the paper mark, judicial relief seemed impossible.

There were some writers who inferred from the 1922 decisions that this attack on the legal-tender quality was imminent.[92] Others argued for this result on the dubious ground that the legal-tender quality of the mark would remain if the mark were treated merely as a mandatory medium of payment, while the amount to be paid was determined, not by the nominal par, but by the real purchasing power of the paper marks transferred.[93] But both direct attack and this form of indirect attack were too radical for the views which still prevailed.

The resistance of the Reichsgericht to any direct attack on the legal-tender legislation appears most clearly in its treatment of default in payment by the debtor in a money obligation. In a rapid and progressive inflation this situation was one that called peculiarly for judicial readjustment. If the debtor was allowed to satisfy his debt by paying the sum originally due, without regard to the date when payment was actually made, the debtor had every reason to postpone payment to the last possible date; the sum finally paid would then represent a greatly decreased purchasing power and the real weight of the money obligation would be enormously lightened. During 1922 and even more in 1923 the mark often lost in a single month one-half its internal purchasing power. From the creditor's point of view, his enforced acceptance of the nominal sum due, some weeks or months after the maturity of the debt, would in effect destroy his claim before it was realized. The Civil Code of course provided that any damages resulting from default should be paid by the defaulting obligor.[94] To show that the non-payment at maturity caused an injury to the creditor it was necessary to prove that the creditor was in a worse position through the delay than he would have been if payment had been made when due. As several writers pointed out, the burden of proof on this point should

[92] For example, Best, in J. W., 1922, p. 1670, and 1923, p. 111.

[93] The law of June 1, 1909, art. 3, merely provided that the notes of the Reichsbank are "a legal medium of payment" (*gesetzliches Zahlungsmittel*), without specifying that they were legal tender at their nominal par. One writer was willing to infer from this language that the face value of the currency was not decisive as to the total sum necessary for the discharge of money debts. Oswalt in J. W., 1923, p. 877. But statutory construction so technical as this could scarcely be reconciled with the obvious purpose of the legislation, and this branch of his argument met with little support. The only judicial decision found which adopted it was that of a court of first instance, on September 12, 1923 (J. W., 1923, p. 961).

[94] Article 286, Civil Code.

not be a heavy one, in view of the, by then, universal "flight from the mark." [95]

But an increase in the sum to be paid involved also a recognition that the paper mark was no longer a medium of payment at its nominal par. The Reichsgericht had refused to intervene as late as September 24, 1921,[96] though lower courts had already begun to respond to the protests of legal writers and the general indignation of laymen.[97] It was only in the last stages of the inflation, as a prelude to general revision of money claims, that the Reichsgericht was willing to modify its views, and to authorize an increase in the amount due proportionate to the intervening depreciation of money during the period of the default.[98]

A judicial, rather than a statutory, revalorization[99] of money obligations might still have been unnecessary if the mark had been stabilized at the end of 1922, at the preposterous figure it had then reached of about 1/1500th of its pre-war purchasing power. If, for example, the Reichsbank had succeeded in its heroic but foredoomed attempt in the spring of 1923 to save the mark on foreign exchange,[100] the whole problem might have been saved for the legislature, and the courts relieved of a painful task.[101] But the uncompromising attitude of foreign creditors and the invasion of the Ruhr destroyed the last hope of preserving

[95] J. W., 1923, pp. 101 ff. For other discussions of this question in legal periodicals see Schram, DEUTSCHE JURISTEN ZEITUNG, 1922, p. 738; Kraner and Baum, J. W., 1923, pp. 117 and 284. To most of these writers the refusal in internal transactions to allow a supplement corresponding to the intervening depreciation was all the more exasperating because the Reichsgericht gave such relief freely in transactions with foreign creditors.

[96] J. W., 1922, p. 159.

[97] Hueck in DEUTSCHE JURISTEN ZEITUNG, 1920, p. 275; Rosenfelder in 71 JHERINGS JAHRBÜCHER 237 at 292-6 (1922). For lower court decisions on the point see J. W., 1922, p. 1730 (Oct. 18, 1922); *ibid.*, 1923, p. 532 (Feb. 24, 1923); and other cases, *ibid.*, 1923, pp. 943, 949, and 956.

[98] 107 R. G. Z. 212 (Nov. 22, 1923). For a later decision on the point see DEUTSCHE JURISTEN ZEITUNG, 1926, p. 1563 (Jan. 29, 1926).

[99] The term "revalorization" will henceforth be used as the best English equivalent of the German *Aufwertung*. It indicates, of course, a revision of principal in a money obligation to compensate for the decreased purchasing power of money.

[100] GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp 251-2 (1930).

[101] In post-war Austria, for example, the paper currency was stabilized only after it had sunk to 1/14,400th of its pre-war purchasing power. The fact that it still possessed *some* value was influential in persuading Austrian courts not to undertake judicial revalorization, without the aid of statute. The final collapse of the German mark in 1923 eventually had at least one beneficial effect, in impelling German courts to restore some part of the substance to money claims already reduced to a mere shadow. See Zeiler, in DEUTSCHE JURISTEN ZEITUNG, 1924, p. 776.

the existing currency system. The futility of the political and economic effort to save the mark from complete disaster became increasingly clear. The question then became, how far should courts attempt to preserve in internal transactions a fictional par which violently contradicted common sense, justice, and the daily experience of all Germans.

Some time before collapse became certain there were writers who urged the abandonment of the paper mark as a standard of performance in private contracts.[102] One of the most vigorous advocates [103] of a general revalorization of money claims was the President of the Darmstadt Court of Appeal. This court, on March 29, 1923, declared that the legal tender legislation had been set aside by the force of events themselves, that the satisfaction in paper marks of a mortgage obligation contracted in gold marks conflicted with the requirements of good faith, and that a distinction was no longer possible between simple money obligations and those in which money was exchanged for commodities or services.[104] The Kammergericht in Berlin, not entirely unsympathetic toward these views, refused however in several decisions of the same period to revise the total of a mortgage debt chiefly because of technical difficulties as to priorities which would result.[105] Here the matter stood through the feverish days of the spring and early summer. There was, however, an increasing movement among legal writers in favor of revalorization.[106] Then, on August 4, 1923, a court of first

[102] A complete bibliography of this high debate cannot of course be given here. Among the articles in the JURISTISCHE WOCHENSCHRIFT are those of Lohe (1923, p. 451), Heymann (1923, p. 522), Rosenthal (*ibid.*, 531), Springmann (*ibid.*, 802), and Sontag (*ibid.*, 907). For a further list of references see OERTMANN, DIE AUFWERTUNGSFRAGE, pp. 10-11 (1924). As early as January 1921 Rosenfelder had come to the conclusion that article 242, the "good faith" clause, could be used for general revalorization of debts expressed in depreciated currency. This remarkable article anticipated to a surprising degree, though not in all details, the subsequent course of judicial decision, Rosenfelder, "Die civilrechtliche Bedeutung der Geldentwertung," 71 JHERINGS JAHRBÜCHER 237 (1922).

[103] Best, whose views are stated in J. W., 1923, pp. 111 and 980.

[104] J. W., 1923, p. 459. A second opinion in another case, restating and amplifying the arguments of the March 29 decision, was issued on May 18, 1923, and published in J. W., 1923, p. 522. Compare also the decision of the High Court of Danzig on May 16, 1923 (J. W., 1923, p. 691) achieving a partial moratorium for the creditor on mortgage payments with the aid of art. 315, Civil Code, and justifying the result by reference to the strong movement for general revalorization which was already under way.

[105] J. W., 1923, pp. 693 and 1044, and DEUTSCHE JURISTEN ZEITUNG, 1923, p. 396 (decisions of May 1, May 24, and June 2, 1923).

[106] Among the few writers who held out against general revalorization were Hedemann and Krückmann, whose views are criticized by Sontag in the JURISTISCHE WOCHENSCHRIFT, 1923, p. 907. Heck, himself an opponent of judicial rather than statutory

instance in Münster declared that courts had properly refrained from intervening so long as there was any hope of stabilization but that with the frustration of all hope, intervention could no longer be postponed.[107] In September and early November two other lower courts joined the procession.[108] In the meantime, the complex and difficult process of preparing a new currency, the Rentenmark, had been approaching fruition.[109] On October 15, 1923, the decree for the establishment of a new bank of issue was promulgated. On November 15 the advances to the Government by the Reichsbank ceased and the new currency was issued to the public, the ultimate ratio for conversion of old into new currency being left for later determination. These operations met with a remarkable initial success.[110] Finally, on November 28, 1923, the Fifth Senate of the Reichsgericht, expressing the practically unanimous opinion of the whole court,[111] announced its decision that the paper mark was no longer legal tender at its par value, that mortgage obligations must be revalorized in terms of the real purchasing power of money, and that this result was dictated by the general rules of private law.[112]

The decision of November 28, 1923, is a landmark in German legal history and a fitting climax to the magnificent work of the Reichsgericht in guiding a great nation through its darkest hours. The decision therefore deserves a careful and sympathetic study. The mortgage in question had been executed in 1913 on land in the former German colony of South-West Africa. The mortgage debt, 13,000 marks, fell due on April 1, 1920. The defendant mortgagee refused to execute a release of the mortgage unless paid in the coin current in the colony at the time of the mortgage or in currency of corresponding value. The plaintiff then sued for an order for the surrender of the mortgage and the execution of a release, on payment of principal and interest in paper marks at their nominal par. The court first discussed the difficult question in the conflict of laws, whether the law of Germany or the law of the place where the land lay (in 1923, English law) should control.

revalorization, concedes that in the course of 1923 an almost complete reversal of opinion occurred among legal writers. 122 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 203 at 206 (1924).

[107] J. W., 1923, p. 1059.

[108] J. W., 1923, pp. 961 and 1057.

[109] The best account in English is that of SCHACHT, THE STABILIZATION OF THE MARK (1927), written by one of the principal participants in this great achievement. Chapters III and IV discuss the period in question.

[110] SCHACHT, THE STABILIZATION OF THE MARK 98-9 (1927).

[111] See OERTMANN, DIE AUFWERTUNGSFRAGE 40 n. (1924); and statement by a committee of judges of the Reichsgericht in J. W., 1924, p. 90.

[112] 107 R. G. Z. 78.

It decided that if the *lex loci* controlled, then depreciated German paper money was not necessarily legal tender, since the German legal-tender legislation had not been expressly extended to the colony and there was not sufficient evidence to prove that German currency had acquired the legal-tender quality in the colony through custom. The court then took up the question that is important for present purposes. If it be assumed that the place of performance was Germany and that German law therefore controlled, would the tender of the specified sum in paper marks discharge the mortgage? The court first pointed out that by April 1, 1920, when the mortgage debt matured, a considerable depreciation of the mark had already occurred, its internal purchasing power being estimated at one-tenth and its external purchasing power at one-fifteenth of its pre-war position. Even if this depreciation were thought insufficient, the court declared that the question could still be raised whether the defendant had forfeited his right to revision of the obligation by his refusal of tender, and indicated its own view that he had not. Even though the possibility of revalorization of money claims had not been recognized by German legal science in 1920, the views then current had become erroneous and were therefore no longer binding.

The principal reliance of the court throughout its subsequent discussion was on the requirement of "good faith" in the performance of contracts (art. 242, Civil Code). For the heroic enterprise to which the court was dedicated no other instrument was adequate.[113] The theories of "change of conditions" so painfully developed could accomplish only a part of the task.[114] Indeed the court had already met

[113] Even in the use of article 242 there was one difficulty which the opinion does not consider but which even the most ardent advocates of revalorization were forced to recognize, for example, Best, in J. W., 1923, p. 980. Article 242 required performance of obligations according to "good faith in the light of (*mit Rücksicht auf*) commercial usages." The appeal to an abstract standard of morality was thus tempered to some extent by its association with current commercial practices, which had certainly not yet reached the stage of a universal and voluntary revalorization of money debts. Best met this difficulty by saying that at least "respectable" debtors no longer attempted to pay off their debts in ludicrously depreciated money and that in the sale of goods and services commercial usage (partly stimulated by court decision?) had adjusted itself to revision of the price term to offset currency depreciation.

