Michigan Law Review

Volume 33 | Issue 6

1935

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

John P. Dawson
University of Michigan Law School

Frank E. Cooper
Member of the Detroit Bar

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Contracts Commons, Law and Economics Commons, Legal History Commons, and the Military, War, and Peace Commons

Recommended Citation
John P. Dawson & Frank E. Cooper, *THE EFFECT OF INFLATION ON PRIVATE CONTRACTS: UNITED STATES, 1861-1879*, 33 MICH. L. REV. 852 (1935).
Available at: https://repository.law.umich.edu/mlr/vol33/iss6/3

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EDITOR'S NOTE

The following article concludes the series 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 first installment of the article below appeared in the March issue.

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

John P. Dawson † *and Frank E. Cooper* ‡

THE INFLATION IN THE NORTH, 1862-1879

THE ECONOMIC SETTING

THE Northern inflation coincided almost exactly in its early stages with the inflation in the South, and was produced by the same basic factor — a budgetary deficit due to war expenditure. The financial mobilization of the North was handicapped at the outset by a deficit inherited from the previous administration and by an impaired national credit. The prompt response of the Northern banks enabled the Treasury to overcome this initial handicap and to finance the greatly increased expenditure through the early months of the war. How long orthodox methods of borrowing would have sufficed has been ever since a matter of debate. Toward the end of 1861 the banking system had begun to show signs of serious strain which was greatly aggravated by the policies of Secretary Chase in concentrating at the Treasury a very large share of the supply of specie. The unfavorable state of national finances at the end of the year and the danger of war with England over the Trent affair were enough to produce a panic on December 16 and to force a suspension of specie payments on December 30, 1861.[146]

The first issue of legal tender notes occurred without adequate debate, and was inspired by the general belief that there was no other way to meet a great national emergency. The act, signed by the Presi-

* The authors wish to express again their indebtedness to Professor Leonard L. Watkins of the Economics Department of the University of Michigan for guidance and criticism.

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

‡ A.B., J.D., Michigan. Member of the Detroit Bar.—*Ed.*

146 For a full account of the events leading up to the suspension of specie payments see MITCHELL, A HISTORY OF THE GREENBACKS, c. 1 (1903).

dent on February 25, 1862, authorized the issue of such notes to a maximum amount of $150,000,000.[147] It was soon made clear that a sum so small would provide only temporary relief. Delay in the imposition of war-taxation and in organizing more reliable methods of long-term borrowing forced the Secretary to request another issue of greenbacks on June 11, 1862. Exactly one month later the President signed an act authorizing a second issue of $150,000,000.[148] This sum likewise proved insufficient to meet the mounting expenditures of the Government. The third and final issue, likewise limited to $150,000,000, was authorized by an act approved March 3, 1863.[149]

The ability of the North to finance the remainder of the war without resort to legal tender money was due to the tardy imposition of heavy war-taxation and to the success of government agents, led by Jay Cooke, in selling government bonds.[150] Secretary Chase and Congress took a strong stand against further issues of paper money. Their pledge not to resort again to this device was kept through the trying months of 1864. Thereafter the successes of the Northern armies and the impending termination of the war made it possible to rely on normal methods of borrowing and even to redeem a small percentage of outstanding treasury notes.[151]

The subsequent history of the greenbacks is entangled with the political and economic history of the reconstruction period. McCullough, the Secretary of the Treasury at the close of the Civil War, undertook a systematic retirement of legal tender money as part of his program of reorganizing the national finances. With this policy Congress at first agreed. But on April 12, 1866, largely through Congressional hostility to the Johnson administration, an act was passed forbidding the redemption of the greenbacks at a rate exceeding $10,000,000 a month for the first six months after the passage of the act, or $48,000,000 a year thereafter.[152] The steady fall in internal prices and the develop-

[147] MITCHELL, A HISTORY OF THE GREENBACKS, c. 2 (1903).

[148] MITCHELL, A HISTORY OF THE GREENBACKS, c. 3 (1903).

[149] MITCHELL, A HISTORY OF THE GREENBACKS, c. 4 (1903). To the $450,000,000 in legal-tender paper money thus authorized should be added three other forms of legal-tender treasury notes which were issued to an amount exceeding $200,000,000. How far they contributed to the further inflation of the currency is not certain, since they bore interest and were withheld from circulation to some extent on that account. MITCHELL, *ibid.*, pp. 174-177.

[150] MITCHELL, A HISTORY OF THE GREENBACKS 119-121 (1903).

[151] MITCHELL, A HISTORY OF THE GREENBACKS 121-131 (1903).

[152] BARRETT, THE GREENBACKS AND RESUMPTION OF SPECIE PAYMENTS, 1862-1879, pp. 161-165 (1931).

ment of an inflationist psychology in the West [153] produced a powerful movement opposed to further contraction of the currency. In February 1868 the limited power of the Secretary of the Treasury to retire the paper currency was entirely withdrawn. In the presidential campaign of 1868 monetary issues played a prominent part. The pledge of the victorious Republican party to redeem the obligation of the government in coin was not brought any closer to fulfillment until 1870 and 1871, when acts were passed providing for the refunding of the national debt.[154] The panic of 1873 produced a powerful resurgence of inflationist sentiment, which was checked only with difficulty.[155] The effort to resume specie payments met numerous obstacles thereafter and resumption was not accomplished until January 1, 1879.[156]

The successive increases and contractions of the monetary supply had their expected effect on the course of internal prices. The most obvious index of monetary depreciation was the premium on gold, which appeared immediately after the suspension of specie payments on December 30, 1861. During the early months of 1862 the gold premium rose slowly, but after the first two issues of legal tender money the rise was progressive and rapid. By the end of 1862, $100 in gold would buy $133 in paper money and by the end of 1863 the same sum was worth $151 in paper money. The highest point was reached in July 1864, when $100 in gold at one time was equivalent to $285 in greenbacks. Thereafter the gap was steadily closed, though with considerable fluctuations from day to day and some important variations from month to month. On April 14, 1865, $100 in gold would buy $146 in greenbacks. The fluctuations in the gold premium continued after the end of hostilities, but the variations were not so wide and the gap slowly closed. By January 1870, $100 in gold would buy only $120 in greenbacks. In December 1878, shortly before the resumption of specie payments, the gold premium disappeared.[157]

The studies of Mitchell have shown that the movements of the

[153] An interesting study of the influence of geographical and psychological factors on political movements is to be found in WILDMAN, MONEY INFLATION IN THE UNITED STATES (1905). Part II, c. 5 covers the period in question.

[154] BARRETT, THE GREENBACKS AND RESUMPTION OF SPECIE PAYMENTS, 1862-1879, pp. 165-172 (1931).

[155] BARRETT, THE GREENBACKS AND RESUMPTION OF SPECIE PAYMENTS, 1862-1879, pp. 173-180 (1931).

[156] The various steps in the complicated processes are traced in detail by BARRETT, THE GREENBACKS AND RESUMPTION OF SPECIE PAYMENTS, c's. 8 and 9 (1931).

[157] The following table has been compiled from the very full record of day-to-day variations in the gold premium on New York markets, given by MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 288-338 (1908). It represents the highest value in greenbacks of $100 in gold on the first day of every month

gold premium in the North were largely influenced, as in the South, by the political and military prospects of the war.[158] But the price of gold did not depart so widely from the prices of other commodities. An abundant supply of gold from California[159] and the preservation (except for a period of 15 days in 1864) of an open market for gold[160] prevented a sharp and disproportionate rise in the value of gold, of

during the war period, after the appearance of the gold premium. Fractions are omitted.

	1862	1863	1864	1865
January 1	$100	$133	$151	$226
February 1	103	156	157	202
March 1	102	171	159	199
April 1	101	156	166	151
May 1	102	150	176	142
June 1	103	146	190	137
July 1	108	144	222	139
August 1	115	129	251	
September 1	116	126	243	
October 1	122	140	190	
November 1	129	145	230	
December 1	128	148	225	

A similar table compiled from the same source is attached to carry the gold quotations from July 1, 1865, at three-month intervals until the disappearance of the gold premium:

	1865	1866	1867	1868	1869	1870	1871	1872
January 1		$144	$132	$133	$134	$119	$110	$109
April 1		127	133	138	131	111	110	110
July 1	$139	153	138	140	137	112	113	113
October 1	144	145	143	139	130	113	114	114

	1873	1874	1875	1876	1877	1878	1879
January 1	$111	$110	$112	$112	$106	$102	$100
April 1	116	113	114	113	104	101	
July 1	115	110	116	112	105	100⅝	
October 1	110	110	116	110	103	100⅜	

[158] MITCHELL, A HISTORY OF THE GREENBACKS 187-238 (1903). On the course of gold prices in the South see Dawson and Cooper, 33 MICH. L. REV. 706 at 708 (1935).

[159] That there was no shortage of gold during the war period is indicated by the fact that from 1862 exports of gold exceeded imports by a considerable margin. This was partly due to the fact that the disappearance of gold coin from general circulation made the existing supply excessive for currency purposes. MITCHELL, A HISTORY OF THE GREENBACKS 190-192 (1903).

[160] After ineffective attempts to control the price of gold through open market operations and through taxation of gold sales, Secretary Chase procured the passage of a bill, on June 17, 1864, prohibiting with heavy penalties the sale of gold for future delivery and forbidding all sales outside the private offices of brokers. The result was merely a further rise in the gold premium and very great inconvenience to business. On July 2, 1864, the act was repealed and on July 5 the gold room reopened. MITCHELL, A HISTORY OF THE GREENBACKS 224-232 (1903). It should be observed that

which there was strong evidence in the South.[161] The prices of gold were more responsive to the various factors which influenced currency values than were the prices of other commodities, and at some points the rise in the gold premium anticipated by important margins the general rise of commodity prices. Nevertheless, for most of the period in question, the price of gold remained consistently somewhat lower than the prices of most other commodities and in its fluctuations stayed close to the general course of commodity prices.[162]

The inflation commencing in 1862 produced the usual disparities in the prices of various commodities, in the relations between wholesale and retail prices, and in the relations between commodity prices in general and wages, rents of real property, and rates of interest. If attention is concentrated on commodity prices, particularly the prices of goods sold at *wholesale*, the evidence shows a steady rise through 1863 and 1864. By the first quarter of 1865 the purchasing power of the dollar was cut to somewhat less than half its pre-war purchasing power. From that point ensued a fairly constant, though interrupted, decline in wholesale prices. By 1870 the purchasing power of the dollar was approximately three-quarters of the pre-war ratio. This position was maintained with some variations until the depression of 1873 produced another steady decline of prices, lasting until the resumption of specie payments in 1879.[163]

even this abortive measure did not attempt to prevent private sales of gold for immediate delivery, and even while the act was in force such sales continued.

[161] Dawson and Cooper, 33 MICH. L. REV. 706 at 731, note 71 (1935).

[162] See the chart worked out by Mitchell for the war period. MITCHELL, A HISTORY OF THE GREENBACKS 277 (1903). In the same author's study of the whole period from 1861 to 1879 more ample evidence is collected. GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD (1908). A statistical analysis of the results of this study appears on pp. 33-42. It was not until 1876 that the general fall of commodity prices raised gold for a time above the median of prices for the post-war period.

[163] The following table, compiled by MITCHELL (GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 23-24), shows the median of wholesale prices for 92 commodities by quarters during the war and post-war periods. Prices for 1860 are taken as 100.

	1862	1863	1864	1865	1866	1867	1868	1869	1870
January	100	125	156	216	182	169	158	159	147
April	100	137	169	190	173	166	162	159	140
July	100	134	194	158	181	150	154	158	132
October	111	135	200	175	173	162	159	153	135

	1871	1872	1873	1874	1875	1876	1877	1878	1879
January	133	133	135	130	127	117	114	99	88
April	131	140	137	129	125	115	108	96	84
July	130	130	130	130	121	110	100	90	85
October	129	133	131	130	120	108	102	94	95

The available evidence as to the course of *retail* prices indicates a much slower response than in the wholesale field, in periods both of rise and decline.[164] Any possible increment to consumers through the slow rise of retail prices was more than offset by the even slower rise of wages, which threw on the wage-earning classes a large share of the economic loss caused by the war and extracted from them the disproportionate gains of entrepreneurs.[165] Nor did farmers participate in the surface prosperity which was so striking to contemporary observers. The prices of farm products rose more slowly than the wholesale prices of other commodities, and it was not until 1867 that the gap was closed and a balance restored.[166] The greatest sacrifice of all was exacted from the owners of real property, whose returns in the form of rent remained extremely low through the period of rising prices and who were not brought back to the relative position of the pre-war period until 1870.[167]

THE CONSTITUTIONALITY OF THE LEGAL TENDER ACTS

The legal issues presented by the Northern Civil War inflation are all overshadowed by the great debate over the constitutionality of the legal tender acts. The main outlines of that debate have long been familiar to students of American constitutional history. Recent controversies over the currency powers of Congress have focussed attention once more on the issues there involved. A brief account will therefore suffice.

[164] MITCHELL, A HISTORY OF THE GREENBACKS 259-264 (1903); MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 67-77 (1908).

[165] See especially the tables showing the decline in real wages during 1863-1865, given in MITCHELL, A HISTORY OF THE GREENBACKS 339-347 (1903). The slow rise of wages, continuing after the steady decline of commodity prices had set in, brought wage earners back to approximately their pre-war position by 1867. Thereafter, through most of the greenback period their position was actually very much better than before the war. MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 98-101 (1908).

It should be noted that averages are here even less representative than in the field of commodity prices. Mitchell's data show wide variations in the wage-scales of particular industries, as between men and women, and in different localities. A HISTORY OF THE GREENBACKS, Pt. 2, c. 5 and App. C; GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD, App., Tables 5-7.

[166] MITCHELL, A HISTORY OF THE GREENBACKS 386-388 (1903); MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 48-57 (1908).

[167] MITCHELL, A HISTORY OF THE GREENBACKS, Pt. 2, c. 6 (1903); MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 90 (1908). Again some wide discrepancies appear, as to different types of real property and as between East and West.

The legal tender acts provided that the treasury notes whose issue was authorized in each case should be receivable for taxes and all other debts owed to the United States, except duties on imports (made payable in coin by other sections); that they should be receivable for all debts due *from* the United States, except interest on bonds and notes (also payable in coin); and that they "shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid." [168] Despite serious doubts expressed in Congress as to the constitutionality of the legal tender provision, the course of decision in the state courts was very strongly in favor of its validity. Out of seventeen state courts that passed on the question, all but Kentucky sustained the legislation and applied it without any regard for the date at which the debt in question arose.[169] In most of the state courts this exercise of the federal currency power was by implication held to invalidate express contractual provisions for payment in gold coin, though unanimity here was not so complete.[170]

[168] 12 Stat. 345, 532, 709 (Feb. 25, 1862; July 11, 1862; and Mar. 3, 1863).

[169] Reynolds v. Bank of Indiana, 18 Ind. 467 (1862); Thayer v. Hedges, 23 Ind. 141 (1864), overruling contrary decision, s. c., 22 Ind. 282 (1864); Metropolitan Bank v. Van Dyck, 27 N. Y. 400 (1863); Breitenbach v. Turner, 18 Wis. 148 (1864); George v. Concord, 45 N. H. 434 (1864); Hintrager v. Bates, 18 Iowa 174 (1864); Lick v. Faulkner, 25 Cal. 404 (1864); Van Husan v. Kanouse, 13 Mich. 303 (1865); Maynard v. Newman, 1 Nev. 271 (1865); Riddlesbarger v. McDaniel, 38 Mo. 138 (1866); Appel v. Woltmann, 38 Mo. 194 (1866); Schollenberger v. Brinton, 52 Pa. 9 at 31, 100 (1866); Carpenter v. Northfield Bank, 39 Vt. 46, 91 Am. Dec. 370 (1866); Hanna v. Ratekin, 43 Ill. 462 (1867); Shaw v. Trunsler, 30 Tex. 390 (1867); Essex Co. v. Pacific Mills, 14 Allen (96 Mass.) 389 (1867); Jones v. Harker, 37 Ga. 503 (1867); O'Neil v. McKewn, 1 S. C. 147 (1869). See also Betts v. Butler, 1 Idaho 185 (1868), Mitchell v. Henderson, 63 N. C. 643 (1869), and Galliano v. Pierre & Co., 18 La. Ann. 10, 89 Am. Dec. 643 (1866), where the validity of the legal tender acts was assumed. The decision in Kentucky was by a divided court, in Griswold v. Hepburn, 2 Duv. (63 Ky.) 20 (1865), the case that was appealed to the Supreme Court of the United States and became the first of the legal tender cases.

After the decision of the Supreme Court of the United States in the first legal tender case, four state courts followed that Court in holding the acts unconstitutional. Johnson v. Norwich and Worcester R. R., 37 Conn. 433 (1870); Fickling v. Marshall, 22 La. Ann. 504 (1870); Harrell v. Barnes, 34 Tex. 413 (1871); Martin's Ex'rs v. Martin, 20 N. J. Eq. 421 (1870). In the case last cited the New Jersey Chancellor reviewed the whole question independently, on the ground that the Supreme Court had consented to hear a reargument, and announced his own conclusion that the acts were unconstitutional. But in Breen v. Dewey, 16 Minn. 136 (1870), the Minnesota court held even after the first legal tender case that the acts were valid as applied to debts contracted after their passage.

[170] Cases are collected in Dawson, "The Gold Clause Decisions," 33 MICH. L. REV. 647 at 674 (1935).

The Supreme Court of the United States showed no alacrity in undertaking the decision of this momentous question.[171] It was not until 1867 that an appeal from the Kentucky decision of 1865 was argued in the Supreme Court. After reargument at the December term of 1868 the Court found itself unable to announce a decision. On November 27, 1869, the eight members of the Court voted and a majority of 5 to 3 was finally found to exist against the validity of the legislation. Publication of the result was delayed, pending the preparation of written opinions, and it was not until February 7, 1870, that the decision of *Hepburn v. Griswold*[172] was announced.

In the meantime an important reorganization of the Supreme Court was impending. In the course of its dispute with President Johnson Congress had forced through legislation reducing the membership of the Court to eight justices, in order to deprive the President of an opportunity to fill any vacancies. On the election of Grant an act was passed restoring the former membership of nine. The vacancy thus created, plus the vacancy soon to arise through the expected resignation of Mr. Justice Grier, created the opportunity to appoint two new members of the Court. Unfortunately, Edwin M. Stanton, nominated by Grant for one vacancy, died four days after the confirmation of his appointment by the Senate. Attorney General Hoar, whom Grant nominated for the second vacancy, encountered opposition in the Senate, and his nomination was accordingly withdrawn. On February 7, 1870, the very day when the opinions in *Hepburn v. Griswold* were being read, the names of Strong and Bradley were sent to the Senate by the President.

This striking coincidence laid the foundation for the accusation later made that the Court had been packed for the purpose of reopening the legal tender question. The denials of the President and the Attorney General and the circumstances under which the appointments were made tend strongly to disprove the main charge. It was a fact that few judges from Northern state courts and few lawyers whose political views were acceptable to the Republican party could have been found who would have agreed with the majority in *Hepburn v. Griswold*.[173]

[171] In 1863 the Supreme Court refused to entertain a writ of error to the New York Court of Appeals for reasons that were held to be erroneous nine years later. 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 220 (1922). A fuller account of the events summarized in the next three paragraphs will be found in the same work, pp. 220-254.

[172] 8 Wall. (75 U. S.) 603, 19 L. ed. 513 (1869).

[173] See 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 239-240

The views of the new members were soon made plain. On April 11, 1870, a majority of the Court, after a remarkable public altercation, voted to hear a reargument of the constitutional question. The particular cases in which the issue was thus reöpened were subsequently dismissed by the parties. It was not until May 1, 1871, that the decision in *Knox v. Lee* and *Parker v. Davis* was announced, reversing the first legal tender case and sustaining the legislation by a vote of 5 to 4.[174]

EFFECTS OF THE GREENBACK INFLATION ON JUDICIAL REMEDIES

1. *Direct Revision of Simple Money Debts*

When the constitutionality of the legal tender legislation had been established, certain important types of private contract were at once exposed to the risk of changes in the value of money. The litigation in all the legal tender cases, in state as well as federal courts, represented an effort by creditors to ward off the loss they must inevitably suffer if debts could be discharged in depreciated paper money. In insisting that the legal tender acts were invalid, creditors were attempting to enforce payment in gold or silver coin and thereby to preserve, by the only available means, the values for which they had originally contracted.

The economic consequences of the legal tender decisions were fully realized at the time. The opposition to the legal tender legislation had in fact derived its force from the desire to save private contracts from the exceptional hazards of an unregulated volume of irredeemable paper currency. The power of the federal government to borrow money was established in the Constitution; no one denied that its promises to repay might have the attributes and perform the functions

(1922), and Sachs, "Stare Decisis and the Legal Tender Cases," 20 VA. L. REV. 856 at 867-873 (1934). One may still reserve a doubt as to whether the views of the new justices on the legal tender question were wholly immaterial to the President in nominating them and to the Senate in approving them. The opinion of Justice Strong had indeed been fully expressed in Schollenberger v. Brinton, 52 Pa. St. 10 at 56 (1866), where he had voted with the majority of the Pennsylvania court to uphold the legal tender acts.

[174] Legal Tender Cases, 12 Wall. (79 U. S.) 457. In a series of subsequent decisions the constitutionality of the legal tender acts was reaffirmed, with a constantly dwindling but increasingly voluble minority. Dooley v. Smith, 13 Wall. (80 U. S.) 604 (1871); Railroad Co. v. Johnson, 15 Wall. (82 U. S.) 195 (1872); Maryland v. Railroad Co., 22 Wall. 105 (1874); Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1884).

of money.[175] The issue fought out in the legal tender cases was the power of the government to enforce the acceptance of paper money at nominal par for the discharge of private debts. That such paper money would depreciate was assumed when its issue was authorized.

After the second decision in the legal tender cases there was no authority for the revision of simple money obligations at the suit of creditors. The central proposition, which no later decision of any state or federal court denied, was that all money obligations containing no provision for payment in a specified currency,[176] could be discharged by the payment of legal tender notes to the amount fixed.

