THE EFFECT OF INFLATION ON PRIVATE CONTRACTS: UNITED STATES, 1861-1879

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EDITOR'S NOTE

The following is the first installment of the final article dealing with inflation problems. The first two articles appeared in the issue of last December, and were entitled:

(1) The Economic Aspects of Inflation.

(2) Effects of Inflation on Private Contracts: Germany, 1914-1924.

THE EFFECT OF INFLATION ON PRIVATE CONTRACTS: UNITED STATES, 1861-1879 *

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THE American Civil War provides ample material for studying the legal consequences of currency depreciation. The sudden demands of war on government budgets made it necessary in both North and South to issue a large volume of paper money, which produced a general rise in prices, a premium on gold, and all the other indices of major monetary inflation. American history had already illustrated the dangers in the use of unstable monetary standards and in too rapid an expansion of the monetary supply.[1] The period of the Civil War is of peculiar interest to lawyers, however, because the record of private

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[1] The American colonies, because of the shortage of metallic money, had early experimented with such novel monetary media as tobacco, corn, and wampum. At various times these commodities were even made legal tender for the discharge of public and private debts. Wheat, sugar, pork, beef, whiskey and musket balls had also appeared among the media in common use. Difficulties in controlling the production and supply of these commodities soon demonstrated their unsuitability for monetary purposes. BULLOCK, THE MONETARY HISTORY OF THE UNITED STATES, Part I, c. II (1900); HEPBURN, A HISTORY OF CURRENCY IN THE UNITED STATES 1-4 (1924); WHITE, MONEY AND BANKING 2-6 (1914).

Paper money was issued as early as 1690 in Massachusetts. Thereafter this expedient was very commonly resorted to in the colonies, usually with considerable depreciation as a result. The efforts of royal governors to restrict such issues of paper money were an important source of friction between the colonists and England. BULLOCK, THE MONETARY HISTORY OF THE UNITED STATES, Part I, c. IV, and Parts II and III (1900); HEPBURN, A HISTORY OF CURRENCY IN THE UNITED STATES 5-11 (1924); WHITE, MONEY AND BANKING 79-86 (1914).

The successive waves of the colonial inflations were merely a prelude to the litigation is more abundant and because of the different course that inflation took in the two main areas. In the North the depreciation was arrested when the purchasing power of money had been cut to approximately one-half of its pre-war ratio. In the South continued issues of paper money brought progressive depreciation of the currency until its final complete collapse. We have therefore for comparison two great communities, governed by essentially the same legal system, projected side by side through varying degrees of monetary convulsion. From a study of the legal devices employed to meet these emergencies it is possible to derive some conclusions as to the resources of American law in the face of inflation. The limitations on the effectiveness of such devices may also suggest the hazards that face any system of private contract in periods of monetary disturbance.

THE CONFEDERATE INFLATION (1861-1865)

THE ECONOMIC BACKGROUND

Fort Sumter was attacked on April 14, 1861. More than a month before that date the Confederate government had been organized, a provisional Constitution adopted, and legislation passed for the mobilization of the military and financial resources of the South.[2] As early as May 16, 1861, the first major issue of paper money appeared, consisting of 20 million dollars in non-interest-bearing treasury notes. Before the end of the year the maximum limit of such issues was raised successively to 100 and then to 150 million dollars.[3] The slow public response to offers of government bonds and the delay in imposition of war taxes made it clear, before one year of the war had passed, that the printing press would be the principal method for financing the war on the Confederate side.[4] Thereafter the only question was the speed with which new issues of paper money would be needed to meet the expenses of the government, which rose steadily with the general level of internal prices.

The Northern blockade and the uncertainties as to eventual success

great disaster of the Revolutionary War, when the paper money of the Continental Congress depreciated to a small fraction of its nominal value. BULLOCK, THE MONETARY HISTORY OF THE UNITED STATES, Part I, c. V (1900); HEPBURN, A HISTORY OF CURRENCY IN THE UNITED STATES, c. II (1924). The inflation of the Revolutionary period left behind a thin deposit of case law and some interesting legislation, which are analyzed in the valuable study of HARGREAVES, RESTORING CURRENCY STANDARDS, c. I (1926).

[2] SCHWAB, THE CONFEDERATE STATES OF AMERICA 3-8 (1901).

[3] SCHWAB, THE CONFEDERATE STATES OF AMERICA 10-12 (1901).

[4] SCHWAB, THE CONFEDERATE STATES OF AMERICA 18 (1901).

of the Confederacy prevented it from securing substantial foreign credits.[5] Attempts were made to induce holders of paper money to exchange it for long-term bonds, but these efforts were from the first unsuccessful. In 1863 compulsion was added to the attractions previously held out for this purpose. The result was to impair the credit of the government rather than to reduce materially the volume of redundant currency.[6] By January 1, 1864, the total issues of non-interest-bearing treasury notes had risen to 731 million dollars. At the end of the war, in April 1865, this total had risen by another 180 million. In addition, the accumulation of an enormous floating debt evidenced by treasury warrants made the government's bankruptcy complete.[7]

The depreciation in purchasing power of the Confederate dollar coincided roughly with these progressive increases in the monetary supply. In the absence of regular quotations of foreign exchange rates, the important index of depreciation was the premium on gold, which appeared as early as July 1861. Until August 1862, the rate of increase in the gold premium was moderate. In that month commenced a rapid rise which was arrested only for a few months in the spring of 1864 and which reduced the paper dollar by January 1865 to less than one-fiftieth of its pre-war gold value.[8]

[5] The effort in 1863 to float a foreign loan, secured by cotton held by the Confederate government, met with initial success, but in the end an estimated total of about 6¼ million dollars was realized out of the expected 15 million. SCHWAB, THE CONFEDERATE STATES OF AMERICA 30-43 (1901).

[6] SCHWAB, THE CONFEDERATE STATES OF AMERICA 22-23, 46-49, 52-55 (1901). The compulsory funding law of 1864 was even more disastrous and equally ineffective. SCHWAB, THE CONFEDERATE STATES OF AMERICA 64-69 (1901).

[7] SCHWAB, THE CONFEDERATE STATES OF AMERICA 56, 76-83 (1901).

[8] The following table has been prepared by SCHWAB, THE CONFEDERATE STATES OF AMERICA 167 and Appendix I, to show the average value in paper currency of one gold dollar:

	1861	1862	1863	1864	1865
January		1.2	3.	21.	53.
February	1.	1.2	3.3	23.	58.
March	1.	1.3	4.1	22.	61.
April	1.	1.5	4.5	21.	
May	1.	1.5	5.2	19.	
June	1.	1.5	.7.	17.	
July	1.1	1.5	9.	20.	
August	1.1	1.5	12.	22.	
September	1.1	2.	12.	23.	
October	1.1	2.	13.	26.	
November	1.2	2.9	15.	30.	
December	1.2	2.9	20.	38.	

Since the author states that the table is based "especially" on prices quoted in

Price fluctuations of other commodities were inadequately reflected, however, in the movement of the gold premium. Speculative factors were extremely important in influencing the market price of gold, and speculation was itself largely controlled by the military and political vicissitudes of the war.[9] On the other hand, the prices of other commodities were influenced by the peculiar industrial and commercial situation of the South. Primarily an agricultural section, with cotton as its major crop, the South was suddenly cut off by war and blockade from its natural markets.[10] Its accumulating surplus of unexportable cotton was reflected in a slow rise in cotton prices, lagging far behind that of gold and other commodities. The same phenomenon appeared to a less degree with tobacco, rice, and other agricultural products. On the other hand, the supply of some agricultural commodities, adequate for ordinary purposes, proved inadequate for the great military effort suddenly required. In such cases the price rise exceeded the gold premium by a considerable margin. In addition, there were some commodities which the Southern states were forced to import from foreign countries or from the Northern states. Here the rise in prices was enormous.[11]

The dislocation in the economic life of the South was further aggravated by defective means of communication; these suffered an almost complete breakdown under the strain of war.[12] As a result the rise in prices of basic commodities was not evenly diffused. Wide disparities

the gold markets at Richmond, Charleston, and New Orleans, it must be accepted with reservations. At least one reported case of the post-war period indicates that the prices of gold in outlying districts deviated considerably from those prevailing in the main centers of population. Dearing's Adm'x v. Rucker, 18 Gratt. (Va.) 426 (1868).

[9] The effects of political and military prospects on the gold premium in both North and South are traced by SCHWAB, THE CONFEDERATE STATES OF AMERICA 168-173 (1901). On the gold premium in the North see the first section in the second installment of this article, which will appear in the April issue of this REVIEW.

[10] HAWK, ECONOMIC HISTORY OF THE SOUTH, c's. 9 and 10 (1934).

[11] See the tables in SCHWAB, THE CONFEDERATE STATES OF AMERICA, Appendix I, and his discussion, pp. 174-178. Unfortunately his survey includes only the retail prices of 22 commodities intended for general consumption. His conclusion is that the retail prices of most of these commodities rose at a rate exceeding the rise in the gold premium. His figures are apparently drawn, however, from market rates in the main centers of population. It would be unsafe to draw from them any conclusions as to the course of prices in country districts or as to the relations between wholesale and retail prices in general. These figures also neglect the prices of industrial products (which rose presumably to even higher levels) and wages (which apparently rose at a very much lower rate—see SCHWAB, THE CONFEDERATE STATES OF AMERICA 181).

[12] On the system of transportation in the South prior to 1860 see HAWK, ECONOMIC HISTORY OF THE SOUTH, c. 11 (1934). An impression of its general condition at the end of the war may be gathered from GARNER, RECONSTRUCTION IN MISSISSIPPI 142-145 (1901); THOMPSON, RECONSTRUCTION IN GEORGIA 25-26 (1915); HAMIL-

appeared between different districts and between city and country in the same district.[13] The course of prices in the main centers of population was therefore no accurate measure of the havoc wrought by the extreme and rapid depreciation.

The disaster was made complete by the Union victory, the repudiation by the North of all Confederate indebtedness, and the abandonment of a currency thus made wholly worthless.

THE LEGAL SETTING

The legal problems raised by the Confederate inflation did not appear in published decisions or legislation until after the close of the Civil War. Normal litigation was interrupted by the war and by legislative moratoria;[14] the reported decisions of the war period dealt almost entirely with questions of public law and with private law litigation that had originated before the war.[15] It was not until after the defeat of the Confederacy that the great flood of cases arising out of the war inflation began to reach appellate courts. The legislative attack on the problem was likewise postponed until after the damage was done. In the German inflation of the last decade there was presented the interesting spectacle of a legal order struggling to maintain the official currency during its steady and progressive collapse, and at the same time to prevent the extreme injustice that followed from unforeseen changes in its purchasing power.[16] In the Confederate infla-

TON, RECONSTRUCTION IN NORTH CAROLINA 184-188 (1914); 1 OBERHOLTZER, HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR 109-112 (1917).

[13] SCHWAB, THE CONFEDERATE STATES OF AMERICA 174 (1901). Abundant evidence of such disparities appears in the reported cases of the post-war period. See, for example, Erwin v. Hill's Adm'r, 51 Ala. 580 (1874); Fife v. Turner, 11 Fla. 289 (1867); Thomas v. Knowles, 40 Ga. 263 (1869); Bozeman v. Rose's Executors, 51 Ala. 321 (1874).

[14] On the moratorium legislation of the war period see SCHWAB, THE CONFEDERATE STATES OF AMERICA, c. 6 (1901); GARNER, RECONSTRUCTION IN MISSISSIPPI 39-41 (1901).

[15] The only reported case found in which a Confederate court was asked to give relief against the effects of monetary depreciation is Smith v. Bryan, 34 Ga. 53 (1864). Here a vendor of land sought cancellation of an executed deed because of the purchaser's delay in payment of the purchase price, alleging that in the meantime a new issue of paper money by the government had reduced the purchasing power of Confederate money by one-third. Plaintiff's illiteracy and ignorance were also alleged. The case came up on temporary injunction, and the court merely held that a case was stated for equitable relief.

[16] Dawson, "Effects of Inflation on Private Contracts: Germany, 1914-1924," 33 MICH. L. REV. 171 (1934). (This article will henceforth be referred to by the author's name.)

tion there is no such record. Remedial effort was postponed till after the final collapse and was directed toward the reconstruction of monetary values in a society that had been brought by war to the verge of ruin.

The legal setting that was created by the final and decisive defeat of the Confederacy presented a peculiar obstacle to the readjustment of private contracts. This obstacle lay in the doctrine of illegality. It was seriously contended that the use of Confederate money by private persons had the indirect effect of aiding the rebellion by promoting the circulation of rebel currency. From this point of view all contracts in which Confederate money was used for any purpose would be considered illegal. Any effort, even by legislation, to readjust such contracts to post-war conditions would then be completely paralyzed.[17]

The problem of illegality was one of the first to be faced in court decision. Like other private law problems arising from the Confederate inflation it became at once entangled with the political issues of reconstruction. The judiciary chosen in many of the Southern states during the period of carpet-bag reconstruction showed a strong inclination to apply doctrines of illegality to all private transactions in which Confederate money had been used. Decisions of this type were usually accompanied by vigorous denunciation of the whole secession movement, which was described as a mere rebellion against lawful authority.[18] In five states the courts steadfastly refused to accept reasoning which would wipe out not only the public obligations of the Confederate states but also an enormous mass of private debts.[19] In other states distinctions were drawn which saved certain classes of private contracts

[17] This occurred, for example, in Texas. Donley v. Tindall, 32 Tex. 43, 5 Am. Rep. 234 (1869).

[18] Hale v. Huston, Sims & Co., 44 Ala. 134, 4 Am. Rep. 124 (1870); Lawson v. Miller, 44 Ala. 616, 4 Am. Rep. 147 (1870); Latham v. Clark, 25 Ark. 574 (1869); Carllee v. Carlton, 27 Ark. 379 (1872); Baily v. Milner, 35 Ga. 330, Fed. Cas. No. 740 (1868); Laughlin v. Dean, 1 Duvall (62 Ky.) 20 (1863); Stillman v. Looney, 3 Cold. (43 Tenn.) 20 (1866); Robertson v. Shores, 7 Cold. (47 Tenn.) 164 (1869); McCartney v. Greenway, 30 Tex. 754 (1867); Brown v. Read, 33 Tex. 629 (1870); Brown v. Wylie, 2 W. Va. 502, 98 Am. Dec. 781 (1868); Calfee v. Burgess, 3 W. Va. 274 (1869).

[19] Forcheimer v. Holly, 14 Fla. 239 (1872); Green v. Sizer, 40 Miss. 530 (1866); Frazer v. Robinson & Daniel, 42 Miss. 121 (1868); Phillips v. Hooker, 62 N. C. 193 (1867); Kingsbury v. Lyon, 64 N. C. 128 (1870); Rutland v. Copes, 15 Rich. Law (S. C.) 84 (1867); Craig v. Pervis, 14 Rich. Eq. (S. C.) 150 (1868); Hale v. Wilkinson, 21 Gratt. (Va.) 75 (1871). See also Taylor v. Turley, 33 Md. 500 (1870), holding valid a promissory note executed in Tennessee in consideration of a loan of Confederate money.

from the slaughter.[20] The Supreme Court of the United States helped greatly to check the excesses of the reconstruction courts and to restore some measure of moderation and humanity.[21] Nevertheless the doctrine of illegality lingered on in several states. It survived to the end in Louisiana [22] and was uprooted in other states only at a very late

[20] In Alabama a distinction was drawn between promises to pay Confederate money in return for goods or services sold and promises to *repay* Confederate money loaned, the defense of illegality being admitted only in the latter class of cases. Bozeman v. Allen, 48 Ala. 512 (1872); Whitfield v. Fulford's Adm'r, 49 Ala. 304 (1873). The same limit to the operation of illegality was apparently adopted also in Arkansas. Latham v. Clark, 25 Ark. 574 (1869); Waymack v. Heilman, 26 Ark. 449 (1871); Carllee v. Carlton, 27 Ark. 379 (1872).

A distinction also appeared between executory contracts and executed transfers of land or goods, the latter being effective even though the consideration was Confederate money. Brown v. Wylie, 2 W. Va. 502, 98 Am. Dec. 781 (1868); Montgomery v. Kerr, 6 Cold. (46 Tenn.) 199, 98 Am. Dec. 450 (1869); Block v. McNeil, 46 Ala. 288 (1871).

[21] The reasoning of the Supreme Court in Thorington v. Smith, 8 Wall. (75 U. S.) 1, 19 L. ed. 361 (1868), had very great influence on the subsequent course of decision in the Confederate and border states. The case came to the Supreme Court from the Federal District Court for Alabama. It was decided, not on constitutional grounds, but under general rules of private law, so that at most its authority was persuasive. Chief Justice Chase, writing for a unanimous court, pointed out that the Confederate government had possessed complete *de facto* control within the Confederate military lines; that obedience to its authority was for private citizens "not only a necessity but a duty"; that the use of Confederate money in private transactions did not have as its primary object assistance to the rebellion; that whatever aid was given to the rebellion by a general adoption and circulation of Confederate money was too indirect and remote; and finally that the complete disappearance of other circulating media made it impossible for private persons to make use of any other standard of value.

The decisions of state courts that refused to give way before this persuasive reasoning escaped review by the Supreme Court on constitutional grounds, since in most cases the result was reached through general rules of private law rather than through legislation. After some debate within the Supreme Court itself [see Hannauer v. Woodruff, 10 Wall. (77 U. S.) 482, 19 L. ed. 991 (1870)], it was finally held that state legislation invalidating Confederate-money contracts was an impairment of their obligation and was therefore in conflict with the federal Constitution. Delmas v. Insurance Co., 14 Wall. (81 U. S.) 661, 20 L. ed. 757 (1871). But a state court could still surmount this obstacle by basing its decision on general rules of contract law rather than on legislation which aimed at the same result. Review by the Supreme Court could also be evaded where the decision was based *both* on common law principles and express legislation. Bank of West Tennessee v. Citizens' Bank, 14 Wall. (81 U. S.) 9, 20 L. ed. 514 (1871). *Cf.* the similar treatment given by the Supreme Court to contracts for the sale of slaves. Palmer v. Marston, 14 Wall. (81 U. S.) 10, 20 L. ed. 826 (1871); Sevier v. Haskell, 14 Wall. (81 U. S.) 12, 20 L. ed. 827 (1871). For a survey of this whole group of cases see New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 8 Sup. Ct. 741 (1887).