[114] The probable intent of the parties to the mortgage agreement is used in the November 28 decision as a supplement to the reasoning by which the legal-tender legislation was held no longer operative. But several writers had already observed that the revalorization of money debts could not be justified by means of the *clausula rebus sic stantibus* or other mechanisms depending on the "essential nature" of the bilateral contract. In most of the contracts left for judicial treatment there was no substantial change of conditions except the change in the value of money. The legal-tender legisla-

situations where relief for currency depreciation could scarcely be explained in terms of the private law of contract, however broadly defined.[115] The consensual basis for revision of the price term in bilateral contracts had been very largely abandoned.[116] And now the obstacle to judicial relief was the language, not merely of private bargain but of

tion stood directly in the path of revision of a simple money obligation. Oppenheim in DEUTSCHE JURISTEN ZEITUNG, 1923, p. 427; Heymann in J. W., 1923, p. 522; OERTMANN, DIE AUFWERTUNGSFRAGE 20-29 (1924). In seeking a broader base for general revalorization one writer appealed to "unjust enrichment." 1 ENNECCERUS, BÜRGERLICHES RECHT, sec. 116 (1923). Another writer suggested the even less plausible and far less convenient device of "error" as to the assumed stability of the mark (Herzfeld, 120 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 203 (1922); this device being later expressly rejected by the Reichsgericht, 111 R. G. Z. 257, July 11, 1925). Some writers and even the Darmstadt Court of Appeal resorted to the expanded conception of usury in art. 138, §2, Civil Code, and declared that any transaction was void in which a money debtor "exploited" the national catastrophe in attempting to pay his debt in depreciated money (J. W., 1923, pp. 111 and 980; *ibid.*, 459 and 522). Most of these helpful suggestions were rejected by the Reichsgericht, which was left with "good faith" as the only legal conception which had a basis in legislation.

[115] Particularly the case of obligations arising out of unjust enrichment. At first, when the obligation to make restitution resulted from rescission for "changed conditions," the revalorization of the claim could be explained in terms of the discretionary nature of the remedy and the court could feel free to attach any "fair" condition to its relief. See 101 R. G. Z. 79 (Dec. 10, 1920); J. W., 1923, pp. 135 and 1046 (lower court decisions of Sept. 23, 1922, and Oct. 19, 1923); but *cf.* dicta to the contrary in the Reichsgericht decision of January 5, 1923 (J. W., 1923, p. 457). But this reasoning would not suffice where the obligation to make restitution arose from simple officious intervention, where relief was given on a theory of *negotiorum gestio* (107 R. G. Z. 148, Nov. 8, 1923). See also 108 R. G. Z. 120 (Mar. 12, 1924).

After the return to a stable currency courts were presented with numerous other situations where revalorization could not be justified by principles of contract law. See below, part IV, sec. 5.

[116] As late as March 24, 1922, the Reichsgericht had attempted to justify its revision of the rent clause in a lease by emphasizing the fact that parties had agreed on a continuation of the lease until the expiration of the term. 106 R. G. Z. 218 at 222 (Mar. 24, 1922). But it can scarcely be said that the lessee, by insisting on a continuation of the lease at the original rental, had "agreed" to its continuation at an increased rental. If he chose to surrender the lease rather than pay more rent, it seems probable that he would have been allowed to do so. In the decision of January 6, 1923 (106 R. G. Z. 7) involving a contract for the sale of land, the court simply ordered that the contract would be rescinded if the purchaser would not consent to a "reasonable" increase in the purchase price. But by September 22, 1923 (J. W., 1923, p. 984) it had become clear that if the parties could not agree on a fair price the lower court was free to fix such a price and refuse rescission (the *vendor* here demanded to be released). The same result was reached in the case of an agricultural lease on November 10, 1923 (107 R. G. Z. 151), where again the *lessor* sought rescission and rejected modification of the rent clause. After stabilization the decisions moved on to the next stage and held not only that the vendor or lessor could not have rescission on account of the changed value of money, but also that he could sue in an affirmative action for revision of the price against the purchaser's opposition. See below, note 217.

statute as well. If the conception of "changed conditions" was to be used at all, it must be employed for a direct attack on legislation which was undoubtedly valid at its inception and which had directed the main course of German economic life until this point.

The court began with an examination of the circumstances under which the legal-tender legislation had been issued, emphasizing chiefly the stability of the German national economy before and at the outbreak of the war and the actual as well as the legal parity of gold and paper money. It then declared:

> "The legislator, in issuing these provisions, did not contemplate an essential depreciation of paper money, especially one so great as developed steadily after the World War and the 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 those various legal provisions which aimed to prevent a debtor from being in a position to rid himself of his obligations in a manner which cannot be reconciled with the requirements of good faith and with commercial usages, that is to say, with the overriding mandate of Art. 242, Civil Code. In this conflict the last mentioned rule must take precedence and the currency legislation must give way, because, as shown above, at the time of its enactment 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; so that a strict application of its provisions in this situation was not contemplated."

For a further basis in statute the court resorted to the recent recognition, in tax and other legislation, that the gold mark and paper mark were no longer equivalent.[117] From this legislation the court drew the conclusion that in these special cases at least the legislature had "broken through the principle" that payment in paper marks at their nominal value would be an effective discharge of a money obligation.

The court then reviewed the earlier decisions of the Reichsgericht,

[117] None of this legislation had expressly abandoned the nominal parity of the paper mark in anything like general terms. Apart from tax obligations, which had been put on a gold basis increasingly through 1923, the only legislation referred to by the court was that of August 18, 1923, authorizing revision of annuities for the support of relatives, and the legislation adopting a cost-of-living index for fines and court fees. It goes without saying that the Rentenmark legislation did not affect in any way the legal tender quality of the Reichsmark, although it undoubtedly contemplated the substitution of the Rentenmark for the Reichsmark in general circulation. The final abandonment of the depreciated paper Reichsmark did not occur until the currency legislation of August 30, 1924, went into operation. ELSTER, VON DER MARK ZUR REICHSMARK 316 ff. (1928); NUSSBAUM, DAS GELD 112-115 (1925).

and admitted that most of these involved bilateral contracts in which money was exchanged for goods or services. But it insisted that even in simple loans of money, secured or unsecured, an "equivalence" was normally anticipated between the performances on either side. Direct support for this conclusion it drew from article 607, Civil Code, which provided that "a person who has received money or other fungible things as a loan is bound to restore to the lender what was received in things of the same kind, quality, and quantity." Legal-tender legislation, insofar as it was effective, defined the scope of the obligation and fixed the quality and quantity in accordance with the nominal par of the currency. But when this legislation became inoperative through unexpected and drastic depreciation in purchasing power, then ordinary contractual principles could take the place of the legislation.

Even more interesting was the attempt to justify this result through interpretation of the probable intention of the parties. The court pointed out that contracting parties were free to adopt a stable currency or commodity as a measure of value. It was only a short step for a court to infer that if existing conditions had been thought of, a provision of that type would undoubtedly have been inserted in the contract. The court was thus led to the remarkable conclusion, not however explicitly stated, that a stable-value clause could be read into mortgage agreements by implication.[118]

The court refused to pass upon certain problems of priorities peculiar to the revalorization of land mortgages, problems which had already been urged as an obstacle to revalorization in lower court decisions.[119] It likewise refused to decide how far its reasoning could be

[118] This result had been expressly realized in a decision of the Court of Appeal of Cologne on October 18, 1923. J. W., 1923, p. 1048. In a mortgage which required payment in gold coin, the court held that, if legislation prevented the performance contracted for, "interpretation" of the contract would lead to the insertion of some stable measure of value, such as gold, so that payment would have to be in paper money of equivalent value. In a later decision of January 16, 1924 (107 R. G. Z. 400), the Fifth Senate of the Reichsgericht amplified its suggestions as to the effect of an express gold clause. By that date it had become clear, as it must have been in November 1923, that 100 per cent revalorization of all mortgage debts was politically and economically impossible. In the January 16 decision the court was faced with a *gold coin* clause, which was held still to be invalid under the Bundesrat decree of September 28, 1914. But the court said that the purpose of the gold clause was clearly to protect the mortgagee against depreciation in the value of money so that a higher rate of revalorization (though in no event 100 per cent) should be allowed in mortgages containing the gold clause.

[119] These difficulties had already led the Kammergericht in Berlin to refuse revalorization of mortgages (above, note 105) and had been much discussed in legal periodicals. The problem was primarily one of priorities as between the particular mortgage

applied to unsecured debts and to bonds of public agencies. The revalorization of mortgage debts that it contemplated was not to be automatic and was not to follow any uniform rule. Instead, like the revision of the price term in bilateral contracts, it was to depend on the special facts of each case, carefully weighed and balanced by the trial judge.

The decision of November 28, 1923, received some vigorous criticism, not only on doctrinal grounds but on account of the enormous difficulties which confronted the courts on the path that they had chosen.[120] But the lower courts which had led the way toward general

debt and other secured claims. In the first place, should the claim of this mortgage creditor to a supplement over the original sum loaned be treated as a "real" right against the land? If so, should it have priority over intervening mortgages or other secured claims? And then, what if the original mortgagor has transferred the mortgaged land to another person, so that the principal obligor and the owner of the land are no longer the same person? The court pointed out that these questions could not arise in the particular case, since the mortgagor was simply trying to force the mortgagee to accept a payment in paper marks and the issue was whether this payment would discharge the whole debt. It was enough merely to hold that the mortgagor was subject to a *personal* obligation to increase his payments in proportion to currency depreciation. Article 1144 of the Civil Code caused trouble even with this solution, since it provided that a mortgagee could not refuse to surrender the mortgage documents on account of other independent claims against the mortgagor. This dilemma was resolved by the conclusion that the personal debt of the mortgagor was not so unrelated to the original mortgage debt as to make article 1144 applicable.

In later legislation the effort to accord the benefit of the original security to the revalorized claim produced some of the most complicated and difficult clauses of the revalorization acts. Third Emergency Tax Decree of 1924, art 2 (3); Revalorization Act of 1925, arts. 4-7, 21-24.

[120] Perhaps the most effective criticism was that of Heck in 122 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 203 (1924). He began by pointing out that the central question was not the actual or presumed intention of the parties to the particular mortgage agreement, but the validity of the legal tender legislation, which overrode mere private bargain in the interest of preserving the national currency. Such legislation, he declared, would be without purpose if the paper mark was expected to preserve at all times its parity with gold. Particularly the legislation at the outbreak of the war, suspending specie payments by the Reichsbank, was based on the assumption that the paper mark would depreciate. The loss to the creditor which would inevitably result was in effect a sacrifice of private claims on the altar of the national interest. This sacrifice the state was morally justified in demanding quite as much as the sacrifice of millions of human lives in the war itself. Heck was willing to concede that the progressive decline of the mark weakened and finally destroyed the interest of the state in preserving its currency in circulation at its nominal par. If it then be conceded that the legal-tender legislation was thereby rendered obsolete, the question remained whether courts could suddenly reject it without supplying new rules for current transactions. The great mass of these transactions had been based on the assumption that the legislation was still in force, so that this was not the usual case of obsolescence. The formulation of new rules for the multitude of unregulated transactions must be largely the result of arbitrary choice, and differences of opinion among particular judges were sure to follow. The most difficult problem of all was the large number of transactions already executed under the erroneous

revalorization had emphasized the imperative need for legislation,[121] and this need was undoubtedly recognized by the Reichsgericht as well.[122] Temporary legislation of this character was passed, effective February 14, 1924, and was held valid by the Reichsgericht in the face of serious attacks on its constitutionality.[123] More comprehensive legislation was passed more than a year later, effective July 15, 1925.[124] But wide areas were left by both these statutes for judicial action. From a brief survey of this legislation and of court decision, some notion may be given of the magnitude of the task which still remained.

