

cería de importancia distinguir entre las varias especies de culpa, ya que, en el supuesto más extremo, siempre habría una presunción de buena fe que lo pone a salvo de las excepciones personales.

Sintetizando, podemos decir, que en derecho cambiario no hay sino cuatro casos de presunción de la buena fe exenta de culpa en que el tenedor, por lo mismo, está relevado de probar su diligencia de hombre avisado.

Vivante ha dicho sobre la buena fe, que debe presumirse siempre cuando el adquirente ignora que el vendedor no puede disponer de la cosa vendida, debiendo continuar su buena fe hasta el momento en que se efectúa la tradición. Si posteriormente llega a conocer aquel defecto, su adquisición no pierde la legitimidad originaria, aun cuando, por ignorar la seguridad de su posición, procure disimular el inesperado cambio de su estado de conciencia (*mala fide superveniens no cecet*); así la tradición de la mercancía verificada por medio del conocimiento de embarque, protege al adquirente de buena fe, aunque conozca la procedencia ilícita de las mercancías antes de su llegada. La ley protege igualmente al poseedor de mala fe, si su vendedor ha adquirido la mercancía de buena fe, porque puede ampararse bajo la defensa que corresponde a este último" (12)

No sobra, para finalizar, insistir en la dificultad de encerrar en una definición el concepto de la buena fe, desde el momento en que ella no tiene un solo y único significado para todos los pueblos, (13) y aún dentro de una misma legislación, como lo anota Fontanarrosa, de pronto se advierte que hay qué distinguir, por lo genral, la noción de la buena fe en materia posesoria de la que rige en materia negocial o contractual. (14). A este respecto es muy amplia la exposición que hace el doctor Alvaro Pérez Vives (15), sobre la buena fe, tomando como punto de referencia las sentencias de la H. Corte del año 36.

(12) César Vivante. Tratado de Derecho Comercial, tomo 3, pág. 116.
(13) "Incluso si tomamos la tan conocida edición, pág. 50 expresión bona fides, nos encontramos que significa una cosa en el derecho inglés y otra en el derecho continental. Precisamente se reconoció en la Conferencia de Ginebra sobre el Derecho de las letras de cambio, que los juristas franceses y los alemanes no tienen el mismo punto de vista sobre el significado exacto de la palabra bona fides". (Cita de Fontanarrosa, obra mencionada, pág. 50).
(14) Rodolfo O. Fontanarrosa. Derecho Comercial Argentino, tomo II seg. ed. pág. 50.
(15) Alvaro Pérez Vives. Compraventa y Permuta en Derecho Colombiano. Ed. Temis de 1953, pág. 551 y s. s.

MONETARY LAW AND CONTEMPORARY PROBLEMS

by Eliyahu Hirschberg, M. J.
(Jerusalem), M. Phil. (London)

I - The Importance of Monetary Law

Introduction:

Some authorities consider monetary law an obscure branch of Commercial law. Others believe that it is part of contract law. Both definitions are true to a certain extent. In modern times, however, monetary law is a very important part of jurisprudence. We live at a time when the instability of the value of money can be said to be the rule rather than the exception to it. Monetary law, therefore, serves as a test case of the adjustment of modern law to contemporary problems and requirements.

Monetary law serves as a foundation for the entire body of both private and public law. Monetary terms are used in contracts, wills, statutes, and treaties. Courts, jurisdiction is often defined in monetary terms, especially in Israel. The basic principles and approaches of monetary law should therefore be of general interest, since as a body they are one of the major contemporary problems.

The general public's interests are daily affected by changes in the value of money, and lawyers and economists are brought into constant contact with problems created by changes in the value of money. Monetary law is of the utmost importance for legal research —its principles and solutions affect other fields of the law— as well as

economic research, which influences the monetary policies of government. One of the author's prior studies¹ attempted to expound upon the basic approaches of monetary law and analyze its basic principles.

Theoretical Foundations of Monetary Law:

Since the Sixteenth and Seventeenth Centuries the law has used the nominalistic principle—a pound is always a pound—notwithstanding changes of value which in fact occur. This approach was adopted since it served the needs and interests of absolute monarchs and princes, who financed their needs and covered their expenses by depreciating the value of money, i. e., they were interested in repaying debts contracted in valuable coins with coins which they had depreciated. Since that time the basic approach of the law has not changed, and the nominalistic principle is still used universally by the law, notwithstanding the fact that money serves as purchasing power.

