

BOOK REVIEWS

MONEY IN THE LAW. By ARTHUR NUSSBAUM. Chicago: THE FOUNDATION PRESS, 1939. Pp. 515.

Had Professor Nussbaum written this book on money before the outbreak of the Great War of 1914, its publication would probably not have attracted as much attention from the legal profession as it is now certain to do. Because of the unparalleled relative stability of economic and monetary conditions which characterized the period ending with the World War, lawyers of the pre-War period did not regard money "as a problem of paramount importance, but as an established fact"¹, and did not find legal problems of money exciting enough to write about. It is, therefore, not surprising that the classic treatments on money by Savigny and Gustav Hartman (1868) had scarcely any successors on the continent² nor any counterpart in the Anglo-American legal literature. It needed the great monetary disturbances which followed the World War to change this attitude. Problems of money were no longer interesting only to the economist; they became fascinating even to the lawyer. This change of attitude produced on the continent a considerable number of monographs (among which Mr. Nussbaum's book, *Das Geld*, appearing in 1925, is the most outstanding) and in America, excellent articles. The English literature presented us with Mr. Feavearyear's book on *The Pound Sterling* (1931) and, shortly before the appearance of Mr. Nussbaum's book, with Mr. Mann's excellent monograph on *The Legal Aspect of Money* (1938). The Anglo-American literature, however, failed to produce a comprehensive treatise. This gap has now been filled by Mr. Nussbaum, a scholar eminently qualified for this undertaking. This new book is by no means a translation of his former work. He has made rich use of our experience since 1925 and he has focused his attention on Anglo-American law without giving up the comparative law approach already used in his earlier book. This is very fortunate indeed. There is no field in law where the comparative law approach can be used to greater advantage. It enables the Anglo-American lawyer to profit by the experience of others, a procedure for which he has a precedent in the attitude of Sir John Davis, who decided the famous case *De Mixt Moneys* in 1604,³ on the basis of continental theories.

¹ MANN, THE LEGAL ASPECT OF MONEY (1938) V.

² M. WOLFF'S, DAS GELD in 4 (1) EHRENSBERG'S HANDBUCH DES HANDELSRECHTS 563, which appeared in 1917, is the outstanding monograph written in the pre-War tradition.

³ *Gilbert v. Ireland*, Davis's (Ireland) 18, 2 State Trials 114, 80 Eng. Rep. 507 (1605).

Mr. Nussbaum's book is of an astounding comprehensiveness: The first three chapters are devoted to Basic Monetary Conceptions in Law (Ch. 1), Kinds of Money (Ch. 2), and The Monetary System (Ch. 3). The remaining five chapters are devoted to Debts in General (Ch. 4), Debts under Fluctuating Currencies (Ch. 5), Gold Clauses and Other Protective Clauses (Ch. 6), Foreign Currency Debts (Ch. 7), and Debts under Exchange Control (Ch. 8).

Mr. Nussbaum is an adherent of the "society" theory of money, as a fascinating section of the first chapter on "Money of the State" (pp. 23-36) clearly shows. According to this theory which had already been advocated by Savigny, it is not the state, but "ultimately society and custom that decide whether coin and paper will function as and so be money." (p. 28) Although it is true, Mr. Nussbaum concedes, that ordinarily the state has and exercises full power over the currency, past experience with fiat money destroyed by complete depreciation shows that there are limitations on the monetary power of the state. This is undoubtedly true as the history of French *assignats*, American continentals and German *marks* tells us. It is also true that courts, Anglo-American as well as continental, have been forced quite frequently by the pressure of society to recognize the monetary character of private currency in emergency situations, as, for instance, when there was a great scarcity of small coins because of rapid inflation. Still, I submit that the contrast between the two theories is over-emphasized. G. F. Knapp, the most famous protagonist of the state theory of money, regarded the state only as the regular and oldest type of a payment community and admitted that any other payment community may create money of its own. The state, not as a state, but "because it is a pay-society, can create a unit of value for itself".⁴ If this explanation is taken into account, the state theory of money is the expression of a very realistic insight. Since the modern state is the most important receiver and maker of payments, the attitude of the pay offices of the state with respect to the media of payment they take and force upon the public is a matter of prime importance for the monetary system.⁵ I also fail to agree with the learned author's contention that the state theory of money prevails in German decisions. The German *Reichsgericht* has recognized the monetary character of emergency money as Mr. Nussbaum himself admits. One of the decisions of the *Reichsgericht*, which Mr. Nussbaum cites (96 RGZ 262) used the state theory of money only

⁴ KNAPP, THE STATE THEORY OF MONEY (1924) 128.