IV

FINAL REVALORIZATION — LEGISLATION AND DECISIONS

The decision of the Reichsgericht on November 28, 1923, gave a strong impetus to the movement for a general revalorization of money obligations. As the problem moved into the arena of political debate its economic and political dimensions were quickly revealed. Powerful industrial and financial interests were opposed to any revalorization whatever. As a result of influences from this quarter the government

impression that the legal-tender act was valid. The creditor in such transactions had at least as strong a claim for judicial relief, and in some respects a stronger claim, than the creditor who had rejected payment in depreciated money. He concluded that the conflicting interests entangled in this Gordian knot could only be severed by legislation.

[121] Decisions of the Darmstadt Court of Appeal and the Münster Landgericht, above, notes 104 and 107.

[122] In the decision of March 1, 1924 (107 R. G. Z. 370), concerning the validity of the Third Emergency Tax Decree (see next note), the Fifth Civil Senate was very clear on this point. It declared that an examination of the circumstances of each individual case, without the aid of legislation, would have led to enormously multiplied litigation, excessive cost, and prolonged uncertainty, which of itself would have impaired the national credit at a critical time. The Fifth Senate expressly stated, in referring to its own decision of November 28, 1923, that this need for legislation had been understood at the time.

[123] Mar. 1, 1924 (107 R. G. Z. 370). The chief basis of the attack on this legislation was Article 153 of the Constitution of the Reich, which provided that "property" could be taken without compensation only for the general good and on the basis of statute. The court expressed some doubt as to whether any taking of property was involved at all, and suggested that the legislation was rather an attempt to regulate the relations of debtor and creditor in a controverted field of private law. But in any case the "general good" required the sacrifice of some part of the creditor's interest. To what extent the general good was promoted by the particular legislation could not be considered by courts. Nor would the court review the details of the legislation in the light of general notions of "good faith," to which many persons were still willing to appeal against the specific language of statute. (On this last point see below, note 126.) The final objection to the legislation, that it imposed a tax of unequal incidence, was still more briefly disposed of.

[124] Revalorization Act of July 16, 1923, discussed below, part IV, secs. 1-4.

gave serious consideration to legislation expressly forbidding revalorization, even by judicial decree.[125] But the forces which demanded some degree of revalorization, on social and moral grounds, were gathering strength. In support of this demand, a committee of the judges of the Reichsgericht addressed to the government a solemn remonstrance and scarcely concealed threat, in one of the most remarkable documents of the post-war era.[126] It is not surprising that the government and the legislature still stood irresolute before a task which surpassed all others in the magnitude of the interests involved and in the infinite complexity of its details. It was almost universally agreed that 100 per cent revalorization would impose a staggering burden on the whole national economy, which had scarcely begun to revive its strength. Every decision as to the rate of revalorization, as to the types of transactions in which it should be attempted and even as to the methods to be used, involved a choice between competing and irreconcilable interests. In striking a balance the only hope lay in compromise.

[125] SCHLEGELBERGER-HARMENING, ANNOTATED EDITION OF THE REVALORIZATION ACT OF 1925, Introd., p. 24 (1927).

[126] The remonstrance is given in the issue of the JURISTISCHE WOCHENSCHRIFT for January 15, 1924, p. 90. The committee pointed out that the idea of revalorization had been gradually extended over broader areas only with the utmost caution and prolonged consideration. The rejection of the nominal parity of the mark had finally occurred because its maintenance would have resulted in widespread injustice, intolerable under a reign of law. "The idea of good faith stands outside of any particular statute or of any particular provision of positive law. No legal order which deserves the name can exist without this fundamental idea. Therefore the legislator may not through his mandate frustrate a result which good faith imperatively demands." If the government, under the influence of self-seeking groups, were to carry through its proposed plan, there would be grave danger that the courts (including here the Reichsgericht) would hold the legislation invalid as in conflict with good faith, immoral, and unconstitutional. The constitutional objections suggested were those considered later in the decision of March 1, 1924 (above, note 123): that a refusal of revalorization would amount to a taking of property without compensation and to a general tax of unequal incidence. Most remarkable of all, perhaps, was the concluding suggestion that the same danger of judicial nullification would exist if the revalorization already achieved by court decision were only *in part* forbidden.

The last ground was in effect abandoned by the Fifth Senate in its decision of March 1, 1924, as to the validity of the Third Emergency Tax Decree (107 R. G. Z. 370). The court merely described as "disputed" the question whether a judge would be bound by legislation which conflicted with good faith and with "the sense of propriety of all fair and right-thinking people." But it declared that the partial revalorization ordered by this Decree represented a compromise between conflicting legal and economic interests, a compromise that was difficult to achieve and whose details could not be reviewed by courts in the light of good faith or other moral ideas. It should be noted also that the Third Senate in its decision of January 25, 1924 (as to the validity of the decree withdrawing claims against the Reich from the competence of ordinary courts), had expressly declared that legislation otherwise valid could not be set aside because of its conflict with good faith or morality. DEUTSCHE JURISTEN ZEITUNG, 1924, p. 209.

Not only did revalorization involve compromise; it required immediate action if Germany's precarious position was not to be further aggravated. The imperative need for credit, particularly foreign credit, made further uncertainty as to the rate and conditions of revalorization peculiarly perilous. When the main decision was made, the Government acted quickly. Empowered by legislation of December 1923, it laid down the broad lines of a national policy in the Third Emergency Tax Decree, effective February 14, 1924. Hastily prepared and filled with ambiguities, this legislation nevertheless supplied the main framework for the comprehensive Revalorization Act of 1925 and for the great mass of supplementary legislation which followed.[127]

It is impossible to pursue this legislation into its details in this paper, already excessively long. Nor can a summary be attempted of judicial decisions and legal commentaries which enveloped it in an almost impenetrable haze. Attention must be concentrated on the main provisions of the 1925 Act itself, and on those points in the voluminous literature which illustrate the more permanent, underlying problems.[128] The discussion may for purposes of convenience be divided into five sections: (1) the legislative rate of revalorization; (2) the terms of payment of revalorized obligations; (3) retroactivity; (4) the types of transactions revalorized by legislation; and (5) the areas left for "free" judicial revalorization.

1. *The Legislative Rate of Revalorization*

The Revalorization Act of 1925 dealt primarily with two main classes of money obligation, the mortgage of land and the negotiable bond. For mortgages of land the basic rate of revalorization was 25

[127] By 1927 there had been issued as many as 23 separate government decrees supplementary to the Revalorization Act of 1925, without counting the voluminous legislation of the separate states of the Reich on matters left for their regulation. See the index of decrees in SCHLEGELBERGER-HARMENING, DAS AUFWERTUNGSGESETZ (1927), and the legislation of the separate states, *ibid.*, pp. 738-989. As late as July 18, 1930, the revalorization of mortgages required further supplementary legislation by the Reich.

[128] No attempt has been made to digest the many dozens of books on the Revalorization Act or the thousands of articles in legal periodicals. The official reports of the Reichsgericht have been read for the period through 1930, as well as the decisions reported in the JURISTISCHE WOCHENSCHRIFT through 1927. The commentary on the Revalorization Act by Schlegelberger-Harmening has been a principal source of information, and the summary by Locher in 125 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 311 (1926) has been useful. There are brief accounts in English of the revalorization legislation by E. L. HARGREAVES, RESTORING CURRENCY STANDARDS 93-104 (1926), by the same author in LONDON ESSAYS IN ECONOMICS 157 (1927), and by Fischer in 10 J. OF COMP. LEG. AND INT. LAW, 3rd ser., p. 94 (1928).

per cent of the original gold value, and for negotiable bonds and similar obligations 15 per cent.[129] The Act was in this respect somewhat more liberal than the Emergency Decree of 1924, which adopted throughout the basic rate of 15 per cent.[130] However, even these ratios were by no means satisfactory to the very large and influential classes of creditors whose claims were in large part wiped out. The sacrifice thus exacted was made somewhat more tolerable by a tax on inflation-gains acquired through payment of debts in depreciated currency.[131] But it was long before protest subsided and before the effort to recover the enormous wealth thus transferred from class to class had lost its political force.

The extension of a flat rate such as 15 or 25 per cent over the whole range of revalorized obligations was clearly impossible. Indeed there were strong demands from influential quarters for an individualized treatment of each particular case, even at the cost of prolonged uncertainty, multiplied litigation, and arbitrary decision.[132] In the face of

[129] Act of 1925, arts. 4 and 33. The rate applied to land mortgages was also extended to annuities registered in the land registry. *Ibid.*, art. 31. The distinction between land mortgages and negotiable bonds, secured and unsecured, was rendered more natural by the highly organized system of land registry in Germany. See Neitzel, "Non-Contentious Jurisdiction in Germany," 21 HARV. L. REV. 476 at 481 (1908); Brickdale, "Land Transfer by Registration of Title in Germany and Austria-Hungary," 31 AM. L. REV. 827 (1897). The obligations primarily intended by the definition of "negotiable bonds" were those of industrial corporations, although no express limitation to this class of obligors appears in the act. The apparent discrimination between mortgages and industrial bonds is to be explained by the effort to exclude from full revalorization those purchasers of bonds who had speculated during the later stages of the inflation on an eventual redemption at or near par. Persons who had held the bonds in question since before July 1, 1920, or who had acquired them otherwise than by purchase since that date, were given an additional 10 per cent of the original debt, in the form of special non-voting shares (*Genussrechte*) which entitled them to a claim on net profits and on a proportionate share in the assets in case of liquidation. Act of 1925, arts. 37-42.

[130] Art. 2 (1) and art. 4 (1).

[131] Discussed by Pistorius, "Das Steuerrecht der dritten Steuernotverordnung," J. W., 1924, p. 475.

[132] This was of course the objective of such authors as Oertmann, whose theory of the *Geschäftsgrundlage* had been adopted so widely in the cases of the inflation period, and who urged a judicial treatment of revalorization under the "good faith" clause, without any aid from legislation. OERTMANN, DIE AUFWERTUNGSFRAGE 72-74 (1924). A somewhat different approach was recommended by Schacht, President of the Reichsbank. He contended that the rate of revalorization should depend on the economic position of the creditor, the "impoverished small rentier" being preferred over the wealthy creditor who was in a better position to stand the loss. SCHACHT, THE STABILIZATION OF THE MARK 213 (1927). The individualized method of treatment was actually incorporated in a Reichstag bill drafted by Deputy Best, which figured largely in Reichstag debates. See the resolution of the Reichstag quoted in 111 R. G. Z. 320 at 325 (1925).

these demands the legislature gave ground in various ways. First of all, it accorded special treatment to certain classes of obligors whose economic situation made this imperative — chiefly insurance companies, banks, and government agencies.[183] Second, it withdrew from the operation of the statutory rules, expressly or by implication, a very wide class of legal transactions, leaving them for "free" judicial decision in accordance with general rules of law.[184] Third, it authorized an examination of the debtor's economic position in certain extreme cases of hardship and permitted a reduction of the normal rate to a minimum of 10 per cent of the original gold value in such cases.[185]

Even in cases where a uniform rate did apply, the difficulties had only commenced when the percentage of revalorization had been fixed. For the same rate could not be applied indiscriminately to all obligations contracted within the last 20 or 30 years, in terms either of gold or of paper money at varying stages of depreciation. A sliding scale was needed by which the original value contracted for could be measured at each successive stage and then translated into stable currency values. In the preparation of such a sliding scale there were two main questions to answer. First, it was necessary to decide what date should be taken as marking the inception of the legal obligation. There were legal difficulties here of a technical character, but there were some broad considerations of policy involved as well, and the solution adopted in the Revalorization Act was a complicated one.[186] Second, it was neces-

[183] Discussed in section 4, below.

[184] Discussed in section 5, below.

