ADJUSTMENT OF CONTRACTS

ON ACCOUNT OF CHANGED CONDITIONS

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THE question of adjustment of contracts on account of changed conditions (in Swedish: *jämkning av kontrakt på grund av ändrade förhållanden*) was discussed at a Scandinavian Jurists' Conference in 1922. The discussion took place against the background of the social changes brought about by the first world war. After a long period of comparatively stable social conditions and of a firm value of money, tied to gold, the war had come as an unexpected shock to most people, obstructing international trade and greatly disturbing the value of money. But now the war was over, and it seemed that normal conditions would again prevail. The records of the discussion at the conference show that the question of adjustment of contracts was considered to be a limited problem which could only be of importance in exceptional conditions.

When the same question is taken up for discussion in the nineteen-fifties the situation is seen to be radically changed. The "normal conditions" have never come back. We have been through another world war, and international stability is still far away. Even more important, perhaps, are our experiences of monetary developments during the last forty years. We have known the unrestrained German inflation of the 1920's, the general return to the gold standard, the economic crisis around 1930, the renewed reversion to paper currency, and finally the second world war, characterized by inflations concealed by a partially effective price control. Nor are the political evaluations current in our present-day society such as to promote stability in the value of money; that aim is pursued, but precedence is given to other objectives—primarily the requirement of full employment—that are hard to reconcile with a stable monetary value. We must therefore reckon with the possibility of considerable changes in the value of money occurring quite apart from war—a presumption that is far from being gainsaid by the experiences of the last ten years.

The fundamental principle of the law of contract that agreements should be kept—*pacta sunt servanda*—provides a starting-point for the subject here discussed. That principle implies, among other things, that a person who has once assumed contractual

liability cannot escape it on the ground that he has miscalculated the future. In the epoch which ended in 1914, exceptions from the rule were not readily allowed, even if it was admitted that they had occasionally to be made. Later times have seen a considerable weakening of the strict fundamental principle in many countries. While events have taken an easier course in Scandinavia than has been common elsewhere, they have nevertheless moved in the same general direction here as in other parts of the world which have been exposed to heavier strains.[1]

In those cases where an exception from the rule *pacta sunt servanda* is granted, the reason is usually that altered circumstances have placed a heavy burden on the debtor. The German author Heck has suggested a striking term for dealing with the problem in question: he speaks of a "limit of sacrifice" (*Opfergrenze*) beyond which the debtor is not bound to go in performing his duties.

This point of view does not, however, exhaust the problem. Altered circumstances may be onerous for one of the parties of the contract, either because his burden of performance has increased or because the performance he receives has decreased in value for him. If both parties have obligations, we can look at the total result and in either event say that his sacrifice has increased. But if only one of the parties has an obligation to perform we must make a distinction: altered circumstances may lead either to an increased burden for the debtor or to a decreased benefit for the creditor.

Thus the problem to be discussed may be put in the following way: Which of the parties in a legal relationship is to bear the consequences of an event that makes the performance of a legal duty more burdensome for the debtor or less profitable for the creditor?

This problem may be said to concern the *supervening hardship of performance*. In certain legal systems this problem is not clearly distinguished from the problem of *supervening impossibility of performance*. For example, the Anglo-American concept of frustra-

[1] A survey of the problem is to be found in a series of articles in the *Journal of Comparative Legislation and International Law, Third series,* Vol. XXVIII (1946), parts III & IV, pp. 1 ff. (Scotland, Union of South Africa, France, Germany), Vol. XXIX (1947), parts III & IV, pp. 1 ff. (U.S.A., Soviet Union, Uruguay, Brazil, etc.), Vol. XXX (1948), parts III & IV pp. 55 ff. (Switzerland).
See also a discussion at the Semaine Internationale de Droit, Paris 1937, on the subject "La révision des contrats par le juge". The report of the proceedings (Paris 1938) contains a number of special reports from different countries.

tion covers some cases of impossibility as well as some cases of hardship. In a comparative discussion of these problems, however, it seems necessary to keep the two problems separate.

The present investigation will concern only the problem of supervening hardship of performance. Nevertheless, as the rules on hardship of performance have often developed from the rules on impossibility of performance or together with them, it will to some extent be necessary to consider the latter problem also.

CONSIDERATIONS OF LEGISLATIVE TECHNIQUE

A basic question concerns the division of tasks between the legislator and the courts and the forms of the legislator's intervention.

Certain questions regarding the effect of changed conditions have long been regulated within the framework of ordinary legislation by fairly definite rules. But general rules have usually been lacking in the written law. The courts have therefore largely had to determine such questions for themselves on the basis of legal provisions expressed in general terms or of generally accepted legal principles.

An extreme position is taken by the French courts. All through the last half-century they have persistently maintained that they cannot in any circumstances make exceptions from the rule of the binding force of contracts.[2] It is true that, under the impact of the upheaval caused by the first world war, one group of French writers took the opposite point of view, but their *théorie d'imprévision* gained no general support and did not change the stand taken by the courts. Prevailing opinion today allows that it may

[2] A famous case is *l'affaire du Canal de Craponne* (1876). Certain charges for the supply of water had been fixed by a contract in the 1560's and had now become very small in comparison with the costs incurred by the supplier. Notwithstanding this, the *Cour de Cassation* refused to increase the charges and declared that in no case was it for the courts, no matter how equitable it might appear to them, to take into consideration the lapse of time and the change of circumstances for the purpose of modifying a contract and putting into it new clauses in the place of the old ones which had been freely agreed by the contracting parties. This dictum is still cited with great approval.

It is of some interest in this connection that as a rule French law does not even admit an intervention by the court for the reason that there has been from the beginning a great disproportion between the obligations of the parties; there is, in other words, no general rule on usury. See Colin & Capitant, *Cours élémentaire de droit civil français*, Vol. II, 10th ed., Paris 1948, secs. 70–79.

be desirable to intercede to help debtors who have become unduly burdened, but this is regarded as a matter for the legislator, to be realized, in the event of a crisis, by a special *ad hoc* enactment.[3]

In other countries the courts have accepted the necessity of allowing more or less far-reaching exceptions to the main rule of *pacta sunt servanda*. This attitude on the part of the courts has not, however, done away with the need for special intervention on the part of the legislator. For this there are two important reasons.

One reason is of a purely practical order and was demonstrated very convincingly by the German experiences of the 1920's.[4] If the courts are called upon to adjust or render void a very large number of contracts on the basis of a relatively undetermined norm, they may find themselves charged with a task that is heavier, in point of sheer quantity, than they can manage. This will be the case especially where the court of last instance refuses to give the lower courts and the general public sufficiently definite guidance, as was the case in Germany with regard to the principles for appreciation of *Reichsmark* debts. In such a situation the legislator is obliged to intervene and create simple schematic rules that reduce the need for litigation to the minimum. And if this goal cannot be quite attained, it may be necessary to create a summary procedure—possibly a combination of lawsuit and mediation—in order to get the matter disposed of within a reasonable time.

Some German legislation of 1939 and 1940 affords examples of this method.[5] Under it a procedure before the courts was instituted

[3] For a further discussion of the problem see Colin & Capitant, *op. cit.*, Vol. II, sec. 130, Mazeaud, *Traité théorique et pratique de la responsabilité civile*, Vol. II, 4th ed., Paris 1949, sec. 1579, David in the *Journal of Comparative Legislation and International Law, Third series*, Vol. XXVIII (1946), parts III & IV, pp. 11 ff., and Trasbot, "La dévaluation monétaire et les contrats de droit privé", *Le droit privé français au milieu du XX^e siècle, Etudes offertes à Georges Ripert*, Paris 1950, Vol. II, pp. 159 ff. Cf. also Kegel, Rupp & Zweigert, *Die Einwirkung des Krieges auf Verträge*, Berlin 1941, part II.

It should be added that the French administrative courts have taken a more indulgent attitude in cases concerning longstanding contracts between an official board and a private enterprise, e.g. contracts for the supply of electric power for the needs of the community. They seem to have been of the opinion that the interests of the community were better served by sanctioning an increase in the price than by driving the enterprise to financial ruin and thereby stopping the supply.

[4] See Nussbaum, *Money in the law*, 2nd ed., New York 1950, pp. 204 ff.

[5] Decree on Judicial Assistance in Respect of Contracts, Nov. 30, 1939, Decree on Judicial Assistance in Respect of Contracts on Power Supply, April 1, 1940, Decree on the Winding up of Contracts on Supply, April 20, 1940. Texts and commentaries are to be found in Kegel, Rupp & Zweigert, *op. cit.* Cf. Enneccerus & Lehmann, *Recht der Schuldverhältnisse*, 14th ed., Tübingen 1954, sec. 41 IV.

whereby a settlement must first be attempted, but the final decision is to rest with the court in cases where no agreement can be reached between the parties. The prerequisites for the intervention of the court are given in some detail, and the measures that can be taken by the court are enumerated; but on the other hand the reconstruction of the relationship within this framework is left to the discretion of the court.[6]

The other reason for the legislator's special intervention is of a different order. By intervening in a very large number of cases the courts would in effect take up position concerning a detail of the country's economic policy. A court of law, however, does not seem to be the right body for dealing with problems of economic policy, especially such as are concerned with monetary policy; furthermore a question of an economic or political character can seldom be isolated but must be planned as a part of a more complex whole. Lastly, a determination of this kind would often have such a markedly political character—for instance, where it involved the taking from one class of society in order to give to another—that the courts should be spared the task.[7]

An intervention by the legislator in a particular event implies the enactment of a law that is applicable to contracts already made, or in other words a law having retroactive force. There is, however, a widely-held opinion that retroactive legislation within the private sector is undesirable, and therefore when considering an intervention we are faced with a conflict between this opinion and our interest in assisting embarrassed debtors. In the legislative debate in Sweden a proposed intervention has been justified in several such cases on the ground that it was really only a question of the application of a general legal tenet that had already found expression in law and legal practice. Thus in Sweden special interventions have been justified on the ground that there has been in existence a general principle to that effect, whereas in France it is precisely the absence of a general principle that has prompted the legislator to take such a course.[8]

[6] The relation between the ordinary legislation and the case-law founded thereupon, on the one hand, and the extraordinary legislation, on the other, is discussed in Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 2nd ed., München & Berlin 1957, pp. 124 ff., and by Kegel in *Verhandlungen des vierzigsten deutschen Juristentages*, Hamburg 1953, Vol. I (Gutachten), pp. 224 ff.

[7] Cf. Nussbaum, *op. cit.*, pp. 215 ff.

[8] On the retroactivity problem see Rodhe, *Något om retroaktiv civillagstiftning*, Stockholm 1943 (the Swedish Parliamentary Reports, 1943, Bill No. 320, Appendix), especially at pp. 53 ff. On French law, see *supra*, p. 156.

Finally, the problem of legislative technique has yet another aspect.

The debate during the last few decades as to the setting of limits to excessive economic loss has been concerned not only with private law in general but also with specific questions of enforcement ("the law of execution"). Thus a manifest tendency to increase the debtor's relief from unduly burdensome executive measures can be observed to be at work side by side with the development of rules of general private law having a largely similar purpose.

These two categories of rules, however, operate in different ways. The legislator who would protect overburdened debtors must consider whether one type or the other will best serve the purpose he has in mind. The rules of execution are intended to provide relief in an actual situation of distress, and their effect persists no longer than that situation does. If the debtor gets on his feet again the creditor can come back and collect his claim. A protective provision in the general law, on the other hand, usually envisages a definite settlement whereby the contract is adjusted or rendered void. This difference in the function of the rules explains why largely similar protective provisions of both types are found side by side. Another difference, too, can be perceived: while in general the executional rules only aim at a protection of a summary nature in cases of real destitution, the rules of general private law are capable of being applied even where the debtor's subsistence is not threatened to the same extent and indeed often without any regard to his financial position *in casu*.

Although other aims are thus pursued in the private-law regulation of these matters than are followed within the executive sector, the mutual interaction of the two must always be considered in any discussion of the significance of changed conditions.

The main problem for our investigation is, however, the rules of general private law.

GENERAL PRINCIPLES

Whenever the courts have consented to adjusting or rendering void contracts on account of changed conditions, they have been faced with two problems which are in part closely connected. One

problem is what exceptions should be made from the rule of *pacta sunt servanda*. The other is what principle can be invoked in support of the exceptions. It cannot, of course, be said that the courts have always, or even generally, been aware of this duality of the problems. However, in making a retrospective analysis of the developments in court practice for the purposes of a comparative study it is necessary to keep the two problems apart.

We shall now first of all consider the general principles which have been put forward to justify divergences from the principle of *pacta sunt servanda*.

A. *The doctrine of "economic impossibility"*

A very important line of development in Swedish law is based on the notion of "economic impossibility". The doctrine proceeds from a provision in sec. 24 of the Swedish Sale of Goods Act, 1905, which is identical with the corresponding acts in Denmark and Norway.

