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THE NATURE OF NOMINALISM

The nominalistic principle is a principle of the law of obligations which deals with the problem of the extent of a monetary obligation. This principle is usually summarized in the following way: a unit of currency is always equal to itself, a pound is equal to a pound, a dollar is always equal to a dollar, a.s.o., and neither external changes in the value of currency, namely the rate of exchange in relation to other currencies, nor internal changes of value of money are taken into account. Therefore, a legal fiction is adopted, namely a presumption juris et de jure in respect of the identity of value of units of currency at different periods of time. The nominalistic principle was defined in three possible ways.14

a. Fictiously a sum of units of currency has the same value as the same amount of gold coins.
b. According to the second approach it is presumed fictiously that the value of currency does not change.
c. According to the third approach the value of money is not taken into account when the extent of a monetary obligation is ascertained.

The third approach is generally accepted and this means that the value of money is not relevant when the extent of a monetary obligation is fixed — so that payment of the nominal sum is sufficient to discharge the debt.

The legal sources of the nominalistic principle

Only in a few countries has the nominalistic principle originated in legislation, as in France where it was adopted by section 1895 of the Code Napoleon. In Anglo-Saxon countries the principle is part of the Common Law, as decided by such cases as Gilbert v. Brett.15 Mann16 expresses the view that this principle forms part of the law of contracts. According to the majority opinion of legal writers this principle belongs to the general law of obligations. It is jus dispositivum, as the parties can contract out of it through the Provision of value clauses. Mann is of opinion that it does not originate in public law or in public policy, but is a principle of purely private law.17 In the Treseder Griffin18 case Lord Justice Denning enunciated a doctrine of public policy and relied on it inter alia to invalidate the gold value clause which was in issue in this case.19 This decision is however incompatible with the rule adopted by the House of Lords in the Feist case20 in which gold clauses were held to be valid, and therefore its binding effect is doubtful.

According to Mann the binding effect of the nominalistic principle originates in the intention of the parties. In the majority of cases the parties do not expect changes in the value of money. In other cases, even if they take such a possibility into account, it does not influence them to such a degree as to cause them to protect themselves through the inclusion of value clauses. The law does not permit the implying of terms which were not included, or which were included but which were not clearly expressed. Therefore the parties are presumed to contract according to the nominal value of money.21 A. Levontin22 is of opinion that this doctrine is not materially different from the legal principles which regulate the supply of commodities and services. The creditor receives the same thing as was promised him. In the same way that a change of value of a thing in the contractual period does not affect the extent of an obligation, so an obligation to pay a sum of money (as chatteis) is not affected by changes in the value of money during the contractual period. Nevertheless, in our opinion, the nominalistic principle does not originate in private law but in public law, though its clear definition in private law enables us to define its boundaries and to eliminate its shortcomings.

The former foundations of the nominalistic principle
The State was interested in upholding the nominalistic principle, mainly on account of fiscal considerations, i.e. the State used to discharge its obligations, received in good money, in depreciated money. But in such a way damage was caused only to the State's creditors, a fact which would have deterred them from making a loan of money to the State. Therefore the State was interested that its own creditors should be able to discharge their obligations to their creditors in the same depreciated money as that in which the State discharged its debts to them, and this was the reason for upholding the nominalistic principle.

The analysis of ancient authorities relating to the nominalistic principle like Molinaeus' book and the case of *Gilbert v. Brett* leads us to the conclusion that the nominalistic principle had an absolute foundation based on the royal prerogative. The sovereign had a prerogative to coin money, on which his emblem was inscribed. This emblem endowed the coin with the quality of being the sovereign's property and entitled him to change the value of the money. The prerogative was understood in the same sense as ownership over the coin and absolute rule over it. R.J. Pothier maintained that coins belong to private citizens only as signs of the value that the sovereign has provided that they should embody; therefore, if the sovereign has reached the conclusion that other coins should reflect the value of commodities, private persons are not entitled to keep the former coins. This was the approach which distinguished the monetary thought of the first nominalists and which guided the judges in the *Gilbert v. Brett* case, who concluded that the Queen is authorized to change the current money and to exchange it into other currency. Some remnants of this approach may be perceived in the comparatively modern case of *Emperor of Austria v. Louis Kossuth*. In this case Kossuth, a Hungarian refugee who had been the leader of the Hungarian rebels during the revolution of 1848, had coined a new currency, which purported to be the Hungarian currency. The Emperor of Austria asked for an injunction against the coining of such currency, and the Court issued such injunction as asked. The Court pointed out that the Emperor of Austria made a profit out of the coining of currency, and the issuing of new currency into circulation would injure the Emperor's property rights.

Such an absolutist conception is very remote from our modern notions. The approach that currency is the property of the sovereign is incompatible with modern notions with relation to private property and is incompatible with our notions in relation to the functions of the State and its Status in relation to currency. Nevertheless, this approach has influenced modern thought through the ancient authorities.

The modern foundation of the nominalistic principle

The theoretical foundations of the nominalistic principle are based on the prerogative of the State over currency. The currency is the creation of the law, arising out of the legislative activity, of the State. The parties contract on the basis of the value of money as fixed by the law, namely on the basis of the nominal value. From this point of view the theory of E.G. Knapp is the theoretical foundation of modern nominalism. The State has the prerogative over money. This fact enables it to fix the amount of currency in circulation, its relationship to foreign currencies and its relationship toward gold, as it deems fit. If a party contracts on the basis of a national currency, he contracts on the basis of the value fixed from time to time by the State. This notion was the ratio decidendi of the decision in a leading case decided by the American Supreme Court, dealing with the legality of "legal tender". It has been said in it that a contract in respect of payment of money suffers from a congenital infirmity, as it is subjected to the prerogative of government authorities in respect to currency, and the obligations of the parties are subject to this prerogative. This view was severely criticised by the minority opinion in this judgment — *inter alia* by Mr. Justice Field, who explained that no substantial difference exists between contracts in respect of payment of money and contracts for the supply of commodities, or contracts dealing with the purchase of land. And just as the government does not interfere with such contracts, it should not interfere with contracts in respect to the payment of money.

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15 (1604) Davis 18, 2 Staple Trials 114.
16 *The Legal Aspect of Money [2nd ed.]*, p. 63-64.
19 This case will be discussed elsewhere.
Referring Principles:

V.2.3 - Nominal-value principle