[185] The language of the Revalorization Act of 1925 was carried over from the Emergency Decree of 1924 (art. 2 (1), arts. 3 and 4). It allowed a reduction to a lower limit of 10 per cent in obligations whose reduction appeared, in the light of the debtor's economic situation, to be "urgently necessary for the avoidance of a gross injustice." In such cases the debtor was required to file his claim for reduction before the appropriate revalorization tribunal by April 1, 1926, except in certain cases specified in the Civil Code for the suspension of statutory prescription. Act of 1925, arts. 8, 31. Similar provisions were applied as well to negotiable bonds, with the difference that no lower limit for reduction was fixed. Arts. 34 and 52.

In this connection should also be mentioned the more liberal provisions of art. 15, introducing various hardship factors as obstacles to *retroactive* revalorization of paid-off debts.

[186] The distinction between mortgages and negotiable bonds was basic at this point as well. In the case of mortgages, the original value of the obligation was measured as of the date of its acquisition by the present owner. In the case of negotiable bonds, the original value was measured as of the date of their issuance by the obligor. Act of 1925, art. 2. The main consideration of policy which dictated this solution in the case of mortgage obligations was the desire to discriminate against purchasers who had bought during the later stages of the inflation, often for speculative purposes. As to negotiable bonds, the same result was achieved by the distinction between old and new

sary to determine what standards of value should be used to measure the real value contracted for at the inception of the obligation. Here the legislature faced in exaggerated form all the difficulties that had begun to emerge with the progressive collapse of existing currency standards. If those standards must be abandoned because of a drastic change in the purchasing power of money, what standards of value were to take their place? A single general index of prices for all classes of transactions was hardly adequate, since one primary result of the shift in currency standards had been to derange the whole price structure and create wide disparities between different price groups. No index of prices derived from a particular group of commodities could at a given moment express the current values of other commodities or services. If legislation was to achieve exact results it would therefore be necessary to classify a very large number of legal transactions along purely economic lines and to complicate enormously the structure of the act. This difficult task was one which courts could hardly avoid if they undertook, as they willingly did, to ensure just results in particular cases left open for judicial treatment.[187] But the Government in the Emergency Decree of 1924 adopted instead, for all cases within its scope, the most accessible of all value-indices, the current value of the mark on foreign exchange.[188] It was soon felt that the wide gap between the external and internal purchasing power of the mark, persisting until the last stages of the inflation,[189] made this index unsuit-

purchasers. The dividing line was fixed at July 1, 1920, and persons who had acquired the obligation before that date were allowed 25 per cent rather than the basic 15 per cent. Act of 1925, art. 37.

But it was clearly unjust to make the date of acquisition decisive in all cases. The Emergency Decree of 1924 had made an exception for one type of case, acquisition through inheritance, which was treated as equivalent to original acquisition. Art. 2 (2). This category was greatly expanded in the Act of 1925, to include acquisition by one of the parties to a marital community of goods, by way of outright gift, and eight other cases of gratuitous acquisition. Art. 3 (1), 2-11. In effect the only type of owner who was thus discriminated against was the person who had himself acquired the debt by purchase for value. To complete the statutory system, the same categories were carried over to the field of negotiable bonds, and persons were treated as "old" holders if they had acquired the bonds by any of the specified means from a person who had held them prior to July 1, 1920. Act of 1925, art. 37 (1).

[187] For a general discussion of the valuation problem in judicial decision, see below, sec. 5 (a).

[188] Art. 2 (2). As in the system later adopted in the Revalorization Act of 1925, revalorization was attempted only in obligations paid off after January 1, 1918. Those contracted before that date were valued in accordance with the nominal parity of the mark, in spite of the considerable rise in internal prices that had already occurred by that date.

[189] GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 186-193 (1930).

able for purely internal transactions. In practical result it meant a still further reduction in the amount actually realized by the creditor. Widespread protest and debate led to the formulation, in the 1925 Act, of a more complex scale, which aimed in general at a median between the dollar-price of the mark and an index of internal wholesale prices.[140]

2. *The Terms of Payment*

The terms of payment reflect the critical position of Germany at the time when the process of revalorization began. Through most of 1924 the industrial and commercial life of Germany was brought close to complete paralysis by the strict credit policy of the Reichsbank, which was made necessary by the danger of renewed depreciation of the currency.[141] The landed property of Germany had been heavily burdened by restrictive legislation through the inflation period, but the necessities of a harassed government required it to be protected, as a principal source of revenue, against the claims of creditors.[142] The inflation itself had destroyed most of the liquid capital of Germany, had altered profoundly the habits of saving of the people and stopped the normal flow of investment.[143] Indeed it is fair to say that the urgent need of credit for industrial, commercial and governmental purposes cast a long shadow over the whole arduous effort of reconstruction.[144]

For these reasons both the Emergency Decree of 1924 and the Revalorization Act of 1925 contained provisions for a long breathing spell for debtors. As to mortgage obligations, a moratorium was declared on principal payments until January 1, 1932.[145] A further extension was

[140] The scale commenced with January 1, 1918, no attempt being made to calculate the real purchasing power of the mark before that date. For 1918 and 1919, the rate was calculated for monthly periods and from January 1, 1920, to June 1, 1923, for 10-day periods. After June 1, 1923, when the mark was well started on its final precipitous descent, the scale was given for each day. The scale, published as an appendix to the Act of 1925, was expressly made the official basis of calculation by article 2. The basis of valuation adopted in the legislative scale will be discussed below, note 188.

[141] SCHACHT, THE STABILIZATION OF THE MARK, c. VI (1927).

[142] See DEUTSCHE JURISTEN ZEITUNG, 1924, p. 122.

[143] GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 323-4 (1930).

[144] See, for example, the statement by Luther, Minister of Finance, in J. W., 1924, p. 473.

[145] Emergency Decree of 1924, art. 5; Revalorization Act of 1925, arts. 25, 36. In the Act of 1925 it was, however, provided that repayment could be contracted for at an earlier date by special agreement, and that in any event the obligor or the owner of the land subject to mortgage or negotiable bond could himself accelerate maturity on three months' notice. Art. 25 (2) and art. 36.

permitted, in cases of extreme hardship to the debtor, until January 1, 1938,[146] and an acceleration of installments was allowed in the creditor's favor only under exceptional conditions.[147] Interest payments did not commence till January 1, 1925, at the moderate rate of 1.2 per cent, and thereafter the rate of interest rose by successive stages to the rate of 5 per cent from and after January 1, 1928.[148] In the case of industrial bonds essentially the same terms of repayment were provided. Further favor was shown toward debtors in this class of obligations, not only by the low rate for normal revalorization (15 per cent), but by the provision that the class of "old" holders, to whom an additional 10 per cent was given, should receive special shares of non-voting stock (*Genussrechte*) instead of a fixed charge.[149]

3. *Retroactivity*

Morally there were strong reasons for attempting a retroactive revalorization of transactions already closed. A creditor who had accepted payment in depreciated currency, in obedience to legislative mandate, had at least as strong a claim as the creditor who had evaded payment until the return to a stable currency. But the existing doctrines of private law under which judicial revalorization had been achieved did not lend themselves readily to the overhauling of completely executed transactions.[150] It could undoubtedly be accomplished by legislation, and in framing the Emergency Decree of 1924 the Government seriously considered a general reopening of closed transactions.[151] But practical difficulties in defining its limits and a reluctance to disturb economic processes which were not yet restored to equilibrium led to a half-hearted compromise. The Emergency Decree of 1924

[146] Art. 26 (1) of the Act of 1925 provided that the personal obligor or the owner of land subject to mortgage could request a further extension until January 1, 1938, if it was "urgently necessary for the prevention of gross injustice." Such applications must be filed by January 1, 1927, with the appropriate revalorization court, except for cases in which the Civil Code allowed a suspension of rules of prescription. Art. 26 (2). These provisions applied as well to negotiable bonds. Art. 36.

[147] Acceleration was allowed where the economic situation of the creditor "urgently required" it and the opposite party would not thereby suffer a material aggravation of his economic situation. But the earliest date at which prepayment could be demanded was January 1, 1926, and installments were not in that case to exceed in any one year 1000 marks or 10 per cent of the principal debt. Again, the creditor's application must be filed by April 1, 1926, with an exception for cases of disability. Art. 27 (1) and (2).

[148] Act of 1925, art. 28.

[149] Act of 1925, arts. 37-44.

[150] See below, sec. 5 (b).

[151] See Luther, Minister of Finance, writing in J. W., 1924, p. 473.

allowed retroactive revalorization of executed transactions[152] only where the creditor in accepting payment had expressly reserved his claim to a larger sum.[153] This solution met with widespread criticism. At the same time it was generally agreed that some limit must be set to the redressing of past injustice. The debate centered chiefly around the date at which inflation losses would be written off, and the date finally chosen was June 15, 1922. Mortgage obligations fully paid before that date, without any reservation of rights by the creditor, were excluded from revalorization.[154] Even this indulgence was denied to holders of negotiable bonds. If payment had been unconditionally accepted in such cases and if the writing evidencing the debt had been surrendered, revalorization was expressly forbidden.[155]

4. *The Types of Transactions Revalorized by Legislation*

The various legal, economic, and political factors at work were most clearly shown in the selection of legal transactions in which revalorization would be attempted. At the outset, it was obvious that the public obligations of the Reich and its constituent states could not be treated

[152] It should be noted that transactions were not treated as executed if litigation was still pending as to the rate or admissibility of revalorization. The Reichsgericht held that the emergency Decree of 1924 must even be applied to cases then before it on revision proceedings. 107 R. G. Z. 370 at 373 (March 1, 1924).

[153] Art. 11. That this provision was not wholly without a basis in good sense is indicated by the fact, asserted in the Reichstag debates, that a reservation of rights had become the common practice of creditors by the spring of 1922. The statutory test put a premium, then, on diligence and foresight by the creditor, perhaps an excessive premium. If it was to be justified it must be on the ground that an express reservation of rights, like the taxpayer's "protest" in paying illegal taxes, served notice on the debtor that he could not safely assume the transaction to be closed.

[154] Article 14 of the 1925 Act allowed revalorization wherever the creditor, in accepting payment, expressly reserved his right to a larger sum. Article 15 allowed it even without such reservation in obligations paid between June 15, 1922, and February 14, 1924, the latter date being the date of the Third Emergency Tax Decree. Any further retroactivity was expressly excluded by article 19. But the comparatively liberal provisions of article 15 were to a large extent counteracted by the "hardship" clause which was attached. This clause excluded retroactive revalorization where the debtor's economic position had been materially impaired by the inflation, and in other situations.

It was estimated in Reichstag debates that the mortgages affected by the retroactive clauses of the 1925 Act had a face value of from 25 to 30 billion marks. Revalorized at 25 per cent, the debt thus revived was 7 billion marks. Even so, Deputy Best urged a further extension of the period to July 1, 1921, claiming that about half the mortgages owned by savings banks had been paid off by the mortgagors between that date and July 1922. SCHLEGELBERGER-HARMENING, COMMENTARY ON THE REVALORIZATION ACT 283 (1927).