[22] The Louisiana decisions in particular show the shocking results of a ruthless and consistent application of illegality doctrine to all types of Confederate-money transactions. The class of cases most clearly within its scope were promises to repay Con-

date, after the normal processes of government had been fully restored.[28] So long as it lasted, it interposed an insuperable obstacle to any fair and intelligent solution of inflation problems.

In other respects, however, the legal setting was not unfavorable. The very fact that Confederate currency was issued by a government in rebellion against the United States cleared the way for a vigorous and direct attack on problems of pure private law. If transactions in which Confederate money was used could be freed from the taint of

federate money loaned. Howard v. Kirwin, 19 La. Ann. 432 (1867); Parker v. Broas, 20 La. Ann. 167 (1868); Baldwin v. Sewell, 23 La. Ann. 444 (1871); and numerous other cases. But the illegality doctrine was applied as well to all contracts for the purchase of land or goods in which the purchase price was payable in Confederate money. Hunley v. Scott, 19 La. Ann. 161 (1867); Haynes v. Rogillio, 20 La. Ann. 238 (1868); Boyd v. Chaffe, 21 La. Ann. 476 (1869); and a series of other cases lasting as late as Denney v. Johnson, 26 La. Ann. 55 (1874). See also Schmidt v. Barker, 17 La. Ann. 261, 87 Am. Dec. 527 (1865), bank deposit payable by bank in Confederate money; McCracken v. Poole, 19 La. Ann. 359 (1867), draft payable in Confederate money; Barrow v. Pike, 21 La. Ann. 14 (1869), partnership carrying on its operations in sugar with Confederate money as a medium of exchange. The repeated litigation of the illegality issue in Louisiana may be taken as indicating the refusal of litigants and trial courts to acquiesce in results so violently contradictory to common sense and elementary justice. How far legal decision was influenced by the turbulent course of carpet-bag politics in Louisiana must be left for speculation. For an account of the political background see LONN, RECONSTRUCTION IN LOUISIANA AFTER 1868 (1918).

28 In Alabama the reaction did not come until the reorganization of the supreme court in 1875. Whitfield v. Riddle, 52 Ala. 467 (1875); Taylor v. Pettus, 52 Ala. 287 (1875). The earlier decisions were overruled in Arkansas in the same year. Gist v. Gans, 30 Ark. 285 (1875); Young v. Mitchell, 33 Ark. 222 (1878). In Kentucky the change occurred as early as 1866: Martin v. Hortin, 1 Bush. (64 Ky.) 629 (1866); in Georgia in 1868: Miller v. Gould, 38 Ga. 465 (1868), and Jepson v. Patrick, 39 Ga. 569 (1869); in Tennessee in 1870: Naff v. Crawford, 1 Heisk. (48 Tenn.) 111 (1870), and Sherfy v. Argenbright, 1 Heisk. (48 Tenn.) 128, 2 Am. Rep. 690 (1870); in West Virginia in 1872: Surber's Heirs v. Kent, Paine & Co., 5 W. Va. 96 (1872). In Texas the supreme court for nearly ten years showed a fanaticism which can only be compared with that of the Louisiana court. McCartney v. Greenway, 30 Tex. 754 (1867); Reavis v. Blackshear, 30 Tex. 753 (1868); and a long line of decisions up to Thompson v. Bohannon, 38 Tex. 241 (1873), when the first break occurred. The earlier cases were not definitely overruled until 1874, in Mathews v. Rucker, 41 Tex. 636.

It should be observed that the tenacity with which the illegality doctrine was maintained was not due solely to the vindictiveness of a carpet-bag judiciary installed under Northern authority. Even in states like Kentucky and Tennessee, where civil government was early restored and the turmoil of military reconstruction avoided, the political domination of Union sympathizers produced a sharp cleavage and prolonged bitterness between the dominant Unionists and the defeated Confederates. From these influences the courts were by no means free. For an account of political conditions in Tennessee and Kentucky see PATTON, UNIONISM AND RECONSTRUCTION IN TENNESSEE (1934); COULTER, CIVIL WAR AND READJUSTMENT IN KENTUCKY (1926).

illegality, it was easy to see that the parties had relied on a wholly illusory standard of value, and the demand for some readjustment of contractual terms became almost irresistible. The process of readjustment was also facilitated by the fact that the Confederate Congress had never declared Confederate money legal tender for the satisfaction of private debts. Such a step had been taken in the North as early as 1862, and created a serious obstacle to judicial relief against the effects of inflation.[24] A few of the Southern states made Confederate money legal tender for limited purposes.[25] For the rest, the circulation of Confederate money at par was enforced only by the pressure of public opinion and by extra-legal methods which post-war decisions could freely condemn.[26] Once the obstacle of illegality was removed,

[24] See the second installment of this article, which will appear in the April issue of this REVIEW.

[25] SCHWAB, THE CONFEDERATE STATES OF AMERICA, c. 5 (1901). Since most of the private-law litigation appeared after the defeat of the Confederacy, courts would not have been embarrassed greatly if the legal-tender attribute had been conferred by legislation. The public interest in maintaining the free circulation of Confederate money at par would by then have disappeared. Nevertheless, there might have been some difficulty in cases where debtors could allege a tender during the war of Confederate money in discharge of Confederate-money debts. In the absence of express legal-tender legislation courts were able quite readily and uniformly to hold that a tender of Confederate money was no discharge. Forcheimer v. Holly, 14 Fla. 239 (1872); Phillips v. Gaston, 37 Ga. 16 (1867); Wooten v. Sherrard, 68 N. C. 334 (1873); Love v. Johnston, 72 N. C. 415 (1875); Austin v. Kinsman, 13 Rich. Eq. (S. C.) 259 (1867); Lynch v. Hancock, 14 S. C. 66 (1880); Simmons v. Trumbo, 9 W. Va. 358 (1876).

[26] Some of the devices resorted to for the purpose of forcing the acceptance by creditors of Confederate money at its par value are referred to briefly by SCHWAB, THE CONFEDERATE STATES OF AMERICA 101-102 (1901). A much more vivid picture is given by cases in which creditors asserted that their acceptance of Confederate money was under duress. The duress consisted most often of threats of imprisonment or heavy fines by military authorities in districts where martial law had been declared. Numerous cases are reported. Glenn v. Case, 25 Ark. 616 (1869); Emerson v. Lee, 18 La. Ann. 134, 89 Am. Dec. 648 (1866); Davis v. Mississippi Central R. R., 46 Miss. 552 (1872); Wilkerson v. Bishop, 7 Cold. (47 Tenn.) 24 (1869); Rollings v. Cate, 1 Heisk. (48 Tenn.) 97 (1870); McCartney v. Wade, 2 Heisk. (49 Tenn.) 369 (1871); Jackson v. Collins, 2 Heisk. (49 Tenn.) 491 (1871); Confederate Money Cases, 31 Tex. 675 (1869); Olivari v. Menger, 39 Tex. 76 (1873); Mann v. Lewis, 3 W. Va. 215, 100 Am. Dec. 747 (1869); Simmons v. Trumbo, 9 W. Va. 358 (1876). Even where Confederate military authorities had not attempted to force the acceptance of Confederate money at par, the inflamed state of popular feeling often made it dangerous for the creditor to refuse Confederate money, as reported cases abundantly show. See, for example, Jones v. Rogers and Son, 36 Ga. 157 (1867); Harshaw v. Dobson, 64 N. C. 384 (1870). In most of these cases the difficulty in applying duress principles lay chiefly in the fact that the threats as a rule came from third persons without any direct participation by the debtor. Nevertheless, the courts quite readily found the existence of pressure in fact and went very far in giving relief.

the way was clear for a large-scale revision of private contracts thrown out of balance by the Confederate inflation.

THE SCALING ACTS

1. *Scope and Purposes*

The constitutional conventions and legislatures which met in the fall of 1865 were faced with a peculiar and very urgent problem. The defeat of the Confederacy not only rendered Confederate currency absolutely worthless; it also entailed the abrupt and immediate substitution of United States currency as the only money that courts of law could recognize. In this respect the legal problems were more acute than in inflationary episodes (as in post-war France) where the depreciated currency was simply retained in circulation and officially devalued.[27] The situation was even more dangerous than in post-war Germany, where the mark was completely abandoned after being reduced to one-trillionth of its pre-war purchasing power, but where the transition to a new and stable currency was gradual and the old and new currencies were used for many months side by side.[28] In the Southern states the great danger was that reconstruction courts, in their hostility to the suppressed rebellion, would interpret "dollars" in all private contracts as meaning United States dollars rather than Confederate dollars. In that case another currency, having the same name but a very much higher purchasing power, would be imposed upon all debtors who contracted during the war to pay Confederate money. The weight of Confederate-money debts would thus be enormously increased.

The first object of legislation, then, was to authorize the introduction of parol evidence for the purpose of showing that "dollars" meant Confederate dollars. Before the end of 1867 such legislation had been passed in all the Southern states that had remained within the Confederate military lines throughout the war.[29] This result was obviously

[27] For a general account of the French post-war inflation see DULLES, THE FRENCH FRANC, 1914-1928 (1929).

[28] See Dawson, 33 MICH. L. REV. 171 at 208, n. 117 (1934).

[29] Ala. Ordinance No. 26 of Sept. 28, 1865 (Rev. Code of 1867, p. 59, sec. 3); Ark. Act of Mar. 5, 1867, sec. 2 (Laws of 1866-7, No. 88, p. 195); Fla. Act of Nov. 7, 1865 [quoted in Fife v. Turner, 11 Fla. 289 at 291 (1867)]; Ga. Ordinance of Nov. 8, 1865 (Laws of 1865-6, App., p. 20); Miss. Act of Feb. 19, 1867 (Laws of 1866-7, No. 282, p. 373); N. C. Act of Mar. 12, 1866 (Acts of 1865-6, c. 69); S. C. Ordinance of Sept. 27, 1865 [quoted in headnote to Rutland v. Copes, 15 Rich. Law (S. C.) 84 (1867)]; Tex. Act of Nov. 10, 1866 (Laws of 1866, c. 125, sec. 4, p. 128); Va. Act of Mar. 3, 1866 (Laws of 1865-6, c. 71, p. 184); W. Va. Act of

just. It could be explained as an effort to ascertain and enforce the real intentions of the contracting parties. It could, indeed, be achieved independently of legislation through general rules of private law. After some resistance by a few courts [30] the main current of decision soon established the admissibility of parol evidence for this purpose.[31] Constitutional limitations, which legislation encountered at other points, were not felt here to be an obstacle.[32] This important but preliminary objective, then, was quickly and easily attained.

But it was not enough merely to authorize proof that "dollars" meant Confederate dollars. This in itself would merely have permitted the discharge of an enormous mass of money obligations in a wholly worthless currency. For a reconstruction of monetary values it was necessary to reach back to an earlier period and to redefine, in terms of United States currency, the standards of value expressed in Confederate money. This process of translation was essentially the same as the process of "revalorization" undertaken in Germany by courts and by the legislature at the end of the great inflation of 1920-1923.[33] The methods adopted for this purpose in the South after the Civil War

Apr. 7, 1873 (Acts of 1872-3, c. 116, p. 307). The Act of Mississippi, cited above, merely provided for a *prima facie* presumption that contracts for the payment of money, entered into after May 1, 1862, and before May 1, 1865, were intended to be dischargeable in Confederate money. But it received the same construction on this point as the statutes of other states. Cowan v. McCutchen, 43 Miss. 207 (1870); Darcey v. Shotwell, 49 Miss. 631 (1873).

[30] Roane v. Green, 24 Ark. 210 (1866); Hastings v. White, 24 Ark. 269 (1866); Wiseman v. Russey, 7 Cold. (47 Tenn.) 233 (1869); Williams v. Boozeman, 18 La. Ann. 532 (1866).

[31] Cases holding parol evidence admissible without the aid of statute: Rivers v. Moss' Assignee, 6 Bush (69 Ky.) 600 (1869); Stewart v. Smith, 3 Baxt. (62 Tenn.) 231 (1873); Mathews v. Rucker, 41 Tex. 636 (1874); Thorington v. Smith, 8 Wall. (75 U. S.) 1, 19 L. ed. 361 (1868); Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275 (1876). The usual reasoning in these cases was to the effect that the general use of Confederate money in the South during the war made the words "dollars" and "cents" ambiguous in meaning, so that parol evidence could be introduced to resolve the ambiguity, just as it might be in the case of contracts entered into in a foreign currency that employed those terms.

[32] Holding legislation to be valid which authorized the introduction of parol evidence: Tarleton v. Southern Bank, 41 Ala. 722 (1868); Kirtland v. Molton, 41 Ala. 548 (1868); Leach v. Smith, 25 Ark. 246 (1868); Fife v. Turner, 11 Fla. 289 (1867); Slaughter v. Culpepper, 35 Ga. 25 (1866); Cowan v. McCutchen, 43 Miss. 207 (1870); Woodfin v. Sluder, 61 N. C. 200 (1867); Rutland v. Copes, 15 Rich. Law (S. C.) 84 (1867); Dearing's Adm'x v. Rucker, 18 Gratt. (59 Va.) 426 (1868); Wilmington and Weldon R. R. v. King, 91 U. S. 3, 23 L. ed. 186 (1875); Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179 (1885).

[33] Dawson, 33 MICH. L. REV. 171 at 201 ff. (1934).

will indicate what resources are available in Anglo-American law if extreme inflation should again produce a similar catastrophe.

For Southern legislatures the first problem was to select the classes of money obligations whose revalorization would be attempted. There was of course a very great variety of private transactions in which Confederate money had in one way or another been involved. War and inflation had co-operated in dislocating the normal economic processes of Southern society and destroying the accumulated wealth of decades. Wealth had transferred from class to class on an enormous scale and the balance of economic power had been shifted.[34] To salvage all the values that had been destroyed was beyond the power of any legal agencies. To restore the whole balance of economic relationships existing at the outbreak of the war was likewise too ambitious a task; more limited objectives were needed.

The limited objectives of Southern legislatures most clearly appeared in their refusal to revalorize executed transactions. A large number of pre-war debts had been carried over into the war period and paid off in depreciated money. Many debts arising in the war period itself had likewise been discharged in paper money of reduced purchasing power. The hardship on creditors in such cases might be almost as great as in the case of money claims surviving unpaid into the post-war period. There were strong moral reasons for reopening claims of creditors who had accepted Confederate money through loyalty to the Confederate cause or through reluctant submission to overpowering public opinion. On the other hand, the reasons of convenience against retroactive revalorization were very strong. Economic processes had proceeded on the assumption that debts paid in Confederate money were finally discharged; the economic burden of revived indebtedness would have placed a still heavier weight on a society very close to complete stagnation; the limits of retroactivity were hard to define.[35] In any extreme inflation such considerations as these interpose

[34] Dislocation of the general economic structure of the South was of course the result of a variety of causes, of which inflation was only one, and among which the emancipation of the slaves played an important part. For a general account see FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA, c's. 22 and 23 (1905); GARNER, RECONSTRUCTION IN MISSISSIPPI 122-138 (1901); THOMPSON, RECONSTRUCTION IN GEORGIA, c's. 3 and 4 (1915).

[35] The problem of determining the limits of retroactive revalorization is one of the most serious legal problems that appear after extreme inflation. It raises again, in retrospect, most of the broad questions of economic policy that are involved in legal relief during the early stages of inflation. These questions will be discussed more fully

a barrier to the reopening of debts paid off in depreciated money. In post-war Germany they prevented judicial or legislative relief of a retroactive character until the return to a stable currency.[36] In the Southern states there was no authority in any of the scaling acts for revalorization of debts paid off in whole or in part. And the courts, either by reason of implications drawn from statutory language or as a result of general rules of private law, were unanimous in refusing such relief.[37]

in the next issue of this REVIEW. At this point it should suffice to indicate the type of questions that would have been raised if retroactivity had been admitted after the Confederate inflation. First, what degree of disproportion between the price paid and the land, goods, or services sold would be required? During 1862 the prices of most necessaries had been approximately doubled, though wide disparities between different commodities had already appeared. [See SCHWAB, THE CONFEDERATE STATES OF AMERICA, Appendix I (1901).] Should price revision be allowed where the money paid was worth less than half the value of the goods sold? Instead of a fixed arithmetical proportion, should courts attempt to fix an arbitrary date, so that transactions entered into after that point should become subject to revalorization, without regard to the movement of prices within the particular group? Second, how far should assumption of risk as to further currency depreciation affect the application of the basic rules? Third, how should *part* payments at successive stages of the inflation be credited on the total debt?

In Germany after the inflation of 1920-1923 the courts attempted at first to fix a definite date, beyond which retroactive revalorization would not be carried. In the end the test became elastic, and the judicial discretion thereby introduced caused serious uncertainty and confusion. Risk-assumption was almost entirely ignored. The crediting of part payments was the subject of a vigorous dispute between the Reichsgericht and the Kammergericht of Berlin, a variety of solutions were proposed, and the arithmetical computations were exceedingly complex. See generally, Dawson, 33 MICH. L. REV. 171 at 233-236 (1934), and on the calculation of part payments, SCHLEGELBERGER-HARMENING, COMMENTARY ON THE REVALORIZATION ACT, art. 18, pp. 305-311 (1927).

[36] Dawson, 33 MICH. L. REV. 171 at 218-219, 233-237 (1934).