During the Great Inflation after World War I, the nominalistic principle was deviated from in Germany and some of the East European Countries, and partial revaluation of debts and obligations was carried out.

The issuance of currency was the first nationalized industry in world history. Monetary law has gradually been adjusted to protect the public interest. Nevertheless, monetary law in current times is still based on the absolute monarch's conception of the role of government in society and the economy, i. e., the imprint of absolutism is still present.

Modern Economic Reality and the Attitude of the Law:

During the period since the end of World War I the value of money has not been stable. Many reasons for this phenomenon have been deduced, but the main reason is that since the end of World War II, of the four major objectives of public policy—growth, full employment, internal stability of the value of money, and external stability of the value of money—stability of the value of money has been treated as the least important of the objectives and has been

1. *The Nominalistic Principle.*

A legal approach to inflation deflation, devaluation, and revaluation, by E. Hirschberg, Bar-Ilan University, Ramat Gan, Israel, 1971, 138 pages.

sacrificed at the expense of the first two. Indeed, the instability of the value of money has been a constant during the entire history of mankind, but only during the last fifty years has it assumed the all encompassing dimensions it has, at the same time that economic reality has also changed.

Nevertheless, the basic attitude of the law has not changed, and current law is substantially the same as it was fifty years ago. Anglo-Saxon monetary law may be treated as an underdeveloped branch of the law. Almost no attention has been given to its theoretical foundations and basic rules. Only two text books were published on the subject in the 1950's, as well as some articles, and only scant attempt has been made to test its basic principles and rules in light of contemporary reality. A maladjustment has consequently developed. The law has not adjusted itself to modern economic and social reality, maladjustment being the basic reason behind this crisis. Different approaches to the same problem prevail in economic theory and in political and government practice.

Modern Economic and Social Reality

Money as a Regulator of Economic Activity:

Under the capitalistic system money serves as a regulator of economic activity. It serves the same purpose, but to a lesser degree, under the socialistic system, which, however, has more direct means of control at its command. In economic practice an element of friction and maladjustment prevails. Economic dynamism therefore brings changes in the value of money in its wake, even if there is some theoretical disagreement about this phenomenon. Since the last world war economic dynamism has prevailed due to unsatisfied wants and government intervention, and the value of money has decreased almost universally. The difference between the situation in underdeveloped and developed countries has been one of degree rather than of kind. In many under-developed countries very rapid inflation has been prevalent. Since 1948 the Israel pound has lost 15.8/16.8 of its value, i. e., less than 6% of its external purchasing power has been preserved. In many Latin American countries the situation has been considerably worse. During the entire post-World War II period the basic attitude of the law has not changed, and in the eyes of the law the rule that "a pound is a pound" has remained in effect even though factual changes of value have occurred.

Whenever economic dynamism in a certain country —either on the consumer's or producer's side (in this instance it is very widely defined to include consumption, investment, and government)— is out of step with world developments, the remedy of devaluation or revaluation is resorted to in order to correct balance of payments problems. The remedy again entails change in the value of money. During the past fifty years several hundred devaluations have been carried out as well as several revaluations, the most recent in 1971.

The Social Dimension of Economic Dynamism:

As a general rule it may be stated that economic dynamism entails social sacrifices. Economic change causes social change. Not every class benefits to the same degree from economic development and growth. Inflation affects certain classes more than others. The producers benefit from inflation at the expense of the consumers. Current revenues and expense are affected, but parallel with current revenues, liquid saving and rights are gravely influenced. A distinction however must be made between current revenues and expenses and liquid savings. Current revenues and expenses are necessarily affected as a result of changes in the value of money; liquid savings are affected since the law adopts the approach that changes in the value of money are not taken into account when the extent of rights and obligations is ascertained. This phenomenon sometimes assumes very severe form, but it can always be perceived when changes in the value of money occur. Many mortgages, life insurance policies, and bonds which were issued twenty years ago in Israel are nearly valueless, except when they were linked to the cost-of-living index or to the U.S. dollar.