[155] Act of 1925, arts. 35, 49, 53, and 57 (2).

in the same way as other debts for the purpose of revalorization.[156] The reasons for this exemption were so persuasive that even the most enthusiastic advocates of revalorization accepted it without protest.[157] The presssure of foreign creditors, ending in the French invasion of the Ruhr, had been a principal cause of financial disaster. Through the adoption of the Dawes plan this pressure had been somewhat relaxed, but reparations remained a primary charge on the budget and aggravated the desperate shortage of credit. Accordingly the Revalorization Act of 1925 applied only to the obligations of such public agencies as were engaged in ordinary business enterprise.[158] By statute effective the same day as the Revalorization Act itself, provision was made for the eventual repayment of government bonds at the basic rate of 2.5 per cent.[159] In the end this indirect repudiation of practically all the internal public debt contributed greatly to the rapid recovery of Germany, although it was achieved through the deliberate sacrifice of large and socially valuable classes in the population.[160]

Banks and insurance companies likewise obtained special treatment of their obligations. From some points of view their economic position was by no means desperate. Their assets, consisting largely of money obligations, had suffered depletion during the general evaporation of paper mark obligations. But their liabilities were correspondingly reduced; and the partial reconstruction of their assets through the revalorization of mortgages and negotiable bonds supplied the avenue for a

[156] As early as October 24, 1923, the government had by decree withdrawn claims against the Reich from the competence of ordinary courts. Serious doubts as to the constitutionality of this decree were set at rest by the assembled Civil Senates of the Reichsgericht three months later. DEUTSCHE JURISTEN ZEITUNG, 1924, pp. 209, 289.

[157] OERTMANN, DIE AUFWERTUNGSFRAGE 71-72 (1924).

[158] Articles 51-54, adopting for the negotiable bonds of such agencies the same rules as for negotiable bonds of private obligors. In article 51 (2) it was provided that the Reich Minister of Justice, with the concurrence of the Reichsrat, should decide what public corporations fell within the statutory class.

[159] Act of July 16, 1925 (REICHSGESETZBLATT, 1925, I, 137). The paper mark obligations of the Reich, including those assumed on the transfer to the government of the nationalized railways (art. 2), were transformed by this Act into new long-term obligations (art. 13). Obligations issued during the inflation period were valued by special methods, but for earlier issues the basic rate was 2.5 per cent (art. 5). As in the case of negotiable bonds of private corporations, a distinction was adopted between "old" and "new" holders, the dividing line being likewise July 1, 1920 (arts. 9-11). Special annuity payments were permitted for the benefit of "necessitous" persons, a class that was however very narrowly defined (arts. 18-27). The obligations of the constituent states of the Reich and of municipalities were likewise revalorized at the basic rate of 2.5 per cent (arts. 31 and 40), with some variations of detail as to methods and conditions of revalorization.

[160] ANGELL, THE RECOVERY OF GERMANY 308-314 (1929).

proportionate revalorization of their liabilities. The Revalorization Act of 1925 therefore adopted a system of partial receiverships for credit agencies whose assets were in part restored by revalorization. This group included not only insurance companies, but also savings and mortgage banks. Their revalorized assets were transferred, together with other general assets to be selected by government officials, to a receiver for distribution to creditors.[161]

Commercial banks were in a different position. Their assets consisted largely of short-term commercial paper, which in general was not subject to revalorization.[162] The overhauling of their complex operations during the progress of the inflation would have entailed an impossible task. There was a strong popular demand for at least a partial revalorization of commercial bank deposits, on the ground that the acquisition of foreign exchange [163] and the charging of enormous rates of interest [164] by commercial banks had left them in a strong position. But members of the government were able to persuade the Reichstag that even a very limited revalorization would impose an intolerable burden on smaller banks and seriously endanger the whole credit structure.[165] Accordingly the Revalorization Act imposed what was, with one exception,[166] its only absolute prohibition of revalorization in purely private transactions. Commercial bank deposits were declared not to be subject to revalorization in the absence of independent agreement by the parties.[167]

[161] The provisions as to insurance companies are contained in arts. 59-61; those as to savings banks in arts. 55-57; those as to mortgage banks in arts. 47-50.

[162] 110 R. G. Z. 40 (Mar. 17, 1925, Second Senate).

[163] There was some basis for the charge that commercial banks, in spite of government restrictions on foreign exchange transactions, were able to increase very greatly their foreign credits expressed in terms of stable currencies. See GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 73-4 (1930).

[164] The rates of interest charged by banks on commercial loans reached extraordinary figures. After September 1923, the Reichsbank itself charged 900 per cent. But even these rates were often insufficient to compensate for the depreciation in the currency between the date of the loan and its repayment. See GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 65-66 (1930).

[165] A brief summary of the discussions in the Reichstag is given by SCHLEGELBERGER-HARMENING, COMMENTARY ON THE REVALORIZATION ACT 467-8 (1927).

[166] This exception was for the case of current accounts, partly on account of practical difficulties in segregating the items for valuation and partly on the ground that the maintenance of a current account in terms of paper money indicated of itself an essentially speculative contract during times of extreme inflation. Art. 65, Act of 1925.

[167] Article 66, providing in substance that revalorization was not permitted in claims arising out of a loan or deposit of money with an enterprise whose ordinary business consisted of the acquisition and reloaning of money.

The basic rules of the 1925 Act applied, as already stated, to two main classes of money obligation, the land mortgage and the negotiable bond. The two classes were distinguished not only by their functions in the credit economy of Germany but by the types of statutory regulation which they required. In the case of mortgages the principal difficulties arose from the policy adopted of according the benefit of the real security to the revalorized personal debt. This policy necessitated some complicated rules for priorities between competing lienors [168] and for cases of transfer of the land subject to mortgage, resulting in separation of the personal obligation from ownership of the land.[169] These and similar problems produced a flood of litigation and of supplementary legislation, whose ramifications cannot be examined here. In the case of negotiable bonds the legislature did not encounter the highly organized system of title registry which so obstructed its treatment of the land mortgage. But the revalorization of industrial bonds required a considerable excursion into the law and administration of private corporations, and left behind an abundant legacy of difficult problems.

5. *"Free" Judicial Revalorization*

The types of money obligation that remained for readjustment were those to which a uniform and generalized method of treatment was wholly unsuitable. Here the legislature was fortunate in having at hand a set of doctrines already formulated by courts of law and subjected to the test of judicial experience. The bewildering variety of private law problems thrown up by the collapse of the national currency would have required an infinitely more complex system of statutory rules for their solution. Convenience and the expressed views of courts themselves persuaded the legislature to abdicate its function and leave these problems to the courts. In the Emergency Decree of 1924 responsibility was transferred to the courts in some important fields which lay well within the scope of the statutory scheme. The concurrence of statutory and judicial rules of revalorization served, however, to increase confusion. In the Act of 1925 this competition was greatly reduced and the statutory methods were made to apply exclusively in most of the transactions selected for statutory treatment.[170] Neverthe-

[168] Act of 1925, arts. 6, 7, 9, 20-23. See Mügel in DEUTSCHE JURISTEN ZEITUNG, 1927, p. 490.

[169] Act of 1925, arts. 17, 21.

[170] The chief source of confusion had been the distinction drawn by the Third Emergency Decree between personal obligation and real security, in land mortgages, railroad bonds, and pledges of vessels. Article 3 permitted the personal obligation to be revalorized in accordance with "general rules of law," while the real security was re-

less there remained a heterogeneous group of claims secured by mortgage in which a uniform revalorization of 25 per cent would have produced unjust results. This group, defined by the Act, was removed from the statutory scheme and made subject to "general rules of law." [171] Still more important, it was expressly declared that all transactions which did not fall within the statutory classes (chiefly mortgages and negotiable bonds) were likewise to be decided in accordance with "general rules of law." [172]

The problems thus left for judicial decision were too numerous and too varied for complete enumeration. The effects of the inflation had been felt in the furthest reaches of German private law, some of them remote from the familiar fields of contract law where judicial intervention was first required. For example, the measure of recovery in tort actions for damages was directly influenced by the purchasing power of money,[173] and so were other non-contractual claims, such as claims based on unjust enrichment.[174] Equally far afield were the problems raised in the law of wills by the depreciation in the value of money

stricted to 15 per cent of the original claim. In the Act of 1925 the general rule was announced that personal obligation and real security must be revalorized at the same rate (art. 9). But the distinction was not wholly abandoned and considerable confusion remained. For a brief survey see Locher, "Der Stand der Aufwertungsfrage," 125 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 311 at 326-8 (1926); also Abraham, "Ein Jahr Aufwertungsgesetz," DEUTSCHE JURISTEN ZEITUNG, 1927, p. 55; Hagen in J. W., 1925, p. 2534.

[171] The device adopted was a prohibition of more than 25 per cent revalorization of all "capital investments." The Act then proceeded to exclude from the category of "capital investment" a variety of specific transactions, such as partition agreements between heirs, married persons, parents and children; agreements for maintenance and support; partnerships, etc. (art. 63). In article 10 the same main categories are referred to as exceptions to the rules for land mortgages, with one very important addition — purchase money mortgages for the balance due on the purchase price of land. In both places the Act provided that the excepted classes of transactions should be revalorized in accordance with "general rules of law."

[172] Act of 1925, art. 62.

[173] An increase in tort damages to compensate for the intervening depreciation of money had already been held permissible during the inflation period. See above, note 84. For later cases see 106 R. G. Z. 184 (Jan. 10, 1923); 109 R. G. Z. 61 (Oct. 11, 1924); J. W., 1925, p. 348 (Dec. 13, 1924). In this connection should also be mentioned the case of appropriation by the state on eminent domain, where independent doctrines also authorized an increase in the amount recoverable. See Locher, "Der Stand der Aufwertungsfrage," 125 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 311 at 339 (1926); Tietz in J. W., 1928, p. 456.

[174] A revision of money obligations arising through unjust enrichment had also been allowed during the inflation period. See above, note 115. For later cases, see 108 R. G. Z. 120 (Mar. 12, 1924); 114 R. G. Z. 342 (Oct. 4, 1926).

legacies.[175] At another extreme were difficult problems in the conflict of laws that legislation could not have anticipated.[176] Nor did the return to a stable currency relieve the courts of the embarrassments caused by continued fluctuation in the value of money. The severe deflation which followed after the inflation was arrested presented questions almost as difficult as those surviving from the inflation period.[177]

However, the bulk of litigation after 1924 centered around the same areas as had been the main battleground in the years immediately before. Application of the revalorization acts themselves absorbed a large share of judicial energy; the problems of statutory interpretation there involved were numerous and difficult. Nevertheless the field in which new judicial doctrines were still most urgently needed was the oldest and most familiar one — the bilateral contract of sale. This field had been left for judicial treatment by the revalorization acts. It was here that the battle lines were drawn most sharply on two central issues, methods of valuation and retroactivity.

(a) *Methods of Valuation.* The problem of valuation had appeared as soon as the Reichsgericht first ventured timidly and reluc-

[175] See 108 R. G. Z. 83 (Feb. 21, 1924); GESETZ UND RECHT, 1924, p. 193; also Kohler, "Geldentwertung und Erbenausgleichung," 122 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 70 (1924). Likewise annuities created independently of contract could be revalorized where the depreciation of money had made them altogether inadequate. 108 R. G. Z. 292 (Mar. 3, 1924).

[176] A general discussion of conflicts problems raised by the revalorization will be found in J. W., 1926, p. 2345; J. W., 1928, p. 137; and 14 J. of COMP. LEG. & INT. LAW, 3rd ser., 66, 73 (1932). See especially the interesting cases on the application of German rules to transactions originating in Czecho-Slovakia, Austria, and France, where varying degrees of monetary depreciation had been experienced and courts had uniformly denied general revalorization. 119 R. G. Z. 259 (Dec. 14, 1927); 120 R. G. Z. 70 (Jan. 27, 1928); J. W., 1925, p. 1986 (April 6, 1925); J. W., 1926, p. 1323 (Feb. 25, 1926).

[177] One of the earliest of these cases was the decision in 110 R. G. Z. 251 (Mar. 9, 1925), involving a loan on November 23, 1923, of 5 quadrillions in paper marks at 575 per cent interest, obviously a risk-rate contemplating further inflation. The question was whether the stabilization of the paper mark, accomplished shortly after the formation of the contract, should release the borrower from a rate of interest that was thus made exorbitant. The effect of the prolonged deflation which followed stabilization was involved in a series of cases. Some of the Senates of the Reichsgericht were willing to apply the "good faith" clause to these comparatively minor changes in the value of money, but in the end all Senates concurred in ignoring them. See the review of the cases in 130 R. G. Z. 368 (Nov. 28, 1930); Wolffsohn in J. W., 1925, p. 450.