[37] Ponder v. Scott, 44 Ala. 241 (1870); Van Hoose v. Bush, 54 Ala. 342 (1875); Glenn v. Case, 25 Ark. 616 (1869); Rogers v. Gibbs, 25 La. Ann. 563 (1873); Pope v. Chafee, 14 Rich. Eq. (S. C.) 69 (1868); Jones v. Thomas, 5 Cold. (45 Tenn.) 465 (1868); Binford v. Memphis Bulletin Co., 10 Heisk. (57 Tenn.) 355 (1872); Ritchie v. Sweet, 32 Tex. 333, 5 Am. Rep. 245 (1869). The same was true of part payments in Confederate money, which were effective *pro tanto* as a final discharge. Herbert v. Easton, 43 Ala. 547 (1869); but *cf.* Daughdrill v. Helms, 53 Ala. 62 (1875); Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255 (1866); Green v. Jones, 38 Ga. 347 (1868); Hall v. Craige, 65 N. C. 51 (1871); Austin v. Kinsman, 13 Rich. Eq. (S. C.) 259 (1867); Fluitt v. Nelson, 15 Rich. Law (S. C.) 9 (1867); Piegzar v. Twohig, 37 Tex. 225 (1872). In Virginia and West Virginia this result was expressly provided for by statute. Va. Laws (1865-6), c. 71, sec. 2; W. Va. Laws (1872-3), c. 116, sec. 2.

In Tennessee for a brief period it was held that the illegality of Confederate-money transactions made payment in Confederate money ineffective as a discharge. Wright v. Overall, 2 Cold. (42 Tenn.) 336 (1865). But this extreme extension of

The problem for legislatures and courts was greatly simplified by the refusal to reopen executed transactions. Debts originating in the pre-war period could be entirely ignored if they had been fully paid during the inflation period. Those that survived unpaid in whole or in part could be enforced without material alteration of their terms, since they had been contracted in United States currency and would be discharged after the war in the same medium.[38] It is true that the purchasing power of Northern currency had in the interval been reduced by approximately one-half (at its lowest point) through the issue of greenback paper money.[39] But in the case of pre-war debts Southern courts and legislatures made no effort to take this depreciation into account.[40]

Attention was concentrated in legislation, as in court decision, on debts which were contracted in Confederate money during the period of the war and which remained unpaid in whole or in part. Revision was authorized in contracts entered into during the inflation period, which usually was defined precisely to commence at a date when the depreciation of Confederate money had become noticeable and to end at a date after the surrender of the Confederate armies.[41]

illegality doctrines was later repudiated (see cases cited above), and in other states illegality, where considered at all, was thought to be an additional reason against reopening debts thus settled. Luzenberg v. Cleveland, 19 La. Ann. 473 (1867); Ritchie v. Sweet, 32 Tex. 333, 5 Am. Rep. 245 (1869).

It is worth noting that the American statutes and decisions after the paper-money inflation of the Revolution also refused to reopen transactions paid off in whole or in part in depreciated money. Anon., 1 Haywood (2 N. C.) 183 (1795); Walker v. Walker, 2 Wash. (Va.) 195 (1796); HARGREAVES, RESTORING CURRENCY STANDARDS 12 (1926); but see Todd's Ex'rs v. Parker, 1 N. J. L. 45 (1791).

[38] Even this relatively clear-cut proposition could lead to some difficulties in application, however. Suppose, for example, that a pre-war debt were renewed during the war period and two new sureties substituted for the original surety on the debt. This case was presented in Horne v. Young, 40 Ga. 193 (1869). The court held that these changes made the renewed debt a Confederate-money obligation and brought it within the scaling act, although they indicated that justice required a different treatment of the principal obligor from that accorded the substituted sureties. But the mere *omission* of one of two original sureties was held by the same court not to amount to a novation so as to bring a pre-war debt within the scaling act. Bonner v. Woodall, 51 Ga. 177 (1874).

[39] See the second installment of this article, in the April issue of this REVIEW.

[40] See below, notes 116, 118, and 119, on the translation of debts contracted in *Confederate* currency into depreciated Northern greenbacks, with allowance for the gold premium.

[41] In Alabama the period fixed was from Sept. 1, 1861, to May 1, 1865; in Georgia from June 1, 1861, to June 1, 1865; in South Carolina from Jan. 1, 1862,

When the objectives of legislative relief had been thus narrowed, it was possible to exclude certain other classes of money obligations. The principal objective could now be defined as the substitution of new standards of value in all executory contracts, to take the place of standards expressed in Confederate currency. To fall within the scope of the scaling acts it was not necessary, of course, that the contract expressly call for payment in Confederate money, if it clearly appeared that Confederate money was the basis of valuation.[42] But if some relatively stable standard, such as gold, had been adopted, no relief was required.[43] Furthermore, by an extension of the same idea, an express assumption of risk as to future changes in the monetary standard would make the contract enforceable without judicial revision. For example, a promise to pay a specified sum in the money current at the maturity of the debt might indicate that Confederate currency was not the exclusive standard for the debtor's performance. In such cases there was usually room for debate on the difficult question of fact, whether

to May 15, 1865; in Texas "before May 26, 1865"; and in West Virginia from May 1, 1861, to May 1, 1865. In Florida all contracts entered into "during the late war" were subject to scaling, and in Arkansas it was merely provided that all contracts payable in Confederate money could be revised. See the statutes cited above, note 29. In all of these states except Florida and Arkansas there might have been difficulty with contracts entered into after the start of the war but before the date at which scaling became permissible. It was assumed, however, that the depreciation of Confederate money had not progressed so far during the first year of the war that any revision of such debts was necessary, and they remained enforceable in United States currency at their face amounts. See Omohundro's Ex'r v. Crump, 18 Gratt. (59 Va.) 703 (1868).

[42] The language of some of the scaling acts made this clear. In three states relief was allowed in all obligations entered into within the periods fixed, if it appeared that they were payable in Confederate treasury notes or were entered into "with reference to Confederate notes as a standard of value." S. C. Acts (1868-9), no. 187, p. 277; Va. Laws (1865-6), c. 71, p. 184; W. Va. Act of Apr. 7, 1873 (Laws 1872-3), c. 116, p. 307. This result followed even more clearly in other states where statutes opened very wide the range of inquiry by fact-finding agencies. Ala. Rev. Code (1867), pp. 58-59; Fla. Act of Nov. 7, 1865 [quoted in Fife v. Turner, 11 Fla. 289 at 291 (1867)]; Ga. Laws of 1865-6, App., p. 20; N. C. Acts of 1865-6, c. 69. It was sometimes very difficult to determine whether Confederate-money prices had been the basis of valuation, and the only means of finding out was to compare the prices agreed upon with current prices in gold or pre-war prices of similar property. Tams v. Brannaman, 23 Gratt. (64 Va.) 809 (1873); Scheible v. Bacho, 41 Ala. 423 (1868); Stewart v. Salamon, 94 U. S. 434, 24 L. ed. 275 (1876); Bierne v. Brown's Adm'r, 10 W. Va. 748 (1877).

[43] Bobo v. Goss, 1 S. C. 262 (1869); Tams v. Brannaman, 23 Gratt. (64 Va.) 809 (1873). Similarly with contracts expressly made payable in United States currency. Sowers v. Earnhart, 64 N. C. 96 (1870). See also Cherry v. Savage, 64 N. C. 103 (1870). A contract for the exchange of goods was even more clearly beyond the scope of the scaling acts. Garrett v. Smith, 64 N. C. 93 (1870); Phillips v. Ocmulgee

so drastic a shift in monetary standards was within the risk assumed.[44] If the debtor was found to have assumed that risk, courts felt themselves impelled to enforce his expressed intention, even though the weight of his obligation was very greatly increased.[45]

The sweep of the scaling acts was wide, even after these areas had been withdrawn from their operation. The cases to which they most clearly applied were promises to repay Confederate money loaned.[46] The acts also applied to promises to pay money in return for goods

Mills, 55 Ga. 633 (1876). But compare Cohen v. Ward, 42 Ga. 337 (1871), where the scaling act was employed in measuring damages for breach of an implied warranty of title in a contract for the exchange of bonds for corporate stock.

[44] The Virginia court wrestled with this problem in a series of decisions. The first was Boulware v. Newton, 18 Gratt. (59 Va.) 708 (1868), an action on a bond for the payment of $5000 without interest "in current funds" three months after demand. The bond further provided that the obligee "shall not be required to receive the money except at his pleasure." The obligee did not demand payment until after the end of the war, on June 25, 1865. The court held that the obligee had contracted for payment in whatever currency was in common circulation at the maturity of the debt, supporting this conclusion by the exemption from interest provided for, by the complete freedom given the obligee to determine the date of maturity, and by the probability that on January 29, 1863, when the bond was executed, the parties contemplated some further depreciation of Confederate money. The question was raised again in Hilb v. Peyton, 21 Gratt. (62 Va.) 386 (1871), where the bond merely provided for payment without interest two years from the date of the bond "in such funds as the banks receive and pay out." The court at first held that the contract was one of hazard, but on rehearing this decision was reversed, and it was held that the parties still contemplated the continued circulation of Confederate money until the maturity of the debt. Hilb v. Peyton, 22 Gratt. (63 Va.) 550 (1872). In the meantime the court had held that no assumption of risk could be inferred from a provision for payment "in current funds" five years after date. Meredith v. Salmon, 21 Gratt. (62 Va.) 762 (1872). The final position taken was that express language or very clear implication would be needed before the conclusion would be drawn that United States currency was contemplated as the medium of payment, merely because it was in fact in general circulation at the maturity of the debt. Calbreath v. Virginia Porcelain & Earthenware Co., 22 Gratt. (63 Va.) 697 (1872). The same general conclusion could be drawn from decisions in other states in contracts for payment in "current funds," "bankable currency," or in media similarly described. Harmon v. Wallace, 2 S. C. 208 (1870); Craig v. Purvis, 14 Rich. Eq. (S. C.) 150 (1868); Darcey v. Shotwell, 49 Miss. 631 (1873); Rives v. Duke, 105 U. S. 132, 26 L. ed. 1031 (1881).

[45] McKesson v. Jones, 66 N. C. 258 (1872); Williams v. Monroe, 67 N. C. 133 (1872); Taylor v. Turley, 33 Md. 500 (1870); and cases cited in previous note.

[46] Whitfield v. Riddle, 52 Ala. 467 (1875); Forcheimer v. Holly, 14 Fla. 239 (1872); Evans v. Walker, 35 Ga. 117 (1866); Cherry v. Walker, 36 Ga. 327 (1867); Mitchell v. Butt, 51 Ga. 274 (1874); Thomas v. Knowles, 40 Ga. 263 (1869); Stokes v. Cowles, 70 N. C. 124 (1874); Wooten v. Sherrard, 71 N. C. 374 (1874); Holt v. Patterson, 74 N. C. 650 (1876); Earp v. Boothe, 24 Gratt. (Va.) 368 (1874); Moon v. Richardson, 24 Gratt. (Va.) 219 (1874); Fultz v. Davis, 26 Gratt. (Va.) 903 (1875); Jarrett's Adm'rs v. Nickell, 9 W. Va. 345 (1876).

sold,[47] services rendered,[48] and land sold.[49] The language of most of the acts referred in terms only to *contracts* entered into during the Confederate period. Courts nevertheless undertook to scale a variety of debts that were thought to come within the spirit of the legislation, though not technically derived in all cases from express contract. In this class were the obligations [50] of collecting agents, trustees, and other

[47] Oliver v. Coleman, 36 Ga. 552 (1867); Crim v. Sellars, 37 Ga. 324 (1867); Robeson v. Brown, 63 N. C. 554 (1869); Brown v. Foust, 64 N. C. 672 (1870); Green v. Brown, 64 N. C. 553 (1870); Ogburn v. Teague, 67 N. C. 355 (1872); McClung's Adm'r v. Ervin, 22 Gratt. (Va.) 519 (1872); Calbreath v. Virginia Porcelain and Earthenware Co., 22 Gratt. (Va.) 697 (1872). See also Maxwell v. Hipp, 64 N. C. 98 (1870), involving the hire of a slave for a term.

[48] Fife v. Turner, 11 Fla. 289 (1867).

[49] Herbert v. Easton, 43 Ala. 547 (1869); Fath v. Bliss, 43 Ala. 512 (1869); Erwin v. Hill's Adm'r, 51 Ala. 580 (1874); Slaughter v. Culpepper, 35 Ga. 25 (1866); Field v. Leak, 36 Ga. 362 (1867); High v. McHugh, 38 Ga. 284 (1868); Clark v. McCroskey, 41 Ga. 137 (1870), an action by a *lessor* of land for rent; Johnson v. Gray, 49 Ga. 423 (1873); McRae v. McNair, 69 N. C. 12 (1873); Wimbish & Co. v. Miller, 72 N. C. 523 (1875); Austin v. Kinsman, 13 Rich. Eq. (S. C.) 259 (1867); Rutland v. Copes, Thomas v. Raymond, 15 Rich. Law (S. C.) 84 (1867); Pharis v. Dice, 21 Gratt. (Va.) 303 (1871); Meredith v. Salmon, 21 Gratt. (Va.) 762 (1872); Sanders v. Branson, 22 Gratt. (Va.) 364 (1872); Myers v. Whitfield, 22 Gratt. (Va.) 780 (1872); Mott v. Carter's Adm'r, 26 Gratt. (Va.) 127 (1875); Brightwell v. Hoover, 7 W. Va. 342 (1874); Bierne v. Brown's Adm'r, 10 W. Va. 748 (1877); Bailey v. Stroud, 26 W. Va. 614 (1885).

[50] Hudspeth v. Johnson, 34 Ga. 403 (1866), Confederate money received by sheriff on execution of judgment; Roberts, Dunlap & Co. v. Graybill, 57 Ga. 117 (1876), same, agent for the collection of a draft; Waller v. Cresswell, 4 S. C. 353 (1873), guardian; Johnson v. Henagan, 11 S. C. 93 (1877), administrator; Moses v. Hart's Adm'r, 25 Gratt. (66 Va.) 795 (1875), curator; Baugh's Ex'r v. Walker, 77 Va. 99 (1883), trustee.

The rules of liability of trustees and other fiduciaries for their dealings in Confederate money underwent considerable development. At first the hostility of reconstruction courts to Confederate money transactions went so far that fiduciaries were held liable for the face amount of debts which they collected in Confederate money and for the face value of assets sold in return for Confederate money. Powell v. Knighton, 43 Ala. 626 (1869); Houston v. Deloach, 43 Ala. 364, 94 Am. Dec. 689 (1869); Pitts v. Singleton, 44 Ala. 363 (1870); Trammel v. Philleo, 33 Tex. 395 (1870); Turner v. Turner, 36 Tex. 41 (1871); Copeland v. McCue, 5 W. Va. 264 (1872); and numerous decisions in other states. These extreme positions were gradually abandoned and it was finally established in most states that the receipt and retention of Confederate money would be proper if justified by the ordinary requirements of prudent administration. Where continued retention of such money was thought reasonable, the fiduciary could ordinarily receive credit for it at its nominal par, even after it had become worthless in his hands. Morris v. Morris, 58 Ala. 443 (1877); Billingslea v. Glenn, 45 Ala. 540 (1871); Jones v. Graham, 36 Ark. 383 (1880); Succession of Herron, 32 La. Ann. 835 (1880); Trotter v. Trotter, 40 Miss. 704 (1866); Purser v. Simpson, 65 N. C. 497 (1871); Larkins v. Murphy, 71 N. C. 560 (1874); Koon v. Munro, 11 S. C. 139 (1878); Kennedy v. Briere, 45 Tex. 305 (1876);

fiduciaries. There was authority also for the scaling of money legacies in wills.[51]

The generalized language of the scaling acts provided no solution for difficult problems of detail that were bound to arise. Such, for example, was the question whether the same rate of revalorization should apply in favor of an assignee of a Confederate-money debt, particularly where the value paid for the assignment was considerably less than the values originally contracted for.[52] There were difficulties as well with the obligations of commercial banks, whose economic position required special treatment,[53] and with claims that had been reduced

Davis v. Harman, 21 Gratt. (62 Va.) 194 (1871); Williams' Adm'rs v. Skinker, 25 Gratt. (66 Va.) 507 (1874).

[51] Elder v. Ogletree, 36 Ga. 64 (1867); but *cf.* Whatley v. Slaton, 36 Ga. 653 (1867).

[52] The proper solution of this problem was by no means clear. Where any considerable interval appeared between the creation of the debt and its assignment, it would usually be found that the assignor had sold at a sacrifice. The question would then arise whether the debtor could take advantage of this accident and reduce the assignee's recovery to the amount that he had paid for the claim. If reluctant to give the debtor a windfall, courts had the choice either of an enrichment of the assignee or a division of the proceeds between assignor and assignee. In Germany after the post-war inflation the latter solution was adopted in legislation, as to claims that were subject to legislative revalorization. Revalorization Act of 1925, art. 17. In judicial decision the only proposition that was clear was that the debtor could not ordinarily demand a reduction of the debt because of an intervening assignment. How the proceeds would be allocated between assignor and assignee had not been decided as late as 1926. DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 113, p. 30 (Feb. 6, 1926).

In several cases Southern courts assumed that the assignee was entitled to the full sum that the assignor could have recovered. Field v. Leak, 36 Ga. 362 (1867); Wimbish & Co. v. Miller, 72 N. C. 523 (1875); Summers v. McKay, 64 N. C. 555 (1870). In the case last cited the court pointed out that the payment by the assignee of less than the full value of the original debt was no concern of the debtor, and added the ingenious though decidedly circular argument, that if the assignee recovered less than the full value of the debt the assignor (here the endorser of a negotiable note) would become liable for the difference on his contract of endorsement. Nevertheless, the existence of an assignment produced results in judicial decision that would have been hard to explain otherwise. In Lamar v. Thornton, 41 Ga. 48 (1870), the measure of recovery was not scrutinized as closely as it might have been if the suit had been brought by the original creditor. In Lohman v. Crouch, 19 Gratt. (60 Va.) 331 (1869) and Jarrett's Adm'rs v. Nickell, 9 W. Va. 345 (1876), the fact that the plaintiff was an assignee was apparently the principal factor in causing the date of maturity of the debt to be selected as the date for valuation, rather than the date of the original contract. On this last question see below, section 3, pp. 747 ff.