⁵ The best discussion of KNAPP'S STATE THEORY OF MONEY is to be found in Max Weber's *Wirtschaft und Gesellschaft*, 3 GRUNDRISS DER SOZIALÖKONOMIE (2d ed. 1925), 40 *et seq.*, 109 *et seq.*, and in PALYI, DER STREIT UM DIE STAATLICHE THEORIE DES GELDES (1922).

by way of obiter dictum where it allowed a Swiss creditor to collect depreciation damages from his German debtor who had defaulted because the Swiss creditor had suffered damages in Switzerland on account of the depreciation of the German mark which was only a commodity and not a measure of value in Switzerland. In the course of the opinion, the *Reichsgericht* remarked that "money is a measure of value and medium of payment only by virtue of the command of the state and only within the limits of the state's territory."

The second chapter of the book contains a fascinating discussion of the Portuguese banknote case (pp. 93-99). Chapter 3, dealing with the colonial antecedents, the legal history of the dollar, the present dollar and the constitutional aspects of the American monetary system is particularly deserving of attention. Chapter 5, dealing with debts under fluctuating currency (pp. 249 *et seq.*) is especially good reading. It contains a very vivid account of the ghastly development of the German inflation and the revaluation efforts of the German *Reichsgericht* and of the German legislature. Mr. Nussbaum is very outspoken in his condemnation of the efforts of the *Reichsgericht* to stem the tide of the inflation.⁶ He claims that it would be "difficult to find in the legal history of the great countries of Western civilization a similar instance of such thoroughgoing aberration and confusion" (p. 277). The revaluation doctrine of the *Reichsgericht* in its confusion of ethical with legal considerations can be accounted for, the author tells us, only by its sociological background. The German *Reichsgericht*, when abandoning the principle that mark equals mark, was the spokesman of the German Bourgeois middle class which resented the entire destruction of its savings; and the middle class, through the *Reichsgericht*, imposed its will upon the government. No justification for the attitude of the *Reichsgericht* can be found, Mr. Nussbaum asserts, in the theory of "revolutionary emergency law" because "an emergency situation does not confer revolutionary powers upon ordinary law courts. On the contrary, it is during just such emergency situations, that the law should be cherished and defended by the courts." These quotations, interesting as they are, might be misleading. They might be interpreted as an indication of a difference in attitude between continental and American lawyers as to the division of powers between courts and legislature. I personally feel quite differently towards the attitude of the German *Reichsgericht*, so harshly condemned by Mr. Nussbaum. First, I doubt very much whether the *Reichsgericht* really usurped legislative powers. The provision of the German Civil Code that obligations have to be

⁶ Mr. Nussbaum had already voiced these criticisms in Germany in his monograph, *BILANZ DER AUFWERTUNGSTHEORIE* (1929).

performed in good faith, gave, in my opinion, a sufficient basis for the decision of the German *Reichsgericht*.⁷ Second, even if we grant that the *Reichsgericht* had taken over legislative powers, it would only prove that the traditional view, to the effect that the German system is based on a clear-cut separation of legislative and judicial power, has proved to be false. In the last analysis, every interpretation of a statute is a legislative act.

Mr. Nussbaum is—as the review has already indicated—a nominalist. The extent of monetary obligations is independent of the functional value of money, particularly its purchasing power. (pp. 249 *et seq.*) However, he concedes that the nominalistic theory is properly applicable only to obligations calling for liquid claims; in the field of unliquidated claims, such as claims for damages, the nominalistic view is not compelling. Those claims are adaptable to a serious change in the purchasing power. However, Mr. Nussbaum does not go so far as to extend his qualification to executory bilateral contracts. He seems to be in favor of applying the nominalistic theory here as his discourse of *Willard v. Tayloe*⁸ shows (p. 263). The basis of his attitude again is his philosophy as to the distinction between judicial and legislative function.

It is undoubtedly true that the nominalistic theory of debts has been voiced by many courts, both Anglo-American and continental, but the problem remains to justify the theory. For Mr. Nussbaum, the explanation of nominalism lies in the basic concept of money. According to him, money differs from other fungibles “in that its composition is legally irrelevant”. “Only the relationship of the money piece to a certain ideal unit (dollar, pound sterling, *franc*, *mark*, etc.) has legal relevancy, inasmuch as the thing is treated as money and not as a mere piece of metal or a scrap of paper.” (p. 5). It is “a thing which, irrespective of its composition is, by common usage, treated as a fraction, integer or multiple of an ideal unit.” (p. 5).