Nor did courts of equity undertake to protect creditors against the partial extinction of money debts through the operation of the legal tender acts. The cases all agreed that the legal tender legislation was in terms as binding on courts of equity as it was on courts of law. Accordingly a mortgagee suing for foreclosure of a mortgage was forced to accept a tender of paper money of the nominal amount due as a discharge of the mortgage debt.[177] Likewise where a mortgagor sued to redeem from the mortgage, courts of equity did not assert the power to refuse affirmative relief or to attach any conditions in granting it, provided the sum tendered in payment equalled the accrued total of the mortgage debt.[178] Even in actions for specific performance by pur-

[175] See, for example, Chief Justice Chase in Hepburn v. Griswold, 8 Wall. (75 U. S.) 603 at 616 (1869); Chase, Clifford, and Field, JJ., in Knox v. Lee, 12 Wall. (79 U. S.) 457 at 582-583, 632-633, and 635-638 respectively.

[176] Debts expressly made payable in gold or silver coin involved other considerations and were discussed by Dawson, "The Gold Clause Decisions," 33 MICH. L. REV. 647 (1935).

[177] Black v. Lusk, 69 Ill. 70 (1873); Van Husan v. Kanouse, 13 Mich. 303 (1865); Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56 (1871); Breitenbach v. Turner, 18 Wis. 140 (1864).

[178] Dooley v. Smith, 13 Wall. (80 U. S.) 604 (1871); Bigler v. Waller, 14 Wall. (81 U. S.) 297 (1871); Warnibold v. Schlicting, 16 Iowa 243 (1864); Fosdick v. Van Husan, 21 Mich. 567 (1870); Appel v. Woltmann, 38 Mo. 194 (1866); Verges v. Giboney, 38 Mo. 458 (1866); Rodes v. Bronson, 34 N. Y. 649 (1866); Meyer v. Roosevelt, 27 N. Y. 400 (1863).

The only case where a condition was attached to equitable relief in the field of mortgage foreclosure or redemption was apparently Stark v. Coffin, 105 Mass. 328 (1870), where the effect of the condition was to force a mortgagee to accept *paper* money at its nominal par as a *pro tanto* discharge. The mortgagee there sued in equity to secure the application to the mortgage debt of a sum of money exacted from a third party as a condition to recovery of the mortgaged premises on writ of entry. This sum represented the value of improvements made on the mortgaged land by the owner-mortgagor, who was alleged to be insolvent. Plaintiff's mortgage contained a gold coin clause, which the court assumed to be enforceable under the decisions of the United States Supreme Court. Nevertheless, the Massachusetts court considered that it was

chasers of land, the state courts held that a tender of legal tender paper money discharged the purchaser's obligation and required equity to decree performance by the vendor.[179]

2. *Bilateral Contracts of Sale*

The operation of the legal tender acts on bilateral contracts of sale was by no means so complete or conclusive, however, as their operation on simple money debts. To describe the effect of the greenback inflation on bilateral contracts of sale it is necessary to consider (1) the remedy of specific performance, (2) the processes of valuation in damage actions, and (3) the possibility of rescission on the ground of intervening monetary depreciation.

(a) *Remedy of Specific Performance*

The problem of specific performance could be approached with a set of concepts quite distinct from that built up on the foundation of the legal tender acts. An ancient tradition had associated flexibility and judicial discretion with the remedy of specific performance. The limits of judicial discretion in this field were not, nor are they even now, exactly defined.[180] In scrutinizing contracts for elements of unfairness, oppression, or inequality courts of equity had laid principal emphasis on adequacy of consideration.[181] More significant for the present purpose

within its power "to prescribe by its decree the kind of money in which a payment should be made," in a case where equitable relief was given on unusual grounds.

In the case of Rodes v. Bronson, supra, the dissenting opinion of Leonard, J., (printed separately in 41 N. Y. 607) asserted that the gold coin clause contained in the mortgage was enforceable in any case, but urged, as an alternative ground for refusing redemption to the mortgagor, the power of equity to refuse relief in cases of hardship.

[179] See cases cited below, notes 189-191.

[180] The power of the Chancery to refuse specific performance on grounds entirely independent of the grounds for rescission was strongly established. Mortlock v. Buller, 10 Ves. Jun. 292, 32 Eng. Rep. 857 (1804); City of London v. Nash, 1 Ves. Sr. 12, 27 Eng. Rep. 859 (1747); Wedgwood v. Adams, 6 Beav. 600, 49 Eng. Rep. 958 (1843); Cathcart v. Robinson, 5 Pet. (30 U. S.) 264 (1831); 2 STORY, EQUITY JURISPRUDENCE, 2d ed., secs. 769-770 (1839). A multitude of modern cases have repeated the familiar formulas, that specific performance is a matter of discretion, that the discretion to be exercised is a "judicial" and not an "arbitrary or capricious" discretion, and finally, the counter-proposition, that in cases where the legal remedy is inadequate specific performance is a matter of right. 65 A. L. R. 9 (1930) and extensive annotation.

[181] Day v. Newman, 2 Cox 77, 30 Eng. Rep. 36 (1788), property worth £10,000 sold for £20,000, specific performance against purchaser and rescission both denied; Clitheral v. Ogilvie, 1 Desauss. (S. C. Eq.) 250 (1792), land worth more than £10,000 sold "precipitately" by a young man for only £3500; Gasque v. Small, 2

was the early recognition of *intervening change of circumstances* as a ground for refusal of specific performance or for the imposition of conditions on the grant of the remedy.[182]

The inflation of the American Revolution had already demonstrated the utility of these ideas in readjusting contracts after extreme monetary disturbance.[183] After the Confederate inflation, whose legal consequences were also being worked out in judicial decision at this time, the historic powers of equity were likewise reasserted, though sparingly exercised.[184] There was now an opportunity to demonstrate that even in periods of moderate inflation the resources of equity could be used in an effort to restore an equilibrium in private contracts.

The opportunity came in the well-known case of *Willard v. Tayloe*.[185] In April 1854 defendant had leased to plaintiff for a period of ten years certain real property in Washington, D. C., on which was erected a hotel building. The lease gave the lessee an option to purchase at any time before the expiration of the lease for the sum of $22,500. On April 15, 1864, two weeks before the expiration of the lease, plaintiff lessee addressed a letter to defendant, notifying him of the exercise of the option to purchase and enclosing a check payable in

Strobh. (57 S. C, Eq.) 72 (1848), specific performance denied against a young man who agreed to pay twice the value of the land; Clement v. Reid, 17 Miss. (9 Sm. & Mar.) 535 (1848); Dodd v. Seymour, 21 Conn. 476 (1852).

The early cases were especially confused as to the exact limits of the requirement of adequacy of consideration. No more illuminating statement was possible than that of Lord Eldon in Coles v. Trecothick, [9 Ves. Jun. 234 at 246, 32 Eng. Rep. 592 at 597 (1804)], to the effect that the inadequacy must be "such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud." See the review of the cases in Seymour v. Delancy, 3 Cowen (N. Y. Law) 445 (1824), and in the annotation to that case in 15 Am. Dec. 270 at 299 (1886).

[182] At this point courts of equity had anticipated by more than two centuries the doctrines of "frustration of the venture" which flowered in the law cases of the twentieth century. See ———— v. White, 3 Swans. 108 n. (*circa* 1710); Davis v. Hone, 2 Sch. & Lef. 341 (1805). But *cf.* Adams v. Weare, 1 Brown C. C. 567, 28 Eng. Rep. 1301 (1784); Haywood v. Cope, 25 Beav. 140, 53 Eng. Rep. 589 (1858).

In Savile v. Savile, 1 P. Wms. 745, 24 Eng. Rep. 596 (1721), relief was given against the effects of a change in the value of money following the collapse of the South Sea Bubble. The court had decreed a public sale of certain property, and defendant had agreed to buy in for £10,500, making a deposit of £1000. The Chancellor refused to order defendant to perform and discharged him on forfeiture of his deposit, saying that "a court of equity ought to take notice under what a general delusion the nation was at the time when this contract was made by Mr. *Frederick*, when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on estates."

[183] Dawson and Cooper, 33 MICH. L. REV. 706 at 728-729 (1935).

[184] Dawson and Cooper, 33 MICH. L. REV. 706 at 725-726 (1935).

[185] 8 Wall. (75 U. S.) 557 (1869).

greenbacks, for the $2000 specified in the option agreement as a down payment. To this letter defendant returned an evasive reply. On April 16, 1864, plaintiff in person tendered $2000 in greenbacks, which defendant refused to receive, demanding payment in gold coin. Subsequent negotiations proved unsuccessful and finally defendant left the city, with the intention of remaining away until after the first of May, when the lease expired. On April 29, 1864, plaintiff lessee filed a bill in equity, alleging these facts, praying for specific performance of the contract to convey, and offering on his own part to perform the agreement according to its true intent and meaning.

The opinion of the Court was written by Mr. Justice Field, who was soon to join the majority of the Supreme Court in holding the legal tender acts unconstitutional. But Field was careful to exclude all constitutional questions from the scope of the decision. Instead, he referred at some length to the discretion of courts of equity in refusing specific performance on grounds of hardship. As a correlative of the power to refuse specific performance he asserted the power of courts of equity to attach conditions to their grant of the remedy, when by that means they could prevent hardship or injustice. The hardship in the particular case arose from two factors. *First*, the influx of people into the national capital during the war had resulted in a general rise in real estate prices. This element was in the Court's view no ground for refusal of the remedy or for modification of the contract, partly because the contract itself indicated an assumption of risk as to "subsequent fluctuations in the value of the property" (the land was shown to be worth only $15,000 at the inception of the lease and the purchase price fixed had been $22,500); and partly because the risk of such fluctuations would in any event be imposed by law. The fairness of the contract in this aspect would have to be determined as of the date of the original contract.[186] The *second* element of hardship resulted from the

[186] One technical point suggested by Field's argument at this point deserves some further attention. In view of the common analysis of an option as a mere offer, until the exercise of the option by the optionee introduces an acceptance and completes the contract of sale, could it not be argued that the contract in Willard v. Tayloe was not formed until 1864, when the option was exercised? Field noticed this point [8 Wall. (75 U. S.) 557 at 568], but concluded that the contract must be treated as having been made in 1854, though not intended to "take effect" until later. This analysis has been adopted in a number of equity cases involving the subsequent exercise of an option to purchase, with an intervening rise in the value of land. O'Connell v. Lampe, 206 Cal. 282, 274 Pac. 336 (1929); Chicago Title and Trust Co. v. Illinois Merchants' Trust Co., 329 Ill. 334, 160 N. E. 597 (1928); Blackburn v. McLaughlin, 202 Ala. 434, 80 So. 818 (1919); Longworth v. Mitchell, 26 Ohio St. 334 (1875). In view of the considerable assumption of risk involved in a long-term option to purchase, this

issue by the government of legal tender notes. This issue produced a marked discrepancy between price and present value. The notes had depreciated to such a point that between April 15 and May 1, 1864, $100 in gold was worth between $167 and $184 in paper money.[187] The Court pointed out that at the time the option was given gold and silver coin were in general circulation and were the only currency recognized by law as legal tender. The Court asserted that the contract must have had reference to such currency and that it would be "inequitable" to substitute for it paper money worth only a little more than half its value. "Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution." The ultimate decree must therefore be for a conveyance by defendant upon the payment by plaintiff of the agreed instalments of the purchase price, with interest, in gold or silver coin, and upon the execution by plaintiff of a mortgage securing the balance of the purchase price, likewise payable in gold or silver coin.

Willard v. Tayloe was decided at the December term of 1869, while the legal tender cases were pending in the Supreme Court after reargument. A few weeks later the decision in *Hepburn v. Griswold*, the first of the legal tender cases, was announced, holding the legal tender acts unconstitutional and requiring payment in gold coin of all debts contracted before their passage. It is almost certain that the im-

construction may be said to represent the probable intentions of the parties, though a different analysis is possible.

The same question arose in the French inflation of the last decade, in the application of the Code rules governing rescission for inadequacy of price (*lésion*). Rescission is there allowed where the price paid for land is less than five-twelfths its value at the time of the contract of sale (French Civil Code, arts. 1674 and 1675). The depreciation of the franc during and after the World War produced a considerable volume of litigation through the efforts of vendors of land to rescind for inadequacy of price. The long-term option to purchase was the special subject of debate. After some fluctuation in court decision it was finally established that the date for measuring the adequacy of price would be the date at which the option was exercised, and one strong motive for the adoption of this technical reasoning was undoubtedly the desire to relieve vendors of land against the effects of inflation. Sirey. 1920.2.113; Sirey. 1921.2.73; Sirey. 1920.1.365; Sirey. 1926.1.128; Wahl in the REVUE TRIMESTRIELLE DU DROIT CIVIL, 1927, p. 571.

[187] See the record of sales on the New York gold exchange in MITCHELL, GOLD, PRICES AND WAGES UNDER THE GREENBACK STANDARD 294 (1908). The official report of Willard v. Tayloe gives figures for the movement of the gold premium between those dates which indicate a somewhat smaller fluctuation [8 Wall. (75 U. S.) 557 at 560 n.].

pending decision of the legal tender cases had an influence on judicial attitudes toward the specific performance problem of *Willard v. Tayloe*. Possibly traditional doctrines of specific performance were chosen as an avenue of escape from a difficult and embarrassing situation. And yet the division within the Court over the constitutionality of the legal tender acts must have been known for many months. The first vote of the justices, holding the acts unconstitutional, had been taken on November 27, 1869. It must have been clear that a decision on the legal tender question could not be longer postponed. There was no dissent in *Willard v. Tayloe* by the three justices who were soon to dissent in *Hepburn v. Griswold* and who, with the new members added the following spring, were eventually to succeed in sustaining the legal tender acts. The opposition in *Willard v. Tayloe* came from another quarter. Chief Justice Chase and Justice Nelson, concurring in the result, wished to seize this opportunity to declare the legal tender acts unconstitutional, so that payment in gold or silver coin would be required in any event. Nor was there anything in later decisions of the Supreme Court on the constitutionality of the legal tender acts which reflected in any way on the reasoning by which *Willard v. Tayloe* was decided.[188]

The decisions of state courts during the greenback period lend no support, however, to the device adopted in *Willard v. Tayloe* for relieving vendors of land from the risk of monetary depreciation. It is possible, perhaps, to distinguish cases which decreed specific performance without price revision in contracts made after the issue of legal tender notes had commenced.[189] Much harder to dispose of is the strong language of an Illinois case, decided before *Willard v. Tayloe*, to the effect that the legal tender acts prevented equity from revising the price term as a condition to specific performance.[190] Even more hostile

[188] Parker v. Davis, 12 Wall. (79 U. S.) 457 (1870), one of the two legal tender cases in which Hepburn v. Griswold was overruled, was an action for specific performance, but the decree of the Massachusetts court ordering payment in gold by the purchaser had been rested on the ground that the legal tender acts were unconstitutional.

[189] Breen v. Dewey, 16 Minn. 136 (1870), specific performance decreed of contract to sell land made in June 1867; Brassell v. McLemore, 50 Ala. 476 (1874), contract made in July 1865; Corson v. Mulvany, 49 Pa. St. 88 (1865), contract made Dec. 12, 1863; Hanna v. Ratekin, 43 Ill. 462 (1867), contract made in March or April 1862, with prior transactions between the parties concerning the same land extending back to 1849. In the latter case it appeared that defendant had through prior financial operations with the plaintiff secured at least a fair return for the property.

[190] Humphrey v. Clement, 44 Ill. 299 (1867), where the court pointed out that by its prior decisions even contracts calling expressly for payment in gold coin could be discharged in legal tender notes, and then said (p. 300):

"Notwithstanding this is a bill for specific performance, we must apply the same

was a decision in Ohio, ordering specific performance on tender of the agreed purchase price in greenbacks, in a contract made before the war. The refusal to take account of monetary depreciation in this case may be in part explained by the fact that it was not decided until 1875, when the premium on gold had been greatly reduced and the resumption of specie payments was not far off. Its language, however, indicates a conviction that the relief granted in *Willard v. Tayloe* was precluded as soon as the constitutionality of the legal tender acts was once accepted.[191]

In assessing the significance of *Willard v. Tayloe* for modern law, it is impossible to treat it as an anomaly produced by divisions within the Court over constitutional issues. It has become probably the leading American case on the subject of specific performance. It has been

rule here. We cannot say, on the law side of the court, that we can recognize no difference between gold and legal tender notes, and on the equity side, that we will recognize a distinction. If Clement paid, or offered pay, the amount due on this contract, on the day it became due, in notes which the law pronounces a legal tender in payment of debts, there at once vested in him a perfect right to a conveyance, and this right a court of chancery must enforce. The sort of discretion which the books speak of as sometimes exercised in cases of specific performance, is not a discretion which justifies the court in disregarding the law, or in saying that is not money which the law says is money. For the purpose of paying a debt, we can recognize no difference between the gold dollar and the legal tender paper dollar, and in this respect equity follows the law."

Unfortunately the date on which the contract had been originally made does not appear in the report.

[191] Longworth v. Mitchell, 26 Ohio St. 334 (1875), involving the exercise by a lessee of an option to purchase given as an incident to a lease in 1857. Of the points raised in Willard v. Tayloe, defendants in their assignments of error urged only the proposition that "Treasury notes were not a lawful tender in the case; and if the tender of gold was waived, or can be excused, still the decree should have been for payment of the purchase money in gold, or its equivalent." In the argument for defendants Willard v. Tayloe was cited, but apparently chief emphasis was laid on the fact that an option to purchase was a mere "privilege" to which the rules of ordinary money debts did not apply. The court, after referring to decisions of the Supreme Court of the United States on the effect of the legal tender acts, said (at p. 343):

"Under these adjudications, it is useless to contend that the legal tender acts apply only to 'debt,' in the strict technical sense of that term, and do not apply to a voluntary or optional payment as in the present case. It is equally useless to contend that the acts do not apply to and govern the rights of the parties in *equity*, equally as at law. The language of the legal tender act is, not merely that these notes shall be 'a legal tender in payment of all debts,' etc., but that they shall be '*lawful money*, and a legal tender in payment of all debts,' etc.

"The highest tribunal of the country having settled it that these acts are constitutional, and that they enter into and form part of all contracts for money, how can it be denied that in equity as well as at law, and in cases of optional payment, equally as in cases of compulsory payment, such notes are to be regarded as money, and a lawful tender."

cited with approval in innumerable decisions, both for its statement of specific performance doctrine and for the use of the particular device there adopted to secure price-revision indirectly, that is, the conditional decree.[192] A case that is woven so deeply into the web of modern equity deserves to be studied as a part of a broader pattern.

It will be recalled that in *Willard v. Tayloe* an important distinction was drawn between increases in price attributable to monetary factors and those attributable to changes in the value of the property itself. The Court undertook to relieve only against those price fluctuations which moved from the side of *money*.[193] The Court assumed without question that gold and silver coin could be taken as an accurate and stable representative of monetary value. This assumption was undoubtedly due to a variety of factors: first, the survival in court decision of a metallic theory of money; second and more important, the fact that the market price of gold did represent, to an unusual degree, a median of commodity prices in general during the greenback period;[194] and third, the likelihood that payment in specie would soon be required in *all* money debts through the impending decision in *Hepburn v. Griswold*.

This assumption can no longer be safely made. It is unlikely that the simple translation of paper-money debts into gold coin of the same nominal value will suffice in any inflation that can now be foreseen. Indeed, the doubling of internal prices which occurred in this country during and after the Great War was accomplished while the United States was still nominally on the gold standard.[195] At the present time governmental control of gold on foreign exchange has brought a wide gap between the official price of gold and the general level of internal prices. Even if this control should be relaxed (an unlikely contingency for the immediate future[196]) we cannot expect that the free operation of demand and supply on an international scale will reproduce the conditions which existed in the 1860's.

[192] Marks v. Gates, (C. C. A. 9th, 1907) 154 Fed. 481, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120; King v. Raab, 123 Iowa 632 (1904); Behr v. Hurwitz, 90 N. J. Eq. 110 at 116 (1918); Watters v. Ryan, 31 S. D. 536, 141 N. W. 359 (1913); Gotthelf v. Stranahan, 138 N. Y. 345 (1893); and many other cases.

[193] This distinction was clearly in Field's mind throughout his opinion, and appears most clearly, though even here only by implication, in the passage in 12 Wall. (79 U. S.) 570-571 (1870).

[194] Above, note 162.

[195] Between September 1917 and June 1919, however, the export of gold was prohibited, and the normal operation of the gold standard was to that extent interrupted. G. CASSEL, MONEY AND FOREIGN EXCHANGE AFTER 1914 (1922).

[196] Dawson, "The Gold Clause Decisions," 33 MICH. L. REV. 647 at 659-660 (1935).

The authority of *Willard v. Tayloe* is distinctly impaired by the fact that the device there used for the correction of the contract price is no longer available. On the other hand, the body of doctrine built up on the other branch of the case is formidable. There was abundant authority even before *Willard v. Tayloe* to the effect that an intervening rise in the value of land, due to the operation of demand and supply, was no ground for a refusal of specific performance.[197] This idea was even more extensively applied during the period after 1870, when the rapid development of natural resources and the opening up of new agricultural areas in the West led to a steady and sometimes startling rise in the market price of land.[198] The land boom which accompanied the inflation of prices during the period of the Great War produced a considerable volume of litigation and a reassertion of the same basic proposition.[199] Conversely, the post-war decline in prices, particularly acute in agricultural areas, had no greater effect in releasing purchasers of land from their liability to specific performance in equity.[200] Again,

[197] Falls v. Carpenter, 1 Dev. & B. (21 N. C.) 237 at 275 (1835); Low v. Treadwell, 12 Me. 441 (1835); Young v. Wright, 4 Wis. 163 (1855). Similarly, an intervening *decline* in the value of land had been held no obstacle to specific performance in favor of the vendor. Cathcart v. Robinson, 5 Pet. (30 U. S.) 264 (1831).