During the first world war the courts in Sweden were faced with the question whether a seller could escape the obligation of performing his contract on the plea that a great increase in the price of the commodity had rendered delivery excessively burdensome. In this situation the courts turned to the Sale of Goods Act. It is true that the Act contained no rule on supervening hardship of this kind, but there was a provision regarding damages for breach of contract by the seller which might provide a serviceable basis for a solution.

Sec. 24 of the Sale of Goods Act lays down as a main rule that in the event of non-delivery of generic goods the seller must pay damages even if he can prove that he has not been guilty of negligence. There is, however, an exception: the seller is free from liability "if performance can be considered to be impossible owing to a circumstance that the seller could not reasonably have foreseen at the formation of the contract, such as the destruction of all goods of the kind in question or of the parcel to which the purchase refers, or war, import prohibition, or other similar occurrence".

According to this provision, then, the seller is in principle under a strict liability to pay damages in the event of non-delivery. This liability persists even if he should be absolutely prevented from delivering. But it disappears in certain cases where the impossibility is of a qualified nature. What, then, are these cases?

In writings analysing sec. 24 we meet with the two notions of *vis major (force majeure)* and objective impossibility.

The concept of *vis major* has a certain affinity to the "act of God or the Queen's enemies", often encountered in English law. Its significance is illustrated by the words "war, import prohibition, or other similar occurrence" in the cited provision of the Sale of Goods Act. A corresponding expression is found in the Swedish Promissory Notes Act, 1936, sec. 7, which mentions "legal enactment, interruption of general commerce or other such insurmountable obstacles".[9] Perhaps we may sum up prevalent opinion with reasonable accuracy by stating the rule as requiring an extraneous event on an extensive scale and of rare occurrence, which carries with it an insurmountable obstacle to the debtor's performance of his obligation.[1]

The notion of objective impossibility as opposed to subjective impossibility was introduced into the Scandinavian discussion from German law.[2] The impossibility is said to be objective where not only the actual debtor, but any debtor, would be unable to perform the contract.

This distinction between objective and subjective impossibility was created in German law for cases of initial impossibility, i.e. an impossibility already existing at the formation of the contract; on the other hand the distinction is of no importance here for

[9] See also the Bills of Exchange Act, 1932, sec. 54 and the Cheques Act, 1932, sec. 48: "a statute issued in Sweden or abroad, or other insurmountable obstacle (*force majeure*)", and the Maritime Code, 1891, sec. 131 (as amended 1936): "an export prohibition, an import prohibition or other measure of an authority".

[1] Cf. Almén, *Om köp och byte,* 3rd ed., Stockholm 1934, sec. 24 at n. 44 ba–45 c, Eberstein, *Den svenska växelrätten,* Stockholm 1934, p. 207, Helper, *Vekselloven og Checkloven,* København 1932, p. 219, Bentzon, *Vis major,* København 1890, *passim,* Afzelius in *T.f.R.* 1891, p. 472, and 1893, p. 479, Kôersner in *T.f.R.* 1919, pp. 109 ff. Cf. also *N.J.A., Second series,* 1936, pp. 402 f. The drafters of the *Projet d'une loi internationale sur la vente* (Roma 1935) use the expressions "*un fait du prince*" and "*une catastrophe soudaine élémentaire*" (see p. 32). Ussing, *Dansk Obligationsret, Alm. Del,* sec. 12 VI D, gives a somewhat wider definition. In German law another mode of expression is also used, according to which *vis major* covers all cases where injury cannot *in concreto* be avoided even with the exercise of the utmost care (Goldschmidt's subjective theory in contrast to Exner's objective one); see Bentzon and Afzelius, *loc cit.* Nowadays the subjective theory seems to predominate in the interpretation of statutes which allow extensions of limitation periods, whereas a modified objective theory is customary when it is a question of release from strict liability. See Enneccerus & Nipperdey, *Allgemeiner Teil des bürgerlichen Rechts,* Vol. II, Tübingen 1955, sec. 219.

[2] Nowadays German law, following the usage of BGB, speaks of *Unmöglichkeit* (objective impossibility) and *Unvermögen* (subjective impossibility).

supervening impossibility.[3] In the Scandinavian discussion, on the other hand, the need was felt to make a corresponding distinction within the field of supervening impossibility, and the German distinction was then carried over into this field, where it could not, however, be immediately applied.

The difficulties have been demonstrated in a celebrated example, which the Swedish commentator Almén has formulated as follows. A Hamburg merchant has engaged to provide an entire shipload of tropical fruits for delivery in Stockholm in May. Fruits of the kind in question are not on the market in Stockholm at the time of the contemplated delivery. Suppose that on the 30th May the vessel runs upon a reef in the Stockholm archipelago and sinks. It will then unquestionably be impossible for anyone to deliver the prescribed quantity of such fruits in Stockholm on the following day (air transport was not then a commercial reality!). Nevertheless, Almén tells us, this is no case of objective impossibility; another ship, chartered by another seller, might have taken another route or might have passed by the danger-spot without accident.[4]

If we were to apply the above definition of objective impossibility to a case such as that cited, we should find it too indefinite in many respects. In the first place, we should have to determine to what moment the impossibility for persons other than the original seller should relate. Almén, as will appear from what has been said, thinks that the relevant moment is not when the obstacle occurred but when the contract was entered into. Even so, the definition is not exhaustive: it would not have been possible for any other person to fulfil the delivery had he sent the goods by the same ship as that used by our seller; nor would it have been impossible for our seller if he had sent the goods by another ship. In order that the definition shall suffice for our purposes it should therefore be clarified by stating that there is an objective impossibility where performance is impossible for *anyone,* whatever arrangements he may have made for the fulfilment of his obligations after the formation of the contract.

It will thus be seen that *vis major* and objective impossibility are two different things. Objective impossibility may sometimes have been caused by a *vis major* occurrence, but this is by no means always the case. On the other hand, a *vis major* incident may have consequences that neither the debtor nor anyone else

[3] Cf. BGB, sec. 275, Heck, *Grundriss des Schuldrechts,* Tübingen 1929, sec. 30 1, and Windscheid, *Pandekten,* sec. 264 2.

[4] See Almén, *Om köp och byte,* sec. 24 at n. 15. The example comes from J. Serlachius, see *F.J.F.T.* 1891, pp. 373 ff.

can avert *after it has occurred,* although there is no objective impossibility, because the incident would have been avoided if some other means of performance had been used.

In the example of the fruit cargo there was neither *vis major* nor objective impossibility. If the ship had perished on May 30th in a hurricane that paralysed all shipping in the Baltic, or if the cargo had been stopped on that same day owing to an import prohibition, there would have been a *vis major* situation but no objective impossibility, since a vessel that reached Stockholm the day before would have escaped these obstacles. And if the hurricane or the import prohibition had been of such duration that the transportation to Stockholm within the prescribed delivery period of fruit of the kind in question would have been impossible ever since the formation of the contract, there would have been an objective impossibility caused by *vis major.*

The drafters of the Sale of Goods Act do not appear to have been aware of the distinction between the two notions. In consequence, sec. 24 of the Act reveals two trains of thought, one derived from the notion of *vis major* and the other from the idea of objective impossibility. "War, import prohibition or other similar occurrence" are words suggestive of the notion of *vis major,* while "destruction of all goods of the kind in question or of the parcel to which the purchase refers" connote the idea of an objective impossibility. In fact then, if not in intent, the provision is a compromise, a fact which is further stressed by the remarkable differences between the reports of the national committees that jointly drafted the bill. The Swedish and the Danish reports speak of *vis major* but do not mention the objective impossibility. On the other hand, the Norwegian report explicitly refers to the German rules in the German Civil Code (BGB), adding that what business people call *force majeure* seems to be exactly the same thing as what lawyers call objective impossibility! The Swedish commentator on the law of sales, Almén, who had been the secretary of the Swedish committee, was strongly influenced by the German ideas. In his commentary, therefore, he tried to make a synthesis of the two conceptions without, apparently, being aware of the differences between them. This attempt was obviously bound to fail, and so his commentaries on sec. 24 do not reach the standard that otherwise characterizes this excellent work.[5]

[5] Almén's commentary has been translated into German, see Almén, *Das Skandinavische Kaufrecht,* Deutsche Ausgabe von F. K. Neubecker, I–II, Heidelberg 1922.

It is not surprising that the subsequent discussion of this question has been rather confused.[6] A competent observer once admitted that sec. 24 had always seemed to him to be "one of the most mysterious sections of our excellent Sale of Goods Act".[7]

The same confusion can be found in the works of certain French legal writers. The French rules on liability for breach of contract use the concept of *force majeure* to limit the field of liability (*Code Civil*, art. 1148). The German concept of objective impossibility, however, seems to have been too much of a temptation even to French legal scholars. So we find a distinction between *impossibilité absolue* and *impossibilité relative,* which is used in connection with the attempts to define the concept of *force majeure.*[8]

To return to sec. 24 of the Swedish Sale of Goods Act, the question now arises whether the seller should be exempted from liability in cases of *vis major* or in cases of objective impossibility or in both cases (or perhaps only when *vis major* has caused objective impossibility). Owing to the widespread use of exemption clauses, the Swedish courts have very seldom had the opportunity of considering this question. In one case from the Supreme Court and one reported case from the Court of Appeal of Stockholm, *vis major* has been held to be a sufficient ground for exempting the seller.[9] There is, on the other hand, no clear decision which accepts or rejects exemption on the ground of objective impossibility.[1] It is submitted that the Swedish judge of today would feel this concept to be an unfamiliar element in the law of his country and that he would hesitate before adopting it.

One reason for his hesitation would also be the fact that there is a tendency to restrict the seller's liability even more than is possible by using the two concepts of *vis major* and objective impossibility. It has been argued among legal writers that the seller in the tropical fruits case ought to be exempted from liability and that, speaking more generally, the seller ought to be free from

[6] Cf. Ussing, *Køb,* 2nd ed., sec. 10 II B 2. See also Kristen Andersen in *Sv.J.T.* 1944, pp. 625 ff., Bagge, *ibid.,* pp. 853 ff., and Ljungman, "Ytterligare om sydfruktslasten", in *Festskrift tillägnad Vilhelm Lundstedt, Uppsala universitets årsskrift,* 1947: 6.

[7] Bagge in *Sv.J.T.* 1944, p. 853.

[8] See Mazeaud, *Traité théorique et pratique de la responsabilité civile,* 4th ed., Vol. II, sec. 1572–3.

[9] *Aktieselskabet Höie Fabrikker* v. *Kürzel,* 1920 N.J.A. 178, *Byggnadsaktiebolaget W-6 i Sundsvall* v. *AB Hilding Regnander,* 1943 Sv.J.T. 15.

[1] Cf., however, *Lindhoff* v. *Johnsson,* 1916 N.J.A. 256, commented on in Rodhe, *Obligationsrätt,* Stockholm 1956, sec. 48 at n. 54–55.

liability if his arrangements for performance fail from no fault of his own. This would be about the same rule as if the exemption clause "no arrival, no sale" or "on safe arrival" were to be deemed an implied term of the contract.[2]

If Swedish law developed in this direction, we should have to consider whether the seller's hability ought still to be expressed in terms of strict liability with certain exceptions. As those exceptions would cover nearly the whole margin between strict liability and fault liability, it would perhaps be more satisfactory to give the rule that the seller, not only in connection with the sale of specific goods (Sale of Goods Act, sec. 23) but also in connection with that of generic goods, bears only a fault liability, and then perhaps to add for the sale of generic goods some special rules of liability, for instance that strictly personal obstacles such as illness etc. are not an excuse for the seller, even if they exclude negligence in the general meaning of this word.[3]

It should be added that even under fault liability the debtor can never allege that he has not money enough to perform his contractual duties.[4]

We have now established the background against which the concept of "economic impossibility" was introduced.