[53] The position of commercial banks in inflation presents some special difficulties. If no revalorization of their deposit liabilities is attempted they are not by any means in a hopeless position. The depreciation in the value of their assets, consisting primarily of currency or fixed money obligations, corresponds almost exactly with the reduction in their liabilities. But their capacity to withstand any considerable revalorization of their liabilities to depositors will depend on the degree to which their assets are revalorized.

to judgment during the inflation period and expressed in "dollars" at the values then prevailing.[54] On the other hand, there were some problems that could be safely left for solution by means of general

The enormous volume of transactions cleared through banks and the complicated problems of accounting involved, both point toward complete emancipation of commercial banks from the general rules for revalorization. This indeed was the final result in Germany after the inflation of the last decade. The exemption of commercial banks was the only important exception admitted in German legislation. Dawson, 33 MICH. L. REV. 171 at 221 (1934).

The leading case on the liabilities of commercial banks after the Confederate inflation was Henry & Co. v. Northern Bank of Alabama, 63 Ala. 527 (1879). After describing in general terms the economic position of such banks during and after the Confederate inflation, especially emphasizing the fact that they held many millions of dollars in Confederate paper money, the court held that the depositor's recovery should not be the value of the money deposited at the date of the deposit but the value of the Confederate money due at the date of the depositor's demand for payment. The court recognized that this measure of damages was an important exception to the general rules for Confederate-money debts (see below, pp. 728 ff. and 747 ff.). It also recognized that in cases where no demand for payment was made until after the end of the war the practical effect would be a repudiation of all liability to depositors on deposits payable in Confederate money. It declared, however, that it reached this result "cheerfully," because "it leads to a wholesome and just result." To support its conclusion it relied on the decision of the Supreme Court of the United States in Planters' Bank v. Union Bank, 16 Wall. (83 U. S.) 483, 21 L. ed. 473 (1872), which adopted the same measure of damages in a similar case, without, however, as full a discussion of the economic reasons for this special treatment.

[54] In three states by legislation the scaling of judgments was expressly authorized. In Virginia all judgments recovered between January 1, 1862, and April 10, 1865, on causes of action accruing within the same period, could be reopened "in a summary way on motion, after ten days' notice." Courts were then authorized to "fix, settle, and direct" for what sum the judgment might be discharged, "having regard to the provisions of this act, to the cause of action for which the judgment or decree was recovered, and any other proof or circumstance that, from the nature of the case, may be admissible." Va. Laws (1865-6), c. 71, sec. 3, p. 185. In Arkansas courts of equity were authorized to enjoin the collection of any judgment in excess of the amounts recoverable under the general provisions of the scaling act. Ark. Laws (1866-7), no. 88, p. 195, sec. 3. In Georgia the Constitution of 1868 (art. 10, sec. 6) permitted evidence to be introduced to explain "the meaning of the word dollars" in judgments rendered during the war.

In Georgia, prior to the constitutional provision above referred to, the Georgia court refused to permit evidence to be introduced, through injunction against execution at law, for the purpose of showing that a judgment in an action for breach of promise to marry had been computed on the basis of Confederate dollars. Mullins v. Christopher, 36 Ga. 584 (1867). In Mississippi, on the other hand, parol evidence was held to be admissible for this purpose to reduce the amount adjudged due from an administrator for Confederate money received. There was a strong dictum to the effect that such relief should be given in *all* judgments rendered during the Confederate period. Rogers v. Tullos, 51 Miss. 685 (1875).

For the difficulties experienced by German courts in revalorizing debts that had been merged in judgments during the inflation period, see Dawson, 33 MICH. L. REV. 171 at 234-235 (1934).

rules of private law. Of these the best example was the measure of recovery in claims based on unjust enrichment, where the amount of the "benefit" could be fixed in terms of the real purchasing power of money at the date of its receipt.[55]

No distinction was drawn, either in legislation or in court decision, between legal and equitable actions.[56] There was some authority for a "discretionary" refusal of specific performance by courts of equity unless the price term was revised so as to conform to equity's standards of fairness.[57] In most of the specific performance cases, however, the

[55] No authority has been found in states in which scaling acts were in force, as to the measure of recovery in quasi-contract for the value of Confederate money received. The only two decisions found were from states without scaling acts, and in both of these the value of the money at the date of its receipt, or at the date of its payment on defendant's account, was the measure of recovery. Luster v. Maloney, 6 Baxt. (65 Tenn.) 374 (1873); Edmonds v. Sheahan, 47 Tex. 443 (1877). A similar question appeared, however, in actions in equity to rescind, where the successful plaintiff was required to account for the value of Confederate money received by him, as of the date of its receipt. Kennedy v. Marrast, 46 Ala. 161 (1871); Magill v. Manson, 20 Gratt. (61 Va.) 527 (1871); Ludington v. Gabbert, 5 W. Va. 330 (1872). See also to the same effect, Bogle v. Hammons, 2 Heisk. (49 Tenn.) 136 (1870); Ezelle v. Parker, 41 Miss. 520 (1867).

[56] In legislation the only exceptions were the Arkansas and Virginia scaling acts. In Arkansas courts of equity were authorized to enjoin the execution of common law judgments as to any excess over the amount recoverable under the general statutory rules. Ark. Laws of 1866-7, p. 195. The Virginia act authorized courts of equity to "grant relief to the debtor" where it appeared that he had tendered Confederate money during the inflation period and that his tender had been refused. Va. Act of Mar. 3, 1866, sec. 4 (Laws of 1865-6, c. 71, p. 184). In judicial decision the only hint that courts of equity possessed any special powers in the scaling of Confederate-money debts is an isolated decision in Tennessee, where no scaling act had been adopted. In Kelso v. Vance, 2 Baxt. (61 Tenn.) 334 (1872), an injunction was awarded against an action at law, in order to prevent the enforcement of a Confederate-money debt at its nominal amount in United States currency. But Stewart v. Smith, 3 Baxt. (62 Tenn.) 231 (1873), indicated that parol evidence was admissible for this purpose without the aid of statute, and Penn v. Reynolds, 23 Gratt. (64 Va.) 518 (1873), refused to extend the powers conferred by the Virginia act to such cases, where parol evidence was not shown to be inadmissible at law.

[57] The most interesting case of this type was Daughdrill v. Edwards, 59 Ala. 424 (1877), decided several years after the Alabama court had returned to the value of the consideration as the only practicable measure of recovery for Confederate-money debts (see below, note 81). The court was evidently still at a loss to explain this departure from ordinary rules of damages. The exaction from the purchaser of a price equivalent to the value of the land sold was explained through the power of courts of equity to refuse the "discretionary" remedy of specific performance unless "the conscience of the court" was satisfied. The Alabama court added that this standard of value might not have been adopted if the *vendor* had assumed the affirmative, although two earlier Alabama cases had done precisely this in actions by vendors of land to foreclose purchase money mortgages. Herbert v. Easton, 43 Ala. 547 (1869); Fath v. Bliss, 43 Ala. 512 (1869). The case, then, is of some value for its assertion of equity's power to control

standards derived from the scaling acts were accepted as satisfactory and were applied in the same manner as in legal actions.[58] Nor did

the operation of equitable remedies, though the result can scarcely be said to depend exclusively on this point. The authority of the case is further weakened by the fact that the bill was in the end held to have been properly dismissed for failure to contain an offer to pay whatever sum might be found due.

The most eloquent appeal to a higher morality as a ground for refusal of specific performance is contained in Hudson v. King, 2 Heisk. (49 Tenn.) 560 (1871). The court there referred to the disruptive effects of the war on Southern society, the universal circulation of Confederate money in districts within the Confederate lines, and the inflated values ascribed to all property as a result. It went on to say that a court of equity could not "shut out the picture of desolation, of broken fortunes, of ruined homesteads, of scattered and impoverished families, and the heavy burden of utter bankruptcy and gloom which, at the close of the late civil war, rested upon the country." The changed conditions existing at the time the suit was brought could therefore be taken into account by courts of equity. What effect these changed conditions should have on equitable remedies is not, however, so clear, for the actual decision was merely that the statute of frauds, even though not pleaded, could be relied on by defendants to defeat plaintiff's enforcement of an oral contract for the sale of land.

In Poague v. Greenlee's Adm'r, 22 Gratt. (63 Va.) 724 (1872), the Virginia court asserted its power to put a *defaulting* purchaser to an election between rescission of the contract with restitution of the purchase price paid, and revision of the price term to correspond with equity's notions of fairness. The same device was used in Carter v. Ragland, 21 Gratt. (62 Va.) 574 (1871), as against a defaulting mortgagor who sought redemption from a purchase money mortgage. But in both cases the standard of value imposed as a condition to affirmative relief was the fair value of the land at the time of the contract, the standard, that is, which the Virginia court had begun to apply to all types of contracts. See below, notes 84 and 85.

An intervening depreciation of Confederate money when coupled with other factors could clearly lead to a denial of specific performance. There was authority, for example, declaring that in periods of rapid monetary depreciation time became of the essence, so that the purchaser's default in payment would lead to a denial of the remedy. Whitaker v. Bond, 63 N. C. 290 (1869); Booten v. Scheffer, 21 Gratt. (62 Va.) 474 (1871); Gentry v. Rogers, 40 Ala. 442 (1867). See also Daniel v. Frazer, 40 Miss. 507 (1866), involving personal inequality and non-disclosure. In Arnold v. Trice, 39 Ga. 511 (1869), the reasoning of the court was most obscure, but apparently mere inadequacy of price due to the depreciation of Confederate money was thought to be a sufficient reason for refusing specific performance.

[58] Williams v. Phipps, 49 Ga. 175 (1873); Bierne v. Brown's Adm'r, 10 W. Va. 748 (1877); Gilkeson v. Smith, 15 W. Va. 44 (1879). See also Piegzar v. Twohig, 37 Tex. 225 (1873). In Turley v. Nowell, 62 N. C. 301 (1868), and Hale v. Wilkinson, 21 Gratt. (62 Va.) 75 (1871), specific performance was decreed over the vendor's objection that the Confederate-money price was grossly inadequate. In both cases the courts expressed an emphatic refusal to review contracts for adequacy of consideration. But the effect of their language was very much qualified by the fact that in both cases the vendor had accepted the whole purchase price in Confederate money without objection. It was entirely proper to hold under these circumstances that the purchaser should not bear the risk of subsequent depreciation of the money paid. This was still clearer where there was no evidence that the price so paid was at the time inadequate, as in the later specific performance cases of Ambrouse's Heirs v. Keller, 22 Gratt. (63 Va.) 769 (1872), and Talley v. Robinson's Assignee, 22 Gratt. (63 Va.)

equity develop its own standards of value in actions for the foreclosure of, or redemption from, mortgages and vendor's liens. In such cases the quantum of the debt would be ascertained by the methods prescribed for contracts in general, and for the collection of the debt so ascertained the ordinary remedies of equity would be applied.[59]

The problem of revalorization was thus considerably simplified for courts by the adoption of a uniform legislative method, available without distinction in all classes of Confederate-money debts. We do not find in the Southern scaling acts an intricate classification of legal transactions, with differing rates of recovery for each. The intricate statutory classifications that were developed after the German post-war inflation in 1924[60] could not be hammered out in Southern post-war legislatures, confused and bewildered as they were by overwhelming economic disaster, deprived of their ablest leaders, and disturbed by political strife. They aimed merely to accomplish the revalorization of all unsatisfied Confederate-money debts, through opening some avenues for judicial intervention. They chose the simplest and most generalized language that could be used to accomplish their purpose. To give such language meaning and content was a major task for the courts.

888 (1872). A partial retraction of the views announced in Hale v. Wilkinson is indicated by Poague v. Greenlee's Adm'r, 22 Gratt. (63 Va.) 724 (1872), discussed in the preceding note.

[59] Cases involving the foreclosure of purchase money mortgages on land: Herbert v. Easton, 43 Ala. 547 (1869); Slaughter v. Culpepper, 35 Ga. 25 (1866); Cargyle v. Belcher, 43 Ga. 207 (1871); Wimbish & Co. v. Miller, 72 N. C. 523 (1875); Austin v. Kinsman, 13 Rich. Eq. (S. C.) 259 (1867); Thomas v. Raymond, 15 Rich. Law (S. C.) 84 (1867). Foreclosure of vendors' liens on land sold: Daughdrill v. Helms, 53 Ala. 62 (1875); Mott v. Carter's Adm'r, 26 Gratt. (67 Va.) 127 (1875); Brightwell v. Hoover, 7 W. Va. 342 (1874); Bailey v. Stroud, 26 W. Va. 614 (1885). Redemption by mortgagor from purchase money mortgage on land: Poague v. Greenlee's Adm'r, 22 Gratt. (63 Va.) 724 (1872); Myers v. Whitfield, 22 Gratt. (63 Va.) 780 (1872). Redemption by mortgagor from mortgage given for Confederate money loaned: Moon v. Richardson, 24 Gratt. (65 Va.) 219 (1874).

By awarding the benefit of the real security to revalorized debts, Southern courts might have entangled themselves in the difficulties that caused so much confusion in post-war Germany and required elaborate regulation by statute for their solution. Dawson, 33 MICH. L. REV. 171 at 222 (1934). In none of the cases cited above, however, was there a subsequent bona fide purchase or an intervening junior lien. In Bailey v. Stroud, 26 W. Va. 614 (1885), there had been a transfer subject to the original vendor's lien, but it was assumed without discussion that the land should still bear the full weight of the revalorized debt.

[60] Dawson, 33 MICH. L. REV. 171 at 211-222 (1934).

2. *Methods of Valuation Adopted*

The selection of standards of value for the revision of Confederate-money obligations presented the first really serious obstacles. Here Southern courts and legislatures faced the difficulties which legal agencies can always anticipate in readjusting private contracts after a major inflation. The effort to formulate legal standards for contract revision is obstructed at every point by the complexity and the disparities of price movements during inflation. The same phenomena appeared in the German inflation of the last decade and had a similar effect on processes of revaluation.[61] In the post-war South, where the depreciation of money had been nearly as rapid and in the end as extreme as in the later German inflation, the difficulties were further exaggerated by the war, by the Northern blockade, and by the other factors which have already been referred to as increasing the disparities in price relationships — the low level of Southern economic development at the outbreak of the war, and the inadequacy of means of communication.[62]

The post-war legislatures in the South had before them the example of their predecessors at the beginning of the American Republic. The problem then had been strikingly similar. After the abandonment of the depreciated paper money issued during the Revolution, the Continental Congress and several of the states had worked out statutory scales for the adjustment of public and private debts. As a rule these scales defined the value of Continental money at monthly and semi-monthly intervals. Their chief defects had been the undue emphasis laid on current prices of gold or other metallic coin and the long intervals between the dates on the legislative scales, which prevented accurate estimates of day-to-day fluctuations.[63] Quite apart from these defects, however, a general scale of values would inevitably have failed to reflect the variable and diverging price-relationships of the Revolutionary inflation. Several of the state acts had expressly provided for departures from the scale, through the intervention of courts of equity or through private or official arbitration.[64] In some

[61] Dawson, 33 MICH. L. REV. 171 at 224-233 (1934).

[62] Above, pp. 707 ff., section on The Economic Background.

[63] HARGREAVES, RESTORING CURRENCY STANDARDS 11 (1926).

[64] The Virginia Act of 1781 [quoted 1 Wash. (2 Va.) 341n.] authorized courts of equity to depart from the scale wherever it appeared that its application would be "unjust," and in that case they were authorized to render such judgments "as to them shall appear just and equitable." An interesting Virginia case in which a court of equity took advantage of the blanket authority here conferred is Hill & Braxton v. Southerland's Ex'rs, 1 Wash. (1 Va.) 128 (1792). The court said among other things (at

cases courts of equity, without statutory authorization, had applied their own standards of value in the effort to insure fair results on the facts of particular cases.[65]

It must have been plain to the Southern legislatures that a single, uniform scale of values for all types of private transactions would be grossly unjust. Furthermore, there was an additional obstacle which had not existed in the years immediately after the Revolution. The clause of the federal Constitution forbidding states to impair the obligation of contracts might be invoked to invalidate legislation which imposed an inexact standard on all types of contracts and thereby

p. 134): "we are of opinion, that the legal scale, so far as it operates in the years 1777 and 1778, is not a just rule in itself, not corresponding with the general opinion of the citizens at the time, as to depreciation"; and especially that it was unfair if applied in the particular case, which involved *imported* commodities. Even more important was the decision of the Supreme Court of the United States in Faw v. Marsteller, 2 Cranch (6 U. S.) 10 (1804), a case coming up to the Supreme Court from Virginia, apparently on diversity of citizenship. The case involved a suit by the owner of a ground rent for an upward revision of the rent, which had been given as the consideration for the purchase price of the land on which it was charged. Chief Justice Marshall, who had himself appeared as counsel in several of the earlier Virginia scaling cases, wrote the opinion for the Supreme Court. After pointing out the need for some flexibility in applying legislation to such an extraordinary situation, Chief Justice Marshall finally concluded that the value of the land at the time of the contract was the only fair measure of the purchaser's obligation.

The Pennsylvania statute resorted to "auditors," appointed by the court, to determine both the applicability and the methods of applying the legislative scale. Levan v. Frey, 2 Yeates (7 Pa.) 320 (1798); Kennedy v. Kennedy, 3 Yeates (8 Pa.) 15 (1800). In Maryland arbitration was adopted in place of a legislative scale. HARGREAVES, RESTORING CURRENCY STANDARDS 14 (1926). Even cruder methods were used by the English Privy Council in an earlier case appealed from the province of New Hampshire before the Revolution. The action was on a bond for payment in the bills of Massachusetts Bay Colony "or current lawful money of New England." Since the bills of Massachusetts Bay Colony had in the meantime suffered severe depreciation and had been withdrawn, Lord Mansfield confessed that he was "at a loss" to determine how much the debtor should recover, and the court finally decreed that the loss through depreciation should be equally divided between the parties. Deering v. Parker, 4 Dall. (4 Pa.) xxiii (1760).