[198] Cady v. Gale, 5 W. Va. 547 (1871), rise in value of land through discovery of oil; Lovejoy v. Stewart, 23 Minn. 94 (1876), rise in value from $40 to $50 an acre to $125 an acre at time of trial; Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938 (1906); Rausch v. Hanson, 26 S. D. 273, 128 N. W. 611 (1910), rise in two years from $15 an acre to $20 or $25 an acre; Burge v. Gough, 153 Iowa 183, 133 N. W. 340 (1911); Anderson v. Anderson, 251 Ill. 415, 96 N. E. 265 (1911); Niquette v. Green, 81 Kan. 569, 106 Pac. 270 (1910); Walton v. McKinney, 11 Ariz. 385, 94 Pac. 1122 (1908); Charbonier v. Arbona, 63 Fla. 384, 57 So. 887 (1912); Dingman v. Hilberry, 159 Wis. 170, 149 N. W. 761 (1914).

[199] Larson v. Smith, 174 Iowa 619, 156 N. W. 813 (1916), purchase price $75 an acre, land rises to $120 or $125 an acre; Greenwood v. Greenwood, 96 Kan. 591, 152 Pac. 657 (1915), 97 Kan. 380, 155 Pac. 807 (1916); Kerwin Machine Co. v. Baker, 199 Mich. 122, 165 N. W. 625 (1917); Nowicki v. Kopelczak, 195 Mich. 678, 162 N. W. 266 (1917); Ogooshevitz v. Arnold, 197 Mich. 203, 163 N. W. 946 (1917); George v. Schuman, 202 Mich. 241, 168 N. W. 486 (1918); Blackburn v. McLaughlin, 202 Ala. 434, 80 So. 818 (1919); Baller v. Spivack, 213 Mich. 436, 182 N. W. 70 (1921); Compton v. Weber, 296 Ill. 412, 129 N. E. 764 (1921); Eakin v. Wycoff, 118 Kan. 167, 234 Pac. 63 (1925).

See also Great Lakes and St. Lawrence Transp. Co. v. Scranton Coal Co., 239 Fed. 603 (1917), involving a contract for the transportation of coal on Great Lakes steamers, with a war-time rise in freight rates.

[200] Allen v. Hayes, 309 Ill. 374, 141 N. E. 188 (1923); Martin v. Toll, 196 Iowa 388, 192 N. W. 806 (1923); Ross v. Carroll, 156 Minn. 132, 194 N. W. 315 (1923). But *cf.* McCaskill Co. v. Dekle, 88 Fla. 285, 102 So. 252 (1924). For earlier cases holding that an intervening decline in the value of the land will not prevent specific performance against the purchaser, see Nims v. Vaughn, 40 Mich. 356 (1879); Homan v. Stewart, 103 Ala. 644 (1893); Clark v. Hutzler, 96 Va. 73

in the period of feverish speculation which followed in the 1920's and which was mostly concentrated in urban areas, a large number of equity cases show the same reluctance to take account of price changes for the purpose either of refusing specific performance or of undertaking an indirect revision of the contract price.[201]

Moreover, in these cases there is hardly a suggestion that the apparent changes in the level of land prices were in any sense the result of a change in the value of money. The only case found where this point was even urged by counsel was an Iowa case, where the purchaser resisted specific performance in the vendor's favor on the ground that "because of the great fluctuation in the value of the dollar" the value of the land had fallen between May 1920 and March 1921 from $375 to $325 an acre. This depreciation, which in any case was not so striking as to "shock the conscience and produce an exclamation," [202] was held by the court to be no defense to the vendor's suit. The court apparently assumed that this depreciation was not distinguishable from fluctuations in value due to more normal operations of supply and demand, saying: [203]

> "If the contract price had been unconscionable and inequitable as of the time the contract was made, it would appeal to the discretion of the court of equity as a reason for refusing specific performance. Yet this rule has no application to a case where fluctuations in value subsequent to the contract result in loss to one of the parties and in corresponding profit to the other. All contracts of purchase and sale are made in contemplation of future fluctuation in value. The purchaser buys today in the hope of increasing valuation tomorrow. The seller sells today in the fear of decreasing valuation tomorrow. The seller always seeks the crest of the market wave; while the purchaser seeks the trough of it. If they could not see future values through different eyes, they could not do business at all. This is the element of chance which inheres in all

(1898); Wren v. Cooksey, 147 Ky. 825, 145 S. W. 1116 (1912). See also Anderson v. Bills, 335 Ill. 524, 167 N. E. 864 (1929).

[201] Keogh v. Peck, 316 Ill. 318, 147 N. E. 266 (1925); Stauch v. Daniels, 240 Mich. 295, 215 N. W. 311 (1927), rise in two years from $300 an acre to $1500 an acre; Chicago Title and Trust Co. v. Illinois Merchants' Trust Co., 329 Ill. 334, 160 N. E. 597 (1928), rise in five years from $2000 an acre to $6000 an acre; Stout v. Porritt, 250 Mich. 13, 229 N. W. 409 (1930); Forest Preserve District v. Emerson, 341 Ill. 442, 173 N. E. 477 (1930); see also Wheat v. Thomas, 209 Cal. 306, 287 Pac. 102 (1930).

[202] The often-quoted test of Chief Justice Savage in Seymour v. Delancy, 3 Cowen (N. Y.) 445, 15 Am. Dec. 270 (1824).

[203] Martin v. Toll, 196 Iowa 388 at 391, 192 N. W. 806 at 807 (1923).

commercial transactions. The profits and losses thus resulting from honest transactions are not subject to review by a court of equity."

If, then, indirect price revision is to be undertaken by courts of equity in the field of specific performance during periods of inflation, this must be done on the ground that unforeseen changes in the value of money lie outside the risks assumed by the parties to private contracts. This was essentially the position adopted by a unanimous court in *Willard v. Tayloe*.[204] It is a position not easy to reconcile with established rules of risk-assumption, not only as regards price fluctuations but also in connection with loss or destruction of the subject-matter of the contract.[205] It is a position, furthermore, which no court can safely take without considering the immense interests, political and economic, that are at stake — interests that are involved to the same degree in both legal and equitable actions.

The practical difficulties in the way of isolating the influence of purely monetary factors may be illustrated by the prices of agricultural land during the American inflation of 1916-1920. A weighted general index of wholesale prices for that period shows a rise in prices to approximately twice the 1913 level by the time of the Armistice. Thereafter the rise continued somewhat irregularly until a high point was reached in May 1920, approximately two and one-half times the pre-war level. Throughout this period, until the spring of 1920, the prices of farm products were well in advance of most commodity prices. This was partly caused by the general price rise, but more particularly by the disruption of ordinary processes of production and the suddenly increased demand for food products during the war.[206] The prices of agricultural land responded to the increased income realized in the production of food. In some districts its value was more than doubled, though the available evidence indicates that in most states the rise was considerably less than the rise of commodity prices in general. The

[204] 8 Wall. (75 U. S.) 557 (1869). It will be recalled that all the justices in that case concurred in requiring payment in gold or silver coin as a condition to specific performance. Chief Justice Chase and Mr. Justice Nelson concurred in the result on the ground that the legal tender acts were unconstitutional, so that creditors should be relieved of the risk of fluctuations in the value of paper money in *all* types of money debts.

[205] Linn County Bank v. Grisham, 105 Kan. 460, 185 Pac. 54 (1919); Brewer v. Herbert, 30 Md. 301 (1868); Paine v. Meller, 6 Ves. 349, 31 Eng. Rep. 1088 (1801); and elaborate discussion in 2 WILLISTON, CONTRACTS, secs. 927-954 (1931).

[206] See the INDEX OF WHOLESALE PRICES ON PRE-WAR BASE, published by the United States Department of Labor for the years 1890-1927, pp. 7-8 (1928).

high point was reached in 1920, before it was realized that the high prices and increasing profit of the war period could not continue.[207] With all the variations that appeared from district to district, it would be beyond the power of accomplished statisticians to trace and measure the effects of purely monetary factors on the value of particular tracts of land.

The refusal of American courts in this later period to follow the example of *Willard v. Tayloe* may therefore be explained in part by the extreme difficulty of measuring the influence of monetary changes on the course of land prices.[208] The doctrine announced in *Willard v. Tayloe* still survives. It is still true that an unforeseen change in circumstances, defeating the purpose for which the contract was made [209] or destroying the intended proportion between price and other performance,[210] can lead to a refusal of specific performance or a "con-

[207] C. R. Chambers, "Relation of Land Income to Land Value," UNITED STATES DEP'T OF AGRICULTURE BULL. No. 1224, pp. 19-26, 35-37 (1924); F. M. Thrun, "A Local Farm Real Estate Price Index," MICHIGAN STATE COLLEGE TECHNICAL BULL. No. 96, c. 5 (1929).

[208] It may not be improper to suggest that another reason was the failure to recognize that the credit inflation of the Great War, with gold payments only partly suspended, was an authentic form of inflation, made necessary as in so many other cases by the financial necessities of government in war-time. See Watkins, "The Economic Aspects of Inflation," 33 MICH. L. REV. 153 (1934). It seems unlikely that the effects of governmental action on the purchasing power of money will be so commonly analyzed in the near future as a mere "rise in the cost of living," resulting inevitably from the increase of government expenditure in a national emergency.

[209] Richardson Shoe Machinery Co. v. Essex Machine Co., 207 Mass. 219, 93 N. E. 650 (1911), frustration of purpose of contract for joint development of shoe manufacturing machinery, through acquisition of control of corporate plaintiff by chief competitor of parties; Anderson v. Steinway and Sons, 221 N. Y. 639, 117 N. E. 575 (1917), zoning ordinance making property unavailable for intended purpose of purchaser. But *cf.* with the last case Biggs v. Steinway & Sons, 229 N. Y. 320, 128 N. E. 211 (1920).

[210] In Watters v. Ryan, 31 S. D. 536, 141 N. W. 359 (1913), protracted litigation over title had made it possible for the purchaser to remain in possession without any correlative return to the vendor in the form of interest on the purchase price. The court ordered a refusal of specific performance unless the purchaser would "consent to a conscientious modification of the contract."

In Behr v. Hurwitz, 90 N. J. Eq. 110 at 116, 105 Atl. 486 (1918), the purchaser to secure specific performance was required to reimburse the vendor for the value of improvements made by the latter under compulsion from the Tenement House Commission.

Several cases have involved the question of subsequent special assessments for uncontemplated local improvements. King v. Raab, 123 Iowa 632, 99 N. W. 306 (1904), condition attached to decree requiring reimbursement of vendor for part of tax already paid and assumption of remainder; Nelson v. Robinson, 189 Iowa 1076, 178 N. W. 416 (1920), purchaser required to take subject to lien for special assess-

scientious modification" of contractual terms. Specific performance has even been denied where the subject matter of the contract indicates a very considerable assumption of risk by one or both parties.[211] And the courts that have most emphatically refused to take account of intervening price changes still assert a broad discretion to refuse this "exceptional" remedy in extreme cases of hardship.[212]

The point at which consideration becomes inadequate and the doctrine of changed circumstances becomes operative is no better defined now than it was in the days of Lord Eldon. It is unwise to suggest any arithmetical test in a field so completely controlled by judicial discretion.[213] The most that can be said is that now, as in the eighteenth century, a disproportion of more than two to one between money price and land sold will warrant an inquiry as to the source of the discrepancy.[214] Special circumstances of unfairness or personal inequality will usually lead to refusal of specific performance where the discrepancy is less than that.[215] In several states a statutory requirement of adequacy of consideration for cases of specific performance has had the same result where the discrepancy was very much smaller.[216] Probably,

ment; Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286 (1893), specific performance denied; Fitzpatrick v. Dorland, 27 Hun. (34 N. Y.) 291 (1882), specific performance denied.

See also Creger's Estate, 198 Iowa 833, 200 N. W. 332 (1924), where specific performance was refused of a contract to sell bank stock on the ground that the retention of earnings in surplus by the directors of the bank had greatly increased its value.

[211] Marks v. Gates, (C. C. A. 9th, 1907) 154 Fed. 481, 14 L. R. A. (N. S.) 317 (1908), 12 Ann. Cas. 120 (1909), involving a contract to transfer to plaintiff a 20 per cent interest in any mining claims located by defendant in Alaska or the Canadian Northwest, in return for $1000 in cash and the cancellation of an antecedent debt of $11,225, claims worth $750,000 being later located by defendant. But *cf.* Heyward v. Bradley, (C. C. A. 4th, 1910) 179 Fed. 325.

[212] Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072 (1908); Linsell v. Halicki, 240 Mich. 483, 215 N. W. 315 (1927); Johnson Realty and Inv. Co. v. Grosvenor, 241 Mich. 321, 217 N. W. 20 (1928).

[213] For a collection of cases, see 65 A. L. R. 7 (1930).

[214] See the cases cited in 14 L. R. A. (N. S.) 317 (1908).

[215] Banaghan v. Malaney, 200 Mass. 46, 85 N. E. 839, 19 L. R. A. (N. S.) 871, 128 Am. St. Rep. 378 (1908); Norris v. Clark, 72 N. H. 442, 57 Atl. 334 (1904); Shoop v. Burnside, 78 Kan. 871, 98 Pac. 202 (1908); and cases cited in 65 A. L. R. 7 at 80-94 (1930).

[216] The CALIFORNIA CIVIL CODE (sec. 3391) provides that specific performance shall not be enforced against a party "1, if he has not received an adequate consideration for the contract; 2, if it is not, as to him, just and reasonable." In Wilson v. White, 161 Cal. 453, 119 Pac. 895 (1911), this provision was held to justify the refusal of specific performance against a vendor who had agreed to take $14,000 for land worth $15,000. Likewise in Haddock v. Knapp, 171 Cal. 59, 151 Pac. 1140 (1915), property worth $1800 and exchanged for other property worth $2500 was held to be an

then, one is justified in drawing the conclusion that if monetary depreciation alone were to produce today a rapid and general rise in land prices to more than twice their present level, the judicial discretion to grant or withhold specific performance would be made to serve as an avenue to indirect price revision. The double-barreled defense of "changed conditions" and inadequacy of consideration would be the instrument. In a subsequent section of this paper an attempt must be made to determine whether courts of equity could themselves undertake to fix a substitute price by attaching a condition to specific performance. At that point also will be discussed two other questions: whether these types of equitable relief conflict with the language of legal tender legislation or the broader monetary policies of the government, and whether the element of assumption of risk would add a further obstacle.

Before leaving the subject of specific performance, however, we should consider the effectiveness of the methods used in *Willard v. Tayloe* to relieve against the results of monetary depreciation. In that case and in specific performance cases generally it has been assumed that judicial discretion is peculiarly free because denial of the remedy will not impair the validity of the contract at law. It is commonly assumed and often held that specific performance can be denied though no grounds exist for rescission.[217] In other words, the result definitely contemplated is that an action for damages may be brought for breach of the contract, though hardship, imposition, or inadequacy of price prevent specific enforcement in equity.

There was good sense in this solution at the period when the foun-

inadequate consideration. In other cases it has been held that the burden of proof is on the purchaser to show adequacy of consideration, and specific performance has been denied on facts that would probably lead to the grant of the remedy in other states. Flood v. Templeton, 148 Cal. 374, 83 Pac. 148 (1905); Herzog v. Atchison, Topeka and Santa Fe R. R., 153 Cal. 496, 95 Pac. 898 (1908). In more recent decisions there has been some reaction against the strict tests there announced. Wheat v. Thomas, 209 Cal. 306, 287 Pac. 102 (1930); O'Connell v. Lampe, 206 Cal. 282, 274 Pac. 336 (1929).

In other states where the language of the California Code has been copied it has also resulted in strict requirements of adequacy of consideration. Babcock v. Engel, 58 Mont. 597, 194 Pac. 137 (1920); Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58 (1904); Phelan v. Neary, 22 S. D. 265, 117 N. W. 142 (1908). See also Shropshire v. Rainey, 150 Ga. 566, 104 S. E. 414 (1920); Christian v. Ransome, 46 Ga. 138 (1872).

[217] Linsell v. Halicki, 240 Mich. 483, 215 N. W. 315 (1927); Kleinberg v. Ratett, 252 N. Y. 236, 169 N. E. 289 (1929); Dunlop v. Wever, 209 Iowa 590, 228 N. W. 562 (1930); Chute v. Quincy, 156 Mass. 189, 30 N. E. 550 (1892); Day v. Newman, 2 Cox 77, 30 Eng. Rep. 36 (1788); and numerous cases cited in 32 MICH. L. REV. 518 (1934).

dations of modern equity were being laid. Until the second half of the seventeenth century there was no really effective method at common law for controlling the measure of recovery in contract actions, and as a result the discretion of the jury was practically unhampered. With the development of the power to grant new trials the control of the court steadily increased. But even this device was administered with a broad discretion and it was not until the latter part of the eighteenth century that the modern rules of damages began to emerge. Their final systematization was the work of the nineteenth century.[218]

In the period when the jury's discretion was uncontrolled and the rules of damages were fluid, sending the plaintiff to a court of law did offer some prospect of alleviating hardship. It was then possible, in the words of a judge writing in 1824, "to send parties from a court of equity to a court of law to obtain equity." [219] But with the crystallization of the rules of damages and the increasing control of the court over the whole process of valuation in damage actions, the main basis for these fundamental assumptions of equity cases has disappeared. It is true that the difficulties in the way of exact valuation in fields where equity is accustomed to operate will often make it possible to take some account, in assessing damages, of the fairness of the transaction or the morality of the plaintiff's whole conduct.[220] It is also true that the denial of the more effective specific remedy will sometimes deprive the plaintiff of the full benefit of a hard bargain. But the mere refusal of specific performance offers no guarantee of the alleviation of hardship. On the contrary, the greater the disproportion between money price and defendant's performance, the greater will be the plaintiff's damages at law. The same objection can be raised where equity merely attaches a condition to its grant of the remedy, which the plaintiff is not bound to accept. In contracts thrown progressively further out of balance by monetary inflation the plaintiff can afford to abandon an equitable remedy that is surrounded with conditions if he can sue at law, and recover damages which represent primarily a change in the purchasing power of money.[221]

[218] See the excellent account of the history of the damage remedy by Washington, "Damages in Contract at Common Law," 47 L. Q. REV. 345 (1931), 48 L. Q. REV. 90 (1932).

[219] Chief Justice Savage in Seymour v. Delancy, 3 Cowen (N. Y.) 445 at 517 (1824).

[220] This is beautifully illustrated by the case of Faulkner v. Denniston, 250 Ky. 373, 63 S. W. (2d) 286 (1933).

[221] For a fuller discussion of the refusal of specific performance as a method of redressing unequal transactions, see 32 MICH. L. REV. 518 (1934).

The accidents of English legal history, then, have created a domain in Anglo-American law where a refined sense of justice can be brought to partial realization, without regard to its subversive effects on broader areas of law. It seems time now to inquire whether the methods used for this purpose are really effective, in any except a narrow intermediate group of cases. The inquiry is especially apposite in contracts disturbed by monetary inflation, where a continuing depreciation of money will progressively increase the disproportion between money price and other performance and, in the same degree, pile up the damages recoverable at law.

In other countries where there is no distinction comparable to our distinction between legal and equitable remedies, other avenues for judicial relief in periods of inflation had to be found. In Germany, where specific enforcement is described by the Code as the ordinary remedy in all cases [222] and where some effective sanctions are supplied for securing it,[223] outright rescission was the device used in the early

[222] German Civil Code, art. 249: "A person who is bound to make reparation must bring about the condition that would have existed if the circumstance making him liable to reparation had not occurred." This sweeping provision applies to tort as well as contract obligations. The damage remedy is introduced at various points, however. (1) By art. 249, sec. 2, the creditor is given the privilege of demanding damages instead of specific reparation "for injury to a person or damage to a thing." (2) By art. 250 the creditor is allowed to fix a reasonable period within which specific reparation or performance must occur and sue for damages if it is not completed by the date fixed. (3) By art. 251, sec. 1, the creditor is given a claim for damages in so far as specific reparation or performance "is impossible or is insufficient to compensate the creditor." (4) By art. 251, sec. 2, the *obligor* is given the privilege of paying damages instead of specific reparation or specific performance if they can be accomplished "only with disproportionate expenditure." (5) Finally, the Code of Civil Procedure, art. 887, in cases of acts that can be performed by third persons and do not depend exclusively on action by the debtor, permits the rendition of a decree authorizing performance by third persons at the debtor's expense, with a reservation for the creditor of any claim for additional damages.

The damage remedy is of course more important in German law than the language of the Civil Code would indicate. Especially in contracts for the sale of goods commercial practice relies on the self-help purchase or sale as a means of liquidating damages and over a wide class of transactions results are probably not much different from those in Anglo-American law. The effect of the Code provisions, nevertheless, was to concentrate attention on general questions of enforceability during the early period of the German inflation, rather than on the measure of recovery. Most of cases cited from the early period in Dawson, "Effects of Inflation on Private Contracts: Germany, 1914-1924," 33 MICH. L. REV. 171 at 178-201 (1934), are cases where a vendor sought outright rescission, either by way of defense to the purchaser's action or else by way of declaratory judgment. The later German cases expressly refused to modify the measure of recovery on account of intervening inflation, where grounds for rescission or direct revalorization did not appear. See below, note 265.

[223] The GERMAN CODE OF CIVIL PROCEDURE draws a series of distinctions be-

stages of the post-war inflation. In France, where specific enforcement is more limited and damages the more common remedy,[224] the hardship caused by the post-war inflation was alleviated chiefly through manipulation of rules of damages.[225] Both these methods of alleviating hardship deserve examination in the light of American experience. For convenience in discussion the effect of inflation on the measurement of damages will be considered first.

(b) *Processes of Valuation in Damage Actions*

The importance of the damage remedy in inflation is not derived merely from the fact that courts of equity may be induced to dismiss actions for specific performance to courts of law for the assessment of damages. It is through the damage remedy that courts must work out most of the difficult problems in valuation which necessarily arise through a change in the value of money. The economic interests at stake in the correct administration of the damage remedy greatly exceed those involved in contracts that are subject to specific enforcement in equity. Of contracts for services and for the sale of personalty all but

tween types of acts which debtors are obligated to perform, and comes remarkably close to the practices adopted by Anglo-American courts of equity. Movable goods and documented securities are physically extracted from the defendant's possession by an officer of the court (arts. 883-885); transfers of title and other "declarations of will" are accomplished by the court's decree and the decree may then be recorded at the title registry (arts. 894-896); acts outside these categories that can be accomplished by a third person may be ordered performed by another at the debtor's expense (art. 887); acts which "depend exclusively on the will of the debtor" may at the court's discretion be ordered performed by him on penalty of fine or imprisonment (art. 888); the defendant may be ordered on penalty of fine or imprisonment "to refrain from acting or to permit the performance of an act" (art. 890); and finally, temporary injunctions and sequestrations of property are permitted, with a wide discretion in the trial court (arts. 935, 938).