The rule of sec. 24 of the Sale of Goods Act exempted the seller in certain cases of qualified impossibility. But what was the meaning of the word "impossibility"? First, it was necessary to take into consideration not only those cases where delivery really could not be accomplished but also the cases where delivery would constitute an unlawful act, even if it could in practice be effected. Therefore so-called "legal impossibility" was created along with "physical impossibility".[5]

Next, even physical impossibility must be defined in the light of the realities of life. The legal concept of impossibility ought to be a practical concept, not a logical one. Therefore Almén pointed out already in the first edition of his commentary (1906) that the exemption rule in sec. 24 could be applied even if the delivery was not logically out of the question—it was enough that the delivery entailed "economic sacrifices which were wholly outside the assumptions of the parties". Once this concession was made, the way was open to classing a strong increase of prices

[2] See Rodhe, *op. cit.*, sec. 48 at n. 61, with references to earlier literature.
[3] See Rodhe, *op. cit.*, sec. 48 at n. 63.
[4] See Rodhe, *op. cit.*, sec. 29 at n. 19.
[5] See Rodhe, *op. cit.*, sec. 30 at n. 7.

among the circumstances that could under sec. 24 exempt the seller from liability. Indeed, the Swedish courts gradually took this line at the end of the first world war and in the years following. Thus "economic impossibility" was accepted side by side with "physical impossibility" and "legal impossibility".[6]

This method of mastering the problem of supervening hardship of performance may have been necessary to make it possible for the courts to modify the strict rule *pacta sunt servanda* in the given situation. It is, however, incontestable that the creation of the rule of "economic impossibility" has considerably increased the confusion which, as already mentioned, exists concerning sec. 24 of the Sale of Goods Act. Now that there is in Swedish law a rule on hardship of performance which is well established, at least in principle, it would be better to admit that the concept of "economic impossibility" has fulfilled its function and ought to be discarded. It would seem that nothing will be gained by continuing to couple together the problem of impossibility of performance and the problem of hardship of performance.

B. *The doctrine of the underlying assumptions of the contract*

In the Swedish attempts to solve the problem of hardship of performance an important rôle has also been played by the doctrine of the underlying assumptions of the contract.

This doctrine has its roots in the old rule, prevalent in civil-law countries, that in every contract the *clausula rebus sic stantibus* is implied.[7] By the beginning of the 19th century this rule had lost its once recognized position, but in the middle of the century it reappeared in Germany in a modernized and more elaborate form as the doctrine of underlying assumptions ("*Voraussetzungen*"), presented by Windscheid in 1850.[8] From Germany this doctrine spread to Scandinavia, where it made considerable headway. On the other hand it was finally unable to establish itself in the country of its origin, where another variant of the same funda-

[6] See Rodhe, *op. cit.*, sec. 30 at n. 4–5, Almén, *Om köp och byte*, sec. 24 at n. 21–23.

[7] See Borum in *T.f.R.* 1939, pp. 127 ff., and Bugge, *ibid.*, 1902, pp. 185 ff. Cf. also Kegel in *Verhandlungen des vierzigsten deutschen Juristentages*, Hamburg 1953. Band I (Gutachten), pp. 135 ff.

[8] Cf. Kegel, *op. cit.*, pp. 143 ff. Cf. also Vahlén, *Formkravet vid fastighetsköp*, Stockholm 1951, pp. 177 ff. with references.

mental idea came to prevail, namely the doctrine of the foundation of the contract ("*Geschäftsgrundlage*"), presented by Oertmann in the year 1921.[9]

The Scandinavian doctrine of underlying assumptions has been discussed especially by the Danish writers Lassen and Ussing.[1] Lassen started from Windscheid's rather individualizing approach of the debtor's situation, but Ussing has urged the need for a more generalizing, "objective" approach and has introduced the concept of type-assumptions. According to Ussing an underlying assumption is relevant if the three following conditions are satisfied.

(*a*) The assumption was determinative for the debtor when giving his promise.

(*b*) The existence of the assumption and the fact of its being determinative were visible to the creditor at the same time.

(*c*) It is considered justifiable on objective grounds to exempt the debtor from responsibility for the correctness of the assumption.

The existence of a type-assumption will be of great importance as regards the second condition, but it may also to some extent relieve the court from the necessity of inquiring into the first condition.

It is obvious that this doctrine does not give the court a comprehensive rule for dealing with the problem of hardship of performance. The importance of the doctrine is that it can give the court the possibility of creating new rules within the framework of the doctrine.

The doctrine of the underlying assumptions of the contract has evidently had a rather strong influence on the Swedish courts, even if a considerable number of judges have repudiated it. In Norway and Denmark the doctrine has been generally accepted by the courts as a principle of great importance. On the other hand, the courts of Finland seem to have adopted a more guarded attitude, at least until recent times.

It is also evident that this doctrine—the scope of which is very wide—has played an important rôle in the argumentation for a more flexible application of the rule *pacta sunt servanda*.

In 1951, the Swedish legal writer Vahlén presented a penetrating and critical investigation of the doctrine of the underlying assumptions of the contract.[2] Vahlén prefers to use the concept of underlying assumption in the strictly psychological meaning only and

[9] Oertmann, *Die Geschäftsgrundlage*, Leipzig 1921.
[1] Cf. Vahlén, *op. cit.*, pp. 181 ff. with references.
[2] Vahlén, *op. cit.*, pp. 210 ff., and also in *T.f.R.* 1953 pp. 394 ff.

he would, in consequence, reduce the scope of the doctrine to the very limited field where individual assumptions of this kind perhaps ought to be relevant. The problem of hardship of performance would not fall within that field.

The German concept "*Geschäftsgrundlage*" has been defined as an assumption, made by one party, that has become obvious to the other during the process of the formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence, of circumstances forming the basis of the contractual intention. Alternatively, it is the common assumption on the part of the respective parties.[3]

If the foundation of the contract disappears, an intervention in the contractual relation can be justified. This rule, however, is also so vague that it cannot be more than a gateway for approaching specific rules on supervening hardship of performance. As such it was soon used during the great inflation of the 1920's, and it has since then been the basis of German views on this problem.[4] Since the second world war, however, the difference between a "subjective", psychological foundation of the contract and an "objective" one has been stressed even in Germany. The objective variant of the doctrine has come to the forefront, especially with regard to the problem of hardship of performance, and this development seems to have caused a certain disintegration of the doctrine, at least in the field mentioned.[5]

In English law, also, a doctrine of the disappearance of the foundation of the contract has played a certain rôle in the decisions in frustration cases.[6]

C. *The doctrine of implied condition*

The dominating doctrine in the English law of frustration is, however, the doctrine of implied condition. The principle emerged as an exception to the old common-law rule, stated in *Paradine* v.

[3] Oertmann, *op. cit.*, p. 37, and 103 (1922) *Entscheidungen des Reichsgerichts in Zivilsachen* 332.

[4] Cf. Enneccerus & Lehmann, *Recht der Schuldverhältnisse*, 14th ed., sec. 41 II 4, Kegel, *op. cit.*, pp. 153 ff., and Cohn in the *Journal of comparative legislation and international law, Third series*, Vol. XXVIII (1946), parts III & IV pp. 19 ff.

[5] See Larenz, *Geschäftsgrundlage und Vertragserfüllung*, München und Berlin 1951, 2nd ed. 1957. Cf. Kegel, *op. cit.*, pp. 190 ff.

[6] See McNair, *Legal effects of war*, 3rd ed., Cambridge 1948, pp. 146 ff. The doctrine was clearly stated by Lord Haldane in *Tamplin (F.A.) Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, (1916) 2 A.C. at p. 404.

Jane (1647), that no regard shall be paid to changed conditions. In order to escape this harsh rule the judge in the later case of *Taylor* v. *Caldwell* (1863) declared that it was only applicable when the contract was positive and absolute and not subject to any condition express *or implied*. By assuming such implied conditions in contracts, the courts have, very cautiously, developed certain rules which permit them in some cases to give a debtor relief when changed circumstances have gravely increased his burden or decreased his gain.[7] It is, however, generally admitted that these implied conditions are nothing more than fictions, meant to cover the rules which the judges have found to be demanded by justice; this way of dealing with the frustration problem has been characterized as a pious fraud.[8]

The drafters of a uniform law on international sales of goods (1956) have also had recourse to the intentions of the parties (art. 85), but they have tried to evade the use of fictions by saying that, in the absence of any expression of the intention of the parties, regard shall be had to the intention usually prevailing among persons of the condition of the parties placed in an identical situation. This is certainly an improvement, but it may be doubted whether even this rule will keep the courts from using their sense of what justice demands, without paying regard to the usually prevailing intentions of contracting parties, even if such intentions could really be established.

D. *The doctrine of unjust enrichment*

In some cases, Swedish courts have justified their intervention in a contractual relation by the argument that under the unexpected circumstances which had occurred, the performance of the contract would have unjustly enriched one of the parties.[9]

[7] See McNair, *op. cit.*, Chap. 6, Cheshire & Fifoot, *Law of contract*, 4th ed., London 1956, Part VII Chap. III, and Gutteridge, "La révision des contrats par le juge", *Semaine internationale de droit 1937*, pp. 38 ff. See also Bagge in *Sv.J.T.* 1944, pp. 853 ff., Reu, *Die Unmöglichkeit der Leistung im anglo-amerikanischen Recht*, Stuttgart 1935, Rheinstein, *Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht*, Berlin & Leipzig 1932, pp. 160 ff., and Kegel, *op. cit.*, pp. 172 ff.

Some recent cases of great importance are *British Movietonews, Ltd.* v. *London and District Cinemas, Ltd* (1952) A.C. 166, and *Davis Contractors Ltd* v. *Fareham Urban District Council* (1956) 3 W.L.R. 37.

[8] By Gutteridge, *op. cit.*, p. 42. See also Cheshire & Fifoot, *op. cit.*, pp. 465 f.

[9] See in particular *Svensson* v. *Johansson*, 1925 N.J.A. 184. Cf. Hellner, *Om obehörig vinst*, pp. 399 ff.

E. *The doctrine of good faith*

Many of the great civil codes on the Continent contain provisions to the effect that agreements must be performed, subject to the dictates of *good faith* (*Treu und Glauben, la bonne foi*).[1] Such provisions have opened yet another road to the creation of rules for changed conditions; their influence has been great in Germany and dominant in Switzerland.[2]

The notion of good faith is also encountered in sec. 33 of the Scandinavian Contracts Acts. But that section cannot fulfil a corresponding function here, since it aims exclusively at conditions relevant to the formation of the contract.

Another term much employed in Scandinavian legislation is that of "improper" (Sw. *otillbörlig*), which can be said to connote the negation of good faith. The expression "obviously unfair" (Sw. *uppenbart obillig*), which has much the same meaning, is also used occasionally. During the last few decades provisions of somewhat varying import have been inserted in several statutes giving the court the power to modify or set aside contractual stipulations the application of which would clearly be in conflict with acceptable business practice or otherwise improper.[3] In Sweden these provisions are now regarded as the expression of a generally accepted principle that can be applied even outside the field where it has been recognized by the legislature. This view was also

[1] See for an example the French *Code Civil* art. 1134, the German BGB sec. 242, the Swiss *Zivilgesetzbuch* art. 2.

[2] For Germany see Nussbaum, *Money in the law,* 2nd ed., pp. 206 ff., for Switzerland see Simonius, "La révision des contrats par le juge", *Semaine internationale de droit 1937,* pp. 174 ff., and Descheneaux in the *Journal of comparative legislation and international law,* Third series, Vol. XXX (1948), parts III & IV pp. 57 ff. Those French writers who have urged *la théorie d'imprévision* (*supra,* p. 155) have used this doctrine as an argument.

[3] In this connection the following statutory provisions could be mentioned:

Inter-Scandinavian legislation: the Contracts Act (Sweden 1915, Denmark 1917, Norway 1918, Finland 1929, Iceland 1936), secs. 36 and 37, the Insurance Contracts Act (Sweden 1927, Denmark and Norway 1930, Finland 1933), sec. 34, the Promissory Notes Act (Sweden 1936, Denmark 1938, Norway 1939, Finland 1947), sec. 8, the Conditional Sales Act (Sweden 1915, Norway 1916, Denmark 1954), sec. 8 (as amended in Norway and Sweden 1953).

Denmark: the Marriage and Divorce Act, 1922, sec. 72, and the Tenancy Act, 1951, sec. 30.

Finland: the Marriage Act, 1929, sec. 115.

Norway: the Marriage and Divorce Act, 1918, sec. 59, and the Tenancy Act, 1939, sec. 36 (cf. also sec. 35).

Sweden: the Marriage Code, 1920, Ch. 11 sec. 29, the Tenancy Act, 1907, Ch. 3, sec. 43 (as amended 1939, on tenancy of living accommodation), and the Employees' Inventions Act, 1949, sec. 9.

expressed in a Supreme Court decision some years ago, where an improper stipulation in a contract for lease of land was modified by the court, although the clauses on the leasing of agricultural land in the Swedish Tenancy Act, 1907, do not contain any general provision to that effect.[4] In Finland, the legislative history of sec. 8 of the Promissory Notes Act reveals a similar attitude; this, however, is not the case in Norway and Denmark. Danish writers do not seem disposed to analogize from the sec. 8 of the Promissory Notes Act, while in the Norwegian literature there is a pronouncement to the opposite effect.[5]

In so far as such provisions are considered applicable directly or by analogy they clearly provide the courts with a possibility of taking account of changed conditions. Such a right is expressly recognized with respect to tenancy of living accommodation in the legislative history of Ch. 3, sec. 43, of the Swedish Tenancy Act, 1907 (as amended 1939), and the same view is supported by the practice of the Swedish courts in applying this provision.[6] A statement in the same sense is also to be found in the legislative history of the Promissory Notes Act in Norway.