[65] Particularly in actions for the specific performance of contracts to convey land. White v. Atkinson, 2 Wash. (2 Va.) 94, 1 Am. Dec. 470 (1795); Lawrence v. Dorsey's Devisee, 4 H. & McH. (Md.) 205 (1798). The power of equity to refuse this "discretionary" remedy or attach conditions to its relief was apparently not denied in Chapline v. Scott, 4 H. & McH. (Md.) 91 (1797), though the appellate court modified the trial court's decree in so far as it had revised the price term in the contract. In Perkins v. Wright, 3 H. & McH. (Md.) 324 (1793), specific performance of a contract to sell land for Continental money was refused, partly because of the "material change of circumstances since the contract" (i.e., the change in the value of money), and partly because contracts involving Continental money were unenforceable in equity because of their "speculative" character.

altered substantially the content of money obligations. In any case, there were only two states that undertook to incorporate in scaling legislation any official and generalized scale of values. In South Carolina an act of 1869 undertook to state the value of Confederate money in United States currency at monthly intervals during the inflation. The scale was not expressly declared to be binding on the courts, however, and the South Carolina Supreme Court, to avoid constitutional difficulties, construed the scale as merely advisory.[66] In North Carolina the legislature recited apologetically that it found "great difficulty in fixing a scale which will secure justice to citizens of all sections of the state"; it further declared its opinion that "no scale which will do justice to all sections of the state can be adopted." The scale which was appended was evidently intended as merely advisory, although the Supreme Court permitted juries to employ it freely.[67]

The refusal to state a single scale of values for Confederate currency involved the important assumption that neither United States currency nor gold could be used as a fair index. This assumption was abundantly justified by all the evidence that survives from the Confederate period. Some traffic there was in Northern greenbacks, secret and illicit at first, and with the open connivance of Confederate authorities toward the end of the war.[68] The sale of gold remained throughout

[66] S. C. Acts of 1868-9, no. 187, p. 277. For the earlier part of the inflation period the value of Confederate money was given for the first day of each month, and the act then declared that its value "from day to day thereafter regularly increased" (or decreased if that was the case) until the last day of the month, when its value was again stated. After May 1, 1863, the quotations were given for the first and fifteenth of each month. In Neely v. McFadden, 2 S. C. 169 (1870), the supreme court declared that the legislature could for convenience create a *prima facie* presumption as to the value of Confederate money on particular dates, but that it could not constitutionally exclude evidence of the parties that the scale, as applied in particular transactions, was incorrect.

[67] N. C. Acts of 1865-6, c. 69. As in South Carolina, the scale stated the value of Confederate money at monthly intervals, starting in this case with November 1861, and continuing through April 1865. Until the time when the Supreme Court of the United States intervened to declare the North Carolina Act unconstitutional (see below, note 86), the state court permitted juries to rely chiefly on the value of the consideration furnished in each case. Brown v. Foust, 64 N. C. 672 (1870); Maxwell v. Hipp, 64 N. C. 98 (1870); and a number of other cases. The legislative scale was held to be applicable primarily in contracts to repay loans of Confederate money. Robeson v. Brown, 63 N. C. 554 (1869). Even after the Supreme Court of the United States had spoken, the North Carolina court insisted that the scale itself was constitutional and could be used by juries as the measure of recovery in Confederate-money debts. Palmer v. Love's Ex'rs, 75 N. C. 163 (1876), 82 N. C. 478 (1880).

[68] SCHWAB, THE CONFEDERATE STATES OF AMERICA 161-163 (1901).

perfectly legal, and gold markets were organized in the larger cities.[69] But neither of these monetary media was used in a sufficient amount to serve as a standard of value. Nor did they reflect with any accuracy the internal purchasing power of Confederate money. The price of gold, as to which full evidence was available, was largely determined by extraneous factors, for gold was the chief medium for speculation on the military and political prospects of the rebellion.[70] Furthermore, the widespread demand for some stable repository of value tended to raise the price of gold above that of other commodities. To adopt the current gold-prices of Confederate paper money would therefore have the effect, for most of the inflation period, of exaggerating the depreciation of Confederate money and reducing the amount of the creditor's recovery.[71]

As a matter of fact, the objection to the use of more stable currencies (gold or Northern greenbacks) cut much deeper. Even if corrections were made for the excessive price of gold due to abnormal demand, the purchasing power of Confederate money could not be ascertained in any such general terms for all classes of commodities. The difficulties were the same as those which precluded any general legislative scale, whether based primarily on gold prices or on a general index of commodity prices.

The result was that in most of the Southern states no effort was made to fix a uniform value of Confederate money for all classes of contracts. Where any measure of recovery was expressly adopted by statute, it was usually declared to be *the value of the consideration*

[69] SCHWAB, THE CONFEDERATE STATES OF AMERICA 229-233 (1901).

[70] Above, note 9.

[71] The calculations of Schwab would seem to indicate that the rise in the prices of most basic commodities exceeded that of gold during the inflation period. Above, note 11. But even in his tables there are some important exceptions. It will also be recalled that his estimates include a relatively small group of commodities, and that they are based on prices current in the markets of the larger cities. From other sources there is abundant evidence that the price of gold rose considerably higher than the prices of most basic commodities. The reported cases offer convincing testimony to this effect. Kennedy v. Marrast, 46 Ala. 161 (1871); Bozeman v. Rose's Ex'rs, 51 Ala. 321 (1874); Erwin v. Hill's Adm'x, 51 Ala. 580 (1874); Harmon v. Wallace, 2 S. C. 208 (1870); Pharis v. Dice, 21 Gratt. (62 Va.) 303 (1871); Calbreath v. Virginia Porcelain and Earthenware Co., 22 Gratt. (63 Va.) 697 (1872); Talley v. Robinson's Assignee, 22 Gratt. (63 Va.) 888 (1872); Bierne v. Brown's Adm'r, 10 W. Va. 748 (1877); Gilkeson v. Smith, 15 W. Va. 44 (1879). The same was true as to United States currency, in so far as it circulated in the South at all. Bozeman v. Rose's Ex'rs, supra; Harmon v. Wallace, supra. See also FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA 179 (1905).

furnished for the debtor's promise to pay.[72] In five states courts were directed by statute to determine in each case the value in United States currency of the Confederate money contracted for. But in two of these states such legislation was nullified by the courts on independent grounds.[73] In Virginia the legislative test was abandoned by the courts after some experiment with its application; and the principal measure of recovery became, as in other states, the value of the consideration furnished by the creditor.[74] Only in South Carolina and West Virginia was there a serious effort made to determine the value of Confederate money by objective tests.[75]

The extent of the innovation resulting from the scaling legislation may be measured by the constitutional objections immediately raised. The constitutional provision invoked was of course the contract clause of the federal Constitution. It was very soon urged before appellate courts that such legislation impaired the obligation of Confederate-money contracts by modifying established rules of damages. In ordinary contracts for the delivery of commodities it had been decided before the middle of the nineteenth century that the proper measure of damages was *the value of the commodity promised at the time and place of delivery.*[76] Contracts for the payment of Confederate money could be placed within this general rule by treating Confederate treasury notes as a mere commodity, like wheat, cotton, or bank notes. This analysis was rendered more plausible by the fact that Confederate notes had been issued by a rebel government and therefore, after the war was ended, did not possess the legal attributes of money. Starting with this premise, it would follow that accepted rules of damages were very materially altered by legislation which adopted *the value of the consideration given*, instead of the value of the money promised.

[72] Ala. Rev. Code of 1867, p. 59, sec. 3; Fla. Act of Nov. 7, 1865 (quoted 11 Fla. 291); Ga. Laws of 1865-6, App., p. 20; N. C. Acts of 1865-6, c. 69; S. C. Ordinance of Sept. 27, 1865 [quoted in 15 Rich. Law (S. C.) at p. 84]; Va. Act of Feb. 28, 1867 (Laws of 1866-7, c. 270, p. 694).

[73] In Texas nullification came through the doctrine of illegality. Donley v. Tindall, 32 Tex. 43 (1869), and a long line of later cases. In Arkansas the statute was held unconstitutional because it adopted the date of the original contract rather than the date when payment was due in measuring the value of Confederate money. Leach v. Smith, 25 Ark. 246 (1868). On this last point see below, section 3, pp. 747 ff.

[74] See below, notes 84 and 85.

[75] Below, notes 91 and 92.

[76] Robinson v. Noble's Adm'rs, 8 Pet. (33 U. S.) 181 (1834); Davis and Stones v. Phelps, 7 T. B. Monr. (23 Ky.) 632 (1828); Huston's Ex'r v. Noble, 4 J. J. Marsh. (27 Ky.) 130 (1830); Bierne v. Dunlap, 8 Leigh (35 Va.) 514 (1837); Rose's Ex'rs v. Bozeman, 41 Ala. 678 (1868); Moore v. Gooch, 6 Heisk. (53 Tenn.) 104 (1871).

The issues involved something more than a mere change in a rule of damages. Southern courts and legislatures were faced with the same problem that harassed German courts after 1923 in the fields left open for judicial revalorization. How far should courts pursue the phantom of a fixed and single value of money, inferred from the shifting and divergent prices of commodities during successive stages of inflation? Or how far, on the other hand, should courts undertake in particular cases to secure a close correspondence between money-price and land, goods, or services sold, without regard to the course of prices in general or the eventual fate of Confederate money? When faced with this dilemma the answer of German courts was a qualified one. In executory contracts of sale, the value of the land, goods, or services sold should be taken into account and was indeed a primary factor in the readjustment of prices.[77] But the relation of the agreed price and the market price of the particular commodity at the date of the contract should so far as possible be preserved; the purchasing power of money in terms of other commodities should also be kept in mind; a variety of other factors might likewise influence the result; of these the most important, and at the same time the hardest to measure in arithmetical terms, was the risk of further depreciation which the parties expressly or by implication assumed.[78]

It is most unlikely that all the problems of valuation which emerged in German post-war cases were in the minds of Southern

[77] Dawson, 33 MICH. L. REV. 171 at 227, 233 (1934). As is there pointed out, the definition of "executory" contracts adopted in the German cases for this purpose was more limited than the one assumed by Southern courts. In the German cases a contract was "executory" only if the vendor of commodities or services had not yet performed. If he had delivered the commodity or performed the service, in whole or in part, it was not felt that the unpaid price needed to be brought into such close conformity with the value of such performance, and his claim was treated as an ordinary money debt. No such distinction appears in the Southern cases, which throughout treated a contract as "executory" and subject to scaling if the money price had not as yet been paid.

[78] Dawson, 33 MICH. L. REV. 171 at 224-233 (1934). The factor of risk assumption does not appear prominently in the German cases of the post-stabilization period; partly, no doubt, because of the extreme difficulty of measuring the effect which various degrees of risk-assumption should have on the measure of recovery. It was primarily in the earlier period, when the issue was over the grant or refusal of rescission rather than over the methods of direct price-revision, that this element loomed large. See Dawson, *ibid.*, at p. 200.

There were writers in Germany who proposed a modified form of a "consideration" test, in urging that mortgages should be revalorized in the proportion that the land subject to mortgage had risen or fallen in value. OERTMANN, DIE AUFWERTUNGSFRAGE 49-50 (1924); Rosenberg in DEUTSCHE JURISTEN ZEITUNG, 1923, p. 649. Their suggestions apparently had no effect on legislation or judicial decision.

legislators. The motives of the scaling acts are nowhere adequately disclosed. Even courts in their application of the scaling acts were unable to envisage all the problems that a more scientific analysis might have raised. At the time it must have seemed that the value of the consideration in each particular case was the only solid ground in the morass which inflation had left behind. The "consideration" test could at least be counted on to secure a fair equivalence between money price and other performance in all Confederate-money contracts. If the scaling acts secured this equivalence it was possible to ignore the bristling questions that lurked in the background — whether the price in the particular case was higher or lower than prevailing prices of similar commodities at the time of the contract, whether the money contracted for could have been profitably used by the vendor for the discharge of debts at par or for the purchase of other commodities whose prices had risen more slowly, or whether the parties had shown foresight or a merely blind credulity as to the future course of Confederate-money prices.

The efforts of Southern courts to justify the resort to the "consideration" test make interesting reading. In a few states the answer to constitutional objections was short and almost flippant.[79] But in Alabama the supreme court held invalid the scaling act, in so far as it made decisive the value of the hogs and goats in return for which the particular defendant had promised to pay Confederate money. The court expressed its sympathy for creditors whose claims were thus exposed to the hazard of extreme and unforeseen inflation, but could find no method consistent with the federal Constitution of upholding the act.[80] After the court was reorganized a few months later this decision was reversed. The new bench found that the result dictated by the statute was also justified by general rules of private law. First, the

[79] Woodfin and Patton v. Sluder, 61 N. C. 200 at 204 (1867): "it is not seen by us how an ordinance which facilitates the means of ascertaining what a contract is, and then enforces it, impairs its obligation." (But see the more elaborate justification offered later by the North Carolina court and quoted below, note 82.) Rutland v. Copes, 15 Rich. Law (S. C.) 84 at 117 (1867): "A contract has vitality from its consideration; without this, it would be *nudum pactum*. The purpose of the ordinance is to discover its true value and real character. . . ." In Slaughter v. Culpepper, 35 Ga. 25 (1866), the court's opinion asserts that only an insane person would have intended to take the risk of such depreciation of Confederate money as actually occurred, and justified the statutory rule as the product of "the natural equity which the understanding approves, the impulse of an honest heart which prompts man to do as he would be done by."

[80] Kirtland v. Molton, 41 Ala. 548 (1868), followed in Thomas' Adm'x v. Thomas, 42 Ala. 120 (1868).

court found that the intentions of the parties could not have been to permit payment in Confederate money after it had become wholly valueless, so that a condition could be implied in the agreement itself; second, the contract had become "impossible of execution"; and third (though this may have been another way of stating the second point), "the delusive standard by which the value of the thing acquired had been measured has vanished," and the value of the property sold was the only remaining guide.[81]

In other states very similar reasoning was used. In Florida the supreme court emphasized the breakdown of Confederate money as a standard of value. Referring to the enormous discrepancies in its purchasing power when used for such diverse purposes as the payment of wages and the purchase of gold, the court concluded that "Confederate notes had no fixed value, and it would be unjust to fix the value of anything else by such a standard." [82] The Virginia cases show a very interesting development. In one early decision the Court of Appeals

[81] Herbert & Gessler v. Easton, 43 Ala. 547 at 554 (1869):
"We must . . . recognize that it was not the intention of the parties to a contract which might be discharged by a payment of this currency, that if it became valueless by the triumph of the United States, the contract was on that account to become void. There was in the minds of every one a general impression that a *quantum valebat* or *quantum meruit*, somehow to be ascertained, was to be paid. We think this is the legal effect of such a contract, and perhaps we may say that it was an implied agreement of the parties. . . .

"The agreement . . . has become impossible of execution. The delusive standard by which the value of the thing acquired had been measured has vanished, and the value of the property, at the time it was sold, is the guide to the just and equitable' judgment."

In later decisions the Supreme Court of Alabama had some difficulty in reassuring itself as to the consistency of this result with ordinary rules of contract law. In Block v. McNeil, 46 Ala. 288 (1871), the court asserted that it followed from the axiom that "things which are equal to the same thing are equal to each other." In Whitfield v. Riddle, 52 Ala. 467 (1875), it was said (at p. 472): "This rule may not, in all cases of this sort, be defensible on strict legal principles; but it is not inequitable, and we consider it established by decisions of this court. . . ." See also Daughdrill v. Edwards, 59 Ala. 424 at 428 (1877).

[82] Fife v. Turner, 11 Fla. 289 (1867). The court also said (at p. 292): "It will be admitted that to carry out the contracts made during the war, by enforcing the performance according to the strict interpretation of the express agreement, would involve very great hardship. Extrinsic circumstances have intervened, values have changed, and what was then considered valuable is now worthless. . . ."

When the attack on the state scaling act was renewed in North Carolina in 1874, the supreme court reverted to the idea, so common in the Confederate-money cases, that the contract "had become by accident impossible of fulfillment" according to its literal meaning. From this the court drew the conclusion that the "general intent" of the parties was to do "as equity prescribed," and this, the court said, was all the statute required of them. Wooten v. Sherrard, 71 N. C. 374 (1874).

insisted on a translation of Confederate money into its current value in *gold*, presenting at the same time some forcible arguments which showed the complete unsuitability of the gold price.[83] But the court was soon forced to admit that the value of the property sold might be used as an alternative to the gold price. Constitutional difficulties were met by pointing to the injustice resulting from the earlier rule, "the unprecedented condition of things growing out of the utter annihilation of the whole currency of the country," and the frustration of the intention of the parties that would follow from insistence on literal performance.[84] In the end the "property standard" was strongly recommended to trial courts for general use, though a "gold standard" could still be used where it could accomplish fair results.[85]

No opportunity was given to the United States Supreme Court to pass on these questions until 1875, when the flood of Southern litigation had begun to subside. In that year the Court very emphatically held unconstitutional the North Carolina statute, as construed by the North Carolina court.[86] The Court declared, Mr. Justice Bradley

[83] Dearing's Adm'x v. Rucker, 18 Gratt. (59 Va.) 426 at 434 (1868):
"Gold, it is well known, was not a currency, but an article of traffic, during the late war. Scarcely any article had a value that was less stable and uniform. It went up, and sometimes went down, for short periods, very suddenly, according to the vicissitudes of the war and the demands of speculation and adventure. Its value was not uniform in different places at the same time. At points remote from the cities, the people paid little or no attention to its fluctuations, and were not governed in their dealings by any reference to its value.

"There would seem, therefore, to be strong ground for saying, that gold does not fulfill the conditions necessary for an absolute standard, the most essential of which are uniformity and stability. But it is a convenient and practicable standard, and answers the purpose as well as any other that can be found; perhaps better than any other. At any rate, it is the standard generally adopted, and will be adhered to from convenience, and almost from necessity; for the dispatch of business requires that some standard should be assumed, and one that is capable of prompt and easy application."