[224] In contracts for the sale of specific real or personal property the French Civil Code provides in effect for specific performance by making title pass through mere agreement and giving the purchaser the specific remedies of an owner for securing possession. CIVIL CODE, arts. 1136, 1138, 1583 (see also arts. 938 and 1703), discussed by Amos, "Specific Performance in French Law," 17 L. Q. REV. 372 (1901). For all other types of contracts the development of a specific remedy was greatly obstructed by art. 1142, CIVIL CODE, to the effect that "every obligation to do or not to do resolves itself into damages" (the provisions of arts. 1143 and 1144 only partly modifying this sweeping provision). French courts have shown remarkable resourcefulness in developing the system of *astreintes* or threats of money fine, which began as a form of damages and have become in modern law a decidedly ineffective but often useful means of enforcing specific performance. See Amos, *ibid.*, 17 L. Q. REV. 372 at 377-380; Esmein in REVUE TRIMESTRIELLE DE DROIT CIVIL, 1903, p. 5; PLANIOL ET RIPERT, TRAITÉ DE DROIT CIVIL, VII, 73-98 (1931).

[225] Below, note 261.

a small percentage receive legal protection against breach only by means of damages. Not only is the total economic wealth thus involved enormous, but the turnover is more rapid than in transactions involving land.[226]

The main lesson to be learned from the greenback period is that paper money, despite its rapid and considerable fluctuations, remained throughout the basic standard for valuation. This result was partly dictated by convenience. Legal tender notes remained throughout this period the standard of value for ordinary commercial transactions, except in the far West, where the abundant supply of gold and the resistance of commercial interests prevented the general introduction of the greenback standard.[227] Legal tender notes were adopted as the standard of value for legal purposes for another and more persuasive reason. Judgments expressed in money must be dischargeable in any lawful money issued by the paramount governmental authority. When the constitutionality of the legal tender acts was established it followed that a judgment which did not specify the form of legal currency in

[226] The fact that transactions involving the sale and lease of land extend as a rule over a longer term is of course an argument for the development of remedial doctrines in that area before all others, since the depreciation of money will ordinarily be more disruptive the longer the period between the inception and the performance of the contract. Even this point loses its force, however, if contracts for the sale of land, after denial of specific performance, are to be remitted to courts of law for the assessment of damages.

[227] This remarkable episode in monetary history is described by Moses, "Legal Tender Notes in California," 7 Q. J. OF ECON. 1 (1892). In the autumn of 1862 an agreement was formed by all the leading merchants of San Francisco not to use legal tender notes and to blacklist any person who attempted to pay off in paper money a debt contracted on a gold basis. A legal sanction was supplied, after prolonged agitation, by the Specific Contract Act of March 17, 1863, authorizing judgments payable in coin on contracts expressly stipulating for coin. (CAL. CODE OF CIVIL PROC., sec. 667.) The act was held constitutional in Carpenter v. Atherton, 25 Cal. 564 (1864). The Supreme Court was willing in 1887 to take judicial notice of the fact that coin was treated as the standard of value through the greenback period (In re Sanderson, 74 Cal. 199).

In Nevada and Idaho specific contract acts were passed in imitation of the California Act and at first were held unconstitutional. Milliken v. Sloat, 1 Nev. 573 (1865); Mitchell v. Bromberger, 1 Nev. 604, 2 Nev. 345 (1866); Betts v. Butler, 1 Idaho 185 (1868). In both states these decisions were later reversed: Emery v. Langley, 1 Idaho 694 (1878); Linn v. Minor, 4 Nev. 462 (1869), the court in the latter case saying that gold coin had as a matter of common knowledge remained the standard of value in the interval, parties relying on personal honesty and extra-legal sanctions for the enforcement of gold-clause contracts.

It was likewise stated by counsel in the Second Legal Tender Cases [12 Wall. (79 U. S.) 457 at 461 (1870)] that in Texas coin was "the standard of value in business."

which it might be discharged could be satisfied in legal tender notes.[228] It was only natural that the measure of the defendant's obligation should be the money in which it would almost certainly be paid.[229]

This argument suggested one other possibility. Gold and silver coins, though withdrawn in most states from general circulation, were still lawful money and a legal tender. Would it not be possible to avoid the inconvenience and risk entailed in the use of a fluctuating standard by providing in the judgment for payment in gold or silver coin? The question was particularly acute in contracts calling expressly for gold. The answer made by state courts was a reflection of their views on the whole problem of the enforceability of the gold clause in private contracts. Until the United States Supreme Court in *Bronson v. Rodes* held the gold clause valid,[230] the courts were almost unanimous in holding that the legal tender acts, by implication, forbade private parties and courts as well to draw any distinction between the various kinds of legal currency.[231] After *Bronson v. Rodes* the validity of the gold clause in private contracts was established. State courts faced reversal

[228] This was precisely the court's holding in Knox v. Lee, 12 Wall. (79 U. S.) 457 (1870), one of the Second Legal Tender Cases. The case came up to the Supreme Court on defendant's exception to a charge to the jury, in the federal circuit court for Western Texas, to the effect that the jury should "recollect that whatever amount they may give by their verdict can be discharged by the payment of such amount in legal tender notes of the United States." The exception was overruled by the Supreme Court and judgment for the plaintiff affirmed.

[229] Apparently the only case to suggest that the legal tender legislation *required* courts to adopt greenbacks as the standard for valuation was the Mississippi decision of Carter v. Cox, 44 Miss. 148 (1870). There the court argued that to adopt gold as a basis for valuation in Confederate-money transactions would be to attack directly the constitutionality of the legal tender acts.

A very different attitude was shown in Essex Co. v. Pacific Mills, 14 Allen (96 Mass.) 389 (1867). There the action was brought for rent payable in silver. The court analyzed the contract as a contract, not for silver coin but for a certain quantity of silver as a commodity. Its reasons for adopting legal tender notes as the standard for valuing the silver due all centered around the injustice to the creditor of adopting specie as the standard. If, as the court held, the judgment should be expressed in money generally, it would be dischargeable in legal tender notes and the defendant could be expected to pay in the cheaper medium. See also Tufts v. Plymouth Gold Mining Co., 14 Allen (96 Mass.) 407 (1867); Sears v. Dewing, 14 Allen (96 Mass.) 413 (1867); and Spencer v. Prindle, 28 Cal. 276 (1865). For cases using gold as the basis of valuation, though the judgment was assumed to be payable in greenbacks, see the two decisions of the United States Supreme Court cited below, note 237, and the Southern cases cited above, notes 116 and 118, especially Moses v. Hart's Adm'r, 25 Gratt. (66 Va.) 795, 803 (1875).

[230] 7 Wall. (74 U. S.) 229 (1868).

[231] See cases cited in Dawson, "The Gold Clause Decisions," Part II, 33 MICH. L. REV. 647 at 674 (1935).

by the United States Supreme Court if they failed to provide in their judgments for payment in gold or silver coin.[232] The result was the general adoption of specific judgments for gold or silver coin in contracts providing expressly for payment in specie.[233]

The authority thus conferred was not used over wider areas of contract and tort obligation. Even in California, where the decisions of the Supreme Court were anticipated by express legislation authorizing specie judgments on gold clause contracts, it was held improper to render judgment for gold in other types of actions.[234] In other states courts persisted, even as to gold clause contracts, in rendering judgment for legal tender notes, meeting the requirements of *Bronson v. Rodes* by adding the difference between the market rates between gold and legal tender notes.[235] Only one case has been found where a judgment

[232] This happened, for example, in Dewing v. Sears, 11 Wall. (78 U. S.) 379 (1870). The Massachusetts Supreme Court had held [14 Allen (96 Mass.) 413] that the lease there involved called for payment of a certain *quantity* of gold coin and not for a specified sum of money, and had rendered judgment for the equivalent in legal tender notes of that quantity of gold. Disagreeing with the Massachusetts court in its construction of the contract, the Supreme Court of the United States held the lease contained a gold *coin* clause, reversed the judgment, and ordered judgment for the sum due in gold coin. See also Butler v. Horwitz, 7 Wall. (74 U. S.) 258, 19 L. ed. 149 (1868).

[233] Dawson, "The Gold Clause Decisions," Part II, 33 MICH. L. REV. 647 at 675 (1935).

[234] More v. Del Valle, 28 Cal. 170 (1865), costs in action for forcible entry and detainer; Spencer v. Prindle, 28 Cal. 276 (1865), action for value of legal services rendered; Tarpy v. Shepherd, 30 Cal. 180 (1866), action for value of billiard table converted; Chamberlin v. Vance, 51 Cal. 75 (1875), action for damages for slander; Livingston v. Morgan, 53 Cal. 23 (1878), damages for trespass in removing a fence. To the same effect, Calhoun v. Page, 37 Tex. 454 (1872), action for damages for injuries to crops by lessee's cattle.

In Nevada, however, an express statutory provision authorizing judgments for gold coin in all action for damages was held valid and applied in an action for trespass to land [Clark v. Nevada Land and Mining Co., 6 Nev. 203 (1870)], and an action for trespass to personalty [Treadway v. Sharon, 7 Nev. 241 (1872)].

[235] Wills v. Allison, 4 Heisk. (51 Tenn.) 385 (1871); Knox v. Gerhauser, 3 Mont. 267 (1878), authorizing judgment for the specified sum in gold or for its equivalent in legal tender notes; Mitchell v. Henderson, 63 N. C. 10 (1869); Dunn v. Barnes, 73 N. C. 273 (1875). In the latter two cases, however, the contracts themselves had called for payment of a specified sum "in gold or its equivalent." The courts of other states had some difficulty with this form of gold value clause. The usual practice was to follow the terms of the contract and render judgment in the alternative, for gold *or* legal tender notes in specified amounts. Holt v. Given & Co., 43 Ala. 612 (1869); Wells, Fargo & Co. v. Van Sickle, 6 Nev. 45 (1870); Bond v. Greenwald & Co., 4 Heisk. (51 Tenn.) 453 (1871). But in Reese v. Stearns, 29 Cal. 273 (1865), the practical difficulties in determining, by reference to a fluctuating market, the sum in legal tender notes that was the "equivalent" of a specified sum in gold were held to require the rendition of a judgment payable only in legal tender notes. After the

for gold or silver coin was rendered in a case not based on an express promise to pay in specie. That was an action for damages against a bailee for negligence resulting in the loss of gold coin deposited. The court relied on the fact that a judgment for gold coin would have been rendered if suit had been brought on the bailee's express contract to redeliver coin. The court said that the liability asserted, though analyzed in terms of tort, was scarcely distinguishable from a liability based on contract, and that the form of judgment should therefore be the same.[236] In two other cases the Supreme Court of the United States held proper judgments expressed in legal tender notes, although the liability of the defendant in both cases had been computed in the trial court in terms originally of gold.[237]

resumption of specie payments by the federal government it was held that the judgment on a contract for "gold or its equivalent" must be for gold only. Atkinson v. Lanier, 69 Ga. 460 (1882).

[236] Kellogg v. Sweeney, 46 N. Y. 291 (1871).

[237] In The Vaughan and Telegraph, 14 Wall. (81 U. S.) 258 (1871), a consignee of barley shipped from Canada down the Hudson River sued in admiralty for the value of the barley, which was lost in a collision on the Hudson caused by defendants' negligence. The evidence showed that the barley was worth in Canada at the time of shipment $2436 in terms of gold and that greenbacks were then at a ratio to gold of $2.01 to $1. The federal district court gave a decree for $2924, without specifying the form of currency in which the judgment was payable. The circuit court on appeal modified the decree and increased the amount to $4896.30, the equivalent in legal tender notes of that sum in gold at the time of the loss. The Supreme Court held this modification proper on the ground that the decree was payable in legal tender notes. Chase, Field, and Clifford, JJ., dissented on the ground that the decree should be for the gold value of the barley and should be payable in gold coin, using the case as a moral to show the dangers in using a fluctuating medium as the basis of the assessment of damages. The case was complicated by the fact that between the rendition of the trial court decree and the final hearing on appeal, the gold premium had been reduced to 9 per cent. The majority held that this appreciation in the value of legal tender notes must accrue to the benefit of the successful libellant, and that the lower court decree, correct when rendered, should not be modified on that ground. [On the effect of an intervening rise in the value of legal tender money in gold clause contracts, see Bond v. Greenwald & Co., 4 Heisk. (51 Tenn.) 453 (1871), and Atkinson v. Lanier, 69 Ga. 460 (1882).]

The second case was Gregory v. Morris, 96 U. S. 619 (1877). There the plaintiff brought an action of replevin for cattle seized by defendant's agent in the exercise of a reserved vendor's lien. The trial court found that the seizure was rightful and proceeded to award defendant damages for the value of the cattle, which had been turned over by the attaching officer to the plaintiff. The original contract of sale had provided that plaintiff should pay defendant for the cattle the sum of approximately $8000 *in gold*. The trial court nevertheless held that the jury must compute defendant's damages in legal tender notes, translating the gold value of the cattle into their value in legal tender notes for this purpose. The judgment for defendant, which was rendered on the basis of this instruction, was affirmed, the court holding that the case did not fall within the principle of Bronson v. Rodes, 7 Wall. (74 U. S.) 229, 19 L. ed. 141 (1868), and that valuation in terms of legal tender notes was proper.

With the widespread use of greenbacks for purposes of legal valuation, the question inevitably arose whether the fluctuations in their purchasing power could be taken into account. The question was presented most sharply in bailments of gold coin. In actions for damages for the bailee's refusal to redeliver, courts were faced with a problem that appeared at first embarrassing. Gold coin and treasury notes were both legal tender. In that sense they were declared by law to be "equivalent." Could courts, without undermining the language and policy of the legal tender acts, officially recognize that the purchasing power of these two currencies diverged in fact very widely? Put more concretely, the question was whether the bailor had suffered damages, measured in legal tender notes, which exceeded the nominal value of the gold coin deposited and represented the market price of gold coin in legal tender notes at the time of the refusal to deliver.

The question was complicated in the early stages by the fact that express contracts for the payment of gold coin were held by most state courts to be unenforceable. A reason commonly given for this result was that gold and treasury notes were made "equivalent" by statute, and that judicial tribunals could recognize no distinction between them.[238] Here, however, a specific quantity of gold coin was dealt with by the parties as a commodity; the bailee's promise was not a promise to pay a total sum of "money." Furthermore, for courts to refuse to recognize a well-known fact was unrealistic, would often result in gross injustice, and was not required by the express language of any statute.

The Supreme Court of Wisconsin was so impressed with the logical difficulties involved that it refused to allow recovery of more than the nominal value of the gold deposited.[239] But in other states the pressure

[238] Cases in which this reason appears prominently are Wood v. Bullens, 6 Allen (88 Mass.) 516 (1863); Whetstone v. Colley, 36 Ill. 328 (1865); Buchegger v. Schultz, 13 Mich. 420 (1865); Burling v. Goodman, 1 Nev. 314 (1865); Riddlesbarger v. McDaniel, 38 Mo. 138 (1866); Warner v. Sauk County Bank, 20 Wis. 492 (1866), involving a *deposit* of gold coin; Gist v. Alexander, 15 Rich. Law (S. C.) 50 (1867); Howe v. Nickerson, 14 Allen (96 Mass.) 400 (1867); Betts v. Butler, 1 Idaho 185 (1868); Spear v. Alexander, 42 Ala. 572 (1868); Flournoy v. Healy, 31 Tex. 590 (1869). See also Davis v. Field, 43 Vt. 221 (1870). In Gibson v. Groner, 63 N. C. 10 (1868), an agreement to pay in gold was enforced, but it was held that the judgment would have to be for the value of the gold in legal tender notes.

The only exception was Chesapeake Bank v. Swain, 29 Md. 483 (1868), where the court held before Bronson v. Rodes, 7 Wall. (74 U. S.) 229, 19 L. ed. 141 (1868), that a contract to pay a sum of money in gold was valid and should be enforced by specifying in the judgment that it could be paid only *in gold coin.*

[239] Warner v. Sauk County Bank, 20 Wis. 492 (1866).

from the business community, in which gold was still widely used for commercial purposes, had a strong effect on judicial decision.[240] The refusal to enforce such agreements caused gross injustice to private parties, as even the Wisconsin court recognized. The avenue for their enforcement came through recognition that the legal tender quality of money was in no way impaired by taking account in legal valuation of its decreased purchasing power.[241]

Judicial recognition of the depreciation of the greenbacks was likewise held permissible in contracts, not for redelivery of specific coin, but for delivery of a named *quantity* of coin or bullion, estimated by weight. Even in states which held invalid all contracts for the payment of "money" in which gold or silver coin was specified, it came soon to be admitted that a contract for coin or bullion described by weight, rather than by its denomination as money, was a contract for a "commodity." For breach of such a contract, to deliver a described quantity of coin or bullion, the damages would be its value in legal tender notes at the date delivery was due. The legal tender acts were thought to be no obstacle to this direct recognition that legal tender notes had depreciated in terms of gold and silver.[242] The tortured rules of construction adopted to achieve this result could all be abandoned after the United States Supreme Court held all specie clauses enforceable by way of judgments for specie.[243] But the grounds stated for these Supreme Court decisions pointed in the same direction. In *Bronson v. Rodes* it was held that judgments for gold or silver coin were necessary because legal tender notes had depreciated; to enforce the acceptance of paper

[240] This appears most clearly in lower court decisions in New York. Bank of the Commonwealth v. Van Vleck, 49 Barb. 508 (1867); Bank of Prince Edward's Island v. Trumbull, 53 Barb. 459 (1868).

[241] Bank of the State v. Burton, 27 Ind. 426 (1867); Cushing v. Wells, Fargo & Co., 98 Mass. 550 (1868); Coffey v. Nat. Bank, 46 Mo. 140 (1870); Kellogg v. Sweeney, 46 N. Y. 291, 7 Am. Rep. 333 (1871), the latter case following the analogy of *money* contracts for payment in gold and providing a judgment payable only in gold coin, as authorized in Bronson v. Rodes, 7 Wall. (74 U. S.) 229, 19 L. ed. 141 (1868). See also Kupfer v. Bank of Galena, 34 Ill. 328, 85 Am. Dec. 309 (1864); Austin v. Easton, 25 Iowa 159 (1868).

The case of Frothingham v. Morse, 45 N. H. 545 (1864), was decided the other way because of the procedural tangle in which the plaintiff became involved through suit in general assumpsit.

[242] Mather v. Kinike, 51 Pa. St. 425 (1866); Christ Church Hospital v. Fuechsel, 54 Pa. St. 71 (1867); Sears v. Dewing, 14 Allen (96 Mass.) 413 (1867); Essex Co. v. Pacific Mills, 14 Allen (96 Mass.) 389 (1867).

[243] Bronson v. Rodes, 7 Wall. (74 U. S.) 229, 19 L. ed. 141 (1868); Butler v. Horwitz, 7 Wall. (74 U. S.) 258, 19 L. ed. 149 (1868); Dewing v. Sears, 11 Wall. (78 U. S.) 379, 20 L. ed. 189 (1870).

money would therefore defeat the purpose for which such contracts were made. Thereafter it was even easier for state courts to take account of the real purchasing power of legal tender notes in applying the greenback standard for purposes of valuation.

The same question appeared in other types of transactions. In the California case of *Spencer v. Prindle*,[244] the plaintiffs sued for the value of services rendered as attorneys at law. Witnesses testifying to the value of the services estimated them both in gold and in legal tender notes, the discrepancy being wide. One witness, for example, declared them to be worth $1,000 in greenbacks or $500 in coin. Defendant requested an instruction that the jury were "not at liberty to take into consideration the difference in the value of the currency of the country." The trial court modified this instruction in such a way as to admit in effect that the difference in value could be taken into account. On defendant's appeal the modified instruction was held correct. The court said:

> "But conceding that, while in legal contemplation there is no difference in value between the different kinds of lawful money, there is a difference, in fact, recognized in the commercial world, and in the ordinary business transactions of the country; how will it affect the question under consideration? . . .
>
> "But in a contract for goods sold, or for services performed, without any stipulated price, a promise is implied to pay what they are reasonably worth. When this question comes to be litigated, the question is, not whether a dollar in greenbacks is worth more or less than a dollar in gold, but what are the goods, or services worth?"

The court then concluded that since any judgment rendered in the action would be a "debt" and could be satisfied in legal tender notes, it was entirely proper to determine the value of the services in question in terms of the currency in which the judgment would presumably be paid.

An even more explicit statement that legal tender legislation does not in itself purport to fix the value at which legal tender money shall circulate is contained in the New York case of *Simpkins v. Low*.[245] In

[244] 28 Cal. 276 (1865). Quotation infra taken from pp. 277-278.

[245] 54 N. Y. 179 (1873). There the action was brought against an agent for damages for refusal to deliver twenty bonds of the San Francisco Waterworks Co., each of which provided for payment of $500 without any specification that payment would be in gold. Defendant had purchased them on account of plaintiff's testator and had paid $23,000 in currency for them (though their total face value was only $10,000).

other states likewise there was authority for the revaluation of tort and contract claims, to make them correspond with the change in the monetary standard which was used as the measure of value.[246] In fact, it was not felt that legal tender legislation required anything more than the acceptance of paper money at par in satisfaction of "debts" once ascertained. The process by which the amounts of those "debts" would be fixed had nothing to do with the operation of the legal tender acts themselves.