F. *The doctrine of "important reasons"*

In German law we find a rule for so-called *Dauerschuldverhältnisse* (i.e. legal relationships wherein the parties are bound to performance of a certain duration) which has provided a solution in many cases. In *Dauerschuldverhältnisse* where a personal relationship is involved each party has a specific right to cancel the contract if he has an important reason for doing so (*wenn ein*

[4] *The King* v. *Nilsson-Langborger* et als., 1948 N.J.A. 138 (tenancy of agricultural land, the principle was used against The King as owner). See also some *dicta* in *Compagnie Beurrière et Fromagère* et als. v. *Stockholms rederiaktiebolag Svea,* 1951 N.J.A. 138 (bill of lading), *Bokförlaget Helko, O. Hellberg* v. *Hultgren,* 1951 N.J.A. 645 (sale of goods), *Aktiebolaget Tannin* v. *Palmér,* 1952 N.J.A. 440 (employment). Cf. Rodhe, *Obligationsrätt,* pp. 12 f.

[5] See for Danish law Ussing, *Enkelte Kontrakter,* 2nd ed., København 1946, sec. 10 I C, and for Norwegian law Kristen Andersen in *Sv.J.T.* 1944, pp. 644 f.

When the Promissory Notes Act, 1936, was being prepared, it was suggested by the Swedish drafters that the rule on adjustment should be inserted in the Contracts Act, 1915, in order that it should have a more general application, but this suggestion was not unanimously approved by the drafters from the other Scandinavian countries. See *N.J.A., Second series,* 1936, p. 52.

[6] See *N.J.A., Second series,* 1939, pp. 568 f. See also *Fastighetsaktiebolaget Livia* v. *Lantmännens tryckeriförening u.p.a.,* 1943 N.J.A. 35, *Rosberg* v. *Nilsson,* 1943 N.J.A. 166, *Bostadsrättsföreningen Islandsgården* v. *Uppsala kaféaktiebolag,* 1944 N.J.A. 454, and *Bellman* v. *Thorell,* 1944 Sv.J.T. 36.

wichtiger Grund vorliegt). For contracts of service and contracts of association this has been expressly provided (German Civil Code secs. 626 and 723), and the same principle is applied in analogous situations.[7]

This specific right of cancellation makes it possible to take account of changed conditions, at least where they are of importance to a party personally.

In Scandinavian law the same principle has been expressed in some statutory provisions, and here also we may perhaps expect an extension of its application by way of analogy.[8]

G. *The doctrine of lost identity*

If the performance of a contractual duty has been (really) impossible for some time and then again becomes possible, the question often arises whether the circumstances have so changed that the contract should not be upheld. According to Almén it should not be upheld, if the impossibility has lasted for such a long time that the performance now would seem "to be, from the economic point of view, quite a different thing" from a performance of the original duty.[9] This conception of lost identity has been borrowed from German law, where it has played a certain rôle, not only with regard to transitory impossibility but also with regard to other cases of changed circumstances.[1] It has also been used in English law.[2]

We have seen that a great number of general doctrines have been alleged to justify exceptions from the rule *pacta sunt servanda*. The multiplicity of doctrines is not, however, matched by an equal multiplicity of material solutions. With good reason it can

[7] See Enneccerus & Lehmann, *Recht der Schuldverhältnisse*, 14th ed., sec. 4 II 4, sec. 132 III 8, sec. 148 V 3, sec. 180 I 1. See also the Swiss *Obligationenrecht*, arts. 352 and 545, and, on societies, the French *Code Civil*, art. 1871.

[8] See the Mercantile Agents Act, 1914, secs. 50 and 51, the Merchant Seamen Act, 1952, sec. 35, and the Partnerships Act, 1895, sec. 27. Cf. Platou, *Norsk selskabsret*, Part I, 2nd ed., Oslo 1927, pp. 148 f., Sindballe, *Dansk Selskabsret*, Part I, 2nd ed., København 1936, pp. 143 f., Ussing, *Enkelte Kontrakter*, 2nd ed., København 1946, sec. 47 III. See also a draft Swedish Employment Contracts Act, 1935, sec. 28 (Statens offentliga utredningar 1935: 18).

[9] Almén, *Om köp och byte*, sec. 21 at n. 176. See also Lassen, *Haandbog i Obligationsretten, Almindelig Del*, 3rd ed., København 1917–20, sec. 67 at n. 2 b.

[1] See Cohn, *op. cit.*, pp. 16 f. and 19.

[2] See McNair, *op. cit.*, pp. 154 f.

be said that in this field more roads than one lead to Rome.[3] The choice of doctrine may still have a certain influence on the material solutions, as some doctrines will tie the hands of the judge more than other doctrines do.

THE MATERIAL SOLUTIONS

After this survey of general legal principles we shall now examine the concrete solutions which have been reached within the framework sketched or which have been introduced through legislation.

As, however, legal precedent in the present field is scarce, it cannot provide sure rules of well-defined extent. Nor is this the place for a systematic study of the various cases of *ad hoc* intervention by the legislator. Instead, we shall attempt to bring out the basic considerations that have emerged in legislation and court practice and in the general discussion.

There is reason here for a distinction between two types of situations, one of which concerns bilateral obligations, while the other concerns obligations that either were originally unilateral or later became so.

A. BILATERAL OBLIGATIONS

Under this heading we shall treat some cases where single acts of performance must for some reason or other be exchanged so long after the formation of the contract that a considerable change of conditions may supervene. We shall also consider cases of continuous performance, such as delivery by instalments, supply of electric power, tenures and leases, and so on.

1. *Causes of hardship*

As has been pointed out above, the present question has often been viewed in the light of the doctrines of impossibility. Not unnaturally, certain ideas of basic importance for questions of impossibility will then often come into the foreground.

[3] Cf. Heck, *Grundriss des Schuldrechts,* sec. 31 6, and Enneccerus & Lehmann, *op. cit.,* sec. 41 II 4.

In foreign law we occasionally encounter the idea, derived from the principle of *vis major,* that the only difficulties that should be taken into account are those caused by occurrences having far-reaching consequences, such as war, currency fluctuations, epidemics, and so on.[4] This reasoning has had a certain influence in Scandinavian law, inasmuch as the concept of economic impossibility has sometimes been invoked by way of analogy from sec. 24 of the Sale of Goods Act, but it has scarcely been of importance in other respects.[5] Clearly, both the doctrine of underlying assumptions and the principle of adjustment of "obviously unfair" contracts leave room for the taking into account of individual difficulties.

More often a requirement derived from the doctrine of impossibility is advanced, to the effect that the change of conditions must be one that "could not reasonably have been foreseen". If a contract is made in the course of a war, or when an outbreak of war appears imminent, difficulties caused by the war will then be taken into account only in cases where the war has been intensified or extended in an unexpected way.[6]

This is perhaps not so where the intervention is founded upon a rule of adjustment of clearly unfair contracts. The above-mentioned rules relating to such interventions make no distinction of principle between conditions existing at the time of contracting and conditions arising subsequently. It is therefore possible that the requirement of unforeseeability will not be given the same force when these rules are applied. Of this question, however, little is known at the present time.[7]

As regards the doctrine of underlying assumptions, also, it is

[4] Cf. on Polish law Longchamps de Bérier, "La révision des contrats par le juge", *Semaine internationale de droit 1937,* pp. 114 f., and on Hungarian law de Szladits, *op. cit.,* pp. 70 f. In Swiss law we meet the more lenient rule that the difficulties must go beyond the debtor's personal sphere, see Descheneaux, *op. cit.,* pp. 59 f.

[5] But see the Norwegian Workmen's Protection Act, 1936, sec. 33, which gives the employer a right of terminating the contract in case of accidents, physical impediments or other events that could not be foreseen. Cf. also Gjelsvik's distinction between general and individual motives in his *Innleiding i rettsstudiet,* 4th ed., Oslo 1945, sec. 37 II.

[6] Cf. *Forsberg* v. *AB Malmö stora valskvarn,* 1918 N.J.A. 20 (II), and *Ahlén & Holm AB* v. *Forssåa bruks AB,* 1923 N.J.A. 20. Cf. also Ussing, *Dansk Obligationsret, Almindelig Del,* 3rd ed., København 1946, sec. 9 I C 5 b, and Ussing, *Køb,* 2nd ed., København 1950, sec. 10 II B 4.

[7] The author's supposition is supported by some judgments from Swedish courts of appeal, concerning adjustment of tenancy contracts formed after the outbreak of World War II, see *Bellman* v. *Thorell,* 1944 Sv.J.T. 36 and *Paulsson* v. *Karlsson,* 1943 N.J.A. 248 (I, at p. 250).

presumably true that unforeseeability is not of constituent importance and that the court is thus free to apply or to discard this criterion.[8]

When in a crisis the legislator intervenes by instituting legislation of a temporary character, the requirement of unforeseeability is usually expressed by limitating the applicability of the new laws so as to cover only contracts made before a certain date.[9]

Nevertheless the problem of unforeseeability recurs in another form in relation to the intensity of the supervening hardship.[1]

Notions of impossibility can also be used to explain the distinction which is sometimes made between difficulties caused by an obstacle and difficulties due to a mere increase of costs.

A contract may become more burdensome for a party through the operation of a certain occurrence which may force the party to substitute expensive raw materials for those originally envisaged or to use a longer route of transport. In such cases the increased burden is due to obstacles that have to be surmounted in order to perform the contract.

But the contract also becomes more burdensome economically when there is a *mere increase of costs*—an increase of the price of the raw material or a rise on the freight market.

On the basis of this distinction it has sometimes been alleged that only real obstacles that render performance more burdensome should be relevant, not a mere rise of prices.[2] Such a rule would have some curious consequences. Thus an importer of a certain commodity might plead, as against a buyer, that he has been obliged on account of a blockade to buy his wares from another source at a higher price than he had expected, whereas this defence would not be open to the buyer as against a subsequent buyer.

[8] According to Ussing, *Bristende Forudsaetninger,* København 1918, p. 150, the main rule should be that the event could not have been foreseen. Illum in *U.f.R.* 1946, p. 122, dissents. Cf. Hellner, *Om obehörig vinst*, pp. 408 f.

[9] Cf. two Swedish Adjustment of Tenancy Contracts Acts, 1942 and 1943, applicable only to contracts formed before September 1, 1940. Cf. also the French *loi Faillot,* 1918, which permitted adjustment of certain contracts formed before August 1, 1914, and another French act of 1949, permitting adjustment of contracts formed before September 2, 1939. The German Decree on Judicial Assistance in Respect of Contracts, 1939, as a rule only referred to contracts formed before the outbreak of war, see Kegel, Rupp & Zweigert, *Die Einwirkung des Krieges auf Verträge,* pp. 179 ff. Later this limitation was set aside by an enactment of 1942.

[1] *Infra,* p. 180.

[2] Cf. Lassen, *Haandbog i Obligationsretten, Almindelig Del,* 3rd ed., sec. 44 at n. 20. Cf. also Sandström and Sunde in the *Forhandlinger paa det tolvte nordiske juristmøte, 1922,* Kristiania 1923, the minutes at pp. 115 and 121 ff.

Moreover, a depreciation of currency would not have any relevance. If the theory has enjoyed any real recognition, this has been of a transient kind; the restriction that it implies has later been abandoned without hesitation.[3]

2. *Character of the hardship*

(*a*) *Increased burden and decreased benefit*

The discussion of the effect of changed conditions has to some extent been dominated by instances where the change has increased the burden for one party to a contractual relationship. This approach is bound up with the common nominalistic view of economics, which regards money as the constant factor. From this point of view it has been natural to say that the difficulties confronting the seller in times of rising prices consist in his having to sacrifice more in order to fulfil his obligations. But if we proceed from a consideration of real value, as opposed to money value, the rise of prices has the opposite effect: the seller fulfils an unchanged obligation for a consideration that is less than he had originally contemplated.

A consequence of the former concept is the fairly common rule that a seller who has had the commodity sold in stock before the rise of prices must make delivery from his stock as long as it lasts, even if the increase of prices is such that it might in itself provide an excuse.[4] On this formula the seller must be content to retain the same nominal capital as before, although he is now out of stock of the goods and is no longer in a position to procure a new stock sufficient for his business, which he must therefore reduce.

This rule conflicts with present-day principles of business economics. Here the view prevails that cost calculations and balance-sheet evaluations must be made on the principle that an unchanged stock should be retained, irrespective of fluctuations in the value of money. For each sale one must therefore account as a

[3] Cf. Lassen, *op. cit.*, sec. 44 at n. 20, and Ussing, *Dansk Obligationsret, Almindelig Del,* 3rd ed., sec. 9 I C 5 b. Note also in Almén, *Om köp och byte,* sec. 24 after n. 23, the difference between the 2nd and 3rd editions.