[84] Pharis v. Dice, 21 Gratt. (62 Va.) 303 (1871). The court was aided in reaching this conclusion by an 1867 amendment of the original scaling act, providing expressly that where the cause of action grew out of "a sale, or renting or hiring of property, whether real or personal, if the court, (or where it is a jury case), the jury think that, under all the circumstances, the fair value of the property sold, or the fair rent or hire of it would be the most just measure of recovery in the action," then they should be privileged to use *either* the value of the money promised or the value of the consideration. Act of Feb. 28, 1867 (Laws of 1866-7, c. 270, p. 694 at 695).

[85] Meredith v. Salmon, 21 Gratt. (62 Va.) 762 (1872); Sanders v. Branson, 22 Gratt. (63 Va.) 364 (1872); McClung's Adm'r v. Ervin, 22 Gratt. (63 Va.) 519 (1872); Myers v. Whitfield, 22 Gratt. (63 Va.) 780 (1872); Sexton v. Windell's Adm'x, 23 Gratt. (64 Va.) 534 (1873).

[86] Wilmington and Weldon R. R. v. King, 91 U. S. 3 (1875).

It may be surmised that the decision of the Supreme Court in this case was alone dissenting, that the jury under this legislation was constituted "a revisory body over the indiscretions and bad judgments of contracting parties." The Court admitted that the devices employed might in many instances relieve the parties from hard bargains, "though honestly made upon an erroneous estimate of the value of the articles purchased." But the result would be "an insecurity in business transactions which would be intolerable"; in any case "the Constitution of the United States interposes an impassable barrier to such new innovation [sic] in the administration of justice." [87] These views were reaffirmed ten years later, when the Virginia scaling act was held unconstitutional for similar reasons.[88]

The only state courts that could have escaped reversal by the Supreme Court, if appeals had been promptly taken, were the appellate

influenced by the absence of any argument for defendant in error, for whom no counsel appeared and no brief was filed. It was perhaps on this account that the opinions of the majority and the minority do not cite Faw v. Marsteller, 2 Cranch (6 U. S.) 10 (1804), in which the Supreme Court, speaking through Chief Justice Marshall, had adopted the value of the consideration as the most "just and equitable" test in a case arising out of the Revolutionary inflation, the court adding that they could perceive "no other guide" in scaling the debt in question. The case had reached the Supreme Court on appeal from the federal circuit court for Virginia [the opinion below being given in Marsteller v. Faw, Fed. Cas. 9137 (1803)]. The power to scale the debt was derived from the Virginia scaling act, which authorized courts of equity to intervene and render "such judgment as shall appear to them just and equitable," wherever the application of the general legislative scale would be "unjust." The action in the particular case was brought in equity by the owner of a ground rent for an upward revision of the rent, which had been given as the consideration for a sale of the land in 1779.

For a case in the Virginia state courts adopting the "consideration" test, see White v. Atkinson, 2 Wash. (2 Va.) 94, 1 Am. Dec. 470 (1795), an action by a purchaser of land for specific performance. But *cf.* Lee v. Biddis, 1 Yeates (6 Pa.) 8 (1791), an action on a bond for the purchase price of land sold, where the court said (at p. 9) that to adopt the value of the land sold as the measure of recovery "would tend substantially to vary the agreement of the parties, by making a new contract for them which they had not in contemplation at the time. . . ."

[87] It is interesting that Mr. Justice Bradley, who had shown some sympathy for the "southern" point of view in other constitutional cases of the period, entered a vigorous dissent in the King case. His argument for sustaining the North Carolina decision was based on the assumption that "the true value of the money named in the contract" could not be ascertained, and especially that to measure its value by its purchasing power in terms of gold or United States currency would be impossible and unjust. His conclusion was that the "purchasing capacity" of the money promised was the real object of inquiry, and that this "purchasing capacity" could be best ascertained by determining what it would buy in terms of the particular commodity (here wood) at that time and place. The value of the commodity promised at the time and place of the contract would thus become the fairest and most convenient measure of recovery, as the North Carolina court had held.

[88] Effinger v. Kenney, 115 U. S. 566 (1885).

courts of South Carolina and West Virginia. Even in South Carolina the value of the property sold was used for several years, in accordance with an early ordinance, passed in 1865.[89] In new legislation, passed in 1869, the current value in United States currency of Confederate money was declared to be the test, and a scale was appended to facilitate the process of translation.[90] Thereafter the South Carolina court held that the value of the property sold could not be used, and juries were projected into the fogs which surrounded the value of Confederate money.[91] The West Virginia cases, on the other hand, consistently held lower courts to their distasteful task. The Court of Appeals first rejected the gold value of Confederate money as a universal guide, for excellent and convincing reasons. It likewise rejected the value of the consideration furnished, following at this point the reasoning of the Supreme Court of the United States. Its conclusion was that trial courts must ascertain in each case the purchasing power of Confederate money at the place and date of the particular transaction. The method suggested was to take evidence of "the average prices of property, real or personal, just before the war" and compare them with "the prices of such property in Confederate notes" in the county and on the date of the contract.[92] No protest by trial courts is recorded; apparently

[89] Austin v. Kinsman, 13 Rich. Eq. (S. C.) 259 (1867); Rutland v. Copes, 15 Rich. Law (S. C.) 84 (1867).

[90] Above, note 66.

[91] McKeegan v. McSwiney, 2 S. C. 191 (1870); Johnstone v. Crooks, 3 S. C. 200 (1871); Parker v. Wilson, 3 S. C. 296 (1871); s. c., 5 S. C. 485 (1874). Constitutional limitations were implicitly the basis for these decisions, though they were not expressly stated. In none of the cases is there any suggestion as to how the "value" of Confederate money should be proved. It had been held in Neely v. McFadden, 2 S. C. 169 (1870), that the federal Constitution required that the parties be allowed to prove that the "purchasing value" of Confederate money at the date of the contract was different from that set in the legislative scale. But the Supreme Court did not undertake to formulate any system of price indices for use by trial courts. The assumption evidently was that the parties in each case would assemble and analyze, for the jury's edification, the complex economic data required.

[92] It should be observed that most of the West Virginia litigation came after the Supreme Court of the United States had held unconstitutional the North Carolina scaling act, so that the decisions represented in part an effort to conform to these authoritative views. The West Virginia scaling act was not passed until 1873, and the illegality doctrine was uprooted only in 1872 (see above, note 23). In two preliminary cases the Court of Appeals had approved, without much discussion, the use of the *gold* value in contracts arising out of loans of Confederate money. Jameson v. Myles' Ex'r, 7 W. Va. 311 (1874); Jarrett's Adm'rs v. Nickell, 9 W. Va. 345 (1876). When the issue was squarely presented in Bierne v. Brown's Adm'r, 10 W. Va. 748 (1877), an action for specific performance of a contract to sell land, the court pointed out the extreme injustice to the vendor through the trial court's use of the gold price. It refused to adopt the value of the land at the time of the contract, however, on the

they proceeded with their heroic task, if not cheerfully, at least without complaint.

Before the Supreme Court of the United States was able to intervene the Southern courts had succeeded, through application of the scaling acts, in liquidating most of the indebtedness left over from the Confederate period.[93] Even in employing the "consideration" test, however, the difficulties were formidable. In the scaling acts themselves it had been recognized that the value of the consideration furnished would not serve as a sole criterion in all types of Confederate-money transactions. It was provided in several of the acts that all the facts and circumstances should be taken into account and that judgments should conform to equity and aim at substantial justice.[94] A broad discretion in trial courts was expressly conferred; the reported cases indicate that this discretion was very freely used.

The most remarkable liberties with accepted rules of damages were taken in Georgia. There either party to a suit involving a Confederate-money contract was by statute authorized to

> "give in evidence, the consideration and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time, and the verdict and judgment rendered shall be on principles of equity. . . ." [95]

The Supreme Court construed this statute in the most liberal manner.[96] Juries were allowed to rely exclusively on the gold value of Confed-

ground that this would revise the contract of the parties too drastically. The only alternative was to ascertain the purchasing power of Confederate money in general terms. In two later cases this duty of trial courts was re-affirmed. Gilkeson v. Smith, 15 W. Va. 44 (1879); Bailey v. Stroud, 26 W. Va. 614 (1885). It should be said, however, that the Court of Appeals did not apparently have in mind a weighted general index of wholesale and retail prices and wages. Trial courts were directed only to ascertain the "average appreciation" of real and personal property.

[93] The cases cited above, notes 46-49, are all cases where the scaling acts were applied in appellate courts for the revision of Confederate-money contracts. In all of them, with the exception of those cited from West Virginia, the value of the consideration given by the creditor was the measure of recovery.

[94] Especially the scaling acts of Alabama, Florida, Georgia, South Carolina, and Virginia, cited above, note 29.

[95] Georgia ordinance of Nov. 8, 1865 (Laws of 1865-6, App., p. 20).

[96] A typical statement in the Georgia cases is that in Taylor v. Flint, 35 Ga. 124 at 128 (1866), to the effect that the object of the scaling ordinance was to enforce contracts according to "natural equity" and to compel men "to adjust their controversies upon the golden rule of doing unto others as they would be done by." See also Evans v. Walker, 35 Ga. 117 (1866); Cherry v. Walker, 36 Ga. 327 (1867). In the latter case the court held erroneous an instruction that the jury *might* consider the

erate money if they preferred,[97] and even to adopt corn as the standard of value.[98] But neither these commodities nor the value of the consideration furnished in the particular case was imposed as the exclusive standard.[99] Furthermore, when a discrepancy appeared, as it commonly did, between the values at the inception of the contract and at the maturity of the debt, juries were allowed not only to receive evidence of these values "at any time," but to select "any time" they pleased for measuring value.[100] The range of choice was sometimes very wide and verdicts represented the crudest sort of compromise.[101]

In other states juries were not allowed to roam so freely. The Virginia Court of Appeals did indeed permit juries to decide at their discretion whether to use the value of the consideration or the gold value of Confederate money as the measure of recovery.[102] At one time juries

value of Confederate money at the maturity of the debt, though not bound to. The supreme court held that this instruction might control the minds of the jury, which should be left entirely free. It was recommended instead that the trial judge merely read the scaling ordinance to the jury and let them formulate their own theories of damages.

[97] McLaughlin & Co. v. O'Dowd, 34 Ga. 485 (1866); Roberts, Dunlap & Co. v. Graybill, 57 Ga. 117 (1876).

[98] Lloyd v. Cheney, 37 Ga. 497 (1867). It was even clearer, of course, that the parties could introduce evidence as to prices of corn and "other articles of produce" to show the purchasing power of Confederate money over a wider range of commodities. Johnson v. Gray, 49 Ga. 423 (1873).

[99] Thomas v. Knowles, 40 Ga. 263 (1869), ordered a new trial where the jury had been restricted to the gold value of Confederate money. In Field v. Leak, 36 Ga. 362 (1867), one judge urged the value of the consideration as the proper measure of recovery in ordinary contracts of sale. A majority of the court, however, said (at p. 371) that they did "not think it best to adopt this as a rule applicable to all cases. In some cases it may be the correct rule; in others it might work great injustice. Let the Courts and juries carry out the provisions of the ordinance in its spirit, and they will find this Court ready to affirm their verdicts and judgments." In the particular case, however, the plaintiff had been awarded only $1025.66 for land and goods worth on a gold basis at least the amount of the purchase price, $4750 (of which only $600 had been paid). A new trial was ordered on the ground that a verdict for $1025.66 was manifestly unjust.

[100] Green v. Jones, 38 Ga. 347 (1868); White v. Lee, 40 Ga. 266 (1869); Mitchell v. Butt, 51 Ga. 274 (1874).

[101] High v. McHugh, 38 Ga. 284 (1868), was an action on a note given on March 3, 1863, and due December 25, 1863, for land sold. The evidence as to the value of the land was conflicting and indefinite; the gold value of Confederate money at the execution of the note was shown to be slightly more than 3 to 1, and at the maturity of the note was 21 to 1. The jury scaled the note at a rate of exactly 10 to 1, and the Supreme Court refused to set aside their verdict. A similar compromise was adopted in Lazenby v. Wilson, 38 Ga. 124 (1868), and Mitchell v. Butt, 51 Ga. 274 (1874).

The date for measuring value is further discussed below, section 3.

[102] Sexton v. Windell's Adm'x, 23 Gratt. (64 Va.) 534 (1873).

in Virginia were permitted, in accordance with a provision of the scaling act, to select any date they pleased for measuring value.[103] But when these powers were employed to reduce a creditor's claim to one-half the gold value of the property sold, the Court of Appeals felt bound to intervene.[104] In other states juries were merely directed to take account of all the facts and circumstances and not to restrict themselves too narrowly to a single factor in valuation.[105]

In states that adhered more strictly to the "consideration" test the reported cases throw little light on the processes by which this relatively simple test was applied. In a period of constant price fluctuation and general economic disorder it was difficult enough to fix, at a given time and place, the value of the commodity involved in the particular contract. Appellate courts usually restricted themselves to announcing the general principle of valuation, asserting the extreme difficulty of the process itself, and affirming judgments that came reasonably close to a common-sense result. Responsibility was thus shifted, in the main, to trial courts, but the problem of valuation was by this means merely transferred to another level.

The difficulties in determining the value of property sold during the inflation period appear in extreme form in contracts for the sale of land. For a variety of reasons land transactions present peculiar difficulties in periods of rapid change in monetary values. In the first place, transactions involving land as a rule extend over a long term, so that the disparity between the money values contracted for and those eventually received will be very great. In the second place, prices of land are influenced by a variety of factors which remove it from the main stream of commodity prices. In periods of inflation the price of land tends to rise at a much slower rate than the prices of other commodities. The development of an organized and active market for land is retarded by its physical immobility, the diversity of uses to which land is applied, and the difficulties in the way of physical division into units of equal value.[106] A tardy response of land prices in the midst

[103] Pharis v. Dice, 21 Gratt. (62 Va.) 303 (1871); Moses v. Trice, 21 Gratt. (62 Va.) 556 (1871).

[104] McClung's Adm'r v. Ervin, 22 Gratt. (63 Va.) 519 (1872).

[105] Harmon v. Wallace, 2 S. C. 208 (1870); Ogburn v. Teague, 67 N. C. 355 (1872).

[106] The influence of commercial practices and established habits of thought on the form of land transactions should probably be included as well, though these are in a sense the product of more basic physical and economic factors. Nor can we neglect the influence of law in the direction of more formalized methods of transfer. The total result of these complex economic, physical and social factors was to mold ordinary land

of a general upward movement is rendered likely by the further factor that costs of production, entering largely into the value of manufactured goods, are absent in the case of landed property, except in so far as improvements are made during the progress of the inflation itself.[107] Finally, the value of land is connected to an exceptional degree with the economic fortunes of its present and prospective users. The result is a spread of prices between various types of land used for different economic purposes or by different economic groups. This likewise raises difficulties in the way of valuation for legal purposes.[108] In periods of inflation, then, there is more than the usual justification for equity's presumption that every tract of land is unique.

These assumptions find support in the only Southern case which fully reveals the processes of valuation adopted by the trial court. *Thomas v. Raymond*[109] was an action by a vendor to foreclose a purchase money mortgage. The land involved was residential property located in Greenville, South Carolina. The property had been conveyed to the purchaser on August 25, 1863, at a time when Confederate money was well started on its downward skid. The mortgage was given to secure the whole purchase price of $7,000, which was made payable six months after the ratification of peace with the United States, or sooner at the mortgagor's option. The purchase price was shown to have been computed on the basis of current Confederate-money prices, so that the case came clearly within the South Carolina scaling act. The trial court assumed and the Court of Appeals agreed that the value of the property at the date of the sale should be the measure of the purchaser's obligation. A commissioner appointed by the trial court therefore proceeded to take evidence as to the value of the house and lot in August 1863. The witnesses examined estimated the value at various figures ranging between $1,500 and $3,000 in

transfers, as compared with sales of goods, into more formalized transactions, extending over a longer term.

[107] Even the element of new construction can be expected to play a relatively minor part in enhancing the value of land, on account of the general cessation of building construction during periods of extreme inflation. In post-war Germany the lag of real estate prices behind those of other commodities was very marked. There the situation was aggravated by governmental regulation, stringent and effective, of land rents. See Boeters in DEUTSCHE JURISTEN ZEITUNG, 1926, p. 558.

[108] In Cutcher v. Jones, 41 Ga. 675 (1871), the court mentioned the variations in the prices of land as between different localities in the state as one of the reasons for allowing latitude to juries in adjusting equities. For a descriptive account of the course of land prices during the German inflation see Kasper in the JURISTISCHE WOCHENSCHRIFT, 1925, p. 194.

[109] 15 Rich. Law (S. C.) 84 (1867).