At this point it will be useful to compare the fuller development of the same ideas which occurred during the general price-rise from 1915 to 1921. The cases of the greenback period were concerned chiefly with contract actions. The embarrassment of the courts was primarily due to the fact that they were asked to recognize a difference in the purchasing power of gold and paper money, both of which were lawful currency and both legal tender. In the cases after the Great War, however, the problem of revaluation emerged in connection with tort actions for personal injuries. No difference between the values of two types of currency appeared to complicate the issues. The United

In order to show that damages had been suffered through failure to deliver up the bonds, plaintiff introduced evidence that gold had continued the standard of value in California, that the bonds would be paid in gold by the obligor, and that they were estimated in California on the basis of ordinary gold bonds. The lower court directed a verdict for plaintiff for nominal damages on the ground no evidence could be received to show a difference in purchasing power of gold and legal tender notes. In reversing the judgment and sending the case back for a new trial the Court of Appeals said (pp. 183-184):

> "Looking at the rulings of the court, and at this evidence which was received, it is obvious that the decisions at the trial present for consideration, the question whether the legal tender acts of congress forbid the recognition of the difference between gold and currency in respect to the question of damages, as between these parties. To this it must be answered, that those acts as finally expounded by the Supreme Court of the United States, relate to the effect of the notes issued under them as a tender in payment of debts arising upon contracts, and that they do not forbid the recognition in other relations of the difference between coin and currency. . . .
>
> "In the next place we are met by the fact that the bonds involved might have been discharged by the debtor to the holder in currency by the tender and delivery in payment of the number of dollars they called for in legal tender notes. And the question is, does that fact conclude the plaintiffs in this suit. Between them and the defendant the question is not one between debtor and creditor. The bonds were chattels, and the law does not fix the value of chattels. It certainly does not forbid their possessing whatever money value is shown in fact to have been possessed by them."

[246] Davis v. Mason, 3 Ore. 154 (1869), action for value of services rendered; Tarpy v. Shepherd, 30 Cal. 180 (1866), action for value of billiard table wrongfully taken.

States remained, at least nominally, on the gold standard. The disturbance was caused by a general rise in prices, produced by an enormous expansion of credit in financing war-time expenditure. The problem of revaluation appeared most frequently in the form of a question in appellate procedure. When verdicts in tort actions were attacked as excessive, could appellate courts take account of the fact that the purchasing power of money had greatly declined? The answer was practically unanimous. The verdicts recovered in earlier decades could be no guide in determining the fairness of verdicts recovered in the war and post-war periods. The general rise in prices had changed the monetary standard in terms of which the verdict and judgment were expressed. Verdicts rendered before that change had occurred, for the same type of injuries as those involved in the particular case, could therefore not be compared with those rendered afterward.[247]

The implications of these decisions were much more important than the narrow point in appellate procedure on which they turned. The refusal to set aside these verdicts as excessive gave official approval to a technique of valuation in which the standard of value itself was subjected to scrutiny. Juries, when asked to translate a damage liability into a fixed sum of money, could not well be prevented from determin-

[247] Noyes v. Des Moines Club, 186 Iowa 378, 170 N. W. 461 (1919); Ward v. Cathey, (Tex. Civ. App. 1919) 210 S. W. 289; Hurst v. Chicago, Burlington and Quincy R. R., 280 Mo. 566, 219 S. W. 566 (1920); Illinois Central R. R. v. Johnston, 205 Ala. 1, 87 So. 866 (1920); Standard Oil Co. v. Titus, 187 Ky. 560, 219 S. W. 1077 (1920); McCreedy v. Fournier, 113 Wash. 351, 194 Pac. 398 (1920); Bowes v. Public Service Ry., 94 N. J. L. 378, 110 Atl. 699 (1920); Quinn v. Chicago, Milwaukee and St. Paul Ry., 162 Minn. 87, 202 N. W. 275 (1925); Missouri Pacific R. R. v. Elvins, 176 Ark. 737, 4 S. W. (2d) 528 (1928); Rowe v. Rennick, 112 Cal. App. 576, 297 Pac. 603 (1931); and numerous other cases cited in 3 A. L. R. 610, 10 A. L. R. 179, 18 A. L. R. 564, and 60 A. L. R. 1392.

As a matter of fact this principle had not had to wait until the period of the Great War for recognition. As early as 1878 the variations in the purchasing power of money had been taken into account in the comparison of verdicts rendered in tort actions. Gale v. New York Central & Hudson River R. R., 13 Hun. (20 N. Y. Sup. Ct.) 1 (1878). The Minnesota court in Johnson v. St. Paul City Ry., 67 Minn. 260, 69 N. W. 900 (1897), had given as one reason for *reduction* of a verdict the fact that the purchasing power of money had risen in the period before the rendition of the verdict. In periods of rising prices before the war it had also been recognized that the decreased purchasing power of money would justify higher verdicts. Dole v. New Orleans Ry. & Light Co., 121 La. 945, 46 So. 929 (1908); Seaboard Air-Line Ry. v. Miller, 5 Ga. App. 402, 63 S. E. 299 (1908); Louisville & N. R. R. v. Williams, 183 Ala. 138, 62 So. 679 (1913); Hays v. United Railways Co., 183 Mo. App. 608, 167 S. W. 656 (1914). In Cross v. Lee Lumber Co., 130 La. 66, 57 So. 631 (1912), the damages had been *increased* from $3500 to $7500 "in view of the decrease in the purchasing power of money."

ing at some stage the real significance of the monetary standard which they were directed to apply. Trial court instructions that they were privileged to do so were approved whenever the question was directly raised.[248] It was felt and often said that this procedure by fact-finding agencies was simply one aspect of the whole process of valuation.[249] Most important of all, the currency legislation of Congress did not prevent judicial recognition of a change in the purchasing power of money. Its legal tender attribute would not be thereby impaired or denied. Courts were simply taking account of a well-known economic fact, which had the most immediate bearing on the process of judicial valuation.[250] No scientific tests were developed for measuring the change in the value of money or for determining the point at which the change could be officially recognized.[251] Where damages were

[248] Halloran v. New England Telephone and Telegraph Co., 95 Vt. 273, 115 Atl. 143, 18 A. L. R. 554 (1921); Rigley v. Prior, 290 Mo. 10, 233 S. W. 828 (1921); Hannon v. Delaware, L. & W. R. R., 98 N. J. L. 191, 119 Atl. 86 (1922); Tennessee River Nav. Co. v. Woodward, 18 Ala. App. 34, 88 So. 364 (1920); Washington & Rockville Ry. v. La Fourcade, 48 App. D. C. 364 (1919).

[249] See, for example, the language of Washington & Rockville Ry. v. La Fourcade, 48 App. D. C. 364 (1919).

[250] Hannon v. Delaware, L. & W. R. R., 98 N. J. L. 191 at 194-195, 119 Atl. 86 (1922):

> "Appellant's next point is that the trial court refused defendant's request to charge that if the jury should find for the plaintiff they must not assess the damage according to its view of the present purchasing power of the dollar. In support of this request appellant submits a lengthy argument on the coinage laws of the federal government, which has not the slightest application to the question involved. Damage which a party sustains and seeks to recover, if found and assessed, is expressed in the currency of the country. It is the standard by which damage is measured, and the amount is properly governed by its relative purchasing power in satisfaction of the injury suffered. The purchasing power of the German mark would have to be considered in expressing compensation in that coin. The trial court was not bound to charge the request as formulated, for the jury was authorized to award compensation, and in doing so to consider the purchasing power of the standard which was used to express it."

The dissenting opinion of Chief Justice Watson in Halloran v. New England Tel. & Tel. Co., 95 Vt. 273, 115 Atl. 143, 18 A. L. R. 554 (1921), indicates the type of argument by which the courts in these cases refused to be misled. Chief Justice Watson there said in substance that the value of legal tender money is regulated by Congress, that this value "is in law unchangeable except by Congress," and that fact-finding agencies were therefore without power to take account of its altered purchasing power.

[251] See, for example, the statement in Hurst v. Chicago, Burlington & Quincy R. R., 280 Mo. 566 at 572-573, 219 S. W. 566, 10 A. L. R. 174 (1920):

> "The dollar is, at best, merely a unit for the measurement of values. It is a fluctuating and variable criterion, and therefore an imperfect one. Statisticians and political economists have devised a unit of measurement which, while necessarily imperfect, is yet more accurate than the dollar for gauging values. This

assessed for injuries suffered at a much earlier date, it was often difficult to translate into a money whose value had changed, the losses suffered some time before. The difficulty was increased where the injuries continued *through* the period of monetary change [252] or where the injuries (such as loss of earning power) were themselves affected by the change in monetary values.[253] But these were inconveniences that followed inevitably from a change in the central standard of value. They did not prevent recognition that such a change had occurred.

The cases of the greenback period, as well as the tort cases of the last two decades, support the general proposition that in measuring the plaintiff's loss through tort or in estimating the value of defendant's performance in contract actions, an intervening change in the value of money must be taken into account. The effect in both types of cases is to enhance the plaintiff's recovery in periods of progressive decline in the purchasing power of money. But these decisions leave unanswered one basic question in the measurement of damages for breach of contract. Is it possible to *reduce* the recovery by a purchaser of land or goods on the ground that an apparent discrepancy between contract price and present value of the subject matter is due merely to a change

unit is arrived at, broadly speaking, by taking the money cost of certain essentials of life, such as rent, clothing, food and fuel, during a given period of time, and comparing it with the cost in money of like essentials of like quantity and quality during a like antecedent period. The relative purchasing power of the dollar is thus ascertained, and its fluctuations are thus shown. Courts cannot, of course, follow the ordinary variations of the money-market, as brokers and merchants do, but when radical, material and apparently permanent changes in social and economic conditions confront mankind, courts must take cognizance of them — not too hastily, lest that which seems to be permanent should prove to be transient; nor yet too tardily, lest justice fail."

It scarcely needs to be said that in none of these cases is there a hint that comparative tables of price-movements or any other indices of monetary values were placed before juries to assist them in measuring the monetary changes that had occurred. Rough approximations, based primarily on the ordinary daily experience of jurors, were all that the assessment of damages in these actions required.

In Calihan v. Yellow Cab Co., 125 Cal. App. 649, 13 Pac. (2d) 931 (1932), the court refused to reduce a verdict as excessive on the ground asserted by defendant, that the purchasing power of the dollar had greatly *increased* in the interval before the verdict was rendered. The court said that what defendant described as a rise in the value of the dollar was really just a "scarcity of money" and then took judicial notice of "the country's gradual emergence from the depths of the depression," so that "we may expect a return to normal conditions." This was said in 1932.

[252] Rigley v. Prior, 290 Mo. 10, 233 S. W. 828 (1921).

[253] Canfield v. Chicago, Rock Island & Pacific Ry., 142 Iowa 658, 121 N. W. 186 (1909); and especially the vigorous opinion of Judge Wiest in Palmer v. Security Trust Co., 242 Mich. 163, 218 N. W. 677, 60 A. L. R. 1392 (1928).

in the value of money? It was suggested earlier, in discussing the subject of specific performance, that the hardship caused by a change in the value of money would not be alleviated by the mere dismissal of bills in equity if the damage remedy were left intact. It was also suggested that the effect on the damage remedy of monetary depreciation would ordinarily be to increase the discrepancy between money price and the value of the property sold. The question now presented is whether relief against unforeseen change in monetary values can be worked out in the administration of the damage remedy itself.

The experience of French courts in the inflation of the last decade will throw some light on this question. The war-time rise in prices in France continued after the Armistice until the *de facto* stabilization of 1926. Indices of internal wholesale prices showed a depreciation of the franc to less than one-eighth of its pre-war purchasing power at its lowest point and to approximately one-sixth of its pre-war position after the decline was arrested.[254] An inflation so considerable as this produced many hardships and naturally resulted in an insistent demand for judicial relief.[255] In contracts for the sale of land the French Civil Code permitted rescission for inadequacy of price exceeding a certain arithmetical ratio, and this rule performed valuable service in the class of cases to which it applied.[256] In other respects, however, the spirit

[254] DULLES, THE FRENCH FRANC, 1914-1928, pp. 513-518 (1929). In terms of retail commodities the depreciation was not so great. At the lowest point, in October 1926, an index of retail prices showed a purchasing power somewhat less than one-sixth of pre-war, and in 1927, after *de facto* stabilization, the depreciation was to a point about one-fifth the pre-war purchasing power. DULLES, *ibid.*, p. 511.

[255] Wahl, writing in SIREY, 1916. 1. 17; Serbesco in REVUE TRIMESTRIELLE DE DROIT CIVIL, 1917, p. 349; VOIRIN, DE L'IMPRÉVISION DANS LES RAPPORTS DE DROIT PRIVÉ (1922); BRUZIN, LA NOTION D'IMPRÉVISION (1922); FYOT, ESSAI D'UNE JUSTIFICATION NOUVELLE DE LA THÉORIE DE L'IMPRÉVISION (1921). The theory of *imprévision* through which legal writers attempted to justify relief for unforeseen monetary depreciation has a close affiliation with the Anglo-American theory of "frustration of the venture" and is not limited, of course, to inflation cases. For a review in English of a recent book on the subject (RIVADENEIREA, LA TEORIA DE LA IMPRÉVISION) see Ireland, in 8 TULANE L. REV. 636 (1934).

[256] FRENCH CIVIL CODE, arts. 887, 1674-1683. These provisions allowed rescission where land was sold for less than five-twelfths of its value at the time of the contract, with an option in the purchaser of retaining the property on payment of nine-tenths of its fair value. A different fraction was adopted for partition agreements between co-heirs. This legal device had its origin, of course, in the rules of the late Roman law for *læsio enormis*, allowing rescission where the price received for land was less than half its value. 19 BAUDRY-LACANTINERIE, TRAITÉ DE DROIT CIVIL 705-769 (1908); 7 PLANIOL ET RIPERT, TRAITÉ DE DROIT CIVIL 275-282 (1931). Cases applying rules of *lésion* to contracts disturbed by the war and post-war inflation are cited above, note 186.

of the French Code was distinctly hostile toward measures for the readjustment of contracts to monetary depreciation.[257] It was only in long-term contracts by public utility companies that the Conseil d'État (the highest court in the French system of administrative law) developed a general theory of price-revision.[258] The efforts of lower courts to apply similar principles to ordinary commercial contracts were completely nullified by the uncompromising attitude of the Cour de Cassation.[259]

The hardships caused by the French inflation had to be alleviated chiefly through manipulation by lower courts of the damage remedy.[260] The measure of recovery in actions for damages lies in general outside the sphere of control by the Cour de Cassation. The avenue thus left for relief against the effects of inflation was fully utilized by lower courts. Where an increase in the value of goods or services sold was traceable to a change in the value of money, lower courts refused to believe that the purchaser of the goods or services in question had suffered substantial damage. By paying a sum with a higher nominal value but the same real purchasing power the purchaser could secure a substitute whose economic value was intrinsically the same.[261]

[257] Art. 1895 of the CIVIL CODE provided in substance that the obligation created by a loan of money is always the numerical sum named in the contract, and shall be unaffected by any subsequent increase or diminution of the monetary supply. Art. 1134 announced the general proposition that "contracts legally formed have the effect of law for the parties making them," and cannot be revoked except by mutual consent or on the grounds authorized by law. Art. 1118 forbade rescission for *lésion* except in the cases where it was expressly authorized.

[258] SIREY, 1916. 3. 17 (March 30, 1916); 1920. 3. 25 (June 27, 1919); 1924. 3. 2 (Feb. 8, 1918); 1925. 3. 58 (Mar. 28, 1924).

[259] BRUZIN, LA NOTION D'IMPRÉVISION 142-170 (1922); 6 PLANIOL ET RIPERT, TRAITÉ DE DROIT CIVIL 545-559 (1930).

[260] There was, however, special legislation for certain classes of contracts. The most instructive is the *loi Failliot*, passed January 21, 1918, allowing rescission of prewar contracts for the sale of goods wherever the expenses or losses through performance "greatly exceed those which could reasonably have been foreseen at the time the contract was made." The text is given in DALLOZ. 1918. 4. 261 with a commentary. For a brief account of the legislative history and underlying policy of this statute see 6 PLANIOL ET RIPERT, TRAITÉ DE DROIT CIVIL 549-559 (1930).

[261] SIREY. 1916. 2. 40 (Tribunal de la Seine), contract by lessor to heat leased apartment; SIREY. 1917. 2. 49 (Tribunal de la Seine), instalment contract for sale of sulphuric acid; SIREY. 1920. 1. 117 (Cour de Cassation), long-term contract for sale of grapes; and other cases discussed by BRUZIN, LA NOTION D'IMPRÉVISION 130-135 (1922), and FYOT, ESSAI D'UNE JUSTIFICATION NOUVELLE DE LA THÉORIE DE L'IMPRÉVISION 168-171 (1921).

It is interesting that the latter writer developed a whole theory of "change of conditions" on the basis of art. 1150, CIVIL CODE, which provided that in actions for breach of contract only those damages were recoverable "which were foreseeable or

If American juries and trial judges are to be permitted to take any account of changes in the purchasing power of money, it will be difficult to prevent the development of similar attitudes in our courts. Let us suppose, for example, that in a contract for the sale of goods, a major depreciation of money occurs between the inception of the contract and the date when delivery is due. On the vendor's refusal to deliver, the purchaser's normal remedy would be a self-help purchase of a substitute on the open market, with a claim for damages for the difference-money. Even if no such purchase is actually made, the measure of damages would ordinarily be the amount that the purchaser *would have had* to pay if he had acted promptly. In either case, the price difference involved in our hypothetical situation would not represent a change in conditions of demand and supply. The difference would rather represent a change in the purchasing power of money. In short, the difference-money measure of damages breaks down where the difference is due to a change in the standard of value itself.

There are grave objections to this device for restoring the balance in contracts disturbed by inflation. In the first place, it would require distinctions to be made between purchasers who had already paid all or part of the purchase price before the vendor's breach, and purchasers who had paid nothing. If all the purchase price had been paid, presumably the purchaser would be entitled to the paper-money equivalent of the vendor's performance, no matter how steeply its nominal value rose through subsequent depreciation of money. If only part payment had been made, how should the value of the money paid be credited on the purchase price, particularly where payment had been made in successive instalments? [262] It would only be in cases where nothing whatever had been paid by the purchaser that he would appear to have suffered no substantial damage. But a purchaser who had deposited funds in a bank to meet his purchase-money obligation, or who had merely withheld a sufficient sum from ordinary use or investment would be able to show a loss through intervening depreciation.

could have been foreseen at the time of the contract." The main foundation for his argument was the very limited scope of specific performance remedies in French law. See above, note 224. The result of this was that effective relief in large classes of commercial contracts could be worked out within the damage remedy. The argument is suggestive for Anglo-American courts, which have imposed different, but equally severe, restrictions on specific performance.

[262] Compare the difficulties experienced in Germany with cases of part-payment on land transactions, even after the principle of general price-revision (revalorization) had been fully admitted. Dawson and Cooper, 33 MICH. L. REV. 706, 717, n. 35 (1935).

An even more serious objection is the necessity for a distinction between price changes due to purely monetary influences and those due to influences on the *commodity* side. This difficulty has already been suggested in the discussion of contracts involving land.[263] It is indeed the fundamental difficulty with all legal devices by which the risks of monetary fluctuation are isolated from ordinary business risks and given special treatment. In the whole range of transactions which receive protection through the damage remedy this problem would be acute. Inflation sets in motion a complex of forces which operate in different degrees on various classes of commodities. In each case it would be necessary to determine how far the influences bearing on the particular commodity (e.g., wheat) were traceable primarily to monetary disturbance. Even those which derived originally from a monetary source might operate through a series of intermediate stages. As to commodities whose markets are highly organized (e.g., stock and commodity exchanges) current prices represent to a high degree the estimate of traders regarding the future course of monetary changes. In less degree, but only because the market is less immediately responsive, the same factor would be at work in all classes of transactions. The anticipation of further inflation leads at an early stage to a "flight from the dollar" which drives prices up and becomes a new and powerful force in the direction of further inflation. Finally, in attempting, through the damage remedy, to estimate the extent of these various influences, there would be the embarrassing necessity for expressing them as exactly as possible in terms of *money*.

But the third and most serious objection to the method used in the French inflation is found in its economic consequences. A vendor of land or goods who refuses to perform will find himself in a much more favorable position than if he does perform but can secure no supplement to the agreed price. A consistent refusal of damage recovery to the purchaser would offer an encouragement for the vendor's breach and would result in practice in the general rescission of commercial contracts. There was not only logic but a powerful argument of convenience behind the position adopted by German courts in the inflation of the last decade. During the intermediate stages in the decline of the German mark, outright rescission was the device selected for the alleviation of extreme hardship. In the very last stage the courts were driven to direct price-revision, in the course of their general revalorization of all money debts.[264] But in contracts of the early period which

[263] Above, notes 206 and 207, and accompanying text.

[264] Dawson, 33 MICH. L. REV. 171, 190 ff. (1933).

did not satisfy the tests for rescission or revalorization, no reduction of the purchaser's damage recovery was allowed. It was held that if the purchaser was entitled to performance at the contract price, he was damaged by the refusal to perform at that price. The discrepancy between the value of the money promised and the value of the vendor's performance at the date it was due might be attributable merely to a change in the value of money. The purchaser was nevertheless entitled to substantial damages, measured by the difference between the nominal sum promised and the nominal value of the opposite party's performance at the date when performance was due.[265]

The elimination of damages due solely to the depreciation of money seems to offer an attractive avenue for the alleviation of hardship. But it leads to enormous complications in the assessment of damages, presents practical difficulties that would be nearly insuperable, and has economic consequences of the greatest importance. It is to be hoped that appellate courts in this country will hold in check the inclination of fact-finding agencies to choose this thorny path.

(c) *The Possibility of Rescission*

There is no hint in any of the cases of the greenback period that commercial contracts could be rescinded on the ground of unforeseen depreciation of money. There are two main reasons why this possibility was not seriously considered. On the economic side, the inflation never proceeded far enough or rapidly enough to raise the issues which confronted European courts in the last decade. The purchasing power of the dollar was never cut to less than half its pre-war purchasing power. After the end of the war its recovery was steady and the resources of the federal government made it certain that the greenbacks could eventually be redeemed. On the legal side, no general theory had been formulated by which judicial relief against the effects of inflation could

[265] DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 111, p. 342 (Oct. 7, 1925); vol. 112, p. 324 (Jan. 16, 1926); vol. 113, p. 136 (Apr. 30, 1926); 54 JURISTISCHE WOCHENSCHRIFT 1480 (Mar. 17, 1925); *ibid.*, 1925, p. 1627 (Mar. 13, 1925); discussed by Zeiler, 55 JURISTISCHE WOCHENSCHRIFT 687 (1926).

