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# The Monetary Legal Theory Under the Talmud

Benjamin Geva

*Osgoode Hall Law School of York University*, [bgeva@osgoode.yorku.ca](mailto:bgeva@osgoode.yorku.ca)

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**Research Paper No. 23**

**Vol. 10/ Issue. 07/ (2014)**

### **The Monetary Legal Theory Under the Talmud**

Geva, B. (2008). The Monetary Legal Theory Under the Talmud. *Revue Internationale Des Droits de l'Antiquité*, 55, 13-38.

Benjamin Geva

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**Abstract:**

Two fundamental principles of modern legal theory of money are nominalism and currency. Both refer to the object passing as money, and its use in payment of debts. Under the former, this object circulates and is tendered in the value of prescribed abstract units of account, as defined by law from time to time, regardless of its own intrinsic value, or even the obligation to redeem it at something of that intrinsic value<sup>1</sup>. Under the latter, this object passes from hand to hand in circulation free from adverse claims of prior owners<sup>2</sup>. A third principle, existing side by side with the two enumerated above, is the issue of the object under the authority of a state and its acceptance by the public at large<sup>3</sup>.

**Keywords:**

Law, Money, Debt, Value, Banking

**Author(s):**

Benjamin Geva

Professor

Osgoode Hall Law School

York University, Toronto

E: [bgeva@osgoode.yorku.ca](mailto:bgeva@osgoode.yorku.ca)

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# The Monetary Legal Theory Under the Talmud

Benjamin GEVA

(*Université de York à Toronto\**)

## 1. *Introduction*

Two fundamental principles of modern legal theory of money are nominalism and currency. Both refer to the object passing as money, and its use in payment of debts. Under the former, this object circulates and is tendered in the value of prescribed abstract units of account, as defined by law from time to time, regardless of its own intrinsic value, or even the obligation to redeem it at something of that intrinsic value<sup>1</sup>. Under the latter, this object passes from hand to hand in circulation free from adverse claims of prior owners<sup>2</sup>. A third principle, existing side by side with the two enumerated above, is the issue of the object under the authority of a state and its acceptance by the public at large<sup>3</sup>.

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\* LL. B. (HU Jerusalem), LL. M., SJD, Harvard; Professor of Law, Osgoode Hall Law School of York University, Toronto, Canada. I acknowledge with gratitude research assistance of Joseph Salmon and Joseph Juda, both of Osgoode Hall Law School, as well as financial support of the Social Sciences and Humanities Research Council of Canada (SSHRCC), as part of a Major Research Grant on the legal history of the order to pay money. All errors are mine.

<sup>1</sup> See e.g. C.PROCTOR, *Mann on the Legal Aspect of Money*, 6th ed., Oxford 2005, p.228.

<sup>2</sup> The classic case is *Miller v. Race* (1758), 1 Burr. 452; 97 Eng. Rep. 398, where Lord Mansfield stated (at 457, Burr; 401, Eng. Rep.) that money "can not be recovered after it had passed in currency" so that "in case of money stolen, the true owner can not recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration..."

<sup>3</sup> Both the state and societal theories of money are discussed by Proctor, above note 2, respectively at 15 and 23.

Way back in Antiquity, the coin<sup>4</sup> emerged as an object used exclusively as money<sup>5</sup>. From its inception and early development, the coin had been a piece of metal, stamped with a mark certifying its intrinsic value<sup>6</sup>. Over the years<sup>7</sup>, the shape became predominantly round and the mark predominantly came to be also that of a figure, frequently the coin issuer, a state ruler<sup>8</sup>. Under the then prevailing metallic theory, the coin circulated primarily<sup>9</sup> by reference<sup>10</sup> to the

<sup>4</sup> “Coin in French. signifieth a corner, and from thence hath its name, because in ancient times money was square...” See M.HALE, (d. 1676), *The History of the Please of the Crown*, 1st American ed. By WA Stokes & I. Ingresoll, Philadelphia 1847, vol. 1, p.187, note 2.

<sup>5</sup> For the origin of the coin in the city-state of Lydia in Asia Minor around the 7th century BCE, see e.g. P.EINZIG, *Primitive Money*, 2nd ed., Oxford 1966, p.192, pp.217-219. See also F.REBUFFAT, *La monnaie dans l’antiquité*, Paris 1996, p.25. For an extensive discussion, see R.M.COOK, *Speculations on the Origin of Coinage*, *Historia* 7 (1958), p.257.

<sup>6</sup> Roman coins were the first to consistently bear explicit value-marks; previously, “For most part the Greeks allowed the size of the various pieces to tell its own tale”, though occasionally, “the type was modified in such a way as to indicated the denomination.” G.MACDONALD, *The Evolution of Coinage*, Cambridge 1916, pp.132-133.

<sup>7</sup> For my own account of the process, see B.GEVA, *From Commodity to Currency in Ancient History – On Commerce, Tyranny, and the Modern Law of Money*, 25 *Osgoode Hall LJ* 115 (1987), pp.121-141. According to *Le Case De Mixt Moneyes* (1605), Davis 18; 80 Eng. Rep. 507 six elements are essential to the legitimation of a coin: (1) a fixed weight; (2) fineness or alloy, (3) impression, (4) denomination; (5) authority of the prince, and (6) proclamation. For a detailed discussion, see particularly HALE, above note 4 at 196, and in general at 187 ff. See also J.COMYN (d. 1740), *A Digest of the Laws of England*, 3rd ed., London 1792, vol. 5, p.94 and J.L.WENDELL, *Blackstone’s Commentaries on the Laws of England*, New York 1858, vol. I, pp.276-278.

<sup>8</sup> The practice of placing the ruler’s effigy on coins, discouraged in the Greek World and the Roman Republic, was introduced or at least reinforced by Imperial Persia. Thereafter, engraving the portraits of living rulers became a valid expression of the divinity of the reigning monarch and his sovereign power. See A.R.Burns, *Money and Monetary Policy in Early Times*, New York 1965, reprint of 1927, pp.113-135, particularly pp.133-135. See also I.CARRADICE, *Greek Coins*, London 1995, p.43, pp.58-60, pp.63-64.

<sup>9</sup> The principal exception has been small change money. For a complex economic analysis relating to the Middle Ages see: T.J.SARGENT and F.VELDE, *The Big Problem of Small Change*, Princeton and Oxford 2002.