A related problem was that raised in contracts of the inflation period containing stable-value clauses (gold or price-indices as measures of value). In two cases the Reichsgericht refused to intervene where subsequent changes in the value of gold or in the general level of prices created a major discrepancy between performances on either side. 118 R. G. Z. 346 (Oct. 7, 1927); 125 R. G. Z. 3 (May 30, 1929).

tantly into the field of price-revision. At first judicial relief had been qualified and conditional; that is to say, rescission of contracts of sale was authorized unless the purchaser would consent to a "reasonable" increase in price. This conditional relief involved only indirectly a substitution of new standards of value for the monetary standards adopted originally by the parties. But who was to determine what was a "reasonable" price under altered conditions? The answer in the early cases had uniformly been, the trial judge. The restricted appellate powers of the Reichsgericht enabled and indeed required it to shift onto lower courts a grave responsibility.[178]

As the doctrines of the Reichsgericht were applied over wider areas it was gradually forced to formulate rules for the guidance of lower courts. In the important 1922 case of the *Pachtinventar* the principal dispute between the parties was precisely on the question of valuation. With obvious reluctance the court was driven to announce general rules of valuation, essentially economic in character, which it was willing to impose on lower courts.[179] Perhaps nothing more illuminating than these rules would have been extracted from the court if it had not determined in the last stages of the inflation to undertake a general judicial revalorization of all money debts. After this step was taken the court could not for long postpone decision on some major economic issues.

There were three general standards of value which courts could use as substitutes for the abandoned paper mark — the gold value of the mark, wholesale price indices, and cost-of-living indices. The choice of one or another of these standards would lead to very great differences in practical result. The inflation in Germany had produced, characteristically, a wide disparity between prices in different commodity groups and a continual and bewildering shift in relations between them. Most pronounced of all was the gap between the gold-value of the mark (represented ordinarily at that time by the current price of the mark in American dollars), and its internal purchasing power. But there was almost as wide a gap between internal wholesale and retail prices, particularly if attention were concentrated in the wholesale group on commodities that entered largely into foreign trade.[180] The customary lag of retail prices and wages had been greatly

[178] See, for example, the important decisions in 100 R. G. Z. 129 (Oct. 21, 1920), and 106 R. G. Z. 7 (Jan. 6, 1923).

[179] See above, notes 78 and 80.

[180] For a statistical summary of the course of prices in various price groups see the tables in GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GER-

accentuated by government price control of basic commodities, most of which were in the retail class. On the whole this regulation had been ineffective, except in the case of rent restrictions imposed on real property.[181] But it had served to slow up considerably the processes of readjustment to a rapidly rising price level, and to widen the gap between various price groups.

One of the first and clearest propositions to emerge was the unsuitability of the gold-price of the mark as a measure of value for internal transactions.[182] The gold-price was fixed, within a narrow range, by the price of the mark on foreign exchange, in terms, that is, of currencies that remained on a gold basis. It was well known that the decline of the mark on foreign exchange had preceded its decline in internal purchasing power by wide margins through most of the post-war period. Furthermore, its movements on foreign exchange had been influenced by speculation, by political factors, by the pressure of reparations payments, and by the flight of capital from Germany itself.[183] A value that fluctuated so capriciously could not be fairly applied as a standard of performance in private contracts. The practical result of its application would be in most cases to reduce very greatly the creditor's recovery.

These considerations of justice and convenience seemed irresistible. They were sufficient to persuade the legislature in 1925 to abandon the gold-price of the mark as the exclusive measure of value in statutory revalorization.[184] And yet the theoretical arguments for retention of the gold-price were sufficiently powerful to divide the Reichsgericht into opposing camps. The conflict was provoked by the Sixth Civil Senate, which imposed the gold-price as the upper limit of revalorization in contracts of sale.[185] The argument used to justify this result

MANY, 1920-1923, pp. 178-9 (1930). A comparison of the results reached by use of dollar-price, wholesale-price, and cost-of-living indices for successive dates during the inflation is given in J. W., 1925, p. 2220.

[181] On government rent regulations, see below, note 196.

[182] This appears very clearly in the *Pachtinventar* decision of 1922, above, note 80. The rules of valuation there stated referred only to the *Pachtinventar* problem, but the reasons given for the unsuitability of the gold-price were applicable to practically all internal transactions.

[183] The most convincing description of the mark's erratic course on foreign exchange is that of the Assembled Civil Senates in the valuation case of March 31, 1925 (110 R. G. Z. 371).

[184] Above, note 140. For further discussion, see below, note 188.

[185] 109 R. G. Z. 146 (Nov. 7, 1924). See also 109 R. G. Z. 258 (Nov. 21, 1924), where the Sixth Senate declared that an attempt to fix the "intrinsic" value of the mark was in itself proper, though not called for by the type of transaction in-

did not deny that the gold-price, either as exclusive standard or as maximum limit, would greatly reduce the creditor's recovery. The argument was aimed rather at the theory and purpose of revalorization, which the Sixth Senate declared to be the correction of the expressed price-term on account of the intervening change in the value of money. If the argument had stopped there no dispute need have arisen. But the court then proceeded to inject the notion that the correction of the price-term could not go beyond the real "intrinsic" value of the sum expressed in paper marks; and the further notion that this "intrinsic" value would in most cases be the current value of the paper-mark on foreign exchange.

These views met vigorous contradiction from the First and Second Civil Senates.[186] And in the form in which they were stated it was easy for the Assembled Civil Senates to refute them a few months later.[187] The most essential and yet the most vulnerable point in the argument was the assumption that money necessarily has an "intrinsic" value, as distinguished from its purchasing power as reflected in the prices of commodities. This assumption was declared by the Assembled Senates to be not only doubtful as a matter of economic theory but irrelevant in any case in the application of the "good faith" test (art. 242) to legal transactions.

Beneath the issues thus formulated there lay another far more fundamental: whether the value of money should be treated for legal purposes as an essentially unitary conception, or whether it should be recognized that the value of money varied widely with every commodity sold. The question thus raised was but one aspect of the basic problem, whether generalized or individualized methods of revalorization should be used. When the legislature was presented with the valuation question it could and did adopt, for its special purposes, a generalized scale of values that applied indiscriminately to all transactions within the scope of its legislation.[188] But courts from the be-

volved in the particular case. In an earlier case on June 3, 1924, the Sixth Senate had flatly said that in bilateral contracts of sale revalorization above the gold-price at the time of the contract could "never" be demanded. J. W., 1924, p. 1867.

[186] The First Senate had already decided two cases in accordance with reasoning that was directly inconsistent with that of the Sixth. 108 R. G. Z. 379 (Sept. 17, 1924); 109 R. G. Z. 97 (Oct. 27, 1924). The Second Senate declared its adherence to the views of the First and its rejection of those advanced by the Sixth, in 109 R. G. Z. 241 (Nov. 27, 1924).

[187] 110 R. G. Z. 371 (Mar. 31, 1925).

[188] The calculations which were the basis for the legislative scale in the 1925 Act are set forth in the official summary attached to the Government's draft of revalorization legislation. See SCHLEGELBERGER-HARMENING, COMMENTARY ON THE REVALOR-

ginning had pursued a more ambitious objective, a close scrutiny and careful weighing of all the facts in the individual case. What they now had to decide, in fields where statute did not reach, was whether this objective required them to recognize that the mark through most of the inflation did not possess a generalized "purchasing power" but rather that its power to attract commodities reflected the variations and disparities of the whole price-structure during inflation.

The same question was presented under another disguise among the questions asked of the Assembled Senates by the embattled Sixth. The problem here was in form more specific. Was it permissible in wholesale contracts to take into account the present market value of the particular commodity sold? This problem was by no means restricted to wholesale contracts; it was soon to appear in many other forms. But wholesale transactions were especially suited for a test of the valuation issue. In such transactions current prices of the commodities involved would be more readily ascertainable and more completely standardized than in any other large group of transactions.

The First Civil Senate had declared that the price to be exacted from the purchaser should coincide as closely as possible with the *present*

IZATION ACT OF 1925, pp. 173-5 (1927). After referring to the low purchasing power of the mark on foreign exchange and its very much higher purchasing power in internal transactions, the official summary proceeded to reject the retail-price index as a standard of value for revalorizing mortgages and negotiable bonds. It pointed out that if money had not been loaned by the creditor, it could not in the *normal* case have been used during the inflation for the purchase of consumption goods, whether those consumption goods were purchased for consumption or by way of investment. The chief reasons for this broad conclusion were (1) that there were physical limits to the creditor's own ability to consume, (2) the purchase of basic commodities as an investment would have amounted to profiteering and would have violated the criminal law, and (3) if creditors *had* done this on a large scale the prices of consumption goods would have been forced up. From the debtor's side also it was unlikely that money borrowed would normally be translated into consumption goods, since the object of borrowing money was usually to make additions to plant and equipment or to assist in the operation of business enterprise. Furthermore, he would be precluded from purchasing consumption goods for purposes of investment by the same factors that prevented the creditor from doing so.

There remained the possibility, for both creditor and debtor, of investing money in land and corporate stocks. The most forcible argument against using land values as the basis for calculating the mark's internal purchasing power was the complete absence of any general index of real estate prices during the inflation. And as to both land and corporate stocks there was the more serious objection that *normally* the purpose of borrowing money would not be, from the debtor's side, to invest in either of these forms of property. The conclusion was that the only standard left that could be applied over a very wide area was the wholesale-price index. Accordingly this index was combined with the dollar-price of the mark, and for most of the period a median between the two was struck.

market value of the goods. Among the reasons urged for this position were (1) the complete unsuitability of retail-price and cost-of-living indices in wholesale transactions, and (2) the wide gaps between various commodities grouped together in the wholesale-price index but subjected to very different economic influences. From these premises it followed that no general index could provide a fair standard for any particular contract; and *a fortiori* (though this the court did not need to decide) no such index could serve for all contracts.

This course of reasoning was given the full approval of the Assembled Civil Senates. The use of the present market price was also held to be justified by considerations which introduced still further complications. The Assembled Senates pointed out that internal prices during the inflation period had been nominally high but in reality low, in relation to commodity prices in foreign countries. Since stabilization a sharp and general rise in real prices had occurred, and this needed to be taken into account. It would be unjust, as the First Senate itself had suggested, to extract goods from a vendor by legal process, unless he were assured a price that was fair not only at the date when delivery was originally due but at the date when it was actually made. In short, the object of revalorization was not simply to ascertain the "real" value of the money contracted for. That value was not ascertainable in general terms and, if it were, it should not necessarily control in an economic setting that was profoundly altered.

Underlying the reasoning of the Assembled Senates was the assumption that in executory contracts of sale [189] one important object of revalorization was to insure a safe and orderly transition from an inflation-economy to the higher real price level of stabilization.[190] The latter objective had been urged in another form by persons who analyzed this higher price level as the reflection of the "general impoverishment" from war and inflation.[191] Cast in so appealing a form, though

[189] It should be observed that the decision of the Assembled Senates was directed only to contracts of sale by wholesale. Later cases, however, applied its reasoning to other types of contracts, including contracts for the sale of land. The limitation to *executory* contracts, on the other hand, is important. Other decisions made it clear that if the vendor of goods or services had already performed, it was not necessary to bring the unpaid price into conformity with the present value and his claim was to be treated as a simple money obligation. 109 R. G. Z. 97 (Oct. 27, 1924); 118 R. G. Z. 346 at 353 (Oct. 7, 1927); and see J. W., 1925, p. 1747 (Mar. 20, 1925).

[190] That this was the real purpose of taking into account the level of post-stabilization prices was recognized by contemporary commentators on the decision. Abraham in J. W., 1925, p. 343; Oertmann in DEUTSCHE JURISTEN ZEITUNG, 1925, p. 995; Traumann, *ibid.*, 1925, p. 1474; Boeters, *ibid.*, 1926, p. 558.