"good currency" and between \$3,000 and \$12,000 in Confederate money. The evidence further showed that four other houses in the same town had been sold during 1863 for \$17,000, \$16,100, \$9,000 and \$5,500 respectively. The witnesses were not clear as to whether these houses were more or less valuable than the plaintiff's house. One witness testified that the house which had sold for \$5,500 was "a fine, large house" on Main Street near the business section and that it brought more than twice as much as plaintiff's house would have sold for at the time, though he (the witness) would have preferred to have plaintiff's house. The other evidence being no more conclusive than this, the commissioner finally added up the values stated by all the witnesses, divided this total by the number of witnesses, and then proceeded to add 25 per cent on the ground that the influx of war refugees into Greenville at about the time of the sale had further augmented the values of all local real estate. The findings of the commissioner were approved by the trial court and eventually by the Court of Appeals, with the exception of the 25 per cent supplement, which was held to be unauthorized.[110]

A second problem, which the "consideration" test was no better able to meet, was the problem of translating the values of the inflation period, even after allowance for the depreciation of paper money, into values expressed in post-war currency. In this, the Southern courts faced another of the inescapable problems in readjusting private contracts after extreme inflation. The course of the Confederate inflation indicated how difficult it was to select any single and uniform standard for the measurement of monetary values. Even when debts had been redefined in terms of more reliable indices of value, the question still remained whether the indices selected could be carried over without change into a stabilized economy. In Germany the shift in the price level which followed the stabilization of the mark was taken into ac-

[110] This modification was made by the trial court, whose decree was affirmed by the Court of Appeals without discussion of this point. The reasoning of the trial judge was exceedingly obscure. He pointed out that the prices of real estate in general had been "less affected by the depreciation of the currency than any other species of property." He then asserted that it was improper to ascribe the rise in Greenville land values to the increased demand. He declared it more in accordance with fact to say that the increased demand prevented the *depreciation* in land values from being as great as it would otherwise have been. In the same passage, however, he points out that none of the witnesses attempted to estimate how far the increase in prices was due to the influx of refugees. In view of the extreme difficulty of estimating the influence on prices of such factors as these, the decision should probably be rested on the insufficiency of plaintiff's evidence.

count by courts of law. This factor was perhaps the principal source of confusion as to the purpose and theory of judicial revalorization. Nor can it be said that the solutions reached by German courts were clear or wholly satisfactory.[111]

The standard adopted in Southern cases to accomplish the transition from inflation to stabilization was gold, the most familiar representative of value. Their choice of this medium was undoubtedly influenced by the survival of a free gold market in North and South throughout the war and post-war periods.[112] More important than this, however, was their persistent faith in gold as a stable and universal measure of value. This faith was not impaired, but rather reinforced, by the depreciation of Northern paper money, which was reflected in a gold premium as late as 1878.[113] Nor was it seriously shaken by the steady decline in the value of gold on world markets, which continued at least until 1873 under the influence of an expanding world production of gold.[114] In spite of the constant shift in the relations between gold and the prices of other commodities, the thinking of Southern courts was dominated by a metallic theory of money.[115] Where the cases reveal any underlying standard for the comparison of Confeder-

[111] Dawson, 33 MICH. L. REV. 171 at 229-232. See especially the vigorous criticism of the German decisions by Abraham, JURISTISCHE WOCHENSCHRIFT, 1925, p. 1343, and Boeters, DEUTSCHE JURISTEN ZEITUNG, 1926, p. 558.

[112] SCHWAB, THE CONFEDERATE STATES OF AMERICA 229-233 (1901); MITCHELL, HISTORY OF THE GREENBACKS 182-187 (1903).

[113] See the next installment of this article, in the April issue of this REVIEW.

[114] MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 27-33 (1908).

[115] See, for example, the language of Bierne v. Brown's Adm'r, 10 W. Va. 748 at 767 (1877): "Gold is regarded as having a fixed and uniform value throughout the civilized world." The whole opinion is pervaded with the conviction that the objective of judicial action must be to reduce Confederate-money values to a gold basis, though the current purchasing power of Confederate money in terms of gold was recognized at the same time to be an unfair and inadequate index of commodity prices in general. See also the language of Chief Justice Chase in Thorington v. Smith, 8 Wall. 1 (1868), where he declared that the value of Confederate money could be ascertained readily enough at any particular time in gold and silver, "the universal measures of value."

The prevalence of a metallic theory of money in the cases of the period is not surprising, in view of the survival of the same basic assumptions in legal decisions and economic literature of the twentieth century. One branch of the Reichsgericht as late as 1924 reverted to metallism, in a form almost as crude, when faced with a major problem of valuation after the German inflation. See Dawson, 33 MICH. L. REV. 171 at 226-227 (1934). For an interesting account of commodity theories of money in recent German economic literature, see ELLIS, GERMAN MONETARY THEORY, 1905-1933, c's. 4-6 (1934).

ate-money and post-war values, that standard was, almost without exception, gold.[116]

The legal tender attribute of Northern paper money was not thought in most states to preclude a resort to gold as the stable carrier of value through time. Any judgment recovered in Southern courts after the end of the Civil War was assumed to be payable in legal tender notes, as a necessary result of the legal tender acts.[117] Any discrepancy attributable to this factor was provided for by adding to the gold value of the debt the current gold premium at the time of trial.[118] In two states, it is true, the legal tender acts were held to require by implication that all processes of valuation be carried through in terms of Northern legal tender money. In these states the jury or other fact-finding agency was forced to project itself back into the Confederate period and ascertain the values of commodities in terms

[116] Crim v. Sellars, 37 Ga. 324 (1867); High v. McHugh, 38 Ga. 284 (1868); Randall v. Pettes, 12 Fla. 517 (1869); Barclay v. Russ, 14 Fla. 372 (1874); Robeson v. Brown, 63 N. C. 554 (1869); Garrett v. Smith, 64 N. C. 93 (1870); Brown v. Foust, 64 N. C. 672 (1870); Ogburn v. Teague, 67 N. C. 355 (1872); Myers v. Whitfield, 22 Gratt. (63 Va.) 780 (1872); Merewether v. Dowdy, 25 Gratt. (66 Va.) 232 (1874); Walsh v. Hale, 25 Gratt. (66 Va.) 314 (1874); Fultz v. Davis, 26 Gratt. (67 Va.) 903 (1875); Wrightsman v. Bowyer, 24 Gratt. (65 Va.) 433 (1874); Moses v. Hart's Adm'r, 25 Gratt. (66 Va.) 795 (1875); Jameson v. Myles' Ex'r, 7 W. Va. 311 (1874); Jarrett's Adm'rs v. Nickell, 9 W. Va. 345 (1876); Bierne v. Brown's Adm'r, 10 W. Va. 748 (1877).

The only exceptions are the cases cited below, note 119, authorizing the use of Northern legal tender money as the basis of valuation for Confederate-money transactions.

[117] In none of the Southern states, except Kentucky, were any doubts expressed as to the validity of the legal tender acts, and in several there were decisions expressly holding them constitutional. See the next installment of this article, in the April issue of this REVIEW.

[118] Brown v. Foust, 64 N. C. 672 (1870); Ogburn v. Teague, 67 N. C. 355 (1872); Crim v. Sellars, 37 Ga. 324 (1867). In some decisions a gold premium was in effect provided for by ordering judgment for the ascertained sum in gold "or its equivalent in legal tender notes." High v. McHugh, 38 Ga. 284 (1868); Wimbish & Co. v. Miller, 72 N. C. 523 (1875); Wrightsman v. Bowyer, 24 Gratt. (65 Va.) 433 (1874); Moses v. Hart's Adm'r, 25 Gratt. (66 Va.) 795 (1875). The earlier Virvinia case of Dearing's Adm'x v. Rucker, 18 Gratt. (59 Va.) 426 (1868), had held that the legal tender acts precluded the recognition of a gold premium, even in Confederate-money debts that had been reduced to a gold basis in the process of revalorization. This case was by implication overruled by the later Virginia cases cited above. How far the Virginia court was willing to go with its translation of debts into gold values is shown by the complicated calculations in Fultz v. Davis, 26 Gratt. (67 Va.) 903 (1875), where there had been payments in greenbacks after the Civil War on a Confederate-money debt.

There was authority even for the reduction to a gold basis, with allowance for the gold premium, in case of a claim for damages for breach of a contract to deliver cotton in return for goods sold, a case that clearly lay outside the scope of the scaling acts. Garrett v. Smith, 64 N. C. 93 (1870). The objections to the use either of gold of a currency not then in general circulation.[119] It may be surmised that gold remained the ultimate standard of reference in such cases. No other, more scientific, methods of valuation were suggested by appellate courts; nor were doubts expressed as to the stability of gold as the permanent and stable representative of monetary value.[120] From cases of the latter type we can therefore derive no more light on the transition problem than from cases which relied exclusively on gold. From all the cases together one obtains the impression of a naïve faith in some essential Money that survived behind the illusory appearances which money sometimes assumed. The persistence of that faith, as much as the difficulty of finding some substitute for gold as a carrier of value, prevented courts from inquiring whether a major shift in monetary values had occurred after stabilization.[121]

or of Northern Greenbacks as a basis for measuring damages in such cases are admirably stated in Bozeman v. Rose's Ex'rs, 51 Ala. 321 (1874).

[119] The strongest statement of this point of view was in Carter v. Cox, 44 Miss. 148 (1870), an action for damages for breach of a contract to deliver cotton. The court held erroneous a charge to the jury that the value of the cotton should be estimated in gold and that the value in gold of United States notes should then be determined. The court said that this method of calculation was "impracticable, unnecessary, and unjust" and, more serious than this, it would constitute a direct attack on the constitutionality of the legal tender acts. The same reasoning appears in two other Mississippi cases. Ezelle v. Parker, 41 Miss. 520 (1867), and Jamison v. Moon, 43 Miss. 598 (1871). In Tennessee the same results were reached in two cases [English v. Turney, 2 Heisk. (49 Tenn.) 617 (1871), and Luster v. Maloney, 6 Baxt. (65 Tenn.) 374 (1873)], but the final position of the Tennessee court was that legal tender notes should be used as the basis of valuation only if they were in general circulation at the maturity of the debt. Moore v. Gooch, 6 Heisk. (53 Tenn.) 104 (1871); Jones v. Kincaid, 5 Lea (73 Tenn.) 677 (1880).

It should be pointed out that neither Mississippi nor Tennessee had a scaling act in force at any time. There were sporadic instances, in states with scaling acts, where United States currency was used as the exclusive standard of valuation. See, for example, Wilkes v. Hughes, 37 Ga. 361 (1867). Its adoption was not thought, however, to be imperatively required as a result of the legal tender acts.

The only decision of the United States Supreme Court to pass on this question was Bissell v. Heyward, 96 U. S. 580 (1877), where the court held that the value of the Confederate money due should be determined in legal tender notes, in which the judgment recovered would be payable and which was "the standard of value to which other currencies are to be reduced to ascertain their value."

[120] An exception must be made for the case of Carter v. Cox, the Mississippi case discussed in the previous note. In the course of its argument that legal tender paper money must be used throughout as the standard of valuation, the court said (at p. 157): "That a specie currency has been immemorial and universal, that it is liable to no abuses or fluctuations, that it is immaculate and unchangeable, that it has any fixed value as money except by law and common consent, which can also substitute any other currency or money, are delusions, which it is time, were dispelled."

[121] Southern courts can be excused for their failure to make such inquiries, in view of the complete absence of satisfactory evidence as to the main course of prices in the

3. *The Date for Measuring Value*

One final problem in valuation remained after standards for measuring values had been ascertained. This was the date with reference to which these standards were to be applied. The interests involved in the choice of dates may be imagined by recalling the rate of depreciation of Confederate money. For more than a year it clung close to its parity with gold. Thereafter it depreciated, in successive six-month intervals, to one-half, one-fourth, and one-twelfth of its pre-war gold value. By January 1865, it had sunk to less than one-fiftieth in terms of gold. Four months later it was wholly worthless.[122]

In states which applied as their exclusive test the value of the consideration furnished by the creditor, these fluctuations in the value of paper money could be largely ignored. As a corollary to the "consideration" test, it was understood in such states that the value of the consideration *at the inception of the transaction* would control.[123] The subsequent inflation of Confederate money would then be irrelevant, except as it cast a deeper shadow over the record of Confederate-money transactions.

In some states the adoption of the "consideration" test did not

South after the war. The data of Schwab (referred to above, note 11) are compiled only for the period of the war and are so incomplete as to provide no basis for comparison with the surviving evidence as to prices in the Northern states. It should be recalled also that the Southern states were immediately transferred at the end of the war to a paper-money standard which was suffering from severe depreciation, so that the conditions of inflation persisted for a considerable period. Beyond this, a sharp and continued deflation was avoided in both North and South by the fact that the world production of gold was continually expanding through the post-war period, with a resultant decline in the value of gold. MITCHELL, HISTORY OF GREENBACKS 272-275 (1903); MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 27-33 (1908). Contraction of the currency and an orderly transition to a stabilized economy were thereby greatly facilitated in both North and South. See SIMIAND, INFLATION ET STABILISATION ALTERNÉES: LE DÉVELOPPEMENT ÉCONOMIQUE DES ÉTATS-UNIS, c. 3 (1934).

[122] See the table of gold values above, note 8. It will be recalled that the course of commodity prices in general followed roughly, though by no means exactly, the movements of the gold premium.

[123] For numerous cases on this point see above, notes 46-49. All of the cases there cited, except those from West Virginia, adopted the "consideration" test and in all of them, without exception, the date of the contract was the date selected for measuring value. See also Randall v. Pettes, 12 Fla. 517 (1869); Barclay v. Russ, 14 Fla. 372 (1874); Evans v. Walker, 35 Ga. 117 (1866); Stokes' Adm'r v. Cowles, 70 N. C. 124 (1874); Carter v. Ragland, 21 Gratt. (62 Va.) 574 (1871); Poague v. Greenlee's Adm'r, 22 Gratt. (63 Va.) 724 (1872). Among all the states using the "consideration" test the only case which held decisive the date of maturity of the debt was apparently Daughdrill v. Helms, 53 Ala. 62 (1875), and there the result, inconsistent with numerous other Alabama decisions, must be explained by the unusual facts of the case.

remove the necessity for choosing between possible dates for valuation.[124] The problem was most acute, however, in states which rejected the "consideration" test and undertook to determine independently the value of Confederate money promised. In those states the courts were cast adrift from whatever anchorage there was in the subject matter of the particular contract. Almost inevitably the range of choice between dates for valuation was widened.

At the outset it was plain that to select the date of the commencement of suit or of verdict or judgment would be equivalent to a denial of all recovery for the value of the money promised. Most of the litigation did not commence until after the end of the Civil War, when Confederate money was worthless; much of it survived into the second decade.

The next date that suggested itself was the date on which the debt was expresssly made payable by the terms of the contract. If that date did not arrive until after the end of the Civil War, the debt would likewise be effectually wiped out. If it fell within the Confederate period, when Confederate money was still in circulation, the creditor might retrieve a fraction of the original value contracted for. The discrepancy in values of money price and other performance would then depend on the length of the period of credit. The cases of extreme and unforeseeable hardship would be those where the period for payment extended over several months or more. In such cases the effect of adopting the maturity of the debt as the date for measuring value would be to throw on the creditor the entire loss through monetary depreciation, resulting from political and economic forces over which he had no control.

The remaining possible date was the date of the contract itself. The same rules of damages which obstructed the use of the "consideration" test caused difficulty here. If Confederate money were viewed as a mere commodity, damages for non-payment should be measured by its value at the date when payment was due. Any departure by courts from this settled rule would require special justification. Any legislation which attempted to modify it might be thought to impair the obligation of contract.[125]

[124] In Georgia and to some extent in Virginia the jury or other fact-finding agency was allowed a wide discretion in the choice of dates. See above, notes 96-103.

[125] This was precisely the reasoning of Leach v. Smith, 25 Ark. 246 (1868), holding unconstitutional the Arkansas scaling act on the ground that it attempted to shift the date for valuation from the maturity of the debt back to the inception of the contract. In Kirtland v. Molton, 41 Ala. 548 (1868), the Alabama Supreme Court at first held the Alabama scaling act unconstitutional for this reason as well as for the reason that it adopted the value of the consideration as the measure of recovery. In Dearing's

That the Supreme Court of the United States did not pursue this line of argument was probably due to a fortunate accident. The first major decision in the Supreme Court on Confederate money questions was *Thorington v. Smith*, decided in 1868.[126] In that case a vendor of land sued in a federal district court for Alabama to foreclose a vendor's lien for the balance of the purchase price. This balance was represented by a promissory note of the purchasers, payable *one day* after the date of the contract. After an admirably liberal treatment of the question of illegality the Court concluded that parol evidence was admissible to show that the price was payable in Confederate money, and concluded further that the plaintiff could recover in United States currency the value of the money promised. The date for measuring its value was said, in a short sentence, to be the date of the original contract. As only one day intervened between that date and the maturity of the debt, it is probable that the problem of fixing the date for measuring value had not received the careful consideration that it deserved. Nevertheless, the language of *Thorington v. Smith* was eagerly taken up by Southern courts, in their anxiety to protect creditors against the hazard of an intervening depreciation.[127] In the Supreme Court itself the date of the inception of the contract was subsequently adopted in three cases without further discussion. In one of these there was a period of a year between the date of the contract and the maturity of the debt, so that the choice of dates was material.[128]

Adm'x v. Rucker, 18 Gratt. (59 Va.) 426 (1868), it was strongly intimated that the Virginia act would have been unconstitutional if it had meant to substitute the date of the contract for the date when payment was due. See also Lohman v. Crouch, 19 Gratt. (60 Va.) 331 (1869).

In all these cases the courts, to fortify their conclusions, argued that *any* contract, in a currency so unstable as Confederate money, involved an assumption of risk as to subsequent depreciation and that the "security of transactions" prevented judicial modification of their terms. In all three states, however, the shocking results of such austerity brought partial or complete retraction. In Arkansas the Supreme Court after its reorganization indicated its willingness to reconsider its earlier position [Gist v. Gans, 30 Ark. 285 at 290 (1875)], but apparently the question was never directly presented for decision. The recantation in Alabama was complete (see above, note 81). In Virginia, Dearing's Adm'x v. Rucker was never expressly overruled, but in a series of cases the date of the contract was held to be the exclusive date for measuring value. Meredith v. Salmon, 21 Gratt. (62 Va.) 762 (1872); Sanders v. Branson, 22 Gratt. (63 Va.) 364 (1872); Merewether v. Dowdy, 25 Gratt. (66 Va.) 232 (1874); Walsh v. Hale, 25 Gratt. (66 Va.) 314 (1874).

126 8 Wall. (75 U. S.) 1 (1868).