<sup>10</sup> In principle, the value of the coin further reflected the coin production costs. See A.SMITH, *The Wealth of Nations*, Books I-III, with an Introduction by A.SKINNERS, London 1970; rep. 1986; first published 1776, p.148 (Book I Chapter V). Production costs express the liquidity service rendered by the coin, not provided by the bare piece of metal of which it consists.

value of its metallic content<sup>11</sup>. Hence, in its original and 'purist' form, metallism did not only signify the definition of money in terms of a standard measured by a prescribed quantity of a precious metal<sup>12</sup>; rather, it further related to the actual conformity of each coin, as the means of payment, to that standard<sup>13</sup>. Certainly, the prevailing principle was that of metallism and not nominalism<sup>14</sup>.

This paper examines the treatment by the Talmud<sup>15</sup> of the two fundamental principles of the modern legal theory of money. The paper is thus designed to demonstrate the existence of a principle facilitating the currency of the coin, as well as cracks in the metallic theory of money, that in retrospect heralded, one thousand years later,

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<sup>11</sup> See e.g. BURNS, above note 8 at 284, explaining that the value of coins as money, namely, the purchase power embodied therein, "can never, for any long period, fall below their value as a commodity, because they can always be converted from coin into metal by melting."

<sup>12</sup> In which form it subsisted as late as the nineteenth century CE. See A.NUSSBAUM, *Money in the Law National and International*, Brooklyn 1950, p.2.

<sup>13</sup> According to F.REBUFFAT, above note 5 at 131 "it is a truism to affirm that the value of a coin primarily depends on the value of its metal from which it consists, its quality, and its weight."

<sup>14</sup> For viewing nominalism as "A money conception which dissociates itself from the metallic element" and thus as the antithesis of metallism see NUSSBAUM, above note 12 at 17.

<sup>15</sup> The Talmud is the summary of the oral law that evolved after centuries of post-biblical scholarly effort by the Jewish sages who lived in Eretz-Yisrael (Palestine, being biblical Canaan, or Judea as it was until shortly after the turn of the Common Era (CE)) and Babylonia. It has two complementary components; the Mishna, a book of law, and the extensive commentary, in the form of an edited record of the discussions in the academies, known as Gemara. In principle, each Mishnaic law is followed by the corresponding Gemara commentary, so that both form the Talmudic text on a given point. The compilation of the Mishna was completed in Eretz-Yisrael around 200 CE. There are two versions for the Gemara, between which the one whose compilation was completed in Babylonia in the fifth century CE ("Talmud Bavli") is the more authoritative one. The compilation of the other version, known as the Jerusalem Talmud ("Talmud Yerushalmi") was completed in Eretz-Yisrael in the fourth century CE. For an introduction, see e.g. A.STEINSALTZ, *The Talmud - The Steinsaltz Edition - A Reference Guide*, New York 1989. "If the Bible is the cornerstone of Judaism, then the Talmud is its central pillar ..." A.STEINSALTZ, *The Essential Talmud*, New York 1976, p.3. Other than indicated otherwise, the ensuing discussion is on the basis of the Hebrew-Aramaic original text of the Talmud Bavli. English translation and comprehensive commentary is published by Mesorah Publications Limited, the Artscroll Series/Schottenstein Edition. Unless otherwise specifically indicated otherwise, all Jewish law sources cited and discussed in this paper are in Hebrew (or Aramaic).

the emergence of nominalism<sup>16</sup>. It will also demonstrate that the Talmud took for granted the third principle, that of issue by state and acceptance by the public.

The Talmud contains passages reflecting a sophisticated multi-metal coin system<sup>17</sup>. At the time of the Talmud, coinage issued by Jewish rulers had been a matter of history<sup>18</sup>; coins under discussion are thus predominantly if not exclusively foreign, that is, not issued by Jewish rulers<sup>19</sup>. This explains the absence of an in-depth discussion on questions relating to the issue of coins. At the same time, the Talmudic texts include extensive discussion on the legal nature of money in circulation, and yet, with no discussion on the power to mint, to withdraw coins from circulation, and related questions.

While the Talmud draws on biblical sources, such reliance ought to be addressed in historical perspective. Indeed, as shown immediately below<sup>20</sup>, the Hebrew Bible<sup>21</sup> is ample with references to 'money'. At

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<sup>16</sup> The landmark case is *Le Case De Mixt Moneyes* above note 7, characterized by SARGENT and VELDE, above note 9 at 105 as "the ground-breaking decision on debt repayment."

<sup>17</sup> For the elaborate currency system under the Talmud see e.g. STEINSALTZ, *Reference Guide*, above note 15 at 290-292.

<sup>18</sup> Presumably, "the earliest Jewish coinage", to be excavated, identified by the inscription of 'Judea' in Aramaic letters", is from the fourth century BCE. See CARRADICE, above note 8 at 55. I suppose that the first reference in Jewish sources to coin issue is in I Maccabees 15:6 where an account is given of the authority conferred (in the 130s BCE) by the Seleucid King Antiochus VII to Simon, Ethnarch of Judea, to "issue special currency legal tender in [the] land". For a mention of this source as well as of coins subsequently issued by the Hashmonean rulers of Judea after 103 BCE (and that did not bear any portrait in compliance with Jewish law forbidding human presentation) see e.g. CARRADICE, *ibid.*, p.84, pp.94-95. The last issue of Jewish coinage in Antiquity is from the revolt of Bar Kochva during the first half of the second century CE. For an account of Jewish coinage in Antiquity, since the Maccabees until Bar Kochva's revolt, see e.g. L.KADMAN and A.KINDLER, *Coins in Paestine Throughout the Ages*, Tel Aviv 1963, pp.18-26 [in Hebrew].

<sup>19</sup> Cf. Talmudic reference to "the coin of Jerusalem" on which "David and Salomon are on one side and Jerusalem the Holy City on the other side" as well as to "the coin of our Father Abraham" in Talmud *Bava Kamma* at 97B, which is not to be taken as an account of historical coins. In his commentary on this reference, *ibid.* D"H "David U-Shlomo", Rashi claims that reference is to coins bearing kings' names and not images, thus acknowledging lack of human presentation on Jewish coins, as in the preceding note. In light of the prohibition on human representation, the reference to the figure on coins as an element adding to their value, as discussed below in text around notes 40 and 54, is another indication to the exclusive treatment of foreign coins in the Talmud.