[4] See Almén, *op. cit.*, sec. 24 at n. 98 d–98 h, and *Byggnadsaktiebolaget W-6 i Sundsvall* v. *AB Hilding Regnander,* 1943 Sv.J.T. 15. See also Ussing, *Bristende Forudsaetninger,* p. 168, Gaarder, *Forelesninger over kjøp,* Oslo 1944, p. 61. Cf. Hasle & Nebelong, *Løsørekøb,* København 1949, pp. 142 f.

cost not the actual price of the commodity when it was bought but the cost of replacing it.[5]

Another consequence of the nominalistic conception of money is the view maintained by Almén that a buyer should in no circumstances be allowed to plead a serious fall of prices as an excuse for not performing his contract; there is then no "obstacle" to payment for the buyer, as his obligation is the same as before.[6]

In our days experience has caused us to lose any illusions about regarding money as a constant factor in society. We have become inclined to attach primary importance to real value rather than money value, and we tend to speak of "a decline in the value of money" rather than of "an increase of prices". Thus the foundation for a differentiation between increased burden and decreased benefit has disappeared, at least where the rise of prices is not confined to some particular item.

Outside the field of increased costs it is at any rate clear that there is no disinclination on grounds of principle to concede relevance to diminished benefit.[7] Thus the characteristic feature of one important group of cases regulated within the framework of ordinary legislation is the discharging of a party from the duty to perform because the agreed consideration has lost its value to him.

> This may be the case with contracts granting one of the parties benefits of a personal nature, such as living accommodation. If the beneficiary dies, his estate will be burdened with the fulfilment of the contract for a consideration that is of no value to the estate. Tenancy legislation in general therefore includes rules giving the tenant's estate the option of revoking the contract prematurely.[8] A corresponding right is sometimes found in master and servant relationships, entitling the master to revoke the contract of service.[9]

[5] Cf. *Enhetliga principer för självkostnadsberäkningar,* ed. by Sveriges standardiseringskommission, 4th ed., Stockholm 1943, pp. 18 f., Skare, Västhagen & Johansson, *Industriell kostnadsberäkning och redovisning,* 4th ed., Stockholm 1958, pp. 74 ff., and Winding Pedersen, *Omkostninger og prispolitik,* 2nd ed., København 1949, pp. 28 ff.

[6] Almén, *Om köp och byte,* 2nd ed., Tillägg och rättelser till första delen, p. 19.

[7] Cf. Ussing, *Aftaler,* 3rd ed., København 1950, sec. 41 at n. 66–68, and Ussing, *Dansk Obligationsret, Almindelig Del,* 3rd ed., København 1946, sec. 44 V.

[8] See the Swedish Tenancy Act, 1907, Ch. 3 sec. 8, the Danish Tenancy Act, 1951, sec. 110, the Finnish Tenancy Act, 1925, sec. 14, and the Norwegian Tenancy Act, 1939, sec. 31.

[9] See the Danish Adolescents' Employment Contracts Act, 1921, sec. 21, and the Finnish Employment Contracts Act, 1922, sec. 29. A contrary rule is given by the Norwegian Workmen's Protection Act, 1936, sec. 33.

In Finnish law a tenant who leaves the neighbourhood owing to a change of employment may revoke his contract of tenancy.[1]

The Scandinavian Maritime Code of 1891, sec. 131 (as amended 1936), gives the charterer a general right to revoke the contract of affreightment, against payment of damages, and proceeds to declare that the charterer shall not be liable where his revocation has been due to circumstances that have rendered the affreightment of no value to him. The provision is to some extent copied from sec. 24 of the Sale of Goods Act, and involves the same difficulties as the latter. If we apply the approach that has been suggested earlier in this paper[2] we should then take the provision in sec. 131 of the Maritime Code to mean that the charterer should be discharged if the impossibility of delivering or carrying the goods, or importing them to their place of destination, is due to a *vis major* situation or perhaps to an unforeseeable objective impossibility. If the affreightment is one of certain specific goods which are lost through an accident, the charterer is free even if the accident was not of an extraordinary nature or otherwise unforeseeable.[3]

The Swedish legislation on the leasing of agricultural land contains specific provisions for cases where a contract of service is entered into in conjunction with a contract of lease. If then the landowner does not provide work he may be liable for damages; but an exception can be made in cases where the landowner's failure to do so is due to changed economic or technical conditions.[4] Similarly, a bad harvest can sometimes be pleaded as a reason why the rent should be reduced.[5]

Court practice in Sweden also offers instances where a diminished benefit has been considered relevant. Thus tenants have sometimes been allowed to plead that the authorities have prohibited their use of the premises as agreed, for instance for the public sale of beer[6], and in some cases the courts have felt called

[1] See the Finnish Tenancy Act, 1925, sec. 14. Cf. the German BGB sec. 570. Cf. also the Swedish case *Isaksson* v. *Åhlund,* 1906 N.J.A. 294. In German and French law one meets the rule that a tenant who cannot use the accommodation owing to war conditions is granted an extraordinary right of terminating the contract. See the German Decree on Judicial Assistance in Respect of Contracts, 1939, sec. 5, and French acts of Sept. 26, 1939, and June 1, 1940.

[2] *Supra,* pp. 162 f.

[3] See the Swedish legislative materials, *N.J.A., Second series,* 1936, pp. 462 ff. For further discussion see Jantzen, *Håndbok i godsbefordring til sjøs,* 2nd ed., Oslo 1952, pp. 296 ff. The drafters, however, seem to have felt that it would not have been correct to give the charterer a right to allege that the contract has become less profitable for him, and so they have taken great pains to explain that in reality the charterer has a *duty* to procure goods, a duty that in some cases may become too burdensome for him.

[4] Cf. *N.J.A., Second series,* 1944, p. 184.

[5] Swedish Tenancy Act, 1907, Ch. 2, sec. 58 (as amended 1943).

[6] See *Martinsson* v. *Andersson and Svensson,* 1902 N.J.A. 178, *Lundstedt* v.

upon to help the beneficiary of a right to cut timber when new legislation has prevented him from felling to the extent he has planned.[7] And in English law there seems to be an accepted rule that whereas a mere increase of costs is of no consequence,[8] a radical decrease of profit can sometimes be taken into account.[9]

(*b*) *Increase of costs and increase of risks*

A contract will become burdensome for a party where it involves him in greater costs than he has expected. Statutory regulations are, however, sometimes found to extend the debtor's protection beyond this; the mere fact that changed conditions have increased the *risk* of further expenses or other inconveniences is then stated to be relevant.

One rule relating to the effect of an increase of risks is to be found in the Scandinavian Maritime Code, 1891, sec. 135 (as amended in 1936). This rule gives each party to a contract of affreightment the right to revoke the contract if after its formation it should turn out that the ship or cargo would be exposed to damage owing to war, blockade, revolutions, civil commotions or piracy, or that such danger has been considerably increased.[1] Sec. 131 of the Code contains a provision of the same character, inasmuch as it gives the carrier a right to revoke the contract when its performance would involve grave inconvenience owing to measures taken by authorities with regard to the goods.

In the field of labour law it is commonly said that the employee may revoke his contract if the work would involve a danger to life or health which could not have been foreseen at the formation of the contract.[2] A corresponding right is often conceded to the

Järnvägsstyrelsen, 1914 N.J.A. 475, *Hallin* v. *Johansson,* 1916 N.J.A. 357, *Ericsson* v. *Brinkman,* 1918 N.J.A. 467. Cf. Ussing, *Bristende Forudsætninger,* København 1918, p. 152.

[7] See Hellner, *Om obehörig vinst,* pp. 399 ff.

[8] Cf. *Blackburn Bobbin Co.* v. *T. W. Allen & Sons,* (1918) 1 K.B. 540. See McNair, *Legal effects of war,* 3rd ed., pp. 307 f.

[9] See for example the Coronation Seat cases, discussed in McNair, *op. cit.,* at pp. 138 and 151.

[1] Cf. the Norwegian case *Waages Tankrederi A/S* v. *O/Y Shell A/B,* 1947 N.Rt. 705, where the Court stated that only events that could not have been foreseen could be taken into consideration.

[2] See the Merchant Seamen Act (Denmark and Sweden 1952, Norway 1953, Finland 1955), sec. 36. See also the Swedish Domestic Servants Act, 1944, sec. 16, and the Finnish Employment Contracts Act, 1922, sec. 30. Cf. on seamen's employment contracts in English law McNair, *op. cit.,* pp. 228 ff.

employer when an employee's illness exposes the employer himself or his family or other employees to risk of infection.[3]

The rules in the Sale of Goods Act, 1905, secs. 39 and 40, can also be considered from the aspect of increase of risks. These provisions grant the seller on credit the right to withdraw the credit or at least to demand security if the buyer should become insolvent after the formation of the contract of sale.[4, 5]

3. *Intensity of the hardship*

It is commonly asserted, when an intervention in favour of an embarrassed debtor is proposed on the basis of general legal principles, that hardship caused by a rise of costs is relevant only if the increase is exorbitant.[6] How great the rise should be, however, has nowhere been determined in actual figures. This reluctance to fix a definite limit is primarily due to the fact that such a limit cannot be determined without regard to what is a normal risk for the type of contract in question. In most contractual relationships a greater or lesser risk for changes in prices or costs is taken into account in the normal course of business, and the "limit of sacrifice" must then lie clearly outside the normal risk field. Great variations are found in this regard. On the one hand there are contracts entered into on the world market in trades where considerable fluctuations of the price level are common and where each contract has therefore something of a speculative character; on the other hand there are contracts in trades where prices are normally stable and where there is no room for speculation; and each must be judged on its own merits.[7]

[3] See the Swedish Merchant Seamen Act, 1952, sec. 32, and the Swedish Domestic Servants Act, 1944, sec. 15. See also the Danish Adolescents' Employment Contracts Act, 1921, sec. 30.

[4] Cf. Enneccerus & Lehmann, *Recht der Schuldverhältnisse,* 14th ed., sec. 41 I, and Oser, *Das Obligationenrecht,* Vol. I, 2nd ed., Art. 83 n. 3.

[5] The rules on increase of risk in the Insurance Contracts Act, 1927, secs. 45–50, do not seem to bear on the problem now discussed, as an increase of risk from the insurer's point of view will appear as an increase of costs.

[6] See for Swedish law Almén, *Om köp och byte,* 3rd ed., sec. 24 n. 23 d, and further *E. M. Mok en Zonen* v. *AB Vidfamne,* 1934 N.J.A. 389, *Tjänstemännens egnahemsförening vid Storängen m.b.p.a.* v. *Järnvägs AB Stockholm–Saltsjön,* 1946 N.J.A. 679, and *Motala ströms kraftaktiebolag* v. *Andersson,* 1956 N.J.A. 136. For Danish law see Ussing, *Køb,* 2nd ed., sec. 10 II B 4, and for Norwegian law Kristen Andersen in *Sv.J.T.*, 1944, pp. 639 f.

[7] Cf. Steglich-Petersen in *Forhandlinger paa det tolvte nordiske juristmøte,* 1922, Kristiania 1922, Appendix III, pp. 8 and 15.

A change of conditions, then, is considered relevant only where it exceeds the risk that contracting parties in the same situation will generally include in their calculations. It should also exceed the risk that the particular parties had anticipated in their particular situation, if anything should happen to be known about this.[8]

This proposition cannot, however, be accepted without qualification. It is by no means certain that, simply because a party has assumed a risk of considerable price changes, this should be construed to include all changes of the magnitude contemplated, whatever their source. A seller of grain may have to bear the risk of a rise in prices caused by a foreseeable failure of the crop, but this does not imply that he should necessarily bear the risk of a similar rise caused by an unforeseeable war. In general, however, no distinction seems to be made between these two cases.

There now appears to be general agreement that the financial position of the burdened creditor is not pertinent to the question of the intensity of an increase in costs; even a party having an extensive business and substantial means should be able to plead that the increase is so great that he should not have to suffer it, even though his financial position would not be seriously disturbed thereby.[9] On the other hand, in determining the importance of the increased costs not only the gross expenses should be considered, but the entire transaction as a whole.[1]

German Court practice has, in common with Scandinavian practice, after some initial hesitation refrained from pursuing the requirement that the burdened party must be under really distressed circumstances.[2] On the other hand, the German *Vertragshilfeverordnung* (Decree on Judicial Assistance in Respect of Contracts) of 1939 is applicable exclusively to such cases. For the big solvent

[8] Cf. Enneccerus & Lehmann, *op. cit.*, sec. 41 III 2.