One of the by-products of inflation is that the social equilibrium is affected. Even though everyone tries to protect his relative standing in the community, not everybody is able to. The end result is strikes, social friction, social resentment, and in more severe cases, frustration. The world is in a period of change but social trends, which are the result of change, must be controlled and moderated, otherwise they will assume unhealthy proportions and form. Once crises erupt, they cannot be contained within disciplinary channels. The problems exist of social and political chain reactions, both national and international, which are not taken into account in disciplinary research.

Many modern phenomena, like consumerism and ecology in the United States, are the result of abuses by the producers, but are nonetheless generated by social tension and dissatisfaction with economic dynamism.

The Monetary Crisis Problem:

As has been stated previously, hundreds of devaluations have been carried out throughout the world since the end of World War I. Nevertheless, the two major reserve currencies of the world have been in financial trouble since at least 1967. The English pound was devalued on November 18, 1967. In March 1968 the two-tier system of gold prices was established. In August 1971 the convertibility of the U.S. dollar into gold was temporarily suspended. The German mark, the Japanese yen, the Swiss franc, and several other currencies have started to float against the value of the U.S. dollar. A general monetary instability currently prevails. This monetary instability has been caused by many political and economic factors; it may continue to prevail in the future and it may, and probably will, have political and economic repercussions.

Many monetary crises are unavoidable, being the result of structural factors and economic maladjustments. Their effects, however, might be alleviated, and this is a challenge to monetary law.

The Economic Crisis Problem:

Since 1929 no grave economic crisis has occurred in the United States, although until 1940 the economic did not fully recover from the crisis. The professional economists and the general public have gained a sense of security. They do not believe that economic crisis will occur in the future. A general fear of inflation prevails, but not one of economic crisis. Recessions, however, have and do happen in the United States and elsewhere in the post-World War II period. In 1971 the U.S. economic was slowly recovering from the last recession, which was caused by the disinflationary policies of the Nixon Administration, and even at the present time the general public in the U.S. is not as optimistic as it was in the past concerning the economic outlook. It seems unlikely that an economic crisis will occur in the United States in the near future, but it does seem possible in the more distant future.

An economic crisis may be brought about by a prolonged recession, which in turn may bring about a crisis in the confidence lodged in the economic. An economic recession is the result of lack of coordination of economic activities, an almost necessary result of the free initiative system of economic planning. Nevertheless, government, policy based on the countercyclical approach can counteract a recession, mitigate its effects, or at least postpone it. At present, recessions are often reinforced by disinflationary measures of governments, resulting from the pressure of public opinion of balance of payments considerations. The economic dynamism which prevailed in the United States since the end of World War II was triggered by the pressure of unsatisfied wants and in Europe and Japan by the process of economic recovery was partially financed by inflation. At the present time basic Economic dynamism is not as strong as it was twenty years ago.

The saturation problem currently exists in the United States, i. e., the present demands in durable consumer goods have nearly been fulfilled, with the exception of housing. Nonetheless, many problems continue to exist in the U.S. poverty, ecology, etc. New demands may be created and past ones expanded, but budgetary limits must be taken into account. Many of these problems can only be adequately solved by government initiative and vision, and their fulfillment might and probably will entail inflation. As long as the fear of inflation pervades, it will gravely affect government initiative in attempting to solve these problems.

The postwar demand by the consumers was the result of constant redefinition of the scale of economic values, with luxuries becoming necessities. This process has continued as long as the consumer maintained a sense of security, but since the process has continued for such an extended period, it can be retarded or reversed, as the consumer in certain situations becomes easily frightened. The saturation problem is less severe in Europe, and the general standard of living is much lower than in the United States; nevertheless, the fear of inflation is much greater than in the U. S. Consequently, in the event of recession the government, being immobilized by the fear of inflation, might adopt corrective measures too late and those steps might also be inadequate in nature. In such an event a crisis of confidence might develop and an economic crisis might set it. This is not to say that economic crisis will take place in the U.S., it only means that such a possibility exists.