<sup>20</sup> List of sources is partial and does not purport to be exhaustive.

the same time, the period in question is well before the appearance of coined money<sup>22</sup>. Moreover, in Hebrew, one word, 'kessef', denotes both 'silver' and 'money'. Furthermore, in ancient times, units of account for payment and unit of weights were interchangeable<sup>23</sup>. On occasion, it is obvious that a biblical reference to 'kessef', even as a means of payment, is made to silver, to be weighed. This is so, for example, when the Patriarch Abraham weighs to Ephron four hundred 'shekel kessef' in payment of the Cave of the Machpela in Hebron<sup>24</sup>. However, elsewhere, the Bible is more ambiguous in referring to 'kessef' as well as to units of which it consists as a medium of exchange for buying and selling<sup>25</sup>, as well as something which is lent<sup>26</sup>, in which valuation is made<sup>27</sup> and both prices<sup>28</sup> and penalties<sup>29</sup> are set and payments are to be made<sup>30</sup>. There is also a reference to 'kessef' as something, that at least compared to agricultural produce, is easily bundled and hence portable<sup>31</sup>. At one point 'kessef' is described as countable, hence, passing by tale<sup>32</sup>. It is also referred to as something that is more liquid than other items of property<sup>33</sup>.

Certainly then, biblical society knew units of account, even as they were interchangeable with units of weight. Moreover, close reading of the sources quoted above suggests the existence of objects that were

<sup>21</sup> The Hebrew Bible largely corresponds to the Christian Old Testament.

<sup>22</sup> Certainly, the Hebrew Bible purports to cover events that preceded the appearance of the coin in Lydia in the 7th century BCE.

<sup>23</sup> This is reflected in the correspondence between coins and weight units mentioned in the Talmud. See STEINSALTZ, *Reference Guide*, above note 15 at 291 and 293. To modern times, some currency names correspond to those of unit of weights. This is true for example for the dollar, pound, marc, dinar, and shekel.

<sup>24</sup> Bible, Genesis, 23:16, which according to some translations, was "current money with the merchant". See e.g. *The Holy Scriptures According to the Masoretic Text*, Philadelphia 1955. See also Isaiah 55:2; Esther 3:9; Ezra 8:25-26.

<sup>25</sup> *Ibid.* Genesis, 17: 23 and 27; Exodus 12: 44; 21:21; Leviticus 22:11; Deuteronomy 2:6; 21:14; I Kings 21:2; Isaiah 1:22; 43:24; 55:1.

<sup>26</sup> *Ibid.*, Exodus 22:24; Leviticus 25:37.

<sup>27</sup> *Ibid.* Leviticus, 5:15; 27: 3-8, 15, 17, 19, 23, 25, and 27; Numbers, 18:16.

<sup>28</sup> *Ibid.* Genesis, 33:19; Joshua 24:32; I Samuel, 9:8; Isaiah 7:23; Jeremiah, 32: 9-10; Song of Songs 8:11; II Chronicles 1:17; 25:6.

<sup>29</sup> *Ibid.* Exodus 21:32-35; 22:16; Deuteronomy 22:29.

<sup>30</sup> *Ibid.* Exodus 30: 12-15; Judges, 16:5 and 18; Isaiah 52:3; Esther 3:11; Ezra 3:7.

<sup>31</sup> *Ibid.* Deuteronomy, 14:25-26 reproduced below in note 38 and discussed below in text around it. See also Proverbs 7:20.

<sup>32</sup> *Ibid.* II King, 12: 10-12.

<sup>33</sup> *Ibid.* Genesis, 47: 14-18.

regarded as media of exchange. The nature of these objects and their proximity to coins, has been fiercely debated<sup>34</sup>. On its part however, being a text compiled and reflecting discussions that occurred while coins already constituted money, the Talmud easily seizes on the plain meaning of biblical sources as if they are truly dealing with coins<sup>35</sup>. On occasion, the Talmud even uses such sources as the basis for its own monetary legal theory<sup>36</sup>. Otherwise, they were used as validation for the use of coined money.

The Talmud examines issues relevant to the emergence of a legal monetary theory in various contexts. First, much on the features of money comes out from the analysis of the money change transaction, that is, from the exchange of coins of one type with coins of another type. In such a transaction, coins of one set may be treated as goods or merchandise<sup>37</sup> bought and paid for by coins of the other set; it is the coins of the latter set which are thus treated as money. In general, in a sale of goods transaction, it is not the payment of the price which causes the property to pass to the buyer or even binds the parties. Rather, it is an act with respect to the goods which obligates the buyer to pay for them. Hence, in a transaction that entails the exchange of goods for money, it is important to identify what constitutes money and what constitutes goods. Certainly, in the sale of 'ordinary' goods, the identification of what constitutes goods and what constitutes money is simple; not so when the 'merchandise' is one set of coins

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<sup>34</sup> There is a scholarly disagreement on whether distinct items of value were actually used in the Ancient East exclusively as means of payments, and thus approximated coins. Proponents include M.BALMUTH, *The Forerunners of Coinage in Phoenicia and Palestine*, in A.KINDLER (ed.), *The Patterns of Monetary Development in Phoenicia and Palestine in Antiquity*, Tel Aviv 1967 (Proceedings of the International Numismatic Commission, The Israeli Numismatic Society, International Numismatic Convention, Jerusalem 1963), p.25; M.BALMUTH, *The Critical Moment: the transition from currency to coinage in the eastern Mediterranean*, 6 *World Archeology* 293 (1975); and J.DAYTON, *Money in the Near East Before Coinage*, 23 *Berytus Archeological Studies* 41 (1974). For a critique see M.A.POWELL, *A contribution to the History of Money in Mesopotamia prior to the Invention of Coinage*, in B.HRUSKA and G.KOMOROCZY (eds.), *Festschrift Lubor Matous*, Vol. 2, Budapest 1978, p.211. Another skeptic is P.GRIERSON, *The Origins of Money*, London 1977, being the Creighton Lecture in History, 1970, p.8, n.7.

<sup>35</sup> See e.g. Talmud, *Kiddushin*, at 11A and 12A.