[191] The chief exponent of the *Verarmungsfaktor* was Zeiler, who attempted to

of doubtful validity as a matter of fact,[192] the "impoverishment-factor" made great headway in judicial decision and enormously complicated the whole valuation problem.[193]

It should be observed that the rulings of the Assembled Senates which we have been examining were all permissive — that is to say, they admitted the propriety of taking account of the factors in question. The only test they specifically rejected, the gold-price as an *upper limit* of recovery, would have had the effect of restricting rather than enlarging judicial discretion. The total result was of course to intensify the uncertainty which confronted the trial courts. This was even more distinctly the result of other suggestions of the Assembled Senates made

compute the total loss in national wealth through war and inflation and to reduce it to index figures for periodic intervals. The results of his calculations were published in the JURISTISCHE WOCHENSCHRIFT, 1923, p. 803; 1924, p, 1129; 1927, p. 2882; 1928, pp. 1339, 1341; and in numerous intervening issues.

[192] The destruction of wealth through war had of course been enormous and irretrievable. But the careful estimate of GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION, c. XII, suggests that the collapse of business activity in the last three months of the inflation was more than offset by the stimulus to production in the earlier stages. Still more remarkable is his conclusion (c's. XI and XII) that Germany's international position was actually improved by a net gain of from 4 to 5 billion gold marks, largely on account of foreign purchases of paper money under the persistent delusion that Germany would eventually stabilize.

[193] The post-stabilization shift in the price-level affected different types of transactions in different ways. As has already been suggested, executory contracts for the sale of goods or services would ordinarily need to be revised in the vendor's favor. Likewise in contracts that had been reduced to simple money obligations, the higher prices (decreased purchasing power of money) of the post-stabilization era would seem at first appearance to have required revision in the creditor's favor. For example, if an owner of property damaged through tort had expended paper marks on its repair; or if the purchaser of goods had bought a substitute in the open market on the vendor's default — in either case the claim would be primarily one for money damages. If the value of the paper marks expended were translated into a stable currency or gold as of the date of the expenditure, one would expect a supplement to be added to the sum so fixed, in order to allow for the decreased purchasing power of gold after stabilization.

But the calculations were much more complicated than this. The question had to be asked — what would have been done with the money expended on repairs or on a self-help purchase of goods *if it had not been* so expended? If it had been held as money it would of course have lost all value. If it had been invested, the progressive destruction of capital assets by the inflation made it unlikely that any particular creditor would have realized out of any expenditure the value originally put in. The real value of the money expended would therefore have to be calculated in terms of the fate that would have overcome it if it had been otherwise expended. This meant an investigation *in each case* of the opportunities available to the particular creditor for investment in assets that would have preserved their value. In such calculations there was clearly but little help to be derived from indices of the national wealth or of the general price level. J. W., 1925, p. 1376 (Feb. 21, 1925); J. W., 1925, p. 1105 (Oct. 12, 1924); 117 R. G. Z. 252 (June 15, 1927); 111 R. G. Z. 342 (Oct. 7, 1925); 112 R. G. Z. 324 at 329 (Jan. 16, 1926); and *cf.* 119 R. G. Z. 231 (Dec. 9, 1927).

at the same time. The First and Sixth Senates had agreed completely on one point, that retail-price or cost-of-living indices were wholly unsuitable in wholesale transactions. But the Assembled Senates declared the use of retail-price indices to be entirely permissible as a guide to discretion. Another method of valuation suggested by the First Senate, laying heavy emphasis on the relation between the contract price and the market price at the time delivery was originally due, was also declared to be permissible but not mandatory.[194] Most important of all, the Assembled Senates indicated great reluctance to formulate tests of valuation in the form of rules of law. The First Senate had begun to extend appellate control over the process of valuation by declaring that the proper method of valuation in each case was a matter of law and the choice by the lower court was subject to appellate review.[195] This tendency was somewhat checked by the Assembled Senates, which declared that the question of valuation should be treated as a question of fact and no further attempt made to restrict the powers of the fact-finding judge by general rules of law.

The confusion which remained throughout the whole field of valuation is vividly shown in contracts for the sale of land. Here the difficulties found in the field of wholesale contracts were enormously multiplied. In the first place, prices of real estate had remained persistently lower than prices of other commodities throughout the inflation. This had been due to a number of causes, most important of which had been the government's rent restrictions, which had successfully confiscated the income of much of the nation's landed property.[196]

[194] The First Senate in 109 R. G. Z. 97 (Oct. 27, 1924) had been inspired by the feeling that too heavy an emphasis on the market value at the time of suit might carry price-revision too far and ignore the terms of the original agreement. It therefore declared that any difference between contract price and market value at the time performance was originally due should be carried over against the present market value, and a deduction or increase made in the same ratio. The First Senate also declared that ordinary principles of contract law required an assumption of risk by the parties as to changes in the general conditions in commodity markets, or in the demand or supply of the particular commodity. It thus returned to the notion that the purpose of revalorization was only to allow for the depreciation of *money*, and not to insulate the parties against the risk of ordinary price changes through influences on the *commodity* side. The Sixth Senate had much good sense on its side when it criticized this last suggestion as imposing an impossible task on the judge. 109 R. G. Z. 146 (Nov. 7, 1924).

[195] 108 R. G. Z. 379 (Sept. 17, 1924); 109 R. G. Z. 97 (Oct. 27, 1924).

[196] The effect of the government's rent policy is shown by the table of average prices for 1920-1923 given by GRAHAM, EXCHANGE, PRICES, AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, pp. 178-9 (1930). Throughout the period from 1920 to 1923 the average of real rentals in Germany was never more than 15.5 per cent of the 1913 average, a figure that was reached in May 1921. For the same

But beyond this was the wide disparity between different classes of land (e.g., agricultural and residential property), and between tracts of the same general class whose value shifted with the economic fortunes of various economic groups in the population.[197] When to these factors was added the general paralysis of the real estate market during the inflation, it can be seen that valuation became mere guesswork. Accordingly, in the valuation of land the Fifth Senate refused to accept any single standard of value as exclusive.[198] The gold-price of the mark, though not by any means the most significant index of value, could be considered. The same was true of the official cost-of-living index published by the government during the inflation at periodic intervals.[199] The value of the land at the time of the original contract was more important, since the relation of that value to the contract price should so far as possible be preserved and the terms of the contract revised no more than justice required.[200] The value of the land at the time the suit was brought should also be considered. But this last test was not the only one, or even the most important; hence the lower court decree, which restricted the trial judge to the present value,

month the average of prices for imported wholesale commodities was 116.4 per cent of the 1913 average; the average of retail prices was 107.1 per cent of the 1913 average; and the average wage of unskilled laborers was 87.2 per cent of the 1913 average. After May 1921 the spread of prices became much greater. Through 1922 and 1923 the average real return from rented land was for the most part around 1 per cent and 2 per cent of the 1913 figures.

For a description of other factors which co-operated to keep real estate values at a low level through the inflation, see Boeters in DEUTSCHE JURISTEN ZEITUNG, 1926, p. 558.

[197] For a general account of land values during the inflation see Kaspar in J. W., 1925, p. 194.

[198] J. W., 1925, p. 2241 (June 17, 1925, Fifth Senate). The action was one by a mortgagee for revalorization of a purchase money mortgage. It will be recalled that mortgages for the balance due on the purchase price of land sold were left by the Revalorization Act of 1925 for revalorization in accordance with "general rules of law."

[199] In a decision of April 1, 1925 (J. W., 1925, p. 2232), the Fifth Senate had said that the principal basis of valuation in land sales should be the cost-of-living index, though the present value of the land could be looked to "to a certain extent." It should be observed, however, that in this case the court was merely asked to reverse a lower court decree which had adopted the gold-price of the mark as the sole basis of calculation (with a further reduction on account of the "impoverishment-factor").

[200] The court pointed out that popular ignorance as to the nature and effect of currency depreciation had led to many sales of land at prices far too low, in view of the mark's real purchasing power at the time. The correction of such errors of judgment was declared to be beyond the scope of revalorization. In an earlier decision of March 11, 1925 (J. W., 1925, p. 1626), the Fifth Senate had been even more emphatic about the necessity for preserving the relationship between price and value at the time of the contract, so that the terms of the contract be given the fullest possible effect.

was erroneous, since his discretion should be left entirely unrestrained.

The Reichsgericht retained what control it could over the whole process of valuation in the far-flung fields in which its doctrines controlled. In some classes of transactions it felt able to select a standard of value that could fairly be made the exclusive standard.[201] In other classes of transactions, in which the discretion of trial courts was ordinarily supreme, the Reichsgericht could still intervene if the results reached seemed grossly unjust.[202] But the great bulk of litigation on these questions pointed clearly to one conclusion — the inflation which had destroyed so much had shattered the whole network of economic relationships from which standards of value were derived. Courts were forced to struggle with an economic problem for whose solution no economic standards were left. The last resort must be the moral sense of a trained judiciary.

(b) *Retroactive Revalorization.* The demand for retroactive revalorization drew its strength from the tardiness with which the legal order had responded to the swift course of economic change. To accede to the demand was really to admit that flagrant and widespread injustice had resulted from the forced circulation of the mark at its nominal par. Against this injustice neither legislation nor judicial decision had been able to provide in time.

The obstacles to retroactive legislation were numerous and formidable. On the economic side the consequences were serious. To overhaul an enormous mass of executed transactions would not only provoke a powerful political opposition but jeopardize the nation's

[201] For example, in annuities intended for the purpose of maintenance and support the Reichsgericht indicated its approval of the cost-of-living index as the basis of valuation, in 108 R. G. Z. 395 (Sept. 25, 1924).

[202] It would be impossible to catalogue the enormous variety of decisions in which the Reichsgericht intervened to correct errors in valuation by lower courts. On the whole its effort was directed toward extending the field of vision and introducing for consideration all the factors which might be thought to influence valuation. One illustration must suffice. In J. W., 1924, p. 804 (Feb. 8, 1924), a lessor sought revalorization of the rent due under a lease of land. The lower court had used the cost-of-living index as the basis for calculating future rent, and had then increased the rent so determined by 50 per cent, on the ground that the rent was to be used by the lessor not only for his own support but also for the maintenance of the buildings on the land, for improvements and taxes. Of this much the court approved, but it reversed the lower court decree on the ground that the court had not taken into account the revenues received by the *lessee* from the leased property. The court declared that for a fair balance of all the interests involved a complete picture of the whole economic setting was necessary.

For a collection of cases to the middle of 1925, see Plum in J. W., 1925, pp. 2653, 2684-2695.

economic security at a critical time. It was chiefly in the interest of economic stability that retroactivity had not been allowed by the Emergency Decree of 1924.[203] But as Germany's economic life revived, the demand for retroactive revalorization became irresistible. In the Act of 1925 the government reluctantly extended revalorization backward to July 1, 1922.[204] In judicial decision the movement in the same direction was gaining strength.

If real progress was to be made the tools of judicial thinking needed tempering. Even article 242 of the Civil Code, the "good faith" clause, did not at first sight lend itself to this new purpose. By merely requiring that obligations be "performed" in good faith, article 242 seemed to restrict this test to cases where performance was still outstanding. Partly at least on this account the cases of the inflation period had refused to reopen transactions in which the agreed purchase price had been paid and accepted in paper marks.[205] But these decisions had been rendered while the legal tender quality of the mark still dominated judicial reasoning. If the legal tender quality were eliminated it could be said that payment of a money obligation in depreciated paper marks was only *part* payment. The balance of the obligation then remained unperformed and the tests of article 242 applied.[206]

But there were legal doctrines of a tougher fiber which stood in the way of broad and uniform extension of this idea. What should be done, for example, with transactions that had reached the stage of judicial decree? In such cases should doctrines of merger prevent revision of the obligation, where the subsequent course of the inflation had reduced the sum recovered to a merely ludicrous value? The problem raised at this point was one that the Reichsgericht had fumbled during the inflation period. It had appeared then as a problem in appellate procedure. Could an appellate court take account of changes in the value of money occurring since the rendition of the lower court decree? Unless it could, a delay of a year or even a few months would suffice to deprive a successful litigant of the fruits of the litigation. It was not till the final collapse late in 1923 that the Reichsgericht had declared its willingness to take account of inflation in all cases pending before it, without regard to the date of the lower court decree.[207] Even this con-

[203] Above, note 151.