The fact that these conclusions were reached without doubt or hesitation may be explained by the fundamental assumption of the German Code that specific enforcement is the normal remedy for breach of contract. Having a primary right to specific performance, a plaintiff was substantially damaged by his failure to secure it. In French law, where damages are the exclusive remedy for most classes of contracts and specific relief is ordinarily worked out *through* the damage remedy, the opposite assumption was more natural. For a sketch of the French and German remedies for breach of contract, see above, notes 222-224.

be justified. The modern theory of "frustration of the venture" was only then beginning to germinate in the law of impossibility of performance. Judicial language and attitudes gave no hope of leniency in cases of supervening change of conditions, outside the narrow limits of strict impossibility of performance.[266]

The development of the doctrine of "frustration" in the early twentieth century [267] has opened a new path for judicial relief on the ground of unforeseen monetary changes. An opportunity to mark out the limits of this new doctrine was presented by the disturbances to existing contracts through the Great War and its accompanying inflation. Unforeseen interference through government requisition, confiscation, embargo, or shortage of materials was then recognized as a ground for rescission.[268] But the cases of this period do not suggest that a rise in prices would of itself be enough. Commodity prices in England and the United States were approximately doubled.[269] In spite

[266] The traditional view in the common law cases was that stated by Serjeant Williams in his notes to Saunders' Reports: ". . . when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." 2 Wms. Saund. 422, note 2, 85 Eng. Rep. 1234 (1671). See 3 WILLISTON, CONTRACTS, secs. 1931 ff. (1927).

The modern doctrine of frustration has its origin in the language of Blackburn, J., in Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (1863), a case involving a lease of a music-hall that was later destroyed by fire. Justice Blackburn attempted to derive his theory of "implied condition" from classical Roman law, but Professor Buckland has recently shown that Roman law texts offer little support for this theory and that the language of Pothier on the subject, quoted by Justice Blackburn, represented a considerable extension of Roman law ideas. Buckland, "*Casus* and Frustration in Roman and Common Law," 46 HARV. L. REV. 1281 (1933).

[267] Particularly in the well-known coronation cases: Krell v. Henry, [1903] 2 K. B. 740; Chandler v. Webster, [1904] 1 K. B. 493; Lumsden v. Barton & Co., 19 T. L. R. 53 (1902); Blakeley v. Muller & Co., 19 T. L. R. 186 (1903); Clark v. Lindsay, 19 T. L. R. 202 (1903); Herne Bay Steam Boat Co. v. Hutton, [1903] 2 K. B. 683.

For a discussion of the modern law of frustration see "The Doctrine of Frustration," 166 LAW TIMES 242 (Oct. 13, 1928); Page, "The Development of the Doctrine of Impossibility of Performance," 18 MICH. L. REV. 589 (1920); 3 WILLISTON, CONTRACTS, secs. 1951-1955 (1927); 12 CORN. L. Q. 72 (1926).

[268] The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490 (1917); Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 Sup. Ct. 147 (1919); Horlock v. Beal, [1916] 1 A. C. 486; Metropolitan Water Board v. Dick, Kerr & Co., [1918] A. C. 119; Peter Dixon & Sons, Ltd. v. Henderson, Craig and Co., [1919] 2 K. B. 778; Bank Line, Ltd. v. Arthur Capel & Co., [1919] A. C. 435; 3 A. L. R. 21 (1919). See Page, "Impossibility of Performance Due to War," 3 WIS. L. REV. 210 (1925); Dodd, "Impossibility of Performance of Contracts Due to War-Time Regulations," 32 HARV. L. REV. 789 (1919); Blair, "Breach of Contract Due to War," 20 COL. L. REV. 413 (1920).

[269] As to wholesale prices in the United States, see the INDEX OF WHOLESALE

of the heavy loss to obligors that was often produced by this movement of prices, it was reiterated in the cases that a mere increase in the cost of performance would be no excuse.[270] For inflation to be recognized in law actions as a "change of conditions" discharging the contract, it will presumably have to exceed, by a considerable margin, the degree of depreciation experienced during the Civil War and again during the Great War.

Nevertheless, it is not to be expected that common law courts will permit a wholesale sacrifice of obligors in the grinding ruin of extreme inflation. It has been suggested that the purpose of "frustration" doctrines is to preserve the intended equivalence between performances on either side.[271] This equivalence can be effectively destroyed by unforeseen monetary changes. In specific performance cases the authority of *Willard v. Tayloe*,[272] still essentially unimpaired, would permit the early development of remedial principles for that special area. A generalization of those principles and their adoption in legal actions could be anticipated if the depreciation of money were rapid and extreme, so that the influence of purely monetary factors was made quite plain.

The Confederate inflation illustrates the imperative need for a developed body of "change of conditions" doctrines to meet the problems raised by extreme inflation. The depreciation of Confederate money during the Civil War was much more rapid than any depreciation now in prospect. In the end Confederate money became wholly

PRICES ON PRE-WAR BASE, published by the United States Department of Labor for the years 1890-1927, pp. 7-8 (1928). As to wholesale prices in Great Britain, see the FOREIGN CURRENCY AND EXCHANGE INVESTIGATION of the United States Senate Commission of Gold and Silver Inquiry, (Serial 9, vol. 1) p. 449 (1925).

[270] Columbus Ry., Light & Power Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349 (1919); London & Lancashire Indemnity Co. v. Board of Comm'rs, 107 Ohio St. 51, 140 N. E. 672 (1923); City of Moorhead v. Union Light, Heat, and Power Co., (D. C. Minn. 1918) 255 Fed. 920; Tennants v. Wilson & Co., [1917] A. C. 495 (relief being here given on the basis of express language in the agreement). See also Peter Dixon & Sons, Ltd. v. Henderson, Craig and Co., [1919] 2 K. B. 778; Commonwealth v. Bader, 271 Pa. 308, 114 Atl. 266 (1921); and Gordon v. State, 233 N. Y. 1, 134 N. E. 698, 21 A. L. R. 562 (1922).

[271] Corbin, "Supervening Impossibility of Performing Conditions Precedent," 22 COL. L. REV. 421 at 427 (1922): "The prevailing concept of justice appears to require only that the obligor should not be forced to perform in case he has not received the substantial equivalent of his performance as agreed upon. If, therefore, the fact that is described as a condition forms a substantial part of this agreed equivalent, the obligor is not under the agreed promissory duty in case of its non-performance. . . ." See also the similar statement by Blair, "Breach of Contract Due to War," 20 COL. L. REV. 413 at 414 (1920).

[272] 8 Wall. (75 U. S.) 557 (1869), discussed above, section 2 (a).

worthless. To sustain the scaling acts against attack on constitutional grounds Southern courts were forced to recur repeatedly to the idea that inflation had destroyed the assumed foundations of private contracts and constituted an unforeseen change of conditions.[273] The Supreme Court of the United States rejected this reasoning in part, holding that the value of Confederate money promised could be measured as of the date of the original contract but that the *consideration promised* for Confederate money could not be used as the standard of value.[274] Neither of these main devices can be recommended for universal use in the readjustment of contracts after extreme inflation. Both tend to oversimplify the legal and economic problems which courts, to their own embarrassment, should take into account. But a fuller judicial experience with private law problems might have suggested more scientific method for legislation; it would also have provided more convincing reasons for sustaining the scaling acts on constitutional grounds. One line of reasoning alone may suffice to indicate the possibilities in the latter connection. The standard of value most commonly adopted for the revision of Confederate-money obligations was the consideration promised for the promise to pay. If the adoption of this standard had been couched in terms of *rescission* of Confederate-money contracts for change of conditions, and of *restitution* of the money value of the property transferred, the application of the standard would have been considered consistent, in a large number of cases, with general rules of private law.[275] Then this legislative standard, crude as it is, might have encountered fewer constitutional obstacles inasmuch as private law doctrines would have led to similar results.

There is no present prospect in this country that inflation will again occur at the rate and to the degree reached in the Confederate states during the Civil War. The type of inflation with which courts will be forced to deal, if serious monetary disturbance appears at all, will be a relatively moderate inflation. In such a contingency it is difficult to define in advance the point at which courts might be persuaded to intervene, although clearly the depreciation would have to be consid-

[273] 33 MICH. L. REV. 706 at 734-736 (1935).

[274] 33 MICH. L. REV. 706 at 736-737 (1935).

[275] Even in recent decisions it is not fully established that after discharge of contracts for impossibility or frustration recovery can be had for the value of property or services received by the opposite party through part performance of the contract. The English cases and a minority of American jurisdictions refuse such relief in quasi-contract or in actions brought on similar theories. These cases are criticized and cases allowing recovery are cited by WILLISTON, CONTRACTS, secs. 1972-1977 (1931), and WOODWARD, QUASI-CONTRACTS, secs. 109-131 (1913). See also Buckland, "*Casus* and

erable. On this point the experience of German courts is instructive. The German inflation after the Great War swept across a legal order whose conservatism was deeply rooted in a magnificent code of private law, scarcely two decades old. Standing firm on the language and spirit of the Civil Code, German courts long ignored the urgent demand for judicial relief from the effects of inflation. About this time a general theory of "change of conditions" was reformulated by legal writers, some fifteen years after English courts had begun to develop their doctrine of "frustration of the venture." [276] This theory was not accepted in judicial decision until the later years of the Great War. Even then it was applied only in a narrow group of cases, those involving contracts whose performance was suspended by war. It was not until 1920, after internal prices had suddenly leaped to a point fourteen times their pre-war level, that rescission was permitted at all generally. The renewed depreciation of the mark, commencing in the autumn of 1921, forced the Reichsgericht to a cautious but consistent extension of remedial doctrines over a widening area of legal transactions. In the end the complete collapse of the mark led to the boldest and most startling step of all — a judicial nullification of the legal tender legislation and a general revalorization of all money debts.[277]

In France the war and post-war rise in prices reduced the franc to one-sixth of its pre-war purchasing power in twelve years. The highest court restrained the impulses of lower courts throughout this trying period. The "stability of commercial transactions" was thought to prevent judicial intervention in private-law transactions. But the inference that might be drawn from French experience is not conclusive. The language and spirit of the French Code were even more hostile than the German Code toward judicial relief on the ground of monetary depreciation. A powerful demand arose among legal writers for judicial rescission of dislocated contracts. To this demand many intermediate courts of appeal responded. In the end the resistance of the *Cour de Cassation* went back to restrictive views of the judicial function in law formulation, views which seem strange to lawyers trained in the tradition of the common law.[278]

Frustration in Roman and Common Law," 46 HARV. L. REV. 1281 at 1287-1297 (1933).

[276] The greatest service was that of Krückmann, whose elaborate argument for the *clausula rebus sic stantibus* was published in 1918. 116 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 157 (1918).

[277] The history of judicial decision during the progress of the German inflation is traced in greater detail in Dawson, "Effects of Inflation on Private Contracts: Germany, 1914-1924," 33 MICH. L. REV. 171 at 178-211 (1934).

[278] See above, section 2 (b).

American courts, then, can be expected to permit judicial relief more freely than it was allowed in the French post-war inflation, and to permit relief before inflation has progressed to the point where German courts were forced to intervene. Before they can do so, however, they must be persuaded that judicial relief will not conflict with the monetary policies of government or produce economic consequences more disastrous than a strict enforcement of commercial contracts.

An attempt will be made in the next section to examine the broader considerations of policy which might influence courts in deciding whether to assume the initiative in periods of extreme monetary disturbance.

GENERAL CONCLUSIONS

THE attitudes that courts should adopt toward the legal problems raised by a major inflation are necessarily influenced by some broad considerations of policy. They should hesitate to develop private law doctrines along lines that would conflict with the language or purpose of monetary legislation or imperil the larger interests of society. At the same time they should be aware that their attitudes toward monetary issues have important economic consequences. Whether they decide to assume the initiative in restoring a disturbed equilibrium or to insist instead on literal enforcement of all money contracts, they should be prepared to face the broader questions of policy that are inevitably involved. In this concluding section attention will be directed to some of the factors of policy which might present obstacles to the development of judicial remedies. They will be considered in the following order: (1) the legal-tender quality of money; (2) the public interest in preserving the purchasing power of money; (3) policies as to the relief of debtors; (4) policies involved in the allocation of risk; (5) the public interest in the security of transactions; (6) the choice between legislative and judicial remedies.

1. *The Legal Tender Quality of Money*

The first and most important barrier to judicial relief against the effects of inflation is legal-tender legislation. It has already been pointed out that the legal-tender acts passed in the North during the Civil War were a deliberate and large-scale sacrifice of private claims to the national interest. When their constitutionality was once established, all "debts" that had been expressed in fixed sums of money (without gold or other stable-value clauses) became at once exposed to the risk of fluctuations in the purchasing power of money. Nor is

the experience of Northern creditors in the greenback period by any means unique. In the German inflation of the last decade, legal-tender legislation stood as an insuperable obstacle to the general revision of money debts until the mark had approached its bottom level, a trillion to one. In the French inflation after the Great War legal-tender legislation had a similar effect, less striking only because the depreciation of the currency never went so far. In general it may be expected that governments resorting to an irredeemable paper currency will by legislation attach the legal-tender quality. The primary purpose of such legislation is usually to ensure the circulation of paper currency; but if the currency depreciates, the inevitable effect is to destroy a substantial share of accumulated wealth which takes the form of claims for money.

The deflation of 1930-1933 provides a further illustration of the effects of legal-tender legislation on judicial remedies. The sharp decline of the price-level (i.e., rise in the value of money) increased greatly the weight of money obligations. The effort of public and private agencies was thereupon directed to a scaling *down* of money debts so as to relieve *debtors*. The devices adopted for that purpose are familiar — judicial and legislative moratoria, the extension of bankruptcy and receivership procedures, the offering of incentives (e.g., through the Home Owners' Loan Corporation) for the voluntary scaling of debts through agreement between debtor and creditor.[279] Seldom was it proposed that courts should undertake a compulsory scaling of debts to correspond to the increased purchasing power of the dollar. In a 1934 Iowa case a debtor urged such relief as a condition to mortgage foreclosure in equity, but the Iowa court emphatically declared that legal-tender legislation stood directly in the way. Nor did this court feel that courts of equity had any greater power than courts of law to relieve against the operation of the legal-tender acts.[280]

[279] See the discussion of devices for relieving mortgagors, "Judicial and Legislative Aid for the Mortgage Debtor," 82 UNIV. PA. L. REV. 261 (1934).

[280] Federal Land Bank of Omaha v. Wilmarth, (Iowa 1934) 252 N. W. 507. The mortgagor there asserted that the mortgaged land had depreciated in value from $40,000 at the time of the loan to $10,000 at the time of suit; that in the same interval the purchasing power of money had doubled; and that "these radical changes in values were not contemplated . . . when the note and mortgage were executed." The mortgagor therefore urged that since the mortgagee had come into equity for relief he should "do equity"; and that either foreclosure should be refused or the mortgage debt of $20,000 should be scaled down to $10,000. The court said (p. 512): "Assuming, for the purposes of discussion, that the appellant's philosophy is correct, then, were the

If courts refused to enforce legal-tender legislation in periods of extreme inflation, their action would tend to a limited extent to arrest the process of depreciation. Debtors would then be unable to pay off debts in paper money at its nominal par. If some reliable and stable standard of value could be found as a substitute for the national currency,[281] the nominal sum due would increase as the purchasing power of money declined. Debtors would then be deprived of the incentive for borrowing which they have in periods of continuing monetary depreciation. They would no longer have the assurance that the money repaid would be worth less than the money borrowed. For the class of borrowers, such as manufacturers and industrialists, who are in the strongest position to profit by this unequal exchange, the removal of this incentive would have some effect in restricting the credit inflation which often accompanies over-issues of paper money.[282]

situation reversed, would the appellant, in what he would term prosperous times, be in court asking that he not be permitted to pay $20,000 in satisfaction of the obligation, but that he be required to pay $40,000 in satisfaction of the debt? Of course, that philosophy cannot be applied to the practical events of life. . . ."

The court then referred to the legal-tender cases of the greenback period and concluded (p. 513): "The appellant, when receiving the money named in the note, in effect agreed to repay it at maturity with legal tender authorized by the Congress of the United States. Under all the cases presented for our consideration, it uniformly has been said that fluctuations in values will not relieve the debtor. Equity cannot arbitrarily grant relief in the face of the Constitution of the United States and the laws thereof, to which the state is subject."

[281] The difficulties of German courts and of Southern courts after the Civil War illustrate the importance of the reservation one must make on this point. If gold is no longer available as a substitute standard of value and if a price-index standard is difficult to formulate, the abandonment of the nominal par of the currency would simply lead to further confusion. See further infra the discussion of the problem of judicial formulation of substitute standards of value.

[282] This suggestion assumes that lenders of money can be found who are willing to assume the risk of depreciation between the date of the loan and the date of repayment. Not many private persons would be willing to assume this risk if further depreciation were in prospect. It is chiefly from commercial banks that the impulse to further credit inflation would come, and their willingness to lend would depend on whether they were able to shift their loss onto some other agency.

The situation of commercial banks during the German inflation illustrates how this process may occur. The extremely liberal rediscount policy of the Reichsbank made it possible for banks to rediscount commercial paper at the Reichsbank, which thus assumed the whole loss through intervening depreciation and made indirect but extensive gifts of purchasing power to private borrowers. An economist has criticized the German courts for failing to repudiate the legal-tender quality of the mark at an earlier date, on the ground that such repudiation would have tended to arrest the process of depreciation. GRAHAM, EXCHANGE, PRICES AND PRODUCTION IN HYPER-INFLATION: GERMANY, 1920-1923, p. 77 n. (1930). His criticism clearly overlooks

In other respects, however, the repudiation of the legal-tender quality would probably have but little effect on the main course of monetary depreciation. The stabilization of contracts, achieved by this means, would not attack the root causes of inflation — usually found in budgetary deficits of the government. If the government was forced by its financial necessities to continued over-issues of paper money, the depreciation would continue at very nearly the same rate. Private persons who found themselves in the possession of such money would be just as anxious as before to dispose of it in return for property of more stable value; that is to say, the "flight from the currency" (an important secondary source of inflation) would continue. It is clear, then, that nullification of legal-tender legislation cannot be justified on the ground of the deflationary effect of such action. Whatever moral justification there might be would be found in the desire to prevent intolerable injustice and hardship to private creditors, whose claims were being swallowed up in the gulf of monetary ruin.

Nor can it be denied that an attack on the legal-tender quality of money is a direct attack on legal-tender legislation. The most telling criticism of the German inflation decisions centers around this point. If the statutes making the mark legal tender were valid at their inception (and of this there was no doubt), how could subsequent depreciation amount to a "change of conditions" that would deprive such legislation of all legal effect? [283] Especially how could this be done in the German legal system, where the principle of judicial review was novel and very narrowly applied? Indeed, as one eminent writer has pointed out, the nullification by the Reichsgericht of the legal tender acts was in violent conflict with the whole legal tradition of Germany.[284] It can only be understood against the background of German politics in the

the legal difficulties in the way of such an attack on legal-tender legislation. It must also be read in the light of the credit policies of German banks, particularly the Reichsbank. It was chiefly through these credit policies that credit inflation was added to the over-issue of paper money as a factor in monetary depreciation. On these policies see GRAHAM, supra, pp. 61-69.

[283] See NUSSBAUM, DAS GELD 127-128 (1925), and the criticisms of Heck, summarized in 33 MICH. L. REV. 171 at 210 n. (1934). It will be recalled that the main legal ground for invalidating German legal-tender legislation was that its enforcement would violate "good faith" and thus be inconsistent with Article 242 of the German Civil Code. But to achieve this result the Reichsgericht was forced to say that "change of conditions" could affect not only private contracts but the language of public statute, which was admittedly valid at its inception.

[284] NUSSBAUM, DIE BILANZ DER AUFWERTUNGSTHEORIE, pp. 12-15 (Recht und Staat, 1929) (citation being to a reprint kindly supplied by the author).

dark days of 1923;[285] and as an expression of protest against shocking injustice, condemned by the moral sense of the German nation.[286]

If monetary depreciation were to go as far in the United States as it did in Germany after the Great War, American courts would not find it so difficult to invalidate legal-tender acts on constitutional grounds. It is by no means inconceivable that such legislation, though valid at its inception, would be held a taking of property without due process if paper money were reduced to $^1/_{10,000}$ of its present purchasing power.[287] This taking results directly from governmental action. The due process clause of the Fifth Amendment could clearly not be invoked to prevent it until the late stages of extreme depreciation. Whether courts would then be willing to intervene would seem to depend on the extent of the public interest in maintaining circulation of the currency at its nominal par.

There is no factual evidence directly showing the importance of the legal-tender attribute in maintaining the circulation of currency. Economic literature throws no clearer light on the question. In mone-

[285] Nussbaum, p. 13 (see n. 284, supra). Professor Nussbaum there points out that the republican government, founded recently by revolution, had shown itself impotent to deal with the overwhelming catastrophe of inflation; and that by contrast a powerful official class, established under the monarchy and reluctant to concede the legitimate authority of the republican government, felt itself to be the last remaining stronghold in a dissolving social order. Perhaps a foreigner can be excused for failure to observe such psychological factors as these, which must undoubtedly have influenced judicial decision in the inflation period and which were wholly ignored in the writer's discussion of the German inflation cases.

[286] Political factors were unquestionably important in producing the revalorization decisions of the Reichsgericht, as is suggested in the preceding note. It is also true, as Professor Nussbaum points out, that in later years a "prevailing opinion" developed among legal writers that the decisions of the Reichsgericht were legally not supportable and had led to social waste and confusion. NUSSBAUM, DIE BILANZ DER AUFWERTUNGSTHEORIE, pp. 8-11 (Recht und Staat, 1929). Nevertheless it must be remembered that the demand for revalorization had appeared in lower courts and legal writings long before the tardy response of the Reichsgericht and that at the time the "prevailing opinion" among jurists welcomed this remarkable adventure of the Reichsgericht in the field of judicial review. See Heck in 122 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 203 at 206 (1924).