[9] It seems, however, difficult to find an explicit foundation for this statement. Cf. Ussing, *Dansk Obligationsret, Almindelig Del,* 3rd ed., sec. 9 I C 5 b, and Kristen Andersen in *Sv.J.T.* 1944, p. 647, where the words used are not quite clear.

[1] Cf. *Fastighets AB Livia* v. *Lantmännens tryckeriförening u.p.a.,* 1943 N.J.A. 35, where the Court held that the plaintiff's action for an increased rent could not be approved, because he had not shown by a calculation of profitability what the increase of heating costs had meant to him.

[2] Cf. Enneccerus & Lehmann, *op. cit.*, sec. 41 III 3. The Swiss courts at first demanded that the debtor's difficulties should bring him to ruin, but they have later modified their position to the effect that it is enough that an adherence to the contract would mean an "usurious exploitation" of the debtor's difficult situation. See Descheneaux in the *Journal of Comparative Legislation and International Law, Third series,* Vol. XXX (1948), parts III & IV, p. 62.

companies some special provisions of a corresponding character were given, opening up the possibility of revising contracts relating to power delivery and the fabrication of goods.[3]

I have earlier pointed out that specific questions of enforcement, belonging to the "law of execution", cannot be ignored in any treatment of the present subject. So far as these rules become relevant—e.g. as regards compositions with creditors—the debtor's financial position will of course be of importance.[4]

4. *Legal effects*

The last half-century has seen considerable changes of opinion as to the effect of changed circumstances, where these are held to be of importance. When the question first arose, no other possibility was contemplated than that of either maintaining the contract or setting it aside completely. The loss must be placed wholly on one party or the other. This view of "all or nothing" has since yielded to another method, which in its most extreme form amounts to a choice of the solution that involves the least total loss and also divides this loss as fairly as possible between the parties.

Besides the earlier recognized method of automatically dissolving the contract, two new devices have been introduced, one of dissolving the contract and awarding damages and the other of adjusting the contract.

The most uncompromising realization of the new views is found in Germany, although Scandinavia and Switzerland have gone rather far in the same direction. English law, however, maintains the principle that an automatic dissolution of the contract is the only possibility.[5]

Beside these types of intervention there is the possibility of assisting an embarrassed party by means of a moratorium.

(*a*) *Dissolution of the contract without damages*

In Scandinavian legal discussion around 1920 we find several very conclusive indications that it was not then considered to be within the competence of the courts to modify the terms of a

[3] See *supra*, p. 156.

[4] Certain moratorium statutes, which are discussed *infra*, also uphold the condition that the debtor must be in individual difficulties.

[5] See McNair, *Legal effects of war*, 3rd ed., p. 157.

contract; only a complete dissolution without damages could be allowed.[6]

This was a natural position to take for lawyers who attempted to solve the problem by an extension of the doctrine of impossibility, which offered no other solution.

Again, the doctrine of underlying assumption seems at this time to have been fairly generally understood to imply that the failure of an underlying assumption could only result in invalidity.[7]

Without affecting this principle a method was, however, devised to mitigate its effects. A Swedish Supreme Court decision endorsed the principle, earlier suggested at the Scandinavian Jurists' Conference in 1919 and also applied in arbitration practice, that a buyer can prevent his seller from revoking the contract on account of increased prices, provided he offers to pay an appropriate additional compensation, so that the increased burden is divided between the parties.[8]

Further than this the courts would not go, at any rate in Sweden. As late as in 1940 two eminent Swedish lawyers pronounced their view that the courts would not uphold a claim for higher compensation or other additions to the other party's performance merely on the basis of general contractual principles. "The promisor can plead the supervening circumstances only for the complete revocation of the contract, unless the promisee agrees to increase the remuneration or allows a decrease of the promisor's performance. And in such cases the promisor can hardly claim that the entire cost of the additional performance shall in some way fall wholly upon the promisee. An apportionment between the parties of the increased costs will generally be the result of an evaluation such as that previously applied in contract law."[9]

[6] See Steglich-Petersen in *Forhandlinger paa det tolvte nordiske juristmøte 1922*, Appendix III, p. 16, Sandström, *op. cit.*, the minutes at p. 115, and Schjelderup in *N.Rt.* 1920, pp. 627 f.

[7] Cf. *Svensson* v. *Johansson*, 1925 N.J.A. 184 (mentioned *supra*, p. 168) where the Swedish Supreme Court seems to have avoided founding its decision on the doctrine of the underlying assumptions of the contract, which had been applied in an earlier case of the same character, because, though it wanted to adjust the contract, it did not consider it correct to use the doctrine for that purpose.

[8] *Åhlén & Holm AB* v. *Forssså bruks AB*, 1923 N.J.A. 20. Cf. Almén, *Köp och byte*, 3rd ed., sec. 24 n. 23 g.

[9] Mr. Justice A. Lindhagen and Professor R. Bergendal in *Statens offentliga utredningar* 1940: 7, p. 28.—Sometimes one may find the variant that the court can modify the contract but *then* the party suffering from the adjustment can choose whether he will be satisfied or will revoke the contract. See for an example a French act of July 6, 1925, on longstanding tenancy contracts.

(*b*) *Adjustment of the contract*

The conception of the doctrine of underlying assumptions described in (*a*) was not, however, unanimously accepted. As early as in 1897 Stang, a Norwegian jurist, had enunciated his view that "contractual stipulations of all kinds" might by interpretation be derived from certain assumptions forming the basis on which the parties enter into the contract, and this view he developed further in later writings.[1]

In a more incidental manner the Danish writers Lassen and Ussing early pointed out that consequences other than invalidity might well be suggested.[2] Ussing has since elaborated the idea, arriving at the conclusion that the failure of a relevant assumption may result not only in the promisor's release from his promise but also in some other change in the contractual relationship.[3]

The departure from the old rule of "all or nothing" that seems easiest to accept is the partial setting aside of a promise based upon a relevant assumption that has failed. This may take the form of some sort of a reduction of the quantum to be performed by one of the parties. A further step is that of passing beyond the bounds of the contract so as to increase or vary the obligation of one party in the interest of the other, unduly burdened party. Thus in a Danish case a buyer was ordered, owing to exceptional circumstances, to pay an increased price for the goods.[4]

In German law there has been a largely analogous development. At first the *Reichsgericht* strictly adhered to the rule that the courts had no right to change a contract, but in a decision of 1920 the court gave way to the new impulses.[5] It was pointed out, however, that the decision was prompted by exceptional, wartime conditions. Nor was the new course followed without hesitation; indeed the court reverted to its earlier practice on several later occasions. In the course of time, however, the new principle won

[1] See Stang, *Vildfarelse*, Kristiania 1897, pp. 66 f., Stang, *Innledning til formueretten*, 3rd ed., Oslo 1935, pp. 483 ff., and Stang in *T.f.R.* 1930, pp. 100 ff. Cf. also Gjelsvik, *Innleiding i rettsstudiet*, 4th ed., sec. 37 IV.

[2] Lassen, *Haandbog i Obligationsretten, Almindelig Del*, 2nd ed. (1908), sec. 18 n. 5, 3rd ed. (1917–20), sec. 17 n. 6 c, Ussing, *Bristende Forudsaetninger* (1918), p. 3.

[3] Ussing, *Aftaler*, 3rd ed., sec. 42 I.

[4] *Kloppenborg Skrumsager* v. *Pedersen*, 1926 U.f.R. 180. Cf. also the cases mentioned *infra* p. 191 in which the Norwegian Supreme Court agreed to adjust an easement; but in these cases the obligation was unilateral, and so adjustment was the only possible alternative.

[5] 100 (1920) *Entscheidungen des Reichsgerichts in Zivilsachen* 129.

general approval, although criticism was still heard from many quarters. In our days judicial adjustment of the contract—*Vertragsbestand mit Ausgleichsanspruch*—is even considered to be a less radical form of intervention than dissolution.[6]

In Scandinavian law the principle of adjustment of contracts has been adopted in the Promissory Notes Act, 1936, sec. 8, and other provisions giving the court the right to adjust or set aside contract terms whose application would be obviously improper.[7] The Swedish Supreme Court has applied such provisions during the last decade in raising rents that were unreasonably low owing to the increased cost of heating.[8, 9]

In other cases the principle of unjust enrichment has been applied in a way that has resulted in changes of contracts.[1]

From the normal legislation we note one important rule providing for adjustment in cases of changed conditions, namely the *pro rata* rule in the Insurance Contracts Act, 1927, sec. 45. According to this rule, the insurer's liability in the case of an increase of risk depends on what he would have done if the circumstances effected by the change had existed when the contract was made. If he would not have granted insurance at all, he is free from liability. If he would have demanded a higher premium, his liability is reduced to a sum corresponding to the premium agreed to. If he would have made some special condition in the insurance contract, he can apply this condition. If he would have made further reinsurance, his liability is reduced accordingly. We can see that owing to the nature of this type of contractual relationship it has been possible to frame the rule with a great deal of precision.

[6] See for example Schlegelberger, "Vertragsgestaltung durch den Richter", *Erwin Bumke zum 65. Geburtstag,* Berlin 1939, pp. 2 ff., Cohn in the *Journal of Comparative Legislation and International Law, Third series,* Vol. XXVIII, parts III & IV, pp. 22 f., and Kegel, Rupp & Zweigert, *Die Einwirkung des Krieges auf Verträge,* pp. 124 ff. See also Kegel in *Verhandlungen des vierzigsten deutschen Juristentages,* Vol. I (Gutachten), pp. 204 f. and 230.

In Swiss law also the adjustment of a contract is possible; see Descheneaux in *Journal of Comparative Legislation and International Law, Third series,* Vol. XXX (1948), parts III & IV pp. 64 ff.

[7] See *supra,* p. 169.

[8] See *supra,* p. 170. Cf. also *Mauser-Werke AG* v. *The King,* 1930 N.J.A. 507 (I), where the Court increased a periodical licence-fee, fixed in German currency.

[9] A sign of the times is the judgment of the Court of Appeal in *Wallbergs fabriks AB* v. *AB Malcus Holmqvist,* 1947 N.J.A. 107, which is a case on usury. In the Contracts Act, 1915, sec. 31, it is stated that a contract may be voidable if it is usurious. In the case mentioned, however, the Court of Appeal held usury to be a good reason to adjust the contract.

[1] *Svensson* v. *Johansson,* 1925 N.J.A. 184, mentioned *supra,* pp. 168 and 192. Cf. also A. Vinding Kruse, *Restitutioner,* København 1950, p. 359.

(c) Dissolution of the contract in conjunction with damages

An apportionment of the burden between the parties can also be achieved by means of a right for the prejudiced party to revoke the contract combined with a duty to assume part of the burden by paying damages.

This leads us to the rules of countermanding. In some cases ordinary legislation grants a right for one party to inhibit the other's performance in kind and limit his own liability to the other's accrued costs and contemplated gain. For certain types of contracts such a right of countermanding is provided by law—as witness in Scandinavia the Maritime Code, 1891, sec. 131, which grants the charterer such a right, and in Continental law the German Civil Code, sec. 649, the Swiss Civil Code, sec. 377 (*Werkvertrag*) and the French Civil Code, sec. 1794 (*entreprise*).

In these cases the countermander need not adduce any particular cause for his desire to countermand. Some Scandinavian writers, however, have suggested a right to countermand resting on general legal principles but presupposing that the countermander can show sufficient cause for a countermand; this is especially the case where changed conditions have rendered performance unduly onerous.[2]

In principle countermanding involves a duty to compensate the other party's entire loss. The net result is an increase of the total loss but no apportionment; the whole loss falls upon the countermander.

In the German legislation on judicial assistance in respect of contracts (*Vertragshilfe*) of 1939 a modified and also extended right to countermand has however been introduced. Thus a person whom the war has forced to restrict or reorganize his business may have an interest in winding up certain types of contracts, such as leases, contracts for the purchase of machinery or raw materials or for the advertisement of his products. This the court can grant if it is found to be a sound solution of the problem having regard also to the interests of the other party; and the losses of the parties are then apportioned between them by means of damages.[3]

In Scandinavian legal theory, suggestions are occasionally found that a dissolution of the contract in combination with damages

[2] See on this question Taxell in *F.J.F.T.* 1949, pp. 151 ff., with references, especially Gunnar Palmgren, "Avbeställning av entreprenad- och leveranskontrakt", *Mercator* 1949, pp. 107 ff.