Public Opinion and Government Policies:

As long as the fear of inflation motivates public opinion and the fight against inflation is a popular political issue, the government in a democratic country must give way to a greater or lesser degree to such pressure, which means that optimal growth is retarded. Moreover, the fear of inflation might motivate public opinion until the country is near the onset of economic crisis, and then it would be too late to adopt corrective measures. Government must therefore cope with the fear inflation at its roots and moderate inflation, since this phenomenon more or less causes a resistance to inflation. Inflation may be moderate, as concerns savings, through certain reforms in monetary law, and therefore the resistance to inflation may become a less potent force. The author's point is that monetary law finds itself in the strategic position between inflation and resistance inflation, but as its study at the present time is neglected, it cannot fulfill its to assist modern society in coping with and solving contemporary problems.

II - The Importance of the Reform of Monetary Law

Monetary Law in its Present Conditions:

Since the nominalistic principle pervades the entire body of the law at the present time, the law serves as an obedient tool of government policy. Government policy, however, has continually moved in a fixed direction during the postwar period, namely toward a decrease in the value of money. In effect, government policy in the past is responsible for the current phenomenon of resistance to inflation. Government in the past neither tried to reform inflation nor alleviate its effects. What the author is in fact suggesting is that the problem may be attacked from the side of the law. Very often, however, government policy moves along the path of least resistance. In the past the subservient attitude of monetary law was convenient for the policy-maker, but at a later stage the policy itself becomes ineffective as it encounters very strong resistance and opposition.

Possible Reforms of Monetary Law:

Partial reforms in monetary law could deprive inflation and devaluation of part of its terrors, as well as cause more just and, in

the end, more efficacious compromise between economic and social considerations; they would therefore deprive the forces of public resistance to inflation of part of their driving force, and in such an event a more effective compromise between economic dynamism and social protection of the status quo could be brought about. Such reforms of monetary law could be realized through reconciliation between the prevalent nominalistic approach and the valoristic approach, which maintains that the essence of money is its purchasing power. Some such reforms could be: freedom to include value clauses in private contracts, partial revaluations, and the adoption of the valoristic solution for long range obligations. (Such proposed reforms are the subject matter of a broader research work which the author is preparing and shorter articles to be published). The aim of the author's book, *The Nominalistic Principle*, was not to suggest specific reforms but to disseminate both theoretical and informative knowledge.

From the point of view of their research interests the experts are only infrequently interested in the basic principles of monetary law. The above mentioned books is intended for them in the same measure as for lawyers, economists, and the general public. The professional lawyers and economists, as well as the general public, daily come into contact with problems caused by changes in the value of money. Consequently they are resentful of the present solutions, which appear unjust and unsatisfactory to them. They do not however understand the basic approaches to the problem. The author's aim is to explain these basic theoretical approaches, to suggest certain solutions, and to let them judge for themselves. As has been stated previously, monetary law finds itself in the strategic position between inflation and devaluation and resistance to inflation and devaluation. The study of the basic principles and approaches of monetary law is therefore extremely important, since it forms important tool for coping with contemporary problems.

The Attitude of the Legislator:

The current problem is whether or no the legislator can reform the present law. It is obvious that this can be done, but there seems to be little or no will to do so. Furthermore, the reform of the law would be a difficult process. The legislator is a political being, and the attitude of the law toward changes in the value of money has

become a major economic and social problem. Therefore, the road to reform appears to be a tortuous route through aware and educated public opinion. The author's book is intended to be a step in the direction of reform.

It is quite possible that serious monetary and economic crisis will occur in the next few years, but there is always a hope that reform will take place, if not at this point then at least at a later time. Monetary law is in its essence international in nature; the reform movement therefore should also be international.

¿Is Informed Public Opinion Interested in Monetary Law?

Public Opinion comes into daily contact with problems caused by changes in the value of money. All over the world it is interested, as an influential body, in monetary and economic problems. Monetary law deals with the legal aspect of major economic and social problems. These problems are currently very topical in nature owing to the dollar problem and the problem of floating and revalued currencies. During the last ten years alone in Israel three currency devaluations have been carried out. Further monetary instability throughout the world is envisioned by the author, but if the necessary steps are taken on an international level at an early enough date, then it seems likely that these problems can be avoided, or at least alleviated.

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