[287] A remote analogy is suggested by the cases on the rates of public utilities, which must, under recent decisions of the United States Supreme Court, be readjusted to changes in the price-level although not confiscatory when first applied. Lincoln Gas and Electric Co. v. City of Lincoln, 250 U. S. 256, 39 Sup. Ct. 454 (1919); Banton v. Belt Line Ry., 268 U. S. 413, 45 Sup. Ct. 534 (1925); Bluefield Co. v. Pub. Serv. Comm., 262 U. S. 679, 43 Sup. Ct. 675 (1923); Missouri v. Pub. Serv. Comm., 262 U. S. 276, 43 Sup. Ct. 544 (1923); McCardle v. Indianapolis Water Co., 272 U. S. 400, 47 Sup. Ct. 144 (1926); Municipal Gas Co. v. Pub. Serv. Comm., 225 N. Y. 89, 121 N. E. 772 (1918). The problem is discussed in 17 MARQ. L. REV. 141 (1933).

tary theory the emphasis placed by particular writers on the legal-tender attribute of money is usually a reflection of their views as to the essential nature of money. Until more general agreement is reached on basic theoretical questions, one scarcely expects to find in economic literature any clear guide to the importance of the legal-tender attribute.[288] Nevertheless, experience would seem to indicate that the debt-discharging power is of great practical importance in sustaining the official currency through periods of depreciation. The inflation in the Confederate states during the Civil War demonstrates that the pressure of an aroused public opinion can go far in ensuring the acceptance of depreciated money, at least during the early stages of depreciation.[289] On the other hand, a rapid and extreme depreciation may, as in Germany, drive an irredeemable paper currency out of circulation, even though the legal-tender attribute is attached.[290] Up until the final collapse of the currency, however, it seems that legal-tender legislation is an important factor in ensuring its circulation. That this is the assumption of legislatures is shown by the prompt resort to such legislation whenever depreciation is in prospect. A similar assumption was one of the main grounds for sustaining the constitutionality of the

[288] "Commodity" theories of money, which attempt to ascribe to money a value independent of the values reflected in the prices of commodities, would tend to place less emphasis on the legal-tender quality and derive the value of money, so far as possible, from the operation of ordinary economic laws. Nevertheless, an adherent of this view, like Helfferich, can with consistency admit that the legal-tender quality is for *legal* purposes an essential element of money. HELFFERICH, DAS GELD 341-351 (1923) [on Helfferich's views in general see ELLIS, GERMAN MONETARY THEORY, 1905-1933, pp. 60-71 (1934)].

On the other hand, the "nominalist" point of view would tend to place great emphasis on the legal-tender quality in attempting to describe the processes by which money is maintained in circulation. See, for example, the views of Cassel, quoted by ELLIS, GERMAN MONETARY THEORY, 1905-1933, p. 53 (1934). But Professor Nussbaum, a distinguished protagonist of nominalism, rejects definitions of money which restrict it to types possessing the legal-tender attribute. As he points out, media of exchange can often attain free circulation without being legal tender and can be indistinguishable from legal-tender money in economic function. NUSSBAUM, DAS GELD 24-25 (1925). See also Ellis, supra, p. 33.

[289] Dawson and Cooper, "The Effect of Inflation on Private Contracts: United States, 1861-1879," 33 MICH. L. REV. 706 at 714 n. (1935). In the later stages of the Confederate inflation, one begins to find in the law reports intimations that many creditors were willing to brave the storm of public opinion and reject Confederate money when tendered at its par value. Even the threat of imprisonment by military authorities, in districts where martial law had been declared, was not enough to overcome the natural cupidity of creditors.

[290] This phenomenon in the later stages of the German inflation is pointed out by HARGREAVES, RESTORING CURRENCY STANDARDS 95 (1926).

legal-tender acts after the Civil War.[291] One must conclude, in spite of the absence of factual evidence, that the legal-tender quality must be preserved by courts, at least until the public interest in the continued circulation of the currency is greatly reduced or wholly destroyed. Although constitutional grounds for a direct attack on legal-tender legislation might be found, it would have to be postponed to a very late stage of monetary depreciation and even then might jeopardize the government's position at a critical time.[292]

After all these concessions have been made, it is important to emphasize that the field of operation for legal-tender legislation is limited. It purports to apply only to "debts"; it declares that "debts" will be discharged by payment of the nominal sum due in legal-tender money; its evident purpose is to ensure the *circulation* of legal-tender money by forcing its acceptance at par. There is nothing in the language of legal-tender legislation to indicate a purpose of "regulating the value of money." The majority opinion in *Knox v. Lee*, the second legal-tender cases, expressly denied the existence of any such purpose;[293] and in *Juilliard v. Greenman*, the last of the legal-tender cases, the power of Congress to make paper money a legal tender was rested not on the

[291] The expediency of making paper money legal tender was said in the legal-tender cases to be irrelevant on a question of constitutional power. Nevertheless, both majority and minority in the Supreme Court expended considerable effort on the debate over the practical importance of the legal-tender quality in ensuring the acceptance by the public of paper money. See Hepburn v. Griswold, 8 Wall. (75 U. S.) 603 at 620-622, 632-635 (1869); Knox v. Lee, 12 Wall. (79 U. S.) 457 at 542-543, 577-579 (1870). For similar arguments see Breen v. Dewey, 16 Minn. 136 (1870).

[292] Particularly at a late stage of depreciation, the financial necessities of the government may make the issue of legal-tender money the only practicable form of governmental borrowing. The impaired credit of the government is apt to make this type of forced loan the only method of maintaining it in operation. However much one might deplore the resultant injustice to individuals, a court should hesitate before destroying the only remaining claim on the wealth of citizens.

[293] Knox v. Lee, 12 Wall. (79 U. S.) 457 at 553 (1870), where Mr. Justice Strong was disposing of the argument that the unit of money value should possess intrinsic value:

> "The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. . . . It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value."

power "To coin Money, [and] regulate the Value thereof," but on an *aggregate* of the broad powers over commerce and finance.[294] It must be emphasized, therefore, that legal-tender legislation has nothing to do with the value at which money shall circulate or with the processes by which the quantum of any "debt" is determined, either by contract, statute, or judgment. The legislation does not preclude a recognition by courts of changes in the value of money that have in fact occurred. Indeed, during the greenback period and again during the American inflation of the Great War, such changes were recognized by courts and given whatever effect was required by general rules of private law.[295] It is only where the amount of a "debt" has been finally and conclusively fixed that legal-tender legislation intervenes to enforce its discharge through payment or tender of the specified sum in legal-tender money.

The limited effect of legal-tender legislation may be suggested by reverting to the problem of specific performance during periods of inflation. Suppose, for example, that a contract is made for the sale of land for $10,000; that at the time of the contract this represents approximately the fair value of the land; and that monetary depreciation subsequently increases the nominal value to $40,000. If equity were to refuse specific performance unless the purchaser consented to a proportionate increase in the price, it would *in effect* hold that $10,000 in depreciated paper money was not legal tender for the discharge of the purchaser's debt. But the result would be explained in terms of the power of courts of equity to prevent hardship and ensure adequacy of consideration. In other words, the nominal sum fixed by the parties would not be a measure of the performance which equity would exact of the purchaser. Being free to redefine the "debt" to conform to its own standards of fairness, a court of equity could remove the case entirely from the operation of legal-tender acts.

If "change of conditions" were urged as a ground for outright rescission at law or in equity, a court would be free in the same way to determine whether the purpose of the contract had been frustrated by intervening monetary depreciation. Although the "debt" due from the purchaser could be discharged by payment of the sum of money promised, the question would still remain whether the nominal sum in paper money was the contemplated equivalent for the other party's performance. Nor does there seem to be any theoretical objection to

[294] Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1884).

[295] Above, section 2 (b).

the further step, taken by German courts in the intermediate stage of the German inflation, of attaching a *condition* to the grant of rescission, so that rescission would be denied if the purchaser consented to a "reasonable" increase in price.[296] The obstacle to the development of rescission remedies, then, does not lie in legal-tender legislation. It is to be found in the limited range of existing private law doctrines and in the practical difficulties which have prevented the recognition of monetary fluctuations as a "change of conditions."

The same type of argument applies to processes of valuation in damage actions. It has already been argued at some length that processes of valuation are not directly affected by legal-tender legislation. It is true that when the amount of the ultimate "debt" has been fixed by a judgment for damages, legal-tender legislation requires the discharge of the "debt" by payment in legal-tender money of the sum specified. But in determining the injury suffered through breach of contract or tort obligation, the damages must be calculated in terms of the values existing at the time of the trial, even though incidentally the value of money itself is one of the factors taken into account.[297]

Finally, legal-tender legislation might be evaded in the case of simple money debts through similar processes of reasoning. Particularly in equity, where a debtor seeks redemption from a mortgage, it might be urged that the sum tendered in depreciated money was insufficient to set in motion the "discretionary" remedies of equity. Courts of equity would then have the power to take into account the intervening depreciation, and exact as a condition to relief the payment of a larger sum of money. But this reasoning was unanimously rejected by courts in the greenback period after the Civil War;[298] it finds no support in the Southern cases, which involved a depreciation that was much more extreme;[299] it was expressly repudiated by the Iowa Supreme Court in 1934, when faced with the converse situation of a *mortgagee* seeking foreclosure after a rise in the value of money.[300] Such reasoning will

[296] DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 100, p. 129 (Sept. 21, 1920); vol. 103, p. 328 (Feb. 3, 1922); vol. 106, p. 7 (Jan. 6, 1923).

[297] Above, section 2 (b).

[298] Above, section 1.

[299] Dawson and Cooper, 33 MICH. L. REV. 706 at 725-727 (1935).

[300] Federal Land Bank of Omaha v. Wilmarth, (Iowa 1934) 252 N. W. 507, cited above, note 280. In that case the mortgagor, seeking a reduction in the amount of the mortgage debt, had relied heavily on specific performance cases as justifying the imposition of a condition on equitable relief. The court said (p. 512): "Manifestly a different situation exists in a specific performance case than that which is present in a foreclosure proceedng." The chief difference that emerged in the course of the court's

probably receive no greater recognition even if depreciation exceeds the limits reached by the greenbacks during the Civil War. In the first place, the discretion of courts of equity in the foreclosure of and redemption from mortgages has not been asserted in such sweeping terms as in the field of specific performance. In the second place, such reasoning is in substance a more direct attack on the operation of legal tender acts, in a field where they are clearly intended to operate.

We feel justified in concluding, then, that the readjustment of private contracts in periods of monetary depreciation is precluded only at certain points and to a limited extent by legal-tender legislation. The next obstacle that must be considered, not wholly unrelated to the legal-tender quality, is the public interest in preserving confidence in the national currency.

2. *The Public Interest in Preserving the Purchasing Power of Money*

If it could be shown that judicial revision of private contracts accelerated the depreciation of money or impaired the national credit, the sacrifice of private claims might be required by an overriding public interest.

In the preceding section it was argued that the legal-tender quality is in practice so important that its repudiation would be dangerous, even though constitutional reasons could be found. But the question now raised involves something more than the repudiation by courts of the legal-tender quality of money. The question is somewhat broader, whether *any* recognition by courts of the decreased purchasing power of money would shake public confidence in the monetary system and accelerate the decline in the purchasing power of money.

This question was discussed in an interesting book by a French writer, published in 1922.[301] He proposed for judicial use a theory of "frustration of purpose," essentially the same as the Anglo-American theory of "frustration of the venture." He felt forced to admit, however, that a large-scale judicial revision of private contracts would

subsequent discussion was the wider discretion claimed by equity in specific performance cases.

But compare the case of American Chicle Co. v. Somerville Paper Box Co., 50 ONT. L. REP. 517 (1921), where a Canadian court adopted a condition to equitable foreclosure as a device for preventing enforcement of a gold-clause in a mortgage on Canadian land. The court's opinion suggests partial "frustration of the venture," hardship, and usury as grounds for the imposition of a condition on equitable relief, after the disappearance of gold coin from circulation in Canada.

[301] VOIRIN, DE L'IMPRÉVISION DANS LES RAPPORTS DE DROIT PRIVÉ (1922).

constitute "an official recognition of the bankruptcy of the currency" and would "precipitate the monetary bankruptcy of the country." [302] He considered this to be particularly true in the field of simple money obligations, such as mortgages, bonds, and Treasury obligations (though it would seem that legal-tender legislation would be a sufficient answer here to any claim for revision). His conclusion was that in most classes of transactions courts should not create a popular impression that the currency had depreciated, though some room for judicial activity might remain.[303]

This argument seems wholly unconvincing. A public as acutely alive to monetary issues as the American public in 1935 does not need to be told by courts that a change in monetary values has occurred. If a major depreciation is under way, its effects on private transactions will become apparent long before any claim for judicial relief has any prospect of success. In the language of the New York Court of Appeals in a case from the greenback period, "Why should a court be the only place where men most affect an ignorance of what all men know?" [304]

There would be more substance to this objection if it appeared that an upward revision of money obligations would increase the volume of money in circulation and thereby indirectly promote a further rise in prices. It seems clear that in most cases the objective of judicial relief would be to increase the sum of money required for a debtor's performance. This is most apparent where an affirmative decree is rendered for the payment of a larger nominal sum in paper money. It is also clear that the same purpose would underlie a condition attached to specific performance or to the grant of rescission, where the condition could only be satisfied by payment of a larger sum of money. Even if rescission were unconditional, the release of the vendor would have the effect of enabling him to secure a larger sum of money for the goods or services he had agreed to sell.

But there seems to be no reason to think that a direct or indirect increase in the sums due on particular contracts would increase the total volume of money in circulation or tend to force up prices in general. The process involved would be merely a transfer of purchasing power from one class of persons to another. The debtors from whom a larger sum was extracted would have less money to spend on other commodities or services. As in the case of direct attack on legal-tender legisla-

[302] VOIRIN, pp. 181-186 (see n. 301, supra).

[303] VOIRIN, pp. 186-187 (see n. 301, supra).

[304] Simpkins v. Low, 54 N. Y. 179 at 185 (1873).

tion, the practical effect would be to remove an important incentive for going into debt. The only generalized result would seem to be a limited check on the tendency toward credit inflation which often accompanies the depreciation of money.[305]

3. *Policies as to the Relief of Debtors*

An important motive for political manipulation of monetary values is often the purpose of relieving debtors. Especially after a prolonged fall in prices, this motive becomes an irresistible impulse to political action. Any court would properly hesitate to employ private law doctrines which would nullify the deliberate efforts of responsible government officials in readjusting monetary values.

But it is not easy to measure the extent to which this motive actually determines the monetary policies of any government. The moderate inflation now being attempted by the Roosevelt Administration undoubtedly received much of its political support from districts where the weight of debt had become intolerable. Some advocates of more extreme measures are actually gratified by the thought that a considerable inflation would transfer wealth on an enormous scale from creditors to debtors.[306] But there are reasons other than the desire to relieve debtors for attempting to induce a rise in commodity prices. The strongest of these reasons is the fact that the depression had an unequal effect on important classes of commodities, so that the balance between them was disturbed. Nor does the text of monetary legislation disclose the extent to which the relief of debtors was a primary motive for inflationary policies.[307]

[305] It should be pointed out here, as it was above, note 282, that a still more effective check on the tendency of debtors to go into debt is the reluctance of creditors to extend credit without some guarantee against depreciation in purchasing power. Since commercial banks are the chief class of creditors who may be eager to take such risks, and since commercial banks would not ordinarily be directly involved in contracts for the sale of goods or services, the economic effect of judicial remedies here would probably be even more limited than would the effect of nullifying legal-tender legislation.

[306] See, for example, the remarks in the United States Senate of Senator Thomas, which provoked such indignation from Mr. Justice McReynolds in the gold clause cases. Senator Thomas made the somewhat over-optimistic prediction that the devaluation of the dollar might transfer wealth from class to class to the extent of "almost $200,000,000,000." See Norman v. Baltimore and O. R. R., (U. S. 1935), 55 Sup. Ct. 407 at 424 n.

[307] The recitals in the Agricultural Adjustment Act, in which power was conferred on the President to devalue the dollar, merely refer to the disruptive effect on the economic structure of the fall in prices of agricultural commodities. Preamble to Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31). In section 2 of the same Act the

In any event, the alteration of monetary values differs from other types of legislative relief for particular classes of distressed persons. It involves a change in the universal standard of value. In the field of mortgage debts, for example, it changes the substance of debts contracted at the lowest level of depression prices as well as those primarily intended — the debts contracted before the deflation had set in. Even if it were clear that the Government aimed to reduce the weight of a mass of long-term debts (without regard to the dates on which they were contracted), does it follow that Congress intended to ensure specific performance of *contracts* to sell, in return for depreciated paper money? Perhaps a distinction between purchase-money mortgages on land and the obligations of purchasers on land contract would be thought artificial. Would the same be true of commercial obligations extending over a shorter term and arising out of the sale of goods and services? In a wholly separate field, would the rates of public utilities, adjusted to a lower price level, be excluded from readjustment? [308] The decisions of the last decade make it clear that damages for personal injuries should be readjusted to the change in the value of money.[309] Would a legislative policy of relieving debtors have anything to do with the sums that should be paid under money legacies in wills,[310] or

purpose of Congress is declared to be the gradual restoration of the pre-war balance between agricultural and other commodities. In sections 21-41 elaborate provisions were made for the extension of credit to farmers and the refinancing of farm mortgages. But sections 43-46, conferring extensive powers over the currency on the executive, make no reference to the relief of debtors as one of the purposes of governmental action. The same is true of the Gold Reserve Act of January 30, 1934 (48 Stat. 337).

That the relief of debtors is an important part of the whole administration program could be collected from many sources. But to determine how far this is the purpose behind monetary policies it would be necessary to look behind statutory language for unexpressed motives, which must have animated different legislators in different degrees and on which there was undoubtedly no clear agreement by even the most subjective tests.

[308] See the cases cited above, note 287, on the necessity for readjustment of utility rates after changes in the value of money.

[309] Above, section 2 (b).

[310] A clearly expressed intention of a testator may often require courts to recognize an intervening change in the purchasing power of money. In the greenback period, for example, the Massachusetts Supreme Court held that an increased sum in legal-tender notes must be laid aside by the executors in order to comply with a direction in the will for the acquisition of 150,000 French francs, which were then to be applied in satisfaction of a debt under a foreign marriage settlement. Bowditch v. Soltyk, 99 Mass. 136 (1868). See also, Matter of Stutzer, 26 Hun. (33 N. Y.) 481 (1882).

It is unlikely that courts would attempt a general revalorization of money legacies in wills until monetary depreciation had gone very far. In Germany the complete collapse of the currency led to revision of money legacies as a part of the general revision of money obligations. DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS,

for discharge of debts contracted in foreign currencies? [311] Or would fiduciaries be allowed a substantial profit through discharge of money obligations in depreciated money? [312] These questions, and innumerable others, may be raised by a major change in the purchasing power of money. Surely most of them lie far outside the range of a legislative policy of relieving long-term obligors and must be referred for their solution to established doctrines of public and private law.

More than this, the supposed policy of relieving debtors could scarcely stand as a barrier to the only types of judicial relief that are

vol. 108, p. 83 (Feb. 21, 1924); GESETZ UND RECHT, 1924, p. 193. It seems, in any event, that a legislative purpose of relieving mortgage debtors and other long-term obligors would have no bearing on an effort to carry out the probable intention of a testator, which intervening depreciation might otherwise defeat.

[311] The complicated problems in the conflict of laws raised by fluctuations in international exchange cannot be considered here. The war and post-war collapse of foreign currencies resulted in a confused and contradictory body of American and English decisions, which are discussed by Drake, "The Reckoning of Damages in Fluctuating Exchange," 23 MICH. L. REV. 695 (1925); Drake, "The Rule, the Principle, the Standard in Fluctuating Exchange," 25 MICH. L. REV. 860 (1927); Drake, "The Proper Rule in Fluctuating Exchanges," 28 MICH. L. REV. 229 (1930); Gluck "The Rate of Exchange in the Law of Damages," 22 COL. L. REV. 217 (1922); and by other authors referred to by Rifkind, "Money as a Device for Measuring Value," 26 COL. L. REV. 559 (1926). See also 80 A. L. R. 1374 (1932), 50 A. L. R. 1273 (1927), and earlier annotations there referred to.

While the conflict in American decisions as to the choice between "breach-day" and "judgment-day" is quite irreconcilable, it might be pointed out that there are reasons for distinguishing a depreciation of the local currency from depreciation of a foreign currency. See Rifkind, "Money as a Device for Measuring Value," 26 COL. L. REV. 559 at 565 (1926). At any rate, in the greenback period there were decisions holding that the depreciation of American currency could be taken into account, and that the foreign creditor could be protected against intervening depreciation by taking the value in greenbacks of the foreign currency due at the time of *trial*. Hawes v. Woolcock, 26 Wis. 629 (1870); Benners v. Clemens, 58 Pa. St. 24 (1868); Marburg v. Marburg, 26 Md. 8 (1866); Nickerson v. Soesman, 98 Mass. 364 (1867); Stringer v. Coombs, 62 Me. 160 (1873).

[312] A trustee or other fiduciary who retained assets through a period of severe depreciation would probably be discharged through surrender of those assets in their original form (unless their retention was held to be negligent or improvident under the ordinary rules for trust administration). It would be another question, however, whether a trustee could pay off in depreciated money a money debt incurred by him in the administration of the trust. For example, if a trustee or other fiduciary commingled trust funds with his own assets (properly or improperly), it seems unlikely that a court would permit a substantial profit to be made through payment in money that had since depreciated. A Northern case in the greenback period expresssly reserved this case as one in which the rules of equity would justify judicial recognition of a change in the purchasing power of money. Warner v. Sauk County Bank, 20 Wis. 492 at 496 (1866). A case arising from the Confederate inflation is even clearer on this point. Baugh's Executor v. Walker, 77 Va. 99 (1883). *Cf.* Matter of Shipman, 82 Hun. (89 N. Y.) 108 at 115 (1894).

now conceivable. A nullification of legal-tender acts, if it came at all, would be postponed to the very last stages of extreme inflation, when the policy of relieving debtors would have disappeared as a motive for governmental action. Similarly, if a general rescission of bilateral contracts were the remedy adopted, that remedy would not become available until depreciation had gone much further than any government now intends. The only fields in which judicial relief is likely (such as the assessment of damages, specific performance cases, the obligations of fiduciaries, and the rates of public utilities) are fields which lie well outside the range of governmental policies for the reduction of debt.

4. *Policies Involved in the Allocation of Risk*

More serious attention must be paid to the factor of risk-assumption, which becomes a primary factor in administering both legal and equitable remedies for "change of conditions." The difficulties in assessing the effect of this factor arise from what may be called its double origin. The allocation of risk depends in first instance on the actual intentions of contracting parties and on the range of risk which was expressly assumed in their agreement. Beyond this, however, lie important elements of risk which attach irrespective of conscious states of mind. For reasons of convenience or basic economic policy risk may be *imposed* as a matter of law.