<sup>36</sup> See below discussion in text around notes 38-40, regarding Deuteronomy 14: 22-26.

<sup>37</sup> Hereafter, 'goods', 'chattels', 'commodities', 'merchandise', 'products' and like words are to be used interchangeably.

paid for by another set of coins. It is then in this context that an intense discussion arises as to what set of coins is money relatively to the other. In the course of this discussion, principal features of money are thus explored.

What constitutes money in the context of money change transaction is important for the purpose of meeting an important religious obligation. Thus, in fulfillment of the duty to eat the harvest tithe in Jerusalem, one is commanded to, either bring the original produce, or convert the produce to money, carry it to Jerusalem, and use it there to buy food to eat in Jerusalem. Permission to convert the produce for money is explicitly given on grounds of difficulties to carry the produce to Jerusalem. At the point of origin of travel, permission is given for the conversion the produce for money, but neither money for produce nor produce for produce<sup>38</sup>. Hence, when one converts fruit, being the original produce, to silver coins, and then to ease the burden of carrying the money to Jerusalem, exchanges the numerous silver coins with fewer more valuable gold coins, a question arises as to whether he effectively exchanges money for a produce, which as indicated, is not allowed<sup>39</sup>. Whether a violation is present or not in that context is outside the scope of the present discussion; suffice it to say that the discussion is part of a broader one as to what is money and what is commodity in the exchange between silver and gold coins.

At the same time, as part of the discussion on this religious commandment the sages purported to define a principal feature for money. Thus, the requirement to bind the money in the hand, was

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<sup>38</sup> See Deuteronomy 14: 22-26 re the obligation to bring a “*Maaser Sheni*” to Jerusalem: “Thou shalt surely tithe all the increase in thy seeds, that which is brought forth in the field year by year. And though shalt eat before the Lord thy God, in the place which He shall choose to cause His name to dwell there, the tithe of thy corn, of thy wine, and of thine oil, and the firstlings of thy herd and of thy flock; that though mayest learn to fear the Lord always. *And if they way be too long for thee, so that though are not able to carry it, because the place is too far from thee, which the Lord thy Lord shall choose to set His name there, when the Lord thy God shall bless thee; then shalt though turn it into money, and bind up the money in thy hand, and shalt go unto the place which the Lord thy God shall choose.* And though shalt bestow the money for whatsoever thy soul desireth, for oxen, or for sheep, or for wine, or for strong drink, or for whatsoever thy soul asketh thee; and though shalt eat there before the Lord thy God, and though shalt rejoice, though and thy household.” Emphasis added.

<sup>39</sup> For an extensive discussion, see Talmud, *Bava Metzia*, at 44B-45B.

understood to mean that what constitutes 'money' must be amenable to be bound up, so as to be easily portable. Alternatively, or in fact complementarily, the Hebrew word for 'bind' is 'tzarta', from which it was concluded that a coin ought to bear the stamp of a figure or image, or in Hebrew, 'tzura'<sup>40</sup>.

A second context in which money is discussed is that of loan transactions. Thus, prices of commodities are set in money. Accordingly, one consequence of the biblical prohibition against charging and paying interest<sup>41</sup> is that only the lending of money, rather than other fungible chattels, is permissible. That is, due possible fluctuation in price of commodities, the loan of a fixed quantity of a commodity, in return to a promise to return the same amount of that commodity in the future, known as a loan of a bushel for a bushel or *se'ah* for a *se'ah*, is usually prohibited<sup>42</sup>. Conversely, since money is in what the price is set, fluctuation in the value of money does not lead to the violation of interest prohibition. Hence, a loan of money against a promise to return the same amount in money is permissible. At the same time, while as indicated, money may consist of coins of different metals, a debt is to be paid only at its value in the metal which, compared to all other metals, constitutes money. This is true even if the loan itself was incurred in coins of another metal. Otherwise, namely, where silver coins are money compared to gold coins, repayment of a gold dinar for a loan made in a gold dinar, and thus effectively linking the value of the debt to the value of gold in silver,

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<sup>40</sup> See Tosafot, D'H 'Asimon' in Talmud, *Bava Metzia* at 44A. The relevant biblical verse is quoted in the immediate preceding footnote.

<sup>41</sup> Prohibition is based on three biblical cites and exists for any transaction where a party is obligated to deliver or pay in genre. These biblical verses are Exodus 22: 24, Leviticus 25: 36-7, and Deuteronomy 23: 20.

<sup>42</sup> The source of the prohibition is a Mishna in Talmud, *Bava Metzia*, at 75A which also enumerates an exception to this rule where the borrower has in its possession the commodity at the time of the loan but it is inaccessible to him: "Lend me ... until my son comes or until I find the key." *Ibid.* See e.g. also *ibid.* at 63B, and cf. *ibid.* at 44B and 46A. The Talmud acknowledges that its position is contrary to the prevailing view in other legal systems under which the irregular deposit of fungible commodities is permissible. See e.g. *ibid.* at 62A. Lending goods could however be lawfully carried out under the Talmud where their value is assessed at the time of the loan so that the borrower's obligation is to return the same type of goods in a quantity of the monetary same value at the time of the return. Mishna in Talmud, *Bava Metzia*, at 75A.



would constitute a loan of a *se'ah* for a *se'ah* (of gold) and thus violate the interest prohibitions<sup>43</sup>.

In the third context, the Talmud deals with various scenarios involving damage caused to a coin, the deterioration of its metallic content, and the effect of its withdrawal from circulation, or otherwise its demonetization. Relevant discussions highlight important aspects of a monetary legal theory.

Finally, in a fourth context, treating money as a medium of exchange, namely, fungible chattels transferable from hand to hand, a doctrine emerged under Talmudic property law, effectively facilitating the circulation of coins. Thereunder, coins pass from one person to another free from prior owners' adverse claims.

The ensuing discussion is divided as follows. Part 2 deals with coins as money and ordinary chattels and thus explores the nature of money in the context of an analysis of the money change transaction. Part 3 discusses the fulfillment of an obligation to pay in money, with particular emphasis on the effect of erosion on the value of a coin; it presents the metallic theory of money under the Talmud. Part 4 analyzes the free transferability of a coin from hand to hand under Talmudic property rules as applied to money.