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

128 Stewart v. Salamon, 94 U. S. 434 (1876). In Wilmington and Weldon R. R. v. King, 91 U. S. 3 (1875), the Court held unconstitutional the North Carolina scaling

It was not until 1885 that the issues involved were squarely faced by the Supreme Court. In *Effinger v. Kenney*[129] a vendor of land sued, as in *Thorington v. Smith*, to foreclose a vendor's lien. The action was brought originally in the state courts of Virginia, which proceeded to apply the value of the consideration (here, the land sold) as the measure of the creditor's recovery. The Supreme Court on writ of error reversed the judgment of the Virginia Court of Appeals on the ground that the state scaling act, as so applied, impaired the obligation of the contract. The Court then went on to discuss the date that should be selected on a new trial for measuring the value of the Confederate money due. In the particular case the sale and conveyance had both occurred on March 30, 1863, and the installment of the purchase price which was in dispute was not payable until March 30, 1865.[130] Unwilling to repudiate the language of earlier cases, however carelessly used, the Court proceeded to offer reasons why the date of the contract could be adopted in determining the value of the Confederate money promised. These reasons, obscurely formulated in the opinion of Mr. Justice Field, may be restated as follows. First, it was said, the rules of damages for ordinary commodity contracts could not be applied to contracts for the payment of Confederate money, which was never a lawful currency or even a recognized subject of property. The only reason why their value would be inquired into for any purpose was because they "were imposed as a currency upon the community by irresistible force." Second, Confederate money had no "intrinsic" value, but only the value conferred on it in particular transactions in which promises to pay such money were exchanged for promises to transfer land or goods. Third, in contracts of this type the intentions of the parties could not have been to assume the risk of

act because it employed the value of the consideration rather than the value of the Confederate money due "at the time and in the locality" where the contract was made. In Bissell v. Heyward, 96 U. S. 580 (1877), an action by the heirs of a vendor of land for specific performance against the purchaser, the date of the original contract was the date used for measuring value, but it did not appear in the report that any terms of credit had been agreed upon. See also Rives v. Duke, 105 U. S. 132 (1881), where the lower court had adopted the date of the contract as the date for measuring value, but the Supreme Court refused to consider the error assigned on this point by the creditor, appellant in the case, on the ground that the selection of that date was favorable rather than prejudicial to him.

[129] 115 U. S. 566 (1885).

[130] The court pointed out that the purchasing power of Confederate money in Virginia was "at least one-third" less than that of United States currency at the time of the contract, and "not more than one-twentieth" that of United States currency at the maturity of the debt.

the depreciation which ultimately occurred. Vendors of land or goods who agreed to accept Confederate money could not have intended to part with their property without any consideration; "they expected an equivalent in any event." Such currency should therefore be treated as having value only at the time and place where such contracts were made.[181] Fourth, this result was justified by strong reasons of convenience, for "any other rule would involve considerations of inextricable difficulty." Finally, and this must have been the most persuasive reason, any other rule "would be inconsistent with justice in determining the value of contracts thus payable, where they matured near the close or after the overthrow of the Confederacy."

The reasoning of *Effinger v. Kenney* was undoubtedly permeated with the notion that Confederate treasury-notes lacked the essential attributes of money, so that revision of Confederate-money debts could be guided by different principles from those that would ordinarily prevail. There were other reasons of a more practical character, however, for applying processes of valuation to the dates when such claims arose. To determine the values originally contracted for, it was necessary to start from the position of the parties at the inception of the transaction. Whether the creditor's extension of credit should reduce his recovery could be viewed as a problem in risk-assumption. When

[181] The exact meaning of the opinion may have been distorted in the effort to give it sense. What was actually said, on the points numbered two and three in the text, was (at p. 576):

> "Their intrinsic value [i.e., the intrinsic value of Confederate notes] was nothing, but their exchangeable value, by reason of their enforced circulation, was the estimate of them at the time in lawful money of the United States. The relation between them and coin and other lawful money was well known in the community, as it was only with coin or other lawful money as a standard of value that commerce was conducted between the insurgents and persons outside the Confederacy. Persons then parting with lands and goods for Confederate notes, or for the promise of them, attached to them this exchangeable value, and expected to receive it then or afterwards. They did not intend to surrender, or suppose they were surrendering, their property without any consideration, if the Confederacy should fail, and its notes lose this exchangeable value. They expected an equivalent in any event. Therefore, as having the value thus given to them at the time and place of their receipt, or the promise of them, the National courts will treat them, but not as having a value at any other time or place."

The last sentence, which is the most crucial of all, is the most obscure. Taken in connection with the rest of the passage it seems to indicate an advanced form of nominalism, coming from a most unexpected source. On the other hand, if Confederate money had value only in the series of isolated transactions in which it was used as a representative of value, why was it stated three sentences earlier that the relation between Confederate money and "coin or other lawful money" was "well known"? It is unfortunately too late for Mr. Justice Field to solve this riddle.

the depreciation of money had gone so far as to destroy the equivalence,[132] in a large number of transactions, between money price and goods or services sold, the limits of assumed risk were probably exceeded. *Effinger v. Kenney* was important for its recognition that judicial revision of contractual terms was required in such cases by something we may call an elementary sense of justice.

In state courts, where Confederate money came to be viewed as a somewhat less monstrous phenomenon, the same idea emerged more clearly. Even in states that rejected the "consideration" test for constitutional reasons, the date for measuring the value of Confederate money was the date of the contract.[133] This clearly involved a departure from ordinary rules of damages; it required courts for this purpose to ignore the terms of credit in all Confederate-money transactions. At first a few courts had resisted so drastic an innovation. As litigation revealed the havoc wrought by inflation on private contracts, these scruples disappeared.[134] In the end wherever scaling acts were in force, the maturity of the debt was abandoned as the date for measuring value. For it was substituted the date of the original contract, either as the exclusive date for valuation or else as the starting point in a still freer adjustment of conflicting equities.[135] Some room for

[132] It is interesting that the opinion of Mr. Justice Field in Effinger v. Kenney contains in germ the idea that played so large a part in the German inflation cases of the last decade, the idea, that is, that courts should restore the "equivalence" destroyed by unforeseen monetary inflation. See Dawson, 33 MICH. L. REV. 171 at 192-193 (1934); STAUDINGER, KOMMENTAR ZUM BÜRGERLICHES GESETZBUCH, art. 242, V 1 b, pp. 46-47 (ed. 1930).

The date of the inception of the debt was the basic date adopted in German legislation for revalorization of paper-money debts. See Dawson, *ibid.*, at p. 215. In judicial decision the date of the original contract was not uniformly used as the date for valuation of contracts within the areas left for judicial treatment. The first litigation of the period after stabilization was concerned primarily with contracts for the sale of goods, mostly on short term. Here discrepancy between values at the date of the contract and at the date fixed for payment was usually not very great, and several decisions assumed the latter date. DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 108, p. 379 (Sept. 17, 1924); vol. 109, p. 146 (Nov. 7, 1924); vol. 109, p. 241 (Nov. 27, 1924). When the question was squarely presented for decision, however, the date of the *contract* was declared to be the proper date. JURISTISCHE WOCHENSCHRIFT, 1926, p. 790 (Dec. 4, 1925). See also, JURISTISCHE WOCHENSCHRIFT, 1926, p. 1538 (Apr. 10, 1926); *ibid.*, 1927, p. 967 (Dec. 21, 1926).

[133] Parker v. Wilson, 5 S. C. 485 (1874); Bierne v. Brown's Adm'r, 10 W. Va. 748 (1877); Gilkeson v. Smith, 15 W. Va. 44 (1879); Bailey v. Stroud, 26 W. Va. 614 (1885). *Cf.* Jarrett's Adm'r v. Nickell, 9 W. Va. 345 (1876), discussed above, note 52.

[134] Above, note 125.

[135] The cases in Georgia and Virginia which permitted juries to select *any* date

risk-assumption remained.[186] But no court was willing to infer that a mere extension of credit was meant to involve an assumption of risk that would include a great political and economic cataclysm. Distinctions based on the length of the period of credit, or on other indicia of risk assumed, were too subtle and complex for the practical administration of justice. In effect all unpaid Confederate-money debts were raised to a common level and were fully revalorized in terms of the values existing at the dates when they arose.

SCALING WITHOUT STATUTE

The final question raised by the Confederate inflation was how far the results reached under scaling acts could be achieved independently, through general rules of contract law. This question could not be ignored in states where scaling acts were passed. It was inextricably entangled with the questions of constitutionality which the state courts and eventually the Supreme Court were forced to decide. To sustain the scaling acts it was necessary to demonstrate that private law doctrine provided avenues for the revision of contracts along the main lines adopted in this legislation.

There were four states where the authority of the Confederate government had prevailed for considerable periods and where no scaling acts were in force.[187] There was one other arena as well where

for valuation, for the purpose of widening their discretion, are referred to above, notes 96-104.

[186] An assumption of risk as to depreciation in monetary values was rarely mentioned in cases involving Confederate-money debts. One of these exceptional cases was Gilkeson v. Smith, 15 W. Va. 44 (1879), where the court declared that the maturity of the debt would be the proper date for valuation if the evidence showed that the parties "had in contemplation the change in value of Confederate notes between the date of the note and the time it was payable, and intended that it should be paid in Confederate notes at the time the note was payable, no matter how much they might then be depreciated. . . ." (P. 58.) At the same time the court declared that affirmative evidence would be required to prove that the court was in this respect a "contract of hazard." From the pleadings in the particular case the court inferred that the risk of subsequent depreciation had probably been assumed by the creditor.

The converse problem, risk of *appreciation* of monetary values in contracts surviving into the post-war period, is discussed above, notes 44 and 45. It will be recalled that in those instances clauses calling for payment in "current funds" were occasionally construed as meaning the "current funds" which might be in circulation at maturity. There, however, the object of the creditor was to enforce payment in *United States currency* to the amount specified in the contract.

[187] Of these, two were the border states of Kentucky and Tennessee, which had been a battleground between the Union and Confederate armies. In Mississippi, which had lain within the Confederate lines through most of the war, the statute passed in 1867 merely raised a presumption that money contracts formed in the war period were

Confederate-money questions were threshed out independently of statute; this was in lower federal courts where actions for the collection of Confederate-money debts were brought in first instance.[138] There was ample opportunity, then, to submit these questions for review in the light of general rules of private law.

The main proposition on which the decisions in these fields were fairly clear was that the date for measuring value should be the date of the original contract.[139] In most of the cases there was no discussion of the reasons for this choice of dates. In the one case,[140] in Mississippi, where the question was more fully discussed, the court's argument anticipated some of the reasons advanced by the Supreme Court in *Effinger v. Kenney* for shifting the date for valuation. The court pointed out that at the time the contract was made Confederate money "represented value," was the accepted currency of the country, and was assumed by the parties to have value; that at the maturity of the note in question Confederate money "had ceased to be of any substantial value"; and that the loss through this depreciation ought not to fall on the creditor. In another passage the court emphasized that the

dischargeable in Confederate money, without providing any rules for their revision. Miss. Laws of 1866-7, p. 373. In Texas a scaling act had been passed, but for nearly ten years it had been nullified through the doctrine of illegality (see above, notes 17 and 23), and when the obstacle of illegality was removed it was entirely ignored by the courts.

To the list of Confederate states without scaling acts should probably be added Louisiana, where the doctrine of illegality survived to the end (see above, note 22), so that for present purposes it can be ignored.

138 Thorington v. Smith, 8 Wall. (75 U. S.) 1 (1868); Stewart v. Salamon, 94 U. S. 434 (1876). The actions there had been brought in federal district courts for Alabama and Georgia, respectively, but it was nowhere suggested that the scaling acts in force in those states would have any bearing on the decisions.

139 Thorington v. Smith, 8 Wall. (75 U. S.) 1 (1868), and Stewart v. Salamon, 94 U. S. 434 (1876), cases discussed above, p. 747, and involving actions for the foreclosure of purchase money mortgages on land; Mathews v. Rucker, 41 Tex. 636 (1874), promissory note for Confederate money loaned; Henderson v. McGhee, 6 Heisk. (53 Tenn.) 55 (1871), same; Darcey & Wheeler v. Shotwell, 49 Miss. 631 (1873), same; Gray v. Harris, 43 Miss. 421 (1870), debt for medical services rendered; Taylor v. Bland, 60 Tex. 29 (1883), mortgage on land and chattels, consideration not stated; Cowan v. McCutchen, 43 Miss. 207 (1870), note payable in Confederate money, consideration not stated.

In four later Tennessee cases, however, it was held that the date for measuring value must be the date fixed by the parties for the maturity of the debt. Wintz v. Weakes, 10 Heisk. (57 Tenn.) 593 (1873), specific performance of contract to sell land; Woodfolk v. Pratt, 1 Baxt. (60 Tenn.) 348 (1872), note for value of personalty sold; Stroud v. Rankin, 2 Baxt. (61 Tenn.) 74 (1872), same; Kelso v. Vance & Eddins, 2 Baxt. (61 Tenn.) 334 (1872), same.

140 Darcey & Wheeler v. Shotwell, 49 Miss. 631 (1873).

case "belongs to a class of exceptional cases, and is dealt with accordingly," and concluded that the choice of the date of the contract did not violate the agreement of the parties, but, on the contrary, gave it fuller effect. In any event, they said, "according to the best lights, and as nearly as human judgment is capable, justice has been done between the parties."

The cases from these states were not so clear on the other main method of the scaling acts for the revision of contracts, that is, through the use of the consideration furnished by the creditor as the measure of his recovery. Certainly most of the cases proceeded on the assumption that the value of the consideration could not be used, and that the value of the Confederate money promised should be the basis of valuation.[141] It is true that there were scattered hints in the cases that the value of the consideration could be used.[142] If the volume of litigation in those states had been comparable to that in the other states of the Confederacy, it is possible that the "consideration" test would have been resorted to, as the simplest and most practicable standard for valuation. The decisions after the inflation of the Revolutionary

[141] Cowan v. McCutchen, 43 Miss. 207 (1870); Mezeix v. McGraw, 44 Miss. 100 (1870); Stroud v. Rankin, 2 Baxt. (61 Tenn.) 74 (1872); Kelso v. Vance & Eddins, 2 Baxt. (61 Tenn.) 334 (1872); Wintz v. Weakes, 10 Heisk. (57 Tenn.) 593 (1873); Johnson v. Blount, 48 Tex. 38 (1877); Thorington v. Smith, 8 Wall. (75 U. S.) 1 (1868); Stewart v. Salamon, 94 U. S. 434 (1876). The case of Woodfolk v. Pratt, 1 Baxt. (60 Tenn.) 348 (1872), is explicit on the point. There the plaintiff had sold a gin stand to defendant for a specified sum in Confederate money and subsequently accepted a promissory note for the amount due. After the war plaintiff sued on the original contract for the value of the gin stand. The court held that the acceptance of defendant's promissory note was a merger of the original debt into a new contract and that to allow recovery of the value of the gin stand, rather than the value of the Confederate money promised, would be "to substitute a legal liability growing out of the receipt of the article and the promise implied by law to pay what it was worth" for the express provisions of the contract.

[142] In Rivers v. Moss's Assignee, 6 Bush (69 Ky.) 600 (1869), an action on a note given for Confederate money loaned was sent back to the lower court for trial with a direction to find "the gold value of the consideration of the note." The case of Darcey & Wheeler v. Shotwell, 49 Miss. 631 (1873), involving the same type of claim, the court argued at some length that plaintiffs' recovery should be "the actual value with which they parted and to which extent the defendants were benefited." Since Confederate money was involved at both ends of these transactions, however, it cannot be said that the courts were driven to a choice between the "consideration" test and the value of the money promised.

In San Patricio County v. McClane, 44 Tex. 392 (1876), there was a dictum that the recovery on a debt for labor done would be "the real consideration for the contract, or what the work for which such obligation may have been given was actually worth."

period[143] and an occasional decision in fields unaffected by inflation[144] indicate that this device can be adopted when other resources fail. From the Southern decisions after the Civil War, however, it would be impossible to draw the conclusion that general rules of private law, independently of statute, point directly to this oversimplified standard for the revision of private contracts.

The history of the Confederate inflation, from the legal side, is the history of an attempt at reconstruction of monetary values. The re-adjustment of private contracts to meet progressive changes in the value of money was not undertaken while the inflation was running its course. After the storm had passed, the efforts of legislatures and courts in the re-adjustment of money obligations formed an essential part in a program of reconstruction for a social and economic order left paralyzed by war.

The objectives of the scaling acts were limited, their methods were crude. Hastily and unscientifically drafted, cast in the broadest terms, they left unsolved some of the major riddles that appear in any large-scale revalorization of debts after extreme inflation. Some of these were primarily legal in character—how far secured claims should be revalorized as against subsequent lienors and purchasers, the treatment to be accorded assignees of money obligations, the extent to which the operation of legal rules should be deflected by the factor of risk-assumption.[145] The basic problems, however, were problems of valuation, which legal doctrine, however modified in its application, could not hope to solve. Here the choice of legal devices required scrutiny of the economic processes of an inflation economy; it raised questions that taxed the ultimate resources of economic science; nor can it be said that the history of the last 70 years has brought us much nearer to a clear and satisfactory answer.

From the experience of the Southern states in the Confederate inflation one lesson may be drawn that is of capital importance for the future. Attempts by legislation to restore the balance in private con-

[143] Above, note 86.

[144] Brown v. St. Paul, M. & M. Ry., 36 Minn. 236, 31 N. W. 941 (1886), action for damages for failure to give plaintiff a life pass over defendant railroad; Trustees of Howard College v. Turner, 71 Ala. 429 (1882), action for damages for breach of contract to permit plaintiff to appoint to perpetual tuition scholarship at defendant college.

[145] Above, notes 59, 52 and 136. Other technical problems left unsolved by the scaling acts are also referred to above, section 3.

tracts face constitutional limitations peculiar to American law. Those limitations were by no means ignored in the decisions of state courts; they were carefully considered in most of the Southern states. They were not thought to preclude the adoption of the "consideration" test because courts, in the turmoil of the reconstruction period and through the poverty of their resources, could propose no better. No regret need be expended over the eventual rejection by the United States Supreme Court of a test so crude. The intervention of the Supreme Court did not occur until after the task had been largely done and the foundations of a new economy had been laid. From the constitutional limitations thus tardily imposed on the states one should draw a different conclusion — that if courts are to respond to the needs of a society dislocated by inflation, they must further develop the resources of American private law. Through such resources, as the next section will attempt to show, the initial strains of moderate inflation can be in part relieved. Beyond that, if inflation should go so far that legislative relief is needed, constitutional obstacles cannot be rightly appraised without taking into account the latent resources of common law and equity.

(*To be concluded in the April issue of the Review*)