[3] See Kegel, Rupp & Zweigert, *Die Einwirkung des Krieges auf Verträge*, pp. 164 ff. Cf. also the two acts of 1940, mentioned *supra* p. 156 n. 5.

apportioning the loss might be allowed even apart from cases of countermanding in the strict sense of that term.[4]

(*d*) *The apportionment of the loss*

If the burden of the changed conditions is to be divided between the parties, we are faced with the question how this distribution is to be realised. In Scandinavian law no precise rules have been developed in this respect, and the meagre authority that is found on the subject is very vague. The statement in Almén's commentary that a buyer who wishes to prevent the seller from revoking the contract of sale owing to an increase of prices should offer to increase his own price so that the seller's loss is reduced to "reasonable proportions" is illustrative of the position.[5]

A more precise rule proposed is that the revoking party should be liable in damages to the amount which would be necessary to put the other party into the position in which he would have been if he had not relied upon the contract (*Vertrauensinteresse*—interest of reliance).[6]

In German law this question has often been considered, partly by the courts in connection with certain cases where the contract has been upheld but modified (*Vertragsfortbestand mit Ausgleichsanspruch*), and partly by the legislation on judicial assistance in respect of contracts. The courts as well as the legislator have stated that the immediate evaluation must be left to the discretion of the judge. In this evaluation the financial situation of the parties must be taken into account, as the greater part of the loss may be thrown upon the financially stronger party. If the judge should find that the circumstances on either side carry equal weight, it is considered that he should charge one half of the loss upon each party.[7]

(*e*) *Moratorium*

The method of allowing a debtor a respite for the performance of his obligations is of especial importance as to unilateral obliga-

[4] See Munch-Petersen in *T.f.R.* 1898, pp. 24 f., and Karlgren, *Avtalsrättsliga spörsmål,* 2nd ed., Stockholm 1954, pp. 38 f.

[5] Almén, *Om köp och byte,* 3rd ed., sec. 24 at n. 23 g.

[6] See *supra,* p. 186 n. 4.

[7] See Kegel, Rupp & Zweigert, *Die Einwirkung des Krieges auf Verträge,* pp. 165 ff. Cf. also Kegel, *Aktuelle Grenzfragen der Geschäftsgrundlage* (7. Beiheft zur Deutschen Rechtszeitschrift), Tübingen 1949, pp. 3 ff.

tions.[8] To some extent it may, however, be possible to allow a respite for mutual obligations also.

Thus the Swedish emergency legislation during the second world war for the protection of persons called up for military service included some provisions of this kind. Buyers under credit sale or conditional sale agreements, who had been called up, were allowed a certain prolongation of the term of payment. Respites were also allowed for payments of rent, though only with the limited purpose of enabling conscript debtors to effect payments monthly as the authorities paid out their rent allowances and of giving the conscript time to arrange for the payment of the rent allowance. In principle, however, the dates of payment were not deferred; the moratorium was given the form that certain consequences of failure to pay, such as the seller's right to reclaim the goods, the tenant's forfeiting of the right of tenancy etc., should not ensue, provided payment was effected before a certain date.[9]

On the following pages we shall have occasion to mention certain Danish legislative measures of the early thirties for the protection of indebted farmers.[1] A general moratorium for the capital amount of mortgaged debts was here completed by a discretionary right for the courts to determine on the merits of each case whether a respite should also be allowed with regard to the interest.

Finally, attention should be drawn to a provision of a similar nature in the normal legislation. A tenant who, because his crop has failed, demands a reduction of his rent in accordance with Chapter 2, sec. 58, of the Swedish Tenancy Act is allowed a respite for payment until his application has been considered.

5. *Comprehensive statutory provisions*

During the last few decades certain attempts have been made to solve the problem under discussion by means of a comprehensive statutory provision. One such attempt is found in a Hungarian proposal for a Civil Code of 1928, another in the Polish Law of

[8] *Infra*, p. 194.

[9] See for an example a Royal Decree of May 26, 1944, on the application of the Moratorium Act, 1940, to certain conscripts. A similar legislative technique has been used in the German Decree on Judicial Assistance in Respect of Contracts, 1939, sec. 9; here, however, it is left altogether to the Court's discretion to decide, with retroactive effect, when a certain remedy shall be denied.

[1] *Infra*, p. 194.

Obligations of 1933,[2] a third in a proposal for changes in the German Civil Code, prepared by the *Akademie für Deutsches Recht* in 1935, and a fourth in the Greek Civil Code of 1946. The Restatement of the Law of Contracts (U.S.A. 1932) also includes a statement to a similar effect.

Section 1150 of the *Hungarian proposal,* translated into French, runs as follows:

> Si, après conclusion d'un contrat synallagmatique, un changement fondamental est survenu dans les circonstances générales, changement dépassant considérablement l'aléa usuel et dont les parties ne pouvaient raisonnablement pas tenir compte d'avance, et si, en conséquence d'un tel changement, l'équilibre économique des prestations réciproques envisagé par les parties se trouve renversé ou si une autre supposition servant de base au contrat fait défaut, de sorte qu'une partie acquerrait, contrairement à la bonne foi et à l'équité, un gain démesuré et inattendu et que l'autre subirait une perte correspondante (impossibilité économique); le juge peut modifier les prestations réciproques des parties conformément à l'équité ou autoriser l'une des parties à se désister, le cas échéant avec partage équitable du dommage.[3]

The *German proposal,* sec. 24, provided:

Beruft sich im gegenseitigen Vertrag der eine Teil darauf, dass ihm die Leistung infolge aussergewöhnlicher Umstände nicht mehr zuzumuten ist, so kann er eine angemessene Ausgleichung verlangen. Er hat dazu den anderen Teil aufzufordern, sich binnen einer angemessenen Frist darüber zu erklären, ob er einer Ausgleichung, deren Art und Höhe vorbehalten werden darf, zustimmt. Wird die Zustimmung verweigert, so kann der Ausgleichsberechtigte vom Vertrag zurücktreten, muss jedoch dem Vertragsgegner den durch den Vertragsschluss entstandenen Aufwand ersetzen.	If one of the parties of a reciprocal contract rightfully claims that, on account of changed conditions, it could not be reasonably expected of him that he should perform his contractual duties, he is entitled to demand an adjustment of the contractual relation. For this purpose he should invite the other party to let him know, within a reasonable time, if that party is willing to accept an adjustment, the scope of which can at that stage be reserved for further negotiations. Should the answer be negative, he can rescind the contract, but he must then pay the costs incurred by the other

[2] A statement of the Polish rule is given in the *Semaine internationale de droit 1937,* pp. 114 ff.

[3] See de Szladits, "La révision des contrats par le juge", *Semaine internationale de droit 1937,* p. 70.

Der Rücktritt muss unverzüglich erfolgen. Schon empfangene Leistungen sind nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung zurückzuerstatten.

Falls der Vertragsgegner die Ausgleichung ablehnt oder die Vertragsparteien sich über die angemessene Ausgleichung nicht verständigen können, entscheidet über Art und Höhe der Ausgleichung der Richter nach freiem Ermessen. Er kann zu diesem Zweck auch den Vertrag abändern. Er hat den Vertrag aufzuheben, wenn dem Vertragsgegner bei Berücksichtigung seiner gesamten Lage nicht zuzumuten ist, den Ausgleichsanspruch zu befriedigen.

Der Ausgleichsanspruch ist ausgeschlossen, wenn nach den gesamten Umständen und dem Sinn des Vertrages der Schuldner die Gefahr einer Veränderung der Verhältnisse tragen sollte.[4]

party by entering into the contract.

The rescission must be declared without delay. In the case of rescission, each party has a claim against the other for the restitution of what has been transferred, according to the rules of unjust enrichment.

If the other party declines to enter into negotiations aiming at an adjustment of the contractual relation, or if such negotiations fail, it is left to the discretion of the court to adjust the contractual relation as it may think best. The court may modify the provisions of the contract. If the other party could not reasonably be expected to accept an adjustment, the court shall rescind the contract.

If, the whole situation and the spirit of the contract being taken into consideration, the party demanding an adjustment ought to bear the risk of changed conditions, the demand shall be refused.

In the *Greek Civil Code* of 1946 Art. 388 runs, translated into English:

> In case of subsequent change in the circumstances on which the contracting parties, under consideration of the principles of good faith and of fairness in transactions, have mainly founded a reciprocal contract, the change being due to extraordinary and unforeseen events, and where because of such a change the obligation of the promisor—in comparison with the obligation of the promisee—has become excessively onerous to him, the court may, at the request of the promisor, reduce his obligation to the proper extent, or decree the discharge of the contract as a whole or to the extent of the non-performed part. In the case in which the discharge of the contract has been decreed, all the obligations arising from it cease to exist and the parties are mutually obliged to return all they have received according to the provisions relating to unjustifiable enrichment.[5]

[4] See Stoll, *Die Lehre von den Leistungsstörungen*, Tübingen 1936, pp. 78 f.
[5] Cited from the *Modern law review*, 11 (1948) p. 42, where this article is commented on by P. J. Zepos.

In *Restatement of Contracts*, sec. 288, we find:

> Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

It may be added that the 40th Conference of German Jurists in 1953 discussed the desirability of a statutory regulation of the problems in question. The predominating opinion was that general provisions, of the same character as those just cited, should not be aimed at. On the other hand, when a considerable change in the economic conditions has occurred, the legislator ought to provide fixed rules for typical situations which have arisen from this change.[6]

B. UNILATERAL OBLIGATIONS

If a contract of bilateral performance has been executed wholly on one side, there may remain an act or payment on the other side which is later rendered unduly onerous for the promisor, or which has lost most of its value to the promisee. The question may then arise whether this performance should be modified even though there is no question of intervention in respect of the performance that has already been executed.

The same problem may arise in connection with performance of a unilateral promise, such as a gift, or another obligation which, if not founded on a promise or other binding declaration, has yet become fixed as to its amount through such a declaration; promises of alimony or support afford examples.

In practice the problem is found to be concerned almost exclusively with unilateral money payments. But it also arises occasionally in connection with one type of unilateral performance in kind, namely, in connection with easements. Swedish legislation contains rules on easements which make it possible to re-model their actual content, where changed conditions provide occasion for such measures. Thus sec. 5a of the Easements Act, 1907, as amended in 1936, provides that the beneficiary of a right to take

[6] *Verhandlungen des vierzigsten deutschen Juristentages*, Vol. II (Sitzungsberichte), Tübingen 1954, Part B, pp. 86 ff.

dead wood on another's land may under certain circumstances have this right exchanged for one of taking fresh wood, where changed circumstances have rendered his original right useless. Norwegian courts have taken the same step without statutory support, basing their decisions on the doctrine of the underlying assumptions of the contract.[7]

(*a*) *Certain obligations are in principle subject to revision*

The starting-point for a treatment of the present aspect of our question is the basic rule, of nominalistic origin, stating that changes in the value of money are of no importance for the continued existence of an obligation.[8] This rule, however, is not without exceptions.

Thus German law recognizes a limitation to the scope of nominalism. Certain types of debts are designated as "value debts" (*Wertschulden*), and with regard to these a gradual accommodation to the current value of money is the rule.[9] Claims for damages and for unjust enrichment and other similar claims are treated as value debts until their amount has been ascertained by judgment or fixed by agreement. As a rule, therefore, the court should take account of currency fluctuations until the day of passing judgment.[1] Rights of alimony and support in family law, damages in the shape of life annuities, and some other obligations remain value debts after fixation of their amount.

The principle that certain unliquidated obligations remain adaptable after their amount has been fixed can also be said to have gained some support outside Germany, but it has hardly met with general acceptance outside the category of rights of alimony and support grants in family law. In French law, how-

[7] See the Swedish Easements Act, 1907, sec. 5–7 and sec. 5 a (added 1936), and, on Norwegian law, Stang, *Innledning til formueretten,* 3rd ed., p. 486. Cf. the opinion of the Swedish Council on Legislation reported in *N.J.A., Second series,* 1937, pp. 245 and 233 ff. Cf. also Illum, *Servitutter,* København 1943, pp. 242 ff.

[8] Cf. Ussing, *Dansk Obligationsret, Almindelig Del,* 3rd ed., sec. 5 III and IV.

[9] See Enneccerus & Lehmann, *Recht der Schuldverhältnisse,* 14th ed., sec. 11 II 3 b, Nussbaum, *Money in the law,* 2nd ed., pp. 180–188, and Boehmer, *Die Einwirkungen des zweiten Weltkrieges, der Nachkriegszeit und der Währungsreform auf privatrechtliche Verhältnisse* (8. Beiheft zur Deutschen Rechtszeitschrift), Tübingen 1949, pp. 23 f. and 33 ff.