## *2. Coins as money and ordinary chattels: The legal nature of the money change transaction*

Much on the features of money comes out from the analysis of the money change transaction, involving the exchange of coins of one type with coins of another type<sup>44</sup>. As will be seen below, in such a transaction, one set of coins may be treated as money while the other may be treated as ordinary goods. Hence, the Talmudic analysis explores the features of money in the context of the rules applicable to the passage of property in the sale of goods.

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<sup>43</sup> See Talmud, *Bava Metzia* at 44B regarding the gold dinars lent to Rav by R' Chiya's daughter. In the fact of the case, the value of the gold dinar *actually* appreciated. Nemukey Yoseph, Rif, *Bava Metzia* at 26B, stating the prohibition to lend a gold dinar for a gold dinar lest its value will increase from 24 to 25 silver dinar, thus goes further.

<sup>44</sup> A comprehensive exposition of the moneychanger's business, who primarily changed money (for a fee) from one coin or denomination to another, including in another metal, is by A.GULAK, *The Moneychanger's Business According to Talmudic Law*, 2 Tarbitz 154 (1931) [in Hebrew].

The starting point in Talmudic law is that for property in a chattel<sup>45</sup> to pass from one person to another<sup>46</sup>, neither payment in money<sup>47</sup> nor mere agreement or words alone<sup>48</sup> will suffice<sup>49</sup>. Rather, the ownership of a chattel passes by means of a formalized procedure, in the form of a proprietary act, called a *kinyan*, carried out in the object to be transferred<sup>50</sup>. Typical proprietary acts involve the change of possession; depending on the type of the object, such acts are *hagbaha* (lifting) and *meshicha* (drawing near or pulling) by the transferee, as well as *mesira* (delivery or handing over) by the transferor<sup>51</sup>.

And yet the Talmud facilitates the acquisition of a chattel by means of *chalifin* or barter, namely, the exchange of two chattels, a procedure that involves a proprietary act in relation to only one of the chattels to be transferred<sup>52</sup>. One type of *chalifin* is that of *kinyan sudar*, or the transfer of ownership in a chattel by means of giving or drawing a kerchief. Under this procedure, the transferor of an object receives or takes from the transferee a kerchief, in return to which ownership passes to the transferee in the chattel to be transferred, while it is still in the possession of the transferor, and without any reference to a proprietary act in it<sup>53</sup>.

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<sup>45</sup> Land is however acquired by payment in money, documentary note, or taking possession. See Talmud, *Kiddushin* at 26A.

<sup>46</sup> Words or payment will however suffice to consecrate property (rather than to transfer it to another person) to a religious trust. See Talmud, *Kiddushin* at 28B.

<sup>47</sup> See Mishna in Talmud, *Bava Metzia* at 44A. And yet taking advantage of this rule is morally deplored. *Ibid.* as explained in Beraitha, *ibid.* at 48A. (Transgressor is to obtain his retribution from Heaven).

<sup>48</sup> One manifestation of this position, as well as the disfavour in which it has been viewed, is in Talmud, *Bava Metzia* at 48A, where a Beraitha is quoted to say that "... one who buys and sells with words [alone] has not acquired [anything] but the sages are not pleased with one who backs out [of] his verbal commitment."

<sup>49</sup> Qualifications to this principle are alluded to in the paragraph that follows.

<sup>50</sup> See e.g. Talmud, *Kiddushin* at 22B, 25B-26A.

<sup>51</sup> See in general Talmud, *Kiddushin* at 25B (as well as 22B) and *Bava Batra* at 84B.

<sup>52</sup> For the broad principle under which "all movables acquire one another" see Mishna in Talmud, *Bava Metzia* at 44A. For one implication see Mishna *ibid.* at 100A. Presumably however, a proprietary act in relation to one of the chattels to be transferred will suffice to transfer both chattels only as long as the parties have not assigned a specific monetary value to the chattels exchanged; where such value has been assigned a proprietary act must nevertheless be performed in each chattel. See *Ibid.* at 47A (Beraitha).

<sup>53</sup> For *kinyan sudar* see Talmud, *Bava Metzia* at 47A.

Coins, which constitute money, are physical objects. Like ordinary chattels, coins can thus be owned and physically transferred, as well as be valued on the basis of their metallic content. Nevertheless, unlike ordinary chattels, coins derive further value from their designated use as currency, by virtue of the image or figure imprinted on them, guaranteeing their weight, fineness and hence their monetary value as media for exchange. Being thus distinguishable from other chattels, coins may neither be transferred by means of *Chalifin*, nor serve as an instrument for acquiring other chattels by means of *Chalifin*, rather than given in payment of chattels. This is so in part due to the requirement that for *Chalifin* a utensil of use-value is required. Furthermore, since coins may be withdrawn from circulation, their monetary character, and hence value as money is not stable, or in the language of the Gemara, “the figure [thereon] tends to become obsolete<sup>54</sup>”.

A Mishna in *Bava Metzia*<sup>55</sup> analyzes the money change transaction in the broader context of the sale of goods. Specifically, the Mishna seeks to identify which currency is the ‘goods’ and which is the ‘money’ in the transaction. This identification is required in order to determine the moment upon which the transaction is binding which is when the ‘goods’ are drawn. Thus, in a transaction in which gold coins and silver coins are to be exchanged, it is the gold that ‘acquires’ the silver, namely, it is the drawing of the gold coins that binds their acquirer to pay with silver coins<sup>56</sup>. Stated otherwise, silver coins are the money and the gold coins are the goods; the transaction then is that of the sale of gold coins. Drawing the gold coins (the goods) finalizes the transaction so as to confer on the owner of the silver coins title to the gold coins, leaving the (unpaid) owner of the gold coins a claim against the owner of the silver coins. Conversely, silver does not acquire gold; drawing on the silver coins (money) will not finalize the transaction, and will not confer on the owner of the gold coins title to the silver coins. Both parties may still withdraw.

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<sup>54</sup> The discussion in the Gemara on both points is however quite intense. See Talmud, *Bava Metzia* at 45B- 47A. The quote is from *ibid.* at 45B.

<sup>55</sup> At 44A.

<sup>56</sup> “In stating that gold ‘acquires’ silver, the Mishna uses ‘acquire’ loosely; no specific silver coins are acquired at that moment; rather a claim to the payment of silver coins arises. Stated otherwise, the Mishna is to be read as saying that having taken the gold, the buyer becomes obligated to pay the silver. Talmud, *Bava Metzia*, at 45B.