On this money concept, he bases his theory of monetary debts which, according to him, call for a sum of ideal units (units of account). Since a debt “is defined by its monetary unit, together with the figure that accompanies it,” he concludes that “changes in the monetary field which have no bearing either upon such unit or figure do not affect the debt” and this is “particularly true,” according to the author, “of changes affecting the metal value, purchasing power, or rate of exchange of the unit.” I submit that this reasoning is neither convincing nor exhaustive. It is not difficult to make out an equally good case for

⁷ CIVIL CODE §§ 157, 242.

⁸ 75 U. S. 557 (1869).

valorism by regarding the transfer of purchasing power as the characteristic feature of a monetary debt.⁹ What are, then, the reasons which have motivated so many courts to take a nominalistic point of view. Certainly one of the reasons, and a very compelling one, is expediency. It is quite impossible to take account of every fluctuation in the purchasing power of money. Also, an abandoning of nominalism would raise the difficult question as to whether changes in the purchasing power of money not originating from credit expansion or contraction are to be taken into account.¹⁰ But these reasons of expediency ceased to be compelling in times of severe depreciation. Our experience with severe depreciations has also made evident the illusory character of Knapp's justification of nominalism based on the "amphitropic" position of each individual, namely, the fact that each individual is debtor as well as creditor.¹¹ This theory reflects the monetary stability of the pre-War period.

Is it justifiable to put the risk of even a severe depreciation on the creditor? The most interesting effort to justify nominalism, even in the case of a severe depreciation (caused by the issuance of greenbacks) is to be found in Justice Strong's opinion in *Knox v. Lee*, one of the Legal Tender Cases.

"It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. . . . The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so the expectation of results would be always equivalent to a binding engagement that they should follow. But the *obligation* of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made."¹²

But even this theory may lose its persuasive force in the collapse of the monetary system. It has been argued (for instance by Cassel) that nominalism is necessary to keep the official currency in circulation. This argument also is not convincing, although it contains some truth. The legal tender quality of money is probably an important factor in keeping fiat money in circulation. But the legal tender legislation does not in itself determine the quantum of money to be paid as Dawson and

⁹ ECKSTEIN, *GELDSCHULD UND GELDWERT* (1932).

¹⁰ MANN, *op. cit. supra* note 1, at 63.

¹¹ KNAPP, *op. cit. supra* note 5, at 48.

¹² 12 Wall. 457, 548 (U. S. 1870).

Cooper have convincingly shown.¹³ It is also not true—as a German court had it—that “without nominalism, capitalism is inconceivable”. However, it is arguable that nominalism has a very important function in a society, the equilibrium of which has been reached at a point of under employment. It makes it possible for the government to try to raise employment by credit expansion. On the other hand, it is quite interesting to notice, a very thoughtful writer has pointed out that nominalism does not have the character of “*jus cogens*”.¹⁴ On the contrary, parties, if they wish to do so, have the right to protect themselves against fluctuations of the purchasing power of money, by gold clauses or by referring to commodity price indices.¹⁵ Nominalism and valorism, it seems, are both “correct” theories within their limitations. It is impossible to take sides in the controversy as long as the social and economic implications of either theory have not been clearly elaborated.

It would take the space of another review to discuss adequately the remaining chapters of the book dealing with gold and other protective clauses, foreign currency debts and debts under exchange control. The subject-matter covered in these chapters bristles with many and very intricate problems. The author handles them with fine craftsmanship.

Mr. Nussbaum's book exhibits an unusual erudition and it is extraordinarily stimulating. Any legal scholar or practicing lawyer who has to deal with the many legal problems relating to money will find Mr. Nussbaum's book indispensable and of invaluable assistance.

FRIEDRICH KESSLER*

CASES AND MATERIALS ON THE LAW OF CORPORATIONS. By HENRY WINTEROP BALLANTINE and NORMAN DUNHAM LATTIN. Chicago: CALLAGHAN & Co. 1939. pp. xxxii, 917.

This latest accession to the array of casebooks now available in the field of corporations and other business organizations is an excellent piece of work. It covers the main topics familiarly dealt with in a first course in corporations, such as the formation of corporations, the limitations on the use of the separate entity privilege, criminal and tort

¹³ *The Effect of the Inflation on Private Contracts: United States, 1861-1879* (1935) 33 MICH. L. REV. 852, 904 ff.

¹⁴ ECKSTEIN, *op. cit. supra* note 9, at 74; MANN, *op. cit. supra* note 1 at 61, n. 4.

¹⁵ That this does not mean that a creditor has a “constitutional right” to protect himself by gold clauses, is illustrated by *Norman v. Baltimore & Ohio Ry. Co.*, 294 U. S. 240 (1935), upholding the constitutionality of the Joint Resolution of June 5, 1933.

* Associate Professor of Law, University of Chicago Law School.