[1] The same rule is found in French law, see Mazeaud, *Traité théorique et pratique de responsabilité civile,* 4th ed., Vol. III, Paris 1950, sec. 2405–2425. Cf. Godlewski de Gozdawa, *L'incidence des variations des prix sur le montant des dommages-intérêts,* Diss. (1954), Paris 1956.

ever, there has recently been a tendency for the courts to tie an index clause to awards for damages in the form of life annuities.[2]

Scandinavian legislation has in the main taken the position that alimony and support agreements (and judgments regarding such amounts) may be adjusted when conditions change; certain reservations must, however, be made as regards spouses who are judicially separated or divorced.[3] Changes in the value of money are one of the circumstances that may justify such adjustment. In Sweden and Finland the legislator has, moreover, when prices have risen, sometimes given tabular rules on an index basis for the adjustment of alimonies and supports.[4]

Concerning awards of damages, no definite practice appears to have been developed in the Scandinavian countries, but several indications from the general discussion show an inclination to allow fluctuations in the value of money after the occurrence of the loss to affect the issue, even, perhaps, up to the time judgment is passed.[5]

(b) Other obligations are in principle invariable

In other cases than those of value debts one is forced back to the nominalistic approach. The question then arises whether this principle is to be applied under all circumstances or whether exceptions should be introduced for cases of real catastrophe. The contrast between nominalism and valorism is here especially marked, since the only solutions available are that of adhering strictly to nominalism and that of accepting some kind of valorism. If an

[2] See the *Revue trimestrielle de droit civil,* 52 (1954) p. 646 and 54 (1956) p. 333.

[3] See the Swedish Marriage Code, 1920, Ch. 5, sec. 9, and Ch. 11, sec. 28, the Swedish Parents and Children Code, 1949, Ch. 7, sec. 8, the Danish Marriage and Divorce Act, 1922, sec. 71, the Danish Matrimonial Régime Act, 1925, sec. 9, the Danish Illegitimate Children Act, 1937, sec. 25, the Finnish Marriage Act, 1929, sec. 115, and the Finnish Illegitimate Children Act, 1922, sec. 27. The Norwegian courts are willing to adjust alimony and support claims without statute authority, see Arnholm, *Lærebok i familierett,* 3rd ed., Oslo 1958, pp. 315 f. Cf. Borum in *T.f.R.* 1939, pp. 136 ff.

[4] Swedish act June 6, 1952 (amended May 24, 1957), Finnish act Marsch 16, 1951. According to the Swedish act (as amended 1957), alimony or support is to be increased by 90 per cent if it was fixed (by agreement or judgment) in 1940 or earlier, by 55 per cent if fixed in 1941–1946, by 45 per cent if fixed in 1947–1950, by 20 per cent if fixed in 1951 and by 10 per cent if fixed in 1952–1954.

[5] See Karlgren, *Skadeståndsrätt,* 2nd ed., Stockholm 1952, pp. 202 f., and B. Nybergh in the *F.J.F.T.* 1956, pp. 139 ff.

On claims based on unjust enrichment, see Grönfors in the *F.J.F.T.* 1950, p. 233.

intervention is decided upon, the result will be an addition to the debt in the event of a deterioration of the value of money and a reduction of the debt in the event of an amelioration.

It is, however, not only fluctuations in the value of money that may create a need for modifying an obligation but also other circumstances decreasing the debtor's solvency or increasing the creditor's need for payment.

(i) As regards an *increased burden to the debtor* we may first note the rules in the ordinary law of forced execution relating to debtor's benefit (*beneficium competentiae*), which set a limit to the deprivation that can be forced upon the debtor. Moreover, there is the modern tendency to give the executive authorities a discretion to take account of especially mitigating circumstances and in such cases to postpone execution. Thus the Swedish Execution Act, 1877, sec. 88 c, provides that a respite may be given where the debtor has got into payment difficulties, which can be assumed to be of temporary duration, mainly through no fault of his own, e.g. owing to illness or unemployment or other such causes. It is, however, a condition that the creditor's right of payment should not be jeopardized or his rights otherwise unduly prejudiced; also the respite must not exceed six months.[6] Finally, mention should be made in this connection of the legislation relating to compulsory composition with creditors.

When a community undergoes a general crisis these rules, adjusted as they are for the most part to the needs of individual cases, will often be insufficient. It is then possible to extend the protective rules in the law of execution, but it is also possible to intervene in the field of ordinary private law. Here, however, the division between these two branches of the law is not distinct.

The two world wars have produced a heavy crop of legislation intended to assist debtors who have got into difficulties owing to the exceptional conditions of war-time. This was so in Sweden,

[6] This rule was established in 1945. Cf. on the corresponding German rules of 1933 Schönke, *Zwangsvollstreckungsrecht,* 5th ed., Karlsruhe 1948, sec. 27. There is also a special Execution Abuse Act, 1934, *(Vollstreckungsmissbrauchsgesetz),* which gives the execution authority the power to delay or refuse measures of execution if they should involve a severity inconsistent with moral principles *("eine mit dem allgemeinen Sittlichkeitsbegriffe unvereinbare Härte")*, see Schönke, *op. cit.,* sec. 44. In France, also, a similar rule was promulgated in 1936, see Toulemon & Blin, *Le respect de la chose jugée et la crise,* Paris 1939. Cf. Fréjaville, "Le declin de la formule exécutoire et les reactions des tribunaux", *Le droit privé français au milieu du XX^e siècle, Etudes offertes à Georges Ripert,* Paris 1950, Vol. I, pp. 214 ff.

where in 1914 there was declared a general private-law moratorium which was also extended to the law of forced execution; it was, however, soon abrogated, at least in so far as it concerned domestic debts, while a moratorium in the law of execution was retained somewhat longer. During a large part of the second world war a general moratorium was avoided, but some special protective provisions were made, these mainly having in view wage-earners called up for military service. Some of these provisions have been considered above in relation to bilateral obligations; to these were added others concerning on the one hand an extension of the debtor's benefit and on the other a possibility of allowing respites for the sale of property seized under judicial order (also property belonging to bankruptcy estates) until a certain time after the conscript's release from the services.[7] In Norway a general moratorium of short duration was declared on April 16th, 1940.[8]

In a deflation crisis there may also be a need for particular measures to be taken for the protection of debtors threatened by ruin. An example is afforded by the situation of land-owners during the thirties. In Sweden the legislator refrained from intervening, while in Denmark statutes of moratorium and compositions were enacted in the years 1931–1933.[9]

All the interventions now mentioned have been introduced by the legislator. The author knows of no case in Scandinavian law where it has been considered within the competence of the courts to help an embarrassed debtor by means of a respite or reduction of his debt.[1]

[7] Cf. the Moratorium Act, 1940, and a Royal Decree of May 26, 1944, on the application of the Moratorium Act on certain conscripts. Cf. also Kôersner & Rabenius, *Om moratorium,* Stockholm 1923.

[8] Cf. a very radical German decree of 1943, which gave the execution authority the power to invalidate, refuse or delay all execution measures if the execution had a causal connection with the war or its after-effects. See Schönke, *op. cit.,* sec. 3 I 5.

[9] See a Danish Moratorium Act, 1933, and a Danish Composition of Debts Act, 1933. Cf. Fr. Vinding Kruse, *Retslæren,* København 1943, Vol. II, pp. 843 ff. in the footnote. In Germany corresponding measures were taken, *inter alia,* by the Regulation of Debts Act, 1933.

[1] In Germany also it seems to have been the rule that difficulties in paying a money debt can be relevant only at the stage of execution. See Kegel, *Aktuelle Grenzfragen der Geschäftsgrundlage* (7. Beiheft zur Deutschen Rechtszeitschrift), pp. 6 and 8, and Boehmer, *Die Einwirkung des zweiten Weltkrieges, der Nachkriegszeit und der Währungsreform auf privatrechtliche Verhältnisse* (8. Beiheft zur Deutschen Rechtszeitschrift), p. 11. Some cases from the 1930's, in which the courts reduced retirement pensions payable by business enterprises which had got into financial difficulties, seem to be exceptions, see Volkmar, "La révision des contrats par le juge", *Semaine internationale de droit 1937,* pp. 21 f., and Cohn in the *Journal of Comparative Legislation and International Law, Third series,* Vol. XXVIII (1946), parts III & IV p. 23.

(ii) In other cases it may be that the change of conditions have resulted in the *performance having lost some of its value to the creditor* because of a fall in the value of money. The question here is whether an increase of the money performance can in such a case be considered to be indicated.

German law offers an example of a revaluation under extreme conditions of obligations concerning money loans and other similar unilateral obligations. During the years after the first world war the *Reichsmark* deteriorated and in 1923 it completely lost its value. In the November of that year the *Reichsgericht* introduced an appreciation *(Aufwertung)* of debts which had exceedingly far-reaching consequences. The court, however, refused to lay down definite rules for the appreciation, declaring that each case should be considered on its own merits and that such circumstances as the financial position of the parties and, in particular, the debtor's solvency should be taken into account. This new practice resulted in great confusion, and it became necessary for the legislator to intervene.[2]

The legislature did not venture to challenge the practice of the courts but accepted the appreciation principle, while at the same time limiting it and consolidating it. Some types of debts were appreciated by certain percentages (loans on mortgaged property by 25 per cent, industrial debentures by 15 per cent), while others, such as the bonds of the land credit associations, life insurance policies and savings bank accounts, were appreciated to the extent that the debtor's financial position would allow.[3]

The German example has remained isolated. The Austrian Supreme Court refused to adopt a similar policy, and an abortive attempt on the part of the Hungarian courts was soon forestalled by the legislator. Thereby, in the words of a Hungarian observer, an end was put to the courts' attempts to solve the insoluble task of introducing logic into the arbitrariness of inflation.[4]

The problem returned in Germany after the end of the second world war, but the position was now different. There was not, as

[2] See Nussbaum, *Money in the law,* 2nd ed., pp. 206 ff. Cf. Kôersner in the *T.f.R.* 42 (1929), pp. 1 ff.

[3] Nussbaum, *op. cit.,* pp. 211 ff. Sometimes courts outside Germany have revalorized debts expressed in German currency, see for an example Descheneaux on Swiss law in the *Journal of Comparative Legislation and International Law, Third series,* Vol. XXX (1948), parts III & IV p. 63. The Supreme Court of Sweden declined to do so in a case on a life-insurance claim, expressed in German currency, against a Swedish insurance company, *Försäkrings-AB Skandia* v. *Ditzinger,* 1930 N.J.A. 507 (II).

[4] See Nussbaum, *op. cit.,* pp. 215 ff., and de Szladits, "La révision des contrats par le juge", *Semaine internationale de droit 1937,* pp. 66 f.

there had been earlier, a uniform price level. An effective price control and rationing system was maintained for necessaries while in other respects the market was characterized by a scarcity of goods and an abundance of money; in consequence the black market flourished and the value of money was low.

In this situation the legislature effectively prevented any attempt at appreciation of debts. The courts had no opportunity to intervene on their own. To a certain extent they tried to assist the creditors by the substitute of a creditor's moratorium, which would give the creditors the possibility of refusing to accept payment pending the advent of the currency reform. This attempt was also stopped by the legislator.[5] Finally came the currency reform of 1948, which itself solved the appreciation problem by differentiation of the recalculation norm. Value debts in the sense used above were recalculated at the rate of 1: 1 (the same applied to payment for performances that had not yet been carried out), while most other pecuniary obligations were recalculated at the rate of 10: 1. The debts of the State (and certain other parties) were cancelled altogether.[6]

Thus, rendered wise by his experiences during the twenties, the German legislator this time solved the problem of appreciation within the framework of the currency reform and did not surrender any part of this responsibility to the courts.

In the Scandinavian countries the question of an appreciation has not been canvassed during the last half-century, even in Finland, where the deterioration of the value of money has proceeded furthest.[7]

CONCLUSIONS

We have now seen how strongly the need for possibilities of adjusting contracts on account of changed conditions has been felt in different countries in the course of the last half-century. The responsibility for the development has in part been assumed by the legislature. But the French view that the responsibility must rest wholly upon the legislature has not been accepted even in

[5] See Boehmer, *op. cit.*, pp. 22 ff. and 27.

[6] See Enneccerus & Lehmann, *Recht der Schuldverhältnisse,* 14th ed., sec. 11 II 3 d., and Boehmer, *op. cit.*, pp. 28 ff.

[7] Cf. G. Palmgren, *Handelsrättsliga inflationsproblem,* Göteborg 1949, pp. 8 f.

legal systems that are in principle founded upon codified law. As regards mutual obligations, the courts in the countries that we have been studying—except for France—have seen themselves called upon to assume the task of intervening in favour of parties who have become unduly burdened as a result of changed circumstances. In doing so the courts have been obliged to resort to various general doctrines in order to justify their acts, in the absence of the legislator's express delegation. In spite of variations in theoretical construction the concrete results have been remarkably similar. As to unilateral obligations the development has taken another course. Nominalism has retained its position, notwithstanding the German experiment in *Aufwertung* in the twenties, but its basic field of application has been limited through a recognition of valorism with regard to the type of debts that have here been designated as value debts.

Our investigation has been limited to the methods adopted by the legislator and the courts for solving the problems arising as a result of changed conditions. Another question which has not been considered here concerns the means by which the parties can themselves solve the problem with the aid of contractual clauses. This question would require a separate comparative analysis against the background of the results presented above.