The problem of defining the limits of risk-assumption underlies many fields of tort and contract law and is resolved in terms of legal concepts which in appearance have little in common.[313] In contract law the problem of risk-assumption is most clearly perceived, perhaps, in cases of impossibility of performance and "frustration of the venture." In such cases judicial relief is invoked on the ground of supervening events which lay outside the contemplation of the parties at the time of the contract and which have defeated the purposes they had in mind. To dispose of such cases courts must not only scrutinize with care the language and economic setting of the particular contract; they must also consider the broader factors of policy which dictate an allocation of risk independently of agreement.

In periods of relative stability fluctuations in the value of money undoubtedly lie within the range of ordinary business risks. It is true that in certain types of economic enterprise (e.g., public utilities) the governmental control of income may prevent readjustment to a gen-

[313] See the suggestive article by Patterson, "The Apportionment of Business Risks Through Legal Devices," 24 COL. L. REV. 335 (1924).

eral movement of prices. If governmental regulation of rates places the enterprise at a disadvantage in the competitive struggle, a strong claim arises for special protection against the risk of monetary change.[314] But in most fields of enterprise unfavorable price-movements are peculiarly the type of hazard against which parties must protect themselves. For this general position the initial justification is that prices are *known* to be unstable. The prices of particular commodities are known to be unstable because the pressures of competition are chiefly concentrated at the point of price. A like reason why the stability of the price structure cannot safely be relied on is the fact, also well known, that the value of money in general is subject to important fluctuations. Beyond this, as a further justification for the position usually taken, is a factor of convenience — the extreme practical difficulty of substituting new standards of value for the monetary standards that have undergone an intervening change. The main reason, however, is probably one that depends neither on factors of convenience nor on what the parties knew or could have ascertained; this reason is the basic assumption in an individualistic economy that the processes of competition should be allowed free operation wherever competition does not involve too great waste. Since agreement on price is the "heart" of competition, judicial interference with free competitive price-fixing is thought to be almost as hazardous as legislative price-regulation.

It follows that for private law doctrines to be applied to inflation problems, the influence on prices of purely monetary factors must clearly emerge as a factor independent of ordinary influences of supply and demand. In periods of moderate inflation this distinction is difficult to make. The specific performance cases of the period during and after the Great War are a sufficient illustration of the difficulty. With equity doctrines available that could easily have been used for the purpose, courts refused to undertake any readjustment of prices by direct or indirect means. The general rise in prices was thought to be a consequence of influences from the *commodity* side, quite as much as it was a consequence of purely monetary changes.

If relief were sought in law actions on the ground of monetary depreciation, a number of commodities would be encountered whose prices are more responsive to monetary fluctuations than is the price of land. Even here, however, the influences moving from the side of *money* would be hard to separate from those moving from the side of

[314] See above, note 287.

commodities. The effect of inflation differs greatly as between different commodity groups. Where markets are highly organized, as in the case of stocks and bonds, wheat, corn, and other agricultural commodities, current prices represent a speculative discount, not only of conditions of supply and demand, but of the future course of the currency itself. It appears, then, that judicial relief could not be expected on any general basis, until indices of the general price-level had made it abundantly plain that the nominal rise in prices was in reality a drastic change in the value of money.

Even if this condition were satisfied, the rules as to risk-assumption would cause difficulty. The situation in the United States in 1935 differs in an important respect from the situation existing before the greenback inflation of 1862. The possibility of civil war had been considered by thoughtful persons before that date. But until the election of Lincoln in 1860 the imminence of the conflict was probably not foreseen. Nor did many persons foresee that the war would take on such dimensions, that it would last so long, or that large issues of paper money would be resorted to to finance it. All these factors were suggested in the opinion of the Supreme Court when it gave relief in *Willard v. Tayloe*.[315] At the present time, however, a rich and varied experience with monetary disturbance, prolonged political agitation, and the announced purposes of the Government have awakened public attention to the possibility of inflation. A general effort is being made to readjust commercial relationships to the prospect of a general rise in prices. Can it be said today that a doubling of prices is outside the contemplation of large numbers of business men?

How much weight should be given this element of conscious risk-assumption cannot be decided by arm-chair speculation. It must be remembered that the effects of inflation are dramatized for courts by its concrete effects on particular private contracts. It is only when a series of private transactions are thrown hopelessly out of balance that courts might be persuaded to intervene. In the German inflation, for example, courts reluctantly granted the rescission remedy when vendors, if forced to perform, would have suffered *losses* approximately equal to the agreed purchase price.[316] When such situations become common, it is plain that the assumed foundations of many commercial transactions have been destroyed.

A willingness to give relief in particular classes of contracts need

[315] 8 Wall. (75 U. S.) 557 (1869).

[316] Dawson, 33 MICH. L. REV. 171 at 184-201 (1934).

not necessarily lead to a general overhauling of all commercial relations. Indeed, the decisions of German courts during the German inflation can be criticized from a social point of view, precisely on the ground that they did not go far enough. The class of cases in which indulgence was first shown, was the sale of goods or services, where a continuing expenditure of money was required for the vendor's performance. The rapid rise in costs of labor and materials caused enormous losses and made plain the disproportion between money price and other performance. It was natural that this type of case should first attract attention. But remedial measures in this field gave protection to the economic group (i.e., manufacturers and industrialists generally) who were receiving the greatest gains from inflation. On the other hand, the class of wage-earners and salaried workers suffered incredible hardships, against which courts were powerless to relieve.[317]

The factor of risk-assumption operates differently on different types of contracts. No prediction can be made as to the emphasis it will receive in each instance. In general, however, it may be said that severe monetary depreciation, when its effects on private contracts have become plain, can properly be distinguished from other forms of economic risk. The forces which lead to a major movement of prices lie far outside the foresight or control of private individuals. When monetary fluctuations lie within a narrower range considerations of policy and convenience may induce courts to withhold relief. But when they are reflected in large numbers of private transactions, through an extreme disproportion between the performances on either side, the doctrines of risk-assumption do not seem to require a strict enforcement of all commercial contracts.

5. *The Public Interest in the Security of Transactions*

It is the effect of judicial remedies on the security of transactions that should lead courts to hesitate. In general the resistance to the development of "change of conditions" doctrines has been rightly based

[317] Within a much narrower area, the doctrines of the Reichsgericht likewise denied relief to vendors whose losses through performance did not take so dramatic a form. For example, in contracts for the sale of land no expenditure of money would be required for the vendor's performance, although the nominal value of the land sold might have risen steeply. Even after the principle of rescission for "change of conditions" had been admitted, rescission was denied in a contract for the sale of land for 19,000 marks, where the land had risen in nominal value to more than 52,000 marks. DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 102, p. 98 (April 16, 1921). Less than a year later, however, the principle was admitted that a rise in the value of the subject matter was of itself enough, and in January 1923 this principle

on the conviction that too wide an extension of such doctrines might imperil the sanctity of contract and produce a general insecurity. Recent extensions have tended more and more to release obligors from strict and literal performance of contract obligations. At every point where further extensions are urged, the central question is whether such extensions can safely be permitted.

The concept of the "security of transactions" is one of those shorthand descriptions of complex social phenomena with which lawyers must deal and which must influence their thinking in a variety of situations. It is none the less significant or suggestive because the idea itself cannot be clearly and specifically defined.

At the outset it should be pointed out that monetary fluctuations greatly alter the economic setting in which the "security of transactions" must be visualized. In any period of monetary instability there is a powerful tendency in *newly framed transactions* toward contracting on shorter term, with an avoidance of long-term commitments.[318] Where monetary depreciation proceeds at the rate reached in the German post-war inflation, vendors of goods and services attempt to move as far as possible onto a cash basis. Where some interval between contract and performance is unavoidable, the "open-price" contract may be used to remove most of the risk of intervening monetary change.[319] In Germany commercial contracts were drafted even more loosely and became so riddled with reservations as to lack most of the elements of binding legal obligation.[320] The development of the remedy of rescission in German law was consistent with irresistible tendencies in the commercial world, and actually facilitated both the transfer to a short-term basis and the rapid readjustment of contracts to a rising price-level.

But this is by no means the whole picture. A large volume of transactions must inevitably be carried over from earlier periods of

was extended to an ordinary contract for the sale of land. DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 103, p. 328 (Feb. 3, 1922); vol. 106, p. 7 (Jan. 6, 1923).

[318] This process, which is commonly observed in any period of general instability, was strikingly exemplified in the North during the Civil War. Credit operations were reduced to the barest minimum, as a result of the general realization that the price level had been artificially raised by excessive issues of greenbacks. The rapid fall in prices at the end of the war produced a minimum of disturbance to business, largely on this account. MITCHELL, HISTORY OF GREENBACKS 375-376, 396-398 (1903).

[319] Various types of "open-price" contract have achieved recognition in American law. See the excellent discussions by Prosser, "Open Price in Contracts for the Sale of Goods," 16 MINN. L. REV. 733 (1932); and in 27 COL. L. REV. 708 (1927).

[320] Dawson, 33 MICH. L. REV. 171 at 187 (1934).

relative stability. Many others, arising after depreciation has set in, will not be drafted so flexibly that readjustment can be quickly secured without litigation. It is clearly impossible, furthermore, to eliminate the extension of credit in a modern industrial society, or to place commercial contracts completely on a cash basis. Unless the parties have protected themselves against monetary fluctuations by stable-value clauses (e.g., through the use of price-indices), some dispute is bound to arise. The question then becomes this: Can legal doctrines, formulated from case to case in ordinary litigation, provide the clear guide to conduct that is especially needed in the general chaos of a major inflation?

The experience of Germany in the inflation of the last decade provides the richest materials for an answer to this question. On the basis of that experience alone, the answer must be negative. Contemporary writers testify to the widespread confusion and uncertainty resulting from the doctrines of the Reichsgericht. Vendors of goods and services were naturally reluctant to perform when the intervening depreciation of money had reduced the money price to a fraction of the real value it possessed at the time of the contract. They eagerly welcomed judicial doctrines which offered some prospect of release from burdensome and unprofitable contracts. Repudiation became the order of the day. The controversies that then arose would have involved protracted and expensive litigation, whose eventual outcome was uncertain. The practical result was to tip the scales heavily in favor of the large industrial concerns, which had grown enormously in power and influence through the processes of the inflation itself.[821]

The experience of Germany is not conclusive. The "change of conditions" doctrines which courts applied to inflation problems had no firm foundation in German statute law. In the form in which they were applied these doctrines were a recent innovation, created by legal writers and courts under the pressure, primarily, of the war and postwar inflation. For German courts this adventure in the field of open and positive law-formulation was a departure from tradition, and within the Reichsgericht itself there was a deep division of opinion as to its propriety. It was not until the inflation had progressed very far that all branches of the Reichsgericht united in assuming leadership

[821] See Solbrig, Meister, and Dove writing in the JURISTISCHE WOCHENSCHRIFT, 1922, pp. 1001-1003.

through the bewildering maze of private-law problems raised by the inflation.[322]

Nevertheless, the difficulties faced by German courts in the development of remedial principles can be anticipated in any legal system overwhelmed by a major inflation. The formulation of law through ordinary litigation is a cumbersome and protracted process. The accidents of litigation affect the form that judicial utterances may take. In periods of economic stability the advantages of judge-made law may outweigh the waste, delay, and uncertainty involved in awaiting the outcome of private litigation. But in periods of rapid economic change, the imperative need for speed and clarity outweigh most other considerations. By the time a case has been carried through trial and appellate courts to a final and decisive conclusion, the whole economic setting may have changed; a solution proper in the beginning may have become meaningless or clearly inappropriate for the situation as it has meanwhile developed.

If courts are to extend the scope of remedial doctrines in inflation cases they must be prepared to act rapidly and decisively. It is not possible to formulate arithmetical tests for determining the degree of dislocation necessary for judicial relief, or to anticipate in advance all the situations that might arise. But it can be expected that the factors of policy involved be weighed as fully as possible in advance and the main lines of development mapped out.

If judicial relief is to be given, what form should it take? The argument in earlier sections of this article pointed to two main conclusions — first, that in cases where specific performance is normally granted a mere refusal of the remedy or the attaching of strict conditions is ineffective as a device for alleviating the hardship caused by inflation; and second, that a reduction in the damages recoverable against defaulting vendors leads to serious complications and encourages repudiation. The main device left for relieving against monetary change is, therefore, rescission, which is incidentally the usual remedy in kindred cases of impossibility and "frustration of the venture."

Should the courts go further and attempt by direct or indirect

[322] The divisions of opinion within the Reichsgericht are referred to in 33 MICH. L. REV. 171 at 188-190 (1934). Contemporary writers testify to the perfectly apparent fact that the Reichsgericht had assumed the leadership in law-formulation in the field of money obligations disturbed by inflation. German law at this point was to a large extent case law, created and generalized from the facts of particular cases. Locher, 125 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 311 at 316 (1926); Mügel, 33 DEUTSCHE JURISTEN ZEITUNG 29 (1928).

means to revise money obligations, so as to prevent general dislocation and preserve continuity in commercial relations? It is conceivable that American courts might follow the example of the German Reichsgericht, and attempt an indirect revision of the price-term by granting rescission *unless* a reasonable increase in price were agreed to. Courts of equity have employed the conditional refusal of specific performance as a means of exerting pressure toward voluntary price-revision in specific performance cases. In courts of law there seems to be no doubt as to the power to render judgments conditional in form, though the power itself has been sparingly exercised [323] and no authority has been found for its use in cases of impossibility or "frustration." In some cases, where the parties have proceeded rather far with performance and the price-term relates to a relatively unimportant element in the whole contract, a direct or indirect revision might be preferable to outright rescission.[324]

But attempts to revise money obligations meet exaggerated difficulties in periods of inflation. The spread of price-changes as between different commodity groups, the rapid fluctuations within particular groups, and the conflicts of interest which appear as between debtor and creditor,[325] all offer special grounds for refusing to "make new contracts for the parties." Even in periods of monetary stability courts of equity have not met with signal success in their attempts to revise the price-term as an incident to specific performance.[326] The extreme infla-

[323] See 31 MICH. L. REV. 696 (1933); 31 COL. L. REV. 124 (1931).

[324] As an example of this type of case one may cite the decision of September 21, 1920, in which the Third Senate of the German Reichsgericht first undertook, through "change of conditions" doctrines, to relieve against the effects of inflation. In that case a lessor of business premises had agreed in 1912 to supply the lessee with steam until the expiration of the lease in 1920. The enormous increase in the price of coal caused the lessor a heavy loss through performance of this term of the contract. The lessor was willing to continue performance, but insisted on an increase in the price stipulated for the supply of steam. Unwilling to rescind the whole lease, the Third Senate ordered the trial court to fix a "fair" price for the steam, which would conform to the intervening increase in the cost of performance. DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS, vol. 100, p. 129 (Sept. 21, 1920); discussed by Dawson, 33 MICH. L. REV. 171 at 185-187 (1934).

[325] The conflict of interest between debtor and creditor, arising out of the different purposes for which money would be used by each, is more fully discussed by Dawson and Coultrap, "Contracting by Reference to Price Indices," 33 MICH. L. REV. 685 at 692-695 (1935).

[326] The field in which equity has gone furthest in this direction is in specific performance at the suit of purchasers, with abatement for deficiencies in quantity or for outstanding encumbrances. See, for example, Yost v. Mallicote's Adm'r, 77 Va. 610 (1883); Ryan v. Evans, 195 Ind. 570, 145 N. E. 6 (1924); American Blower Co. v.

tions experienced by Germany in the last decade and by the Southern states during the Civil War gave eloquent testimony to the disruption in economic processes which impedes the formulation, in courts of law, of substitute standards of value. Difficulties of the same type, though less exaggerated in degree, are encountered in periods of moderate inflation. To impose the burden of price-revision on trial courts would lead to intolerable confusion and delay, which can scarcely be justified by the gain in continuity and stability of existing commercial relationships.

6. *The Choice Between Legislative and Judicial Remedies*

When monetary depreciation has proceeded far the choice finally presented is one between legislative and judicial remedies. Some central questions of policy and of legal method are involved in this choice. The course taken in any legal system will depend ultimately on certain basic presuppositions and on inherited traditions as to legal method.

After the overwhelming catastrophe of the German inflation, courts declared themselves ready to undertake a general revision of all money obligations by the technique of ordinary private litigation. But the problems involved were soon found to be too complex for solution by this means. The whole field of mortgage obligations and long-term bonds was withdrawn from the operation of private law rules and revised by statute at a flat rate, with the aid of a generalized scale of money values covering most of the inflation period. Important classes of money obligations remained, however. The effort of courts was here directed to attaining more exact results than could be achieved by the generalized language of statute.[327] The total product of this effort has been described by one eminent critic as multiplied waste and confusion.[328] Confusion there was, and protracted uncertainty. But it is

MacKenzie, 197 N. C. 152, 147 S. E. 829 (1929); and annotations in 10 L. R. A. (N. S.) 117 (1907); 38 L. R. A. (N. S.) 1195 (1912); 34 A. L. R. 1021 (1925); and 64 A. L. R. 1053 (1929).

[327] Dawson, 33 MICH. L. REV. 171 at 211-238 (1934).

[328] NUSSBAUM, DIE BILANZ DER AUFWERTUNGSTHEORIE, pp. 15-18 (Recht und Staat, 1929). It is there pointed out that one weekly series of selected "revalorization decisions" published in Germany attained a total of 424 decisions in 1926, 609 in 1927, and 563 in 1928; and that the decisions published by Zeiler had totaled 1530 by May 1929. It was estimated that at least 2,864,217 actions were brought in Prussia alone prior to January 1928, and that in Prussian courts of first instance 849 judges were required for the decision of revalorization questions. In the "revalorization senate" of the Berlin Kammergericht (an intermediate court of appeal), 18 judges were employed and throughout Germany several hundred judges were added to the regular judicial personnel for the decision of revalorization cases.

believed that the whole blame cannot be rested on courts for assuming the initiative in the fields expressly remitted to their charge. A large share of the resulting litigation arose from the complexity and obscurity of the revalorization acts. In the field of judicial revalorization, much of the difficulty was due to the universal havoc wrought by inflation on the whole economic and legal order. Legislation could have provided more generalized standards for the revision of money obligations; the uncertainties inherent in a system of judicial precedent could have been largely removed, at the expense of a more exact justice in an enormous mass of particular cases. For the effort of German courts to reconstruct an economic system through the resources of a developed and refined legal science, an American lawyer would be inclined not to criticize, but to pay them a high tribute.

The Confederate inflation resulted, like the German, in complete catastrophe. The initial impetus for the reconstruction of monetary values came there from legislation. But the language of the scaling acts was so general and their standards so crude that the main burden was thrown on the courts. Wholly unprepared for their task, with but little experience as a guide, the Southern courts showed remarkable insight into the economic and legal problems created by extreme inflation. Before the Supreme Court of the United States intervened to invalidate the main method employed in the scaling acts, Southern courts succeeded in liquidating most of the outstanding indebtedness expressed in Confederate money.

In an inflation less extreme than the German or the Confederate inflation, it is unlikely that American legislatures would act before the destruction of values had brought widespread and intolerable injustice. If legislation were employed, it is doubtful whether generalized tests could be framed that would be more precise or illuminating than tests derived from general rules of private law.[329] In any event, such legis-

[329] See, for example, the *loi Failliot* passed in France on January 21, 1918, allowing rescission of some types of contracts for the sale of goods wherever the expenses or losses through performance "greatly exceed those which could reasonably have been foreseen at the time the contract was made." Dalloz. 1918. 4. 261.

Legislative relief could of course be undertaken on a narrower scale for certain specified types of contracts, such as contracts of employment on public enterprises or contracts for maintenance and support. Here it would be possible to readjust money obligations in terms of cost-of-living indices, since a large share of the expenditure by the obligees would be on commodities listed in a cost-of-living index. In the later stages of the German inflation contracts for maintenance and support were selected for special treatment, and legislation was passed authorizing officials to modify money obligations of this type in accordance with "equity." Law of Aug. 18, 1923 (REICHSGESETZBLATT, 1923, I, 815).

lation would encounter constitutional obstacles which would require extreme care in drafting. Such legislation would probably have to be drawn in such form as to project the courts into calculations of the value of *money*, at a time when economic data provided no satisfactory index of the value of money in general.[330]

A prediction that remedial measures would come first in this country from courts and not from legislatures does not by any means imply that the doctrines of private law can adequately protect private contracts against the effects of inflation. Judicial remedies, like legislation, would come at a late stage, when most of the damage had been done. The only effective protection of contracts against monetary fluctuation seems to lie in the widespread adopion of stable-value clauses, particularly through the use of price-indices.[331] But if such clauses are not used and if a major depreciation of money should again occur in this country, it is to be expected that American courts will play a leading part in salvaging values from the devouring ruin of inflation.

[330] The most important conclusion to be drawn from the cases arising out of the Confederate inflation is that legislation which revises money obligations too drastically will be invalidated by the Supreme Court of the United States on constitutional grounds. The Supreme Court finally held that the dates on which money obligations arose, rather than the dates of maturity, could be used for the purpose of revalorization. The Court rejected, however, the standard of value to which most of the scaling acts resorted — the value of the *consideration* furnished for a promise to pay Confederate money. The result was that Southern courts, in order to conform to the views of the Supreme Court, would have had to determine the value of Confederate money in general terms. All the evidence from the Confederate period tends to show the extreme difficulty of this process, and in the states where it was attempted the cases throw little light on the methods actually used. Price-indices would in modern times be the only standard a court could employ. But no price-index now published would give more than an approximation, and in periods of inflation it is clear that the spread between different classes of commodity prices would make even an approximation difficult.

The decisions of the Supreme Court of the United States on the constitutionality of the scaling acts are discussed by Dawson and Cooper, 33 MICH. L. REV. 706 at 736-737, 749-752 (1935). The difficulties in measuring the value of money by means of price-indices or by any other method are referred to by Dawson and Coultrap, 33 MICH. L. REV. 685 (1935).

[331] Dawson and Coultrap, "Contracting by Reference to Price Indices," 33 MICH. L. REV. 685 (1935).