Similarly, in a transaction contemplating the exchange of copper coins (*prutot*) and silver coins, the copper coins (goods) acquire the silver coins (money). Silver coins are thus ‘money’ by reference to both gold and copper coins.

The Mishna goes on to state that in a transaction contemplating the exchange of bad coins for good ones, the former are the merchandise and the latter are the money. “Bad coins” are either (i) coins that were disqualified<sup>57</sup>, namely, either withdrawn by the government or rejected by the population of a region<sup>58</sup>, or (ii) coins that were physically deteriorated<sup>59</sup>. Similarly, in a transaction contemplating the exchange of an *asimon* and a coin, the *asimon* is the goods and coin is money. According to Rashi, “*asimon*” is a metal disk ready for minting, but which has not yet been imprinted<sup>60</sup>. Tosafot is however of the view that an *asimon* is a coin bearing a deficient image or imprint<sup>61</sup>, meaning a ‘coin’ that is not current, but is nevertheless worth and exchangeable at its metallic value<sup>62</sup>.

To a limited extent, both ‘*asimons*’ and ‘bad coins’ circulate, though according to Tosafot’s interpretation, the former circulate better than the others<sup>63</sup>; possibly, both are ‘money’ vis-à-vis other chattels. This appears to apply to a physically damaged coin<sup>64</sup>, coins rejected by the population in one region<sup>65</sup>, possibly coins with an

<sup>57</sup> Rashi in Talmud, *Bava Metzia* at 44A, D”H ‘Maot haraot’.

<sup>58</sup> For these two options, see Tosafot, *ibid.* D”H ‘Hazahav’, by reference to BM at 46B

<sup>59</sup> Tosafot, *ibid.*; Chidushei HaRashba, *Bava Metzia* at 44A; and Nimukei Yoseph, Rif, *Bava Metzia* at 25A.

<sup>60</sup> Rashi, BM at 44A D”H ‘Asimon’.

<sup>61</sup> Tosafot, *ibid.* D”H ‘Hazahav’ and ‘Asimon’. The deficiency may be a matter of bad or damaged imprint.

<sup>62</sup> See Chidushei HaRamban, as well as Chidushei HaRashba, both to *Bava Metzia* at 44A.

<sup>63</sup> Tosafot, Talmud, *Bava Metzia*, at 44A D”H ‘Hazahav’.

<sup>64</sup> A crack in a coin is a discernible physical change which passes ownership in it to a thief, who thereby becomes liable to the owner for the return of its value at the time of the theft rather than for its return in specie. Talmud, *Bava Kamma*, at 96B (Mishna) and 97A-97B (Gemara). For damage as physical change see Talmud, Gittin, at 53B, Tosafot D”H ‘Gazlan’.

<sup>65</sup> Rejection of a coin by local population in a region is certainly not a discernible change and thus does not pass ownership to a thief who thus remains liable to return it to the owner in specie. See Talmud, *Bava Kamma*, at 96B (Mishna) and 97A-97B (Gemara).

effaced image<sup>66</sup>, as well as to circulating metallic disks. This however need not necessarily apply to 'bad coins' in the form of disqualified coins by virtue of withdrawal by the government<sup>67</sup>, unless they nevertheless circulate, albeit with difficulty, at the value of their metallic content.

In any event, vis-à-vis good coins, both '*asimons*' and 'bad coins' are chattels<sup>68</sup>. Elsewhere, the Gemara is telling us that in the exchange between two purses of 'bad coins', each purse is merchandise<sup>69</sup>. One may speculate that the same is true for the exchange of two purses of '*asimons*'. As between '*asimons*' and 'bad coins' the Gemara is silent. It is likely either that whichever is in better circulation is the 'money'<sup>70</sup>, or else, that both are chattels.

It is at that point that the Mishna states that regarding the sale of chattels, it is the chattels that acquire the coins, but the coins do not acquire the chattels. Stated otherwise, it is the proprietary act with respect to the chattels that obligates the buyer to pay for them; at the same time, a proprietary act with respect to the money would neither pass ownership to the chattel nor bind the parties to the contract. According to Tosafot, the Mishna here refers to chattels paid for with

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<sup>66</sup> According to Talmud, *Bava Kamma*, at 98A, this is not a visible physical change, so as to confer ownership on a thief and requires him to return the value of the coin rather than itself, though as Tosafot points out (*ibid.* D"H 'Hashaf') this could be so only according to one who adheres to the position, indicated in the note that immediately follows, that withdrawal of a coin by the government is not tantamount to a visible physical change.

<sup>67</sup> In which case it is disputed whether this withdrawal is tantamount to a visible physical change, so as to require a thief to return the value of the coin, or whether it does not amount to a physical change so as to leave the thief's duty to return the coin in specie unchanged. See Talmud, *Bava Kamma*, at 96B, 97A, and 98A.

<sup>68</sup> Per the plain text of the Mishna in Talmud, *Bava Metzia* at 44A.

<sup>69</sup> Talmud, *Bava Metzia* at 46B, by reference to the exchange between two purses of disqualified coins, one full of coins withdrawn by the government, and the other full of coins rejected by the local population of a region. *Quaere* as to the impact of the exchange of purses as opposed to coins per se on the ruling.

<sup>70</sup> Namely, '*asimons*' according to Tosafot. At the same time, there is no indication that what Rashi considers as '*asimon*' circulates at all, in which case, according to this interpretation, it would be the merchandise compared to the 'bad coins'. Assuming they are made of same metal, unlike between coins of different metals, 'value' is not a factor in assessing which is 'money' between '*asimons*' and 'bad coins'. Metallic difference will add another unknown to the question.

any type of coin, even gold or copper coins, good, bad or unminted; they are deemed coins relative to all movables that are not currency<sup>71</sup>.