[204] Above, note 154.

[205] Above, note 89.

[206] This basic idea was clearly formulated as early as December 3, 1924, in 109 R. G. Z. 111. See Mügel, DEUTSCHE JURISTEN ZEITUNG, 1928, p. 29.

[207] Through most of the inflation period the position of the Reichsgericht had been

cession would not provide for the much larger number of contract claims that had been reduced to judgment in lower courts and never carried up on appeal. Legislation could override the difficulties which the law of judgments presented in such cases.[208] The Reichsgericht was forced to more devious methods. In the end it held that currency depreciation intervening after a lower court decree was a "new fact" not included within the scope of the adjudication.[209]

The court also determined to revive claims that had been extinguished, not by judgment but by prescription and voluntary compromise. Prescription, especially, proved embarrassing. By the time retroactivity was admitted in Reichsgericht decisions, short statutes of limitation had outlawed many meritorious claims. To revive them it was necessary to say that the disastrous decline of the mark, commencing in 1922, created a new cause of action, so that the period of prescription ran from that point.[210] With claims extinguished during the inflation by voluntary compromise such ingenious reasoning was not necessary. But courts found that they had stirred up instead a buzzing swarm of problems in risk assumption, foreseeability, and actual or presumed intent. Both in legislation and judicial decision the results were confused and contradictory.[211]

When these obstacles had been removed or evaded, one last question remained. How far back should retroactivity be carried? The limit could not be determined merely by reference to general economic tests,

that its sole function was to determine whether lower court decrees were erroneous on the facts presented at the time of their rendition. Subsequent events, such as the depreciation of the currency, would then be wholly irrelevant. J. W., 1923, p. 1023 (May 15, 1923); J. W., 1923, p. 983 (Sept. 17, 1923); J. W., 1924, p. 172 (Sept. 26, 1923). It was not until November 10, 1923 (107 R. G. Z. 149) that the Reichsgericht expressed a willingness to take account of subsequent depreciation of money. In the end it was willing to take such depreciation into account on its own motion, though error was not specifically assigned by either party to the appeal. 108 R. G. Z. 75 (Feb. 15, 1924).

[208] In art. 68 (2) of the Revalorization Act of 1925 it was simply provided that judgments already rendered in transactions subject to retroactive revalorization should be ignored.

[209] 107 R. G. Z. 180 (Nov. 14, 1923); 109 R. G. Z. 195 (Nov. 15, 1924); 109 R. G. Z. 345 (Dec. 17, 1924); 109 R. G. Z. 375 (Dec. 23, 1924); 110 R. G. Z. 147 (Jan. 30, 1925); 113 R. G. Z. 324 (May 4, 1926); J. W., 1925, p. 1623 (April 4, 1925). See Locher in 125 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 311, 344-6 (1926).

[210] 108 R. G. Z. 38 (Jan. 17, 1924); 111 R. G. Z. 147 (June 22, 1925).

[211] See 116 R. G. Z. 143 (Feb. 12, 1927); 117 R. G. Z. 226 (June 11, 1927); 117 R. G. Z. 296 (June 22, 1927); 121 R. G. Z. 371 (July 4, 1928); 122 R. G. Z. 200 (Oct. 30, 1928); 127 R. G. Z. 296 (Feb. 27, 1930); Roth in J. W., 1926, p. 2341.

and yet clearly a line must be drawn somewhere. The process of fixing a line proceeded at first by methods, familiar to Anglo-American lawyers, of judicial inclusion and exclusion. The process pointed more and more definitely to the summer of 1922 as the period of sudden and catastrophic change in economic conditions and especially of change in the popular attitude toward the mark as a standard of value.[212] Asserting the need for certainty in the matter, the Second Senate went so far as to fix August 15, 1922, as the precise point at which the monetary revolution occurred.[213] Other Senates refused to accept so definite a limitation and opinion remained for a time sharply divided. The conflict in this instance was resolved early in 1927 without convocation of the Assembled Civil Senates, by the partial recantation of the Second Senate and by the general recognition that a definite limit was fair and desirable among commercial groups engaged in a rapid turnover and exchange of commodities.[214] For transactions in which there was no such intricate network of dependent and related transactions, the judicial rules as to the limits of retroactivity remained flexible and discretionary.[215]

The outer boundaries of retroactive revalorization were somewhat extended and greatly complicated by the survival of older "change of conditions" theories into the post-stabilization period. Even though a vendor of goods could not insist on direct revalorization, he might have

[212] The important decisions, out of a considerable number, were 109 R. G. Z. 39 (Oct. 1, 1924, First Senate); J. W., 1925, p. 227 (Nov. 11, 1924, Sixth Senate); J. W., 1925, p. 1377 (Jan. 28, 1925, First Senate); J. W., 1925, p. 1627 (Mar. 13, 1925, Sixth Senate); J. W., 1925, p. 1989 (June 6, 1925, Fifth Senate); 111 R. G. Z. 156 (June 26, 1925, Second Senate); 112 R. G. Z. 194 (Dec. 8, 1925, Second Senate); 113 R. G. Z. 201 (Mar. 30, 1926, Second Senate).

[213] 113 R. G. Z. 136 (Apr. 30, 1926); 115 R. G. Z. 198 (Dec. 7, 1926).

[214] The First Senate had been the chief antagonist of the Second Senate on this point, starting with the decision in 112 R. G. Z. 324 (Jan. 16, 1926). But even the First Senate had admitted the necessity for caution in extending revalorization back as far as 1919 and 1920. It ordered the lower court in the case cited to examine the general economic background with great care before allowing such relief. The Fifth Senate in a later case described very persuasively the dangers of retroactivity to the security of commercial transactions; it then proceeded to suggest a distinction between transactions which were more or less isolated (like contracts for the sale of land) and those which formed merely one in a connected series. 114 R. G. Z. 399 (Nov. 20, 1926). The Second Senate itself soon adopted this suggestion and allowed revalorization of a payment made January 1, 1922, on a contract for the purchase of a factory. 115 R. G. Z. 201 (Feb. 18, 1927). Finally the First Senate announced its essential agreement with these views and the conflict was resolved almost as quickly as it had arisen. 116 R. G. Z. 306 (April 6, 1927); 116 R. G. Z. 313 (May 7, 1927).

[215] 116 R. G. Z. 306 (April 6, 1927); 116 R. G. Z. 313 (May 7, 1927); 118 R. G. Z. 375 (Jan. 11, 1928); 124 R. G. Z. 76 (April 19, 1929).

the privilege of withdrawing from the contract if the intervening rise in prices amounted to such a "change of conditions" as to satisfy the tests prevailing in 1921 and 1922. By the adoption of such mechanics, courts could refrain from judging too harshly, in the light of wisdom subsequently acquired, conduct by purchasers to which no disapproval had attached at the time.[216] But the competition between revalorization and "change of conditions" theories produced inevitable confusion, into which it is not necessary here to penetrate.[217]

The bold and generous extension of retroactive revalorization can be taken as a fitting climax to the work of the Reichsgericht through the inflation. Its work was not yet finished. Abundant litigation survived into the next decade. Some new doctrines were still needed to

[216] One important reason, given in the decisions of 1924 and after, for imposing some limit on retroactivity, was the notion that a refusal of a purchaser to consent to price-revision was entirely justified by the commercial morality prevailing as late as the spring of 1922. To this reason should be added the reluctance of courts to admit that the legal theory on which their earlier decisions were based had been fundamentally erroneous. To read back into an earlier period the knowledge of economic processes acquired through final collapse of the currency was to acknowledge too disastrous an error. 109 R. G. Z. 39 (Oct. 1, 1924); J. W., 1925, p. 227 (Nov. 11, 1924); J. W., 1925, p. 1377 (Jan. 28, 1925); J. W., 1925, p. 1989 (June 6, 1925); 112 R. G. Z. 324 (Jan. 16, 1926); 114 R. G. Z. 399 (Nov. 20, 1926).

[217] The distinction between "change of conditions" theories and outright revalorization turned chiefly on the fact that "change of conditions" merely opened an avenue to the vendor's rescission, unless a fair increase in price were consented to by the purchaser. The theory of revalorization, on the other hand, imposed an affirmative obligation on the purchaser to pay a higher price commensurate with the depreciation of money. If the vendor had already performed he could sue in an affirmative action and recover a supplement to the price. 115 R. G. Z. 201 (Feb. 18, 1927); 116 R. G. Z. 306 (April 6, 1927); 116 R. G. Z. 313 (May 7, 1927); 118 R. G. Z. 375 (Jan. 11, 1928). Or if he had not as yet performed he could treat the purchaser's clear and express refusal to pay a higher price as a positive breach of contract, excusing him from further performance. 109 R. G. Z. 39 (Oct. 1, 1924); J. W., 1925, p. 1625 (April 8, 1925); 111 R. G. Z. 156 (June 26, 1925). In the absence of such clear and express refusal the vendor could not rescind and was restricted to his remedy for affirmative revalorization. J. W., 1926, p. 2360 (Jan. 15, 1926).

The practical differences between the two theories was not as great as might at first appear. If the purchaser sued after stabilization to enforce specific delivery, he was required to pay a revalorized price, even though the vendor could not rescind for the purchaser's original refusal to pay a higher price. 108 R. G. Z. 379 (Sept. 17, 1924); J. W., 1925, p. 1625 (April 8, 1925); 112 R. G. Z. 194 (Dec. 8, 1925). The really significant case was the one where the purchaser sought damages rather than specific performance. In such a case the vendor would be liable to pay substantial damages for a refusal to perform if the transaction had not extended over into the revalorization period and if, further, the depreciation of money had not been great enough to amount to a "change of conditions." J. W., 1925, p. 1627 (Mar. 13, 1925); 111 R. G. Z. 342 (Oct. 7, 1925); 112 R. G. Z. 324 (Jan. 16, 1926); 113 R. G. Z. 136 (April 30, 1926); 115 R. G. Z. 198 (Dec. 7, 1926).

help in the final liquidation of inflation claims.[218] But the court, at the end of this chapter, had made its last great contribution.

That a court of law could do so much is proof of the courage and imaginative insight of the German judiciary. There were times, it is true, when the Reichsgericht seemed unable to respond to the overwhelming need of a society in dissolution. A complex judicial machinery could not be geared to the speed of progressive economic disaster. But if the response seemed tardy it was because the pace was fast. Seldom in history has there been a revolution in judicial thinking so complete, in the short space of four or five years. In retrospect it seems plain that every available resource of legal science was applied to relieve the mounting burden of intolerable injustice, to preserve what was left of order in the midst of universal collapse, and finally to reconstruct those values that the wreck had not wholly destroyed.

[218] To the numerous progeny of article 242 (the "good faith" clause) was added the very interesting doctrine that mere delay in asserting a claim for revalorization could result in its forfeiture. For example, a suit brought in April 1926 was held to be barred by this flexible rule of laches; the court pointed out that as early as 1924 the possibility of retroactive revalorization was generally known through the daily press. 117 R. G. Z. 358 (Sept. 23, 1927). But here as in other cases of judicial revalorization the result depended largely on the facts of the particular case, on the type of transaction involved, and on the degree of reliance by the debtor on the finality of his paper-mark payment. The decisions are reviewed in 117 R. G. Z. 358 (Sept. 23, 1927); 119 R. G. Z. 231 (Dec. 9, 1927); and J. W., 1928, pp. 1335, 1337, and 1339.