The ensuing Gemara reports of an earlier contrary position in relation to the Mishna under discussion according to which between gold and silver coins it is the gold coins that constitute money and the silver coins are the merchandise<sup>72</sup>. The Gemara uses the occasion to discuss what are the decisive factors in assigning to some objects the quality of money in relation to others. The Gemara sets out two factors: easy circulation and hence greater acceptance on one hand, and added value to the metallic content by virtue of being money or currency on the other hand. The Gemara concludes that while silver coins circulate more easily than those of gold, the added value to the metallic content of gold coins is greater than that of silver coins, and hence are the conflicting views on what between the two constitutes money in relation to the other<sup>73</sup>. What ultimately has been preferred as the decisive factor is then the easy circulation, which further explains why silver coins are money not only in relation to gold coins but also in relation to copper coins<sup>74</sup>. Against the silence of the Talmud itself, there is however no consensus among commentators as to what constitutes money in a transaction in which copper coins are exchanged for gold coins. At the same time, it is agreed that in an exchange of coins of different denominations of the same metal both sets are money so that the transaction is not finalized until each party draws what is tendered to him<sup>75</sup>.

### 3. *Coins valued on basis of metal: effect of erosion*<sup>76</sup>

#### a) Introduction

A creditor and debtor may agree on the type of coins in which a debt is to be paid<sup>77</sup>. Thus, if the agreed coins are to be freshly minted,

<sup>71</sup> Tosafot, Talmud, *Bava Metzia*, at 44A D”H ‘Hazahav’

<sup>72</sup> Which is the position reported in the Mishna in the Jerusalem Talmud.

<sup>73</sup> Talmud, *Bava Metzia*, at 44A-44B.

<sup>74</sup> *Ibid.*

<sup>75</sup> Shulchan Aruch, *Choshen Mishpat*, Section 203 Rules 3-7.

<sup>76</sup> Unless indicated otherwise, the ensuing discussion in Part 3, as of the third paragraph below, on the Talmudist metallic theory of money, focuses on Talmud, *Bava Metzia*, at 51B – 52B.

<sup>77</sup> For example, they may prefer and hence agree on either heavy coins or coins recognizable and accepted in more locations (though of less weight), as well as on the

the creditor may decline a tender of old coins even where the latter are of better quality<sup>78</sup>. The same is true for an agreement to pay with coins that are not current at the place of payment; in such a case, a tender of other coins, including those that are current in the place of payment, is invalid<sup>79</sup>. There is however a disputation in the case of a payment obligation to be made in a coin<sup>80</sup> that thereafter, namely, prior to repayment, was disqualified<sup>81</sup>. According to one view, the debtor is to pay in a coin that passes as currency at the time of payment<sup>82</sup>. According to the contrary view, the debtor may<sup>83</sup> tender the disqualified coin, as long as it is acceptable anywhere else, though possibly, only as long as this is of any use to the creditor<sup>84</sup>.

By definition, a rule requiring the tender of a particular type of coin, whether agreed or current at the time or place of payment, reflects a shift away from strict orthodox metallism. The latter focuses solely on the metallic content of the coin. Nevertheless, also in this context of the impact of monetary changes on payment obligations, metallism is not abandoned altogether. This can be seen from the discussion on the effect of either the re-valuation or the devaluation of a currency by varying the weight of a given denomination. In principle, in either case, to the extent that the creditor is paid with the

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delivery of the coins either bound or loose. Cf. Talmud, *Bava Metzia*, at 108B. Similarly, they may agree on the type and quality of grain in which payment (typically for rent of farm land) is to be made. See e.g. Talmud, *Bava Metzia*, at 106A.

<sup>78</sup> Talmud, *Bava Metzia*, at 45B.

<sup>79</sup> Chidushei HaRitva, *Bava Metzia*, at 45B.

<sup>80</sup> Among commentators, there is no consensus as to when and whether the term as to the coin to be returned needs to be explicit. See e.g. in Talmud, *Bava Kamma*, at 97A, Rashi D”H ‘Hamalveh et chavero’ and ‘Al hamatbea’ as well as Tosafot D”H ‘Hamalveh et chavero al hamatbea’, and Nimukei Yoseph, Rif, *Bava Kamma*, at 35A D”H ‘Matbea ve-chu’.

<sup>81</sup> Talmud, *Bava Kamma*, at 97A-97B. While in general, as indicated above in text at note 58, coin disqualification may be either by means of withdrawal by the government or by the rejection by the local population in a region, the ensuing discussion points out that here the disputation focused on the latter case, that of rejection by the local population in a region.

<sup>82</sup> Though in principle, as discussed immediately below, at the original value, in case of revaluation. Talmud, *Bava Kamma*, at 97B-98A.

<sup>83</sup> In other words, according to that view, the choice of the coin appears to be at the debtor’s discretion.

<sup>84</sup> For example, the creditor may have commerce with a place in which the agreed coin is still used, or else, may change coins, where this option is available. Talmud, *Bava Kamma*, at 97B.

new coins, he is mandated to take in discharge of the debt due to him the original metallic weight, namely a reduced number of re-valued coins in case of re-valuation, and additional number of devalued coins in case of devaluation<sup>85</sup>. Indeed, as shown below, the prevailing monetary legal doctrine under the Talmud is metallic.

In demonstrating this feature of Talmudic law, of particular interest is the ability to pay with an eroded or even damaged coin that has lost some of its metallic content. Certainly, it is recognized that added value is conferred on a coin by the image imprinted on it<sup>86</sup>; and yet, it is contested as to whether this value is substantial. Indeed, the view that one is liable for diminishing the metallic content of his fellow's coin, but not for merely effacing its *image*, can be attributed only to the position that most of the coin value is derived from its metallic content<sup>87</sup>.

The metallic content of a coin may however not be constant. Coins that circulate heavily tend to erode from use and handling. An eroded coin does not have the same metal content as if it were a new coin of the same denomination and hence is less valuable. To use an eroded coin as if it were a new coin could therefore constitute fraud. The Mishna discusses the level of erosion at which the use of a coin would be fraud, and is followed by a Gemara analyzing possible scenarios. Broadly speaking, coins fall into three categories:

1. Full-weighted coins or those that eroded to (including) the limit of fraud<sup>88</sup> (according to Rava), and according to Abayee, even down to another Isar<sup>89</sup>, may be used at their face value. In the case of an eroded

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<sup>85</sup> Talmud, *Bava Kamma*, at 97B-98A. See elaborations in Nimukei Yoseph, Rif, *Bava Kamma*, at 35A; Rosh, D" H Bo Mineh, commenting on Talmud *Bava Kamma*, at 98A; Rambam, *Mishpatim: Hilchot Malveh ve-Loveh*, Section 4, Rule 11. Rashi is of the view (Talmud, *Bava Kamma*, at 98A D" H 'Le-inyan nascha') that in the case of re-valuation, the added weight of the original amount of (heavier) coins of the new (re-valued) currency will constitute prohibited interest. Note that where the new price in new revalued coins is same as old price in the original coins and adjustment in the amount to be repaid is to be made only as of 20% re-valuation.

<sup>86</sup> Talmud, *Bava Metzia*, at 44A-44B. See also at 45B. This added value was mentioned above in text that follows note 53.

<sup>87</sup> Talmud, *Bava Kamma*, at 98A.

<sup>88</sup> For the various views on the limits of fraud see §(c) below.

<sup>89</sup> A small-value coin worth 8 Perutot and 1/24 dinar. See table in STEINSALTZ, *Reference*, above note 15 at 292.



coin falling into this category, *quaere* as to whether the payor ought nevertheless to be prepared to make up difference if the payee protests.

2. Coins eroded beyond that point, that is, the fraud limit (and according to Abayee plus another Isar<sup>90</sup>), reduced to up to (including) 50% of their original weight, may be used at their actual weighted metallic value—at least at the 50% point.

3. Coins reduced below 50% of their original weight are to be demonetized, and may not be used as money.

The following discussion explains and elaborates on these rules.

b) Deficient coins as money

The Mishna states that the holder of an eroded coin may use it for deconsecrating *maaser sheni*, namely, transferring the sanctity of produce which ought to be taken and eaten in Jerusalem onto money to be taken to Jerusalem and used there to buy food<sup>91</sup>. The Mishna goes on to say that the holder of the eroded coin need not worry, for it is only one of ungenerous disposition who refuses to take such a coin. This statement is taken by Rashi to refer to deficiency to the limit of fraud, and by Rav Papa in the Gemara to further apply to defective coins, such as cracked or bent, provided such coins circulate, albeit with difficulty. An inconclusive discussion develops whether deficient coins used for deconsecrating *maaser sheni* are to be accepted at their actual or face value, and whether this is at the same exchange rate as when such coins are changed. Ultimately, the Gemara concludes, the Mishna does not deal with this point and is not to be taken to mean that the value of a deficient coin is to be inflated when it is used for the consecration of *maaser sheni*. Rather, according to Rashi, the Mishna that permits the use of a deficient coin to redeem *maaser sheni*, means that the deficient coin is not to be demonetized, but rather is to be treated like a coin, that is money, and as such is an acceptable medium of exchange. Stated otherwise, the deficient coin is not to be treated as a mere lump of metal, which is not a valid medium for redemption.

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<sup>90</sup> For the various views on the limits of fraud see §(c) below.

<sup>91</sup> Deuteronomy, 14:24-25, reproduced above in note 38.

In sum, deficient coins that are permitted to circulate, are to be treated as money. This is true at least for coins eroded to the limit of fraud.

c) Erosion to the Limit of Fraud

Elsewhere, the Gemara provides for the right of a defrauded party to a sale transaction, whether an overpaying buyer or an underpaid seller, either to rescind the contract and reverse the sale, or to have the price adjusted<sup>92</sup>. It is however recognized that in a sale of a commodity by measure, weight or number, where the wrong quantity is actually delivered, the entire quantity is returnable<sup>93</sup>. This is true regardless of whether the quantity delivered is higher or lower from that specified in the contract, and irrespective of whether the discrepancy is less than the standard amount for price fraud (which as will be seen immediately below is 1/6)<sup>94</sup>. Presumably, this remedy is available to the buyer since it is natural for a person to insist that he receives the exact quantity for which he bought; otherwise, the sale is mistaken<sup>95</sup>. Nevertheless, our Mishna<sup>96</sup> considers the payment with a deficient coin, weighing less than its stated monetary value, as valid, as long as the deficiency falls within the rules pertaining to fraud. This may indicate that the coin is not weighed in each transaction, so as not to be something sold according to weight<sup>97</sup>.

The Mishna cites three positions as to the limit of fraud for coins. According to R' Meir it is 1/24 (4 Isars to the Sela). According to R' Yehuda it is 1/12 (4 Pundyons to the Sela) and according to R' Shimon it is 1/6 (8 Pundyons to the Sela)<sup>98</sup>. After some discussion, the Gemara concludes that at the limit of fraud, whatever it is, the coin is still acceptable.

<sup>92</sup> See e.g. Talmud, *Bava Metzia*, at 49B, 51A and 56B. Both latter texts cite Leviticus 25:14 as the source.

<sup>93</sup> Talmud, *Bava Metzia*, at 56B.

<sup>94</sup> *Ibid.* See also Talmud, *Kiddushin*, at 42B.

<sup>95</sup> See Rashi, Talmud, *Bava Metzia*, at 56B, D" H 'Chozer'

<sup>96</sup> Talmud, *Bava Metzia*, at 51A-52B.

<sup>97</sup> Accordingly, where a coin is sold by weight, any small missing amount is deemed fraud. See Yachin U-Voaz, Mishna, *Bava Metzia*, Section 4 Rule 5.

<sup>98</sup> See table in STEINSALTZ, *Reference*, above note 15 at 292.

No resolution to the fraud limit for coins is given<sup>99</sup>. The Gemara observes that a controversy exists as to the critical fraction for fraud only as to a coin and not as to a garment, in which case all agree that the limit of fraud is 1/6. Two alternative explanations are provided for the discrepancy. According to the first explanation, the rule as to the garment is according to R' Shimon who thinks<sup>100</sup> that in both cases (garment and coin) the limit of fraud is 1/6. The alternative explanation is that the rationale for a fraud limit in garments is that people are prepared to overpay for garments<sup>100</sup>. At the same time, with a coin that does not circulate at face value when it is deficient, one does not forgo a deterioration of even less than a 1/6. Thus, according to R' Meir, even a deficiency of 1/24 is significant.

The Mishna inquires as to until when it is permitted for a defrauded party to return a defective coin and claim that it was unacceptably eroded at the time of payment. The Gemara's understanding is that beyond such a period, it is only a pious person who will accept the coin back even though he is under no obligation to do so.

The length of the period depends on the location where the fraud occurs: in cities the deadline is set by the time the defrauded party will show the coin to a moneychanger. Presumably, this is likely to happen promptly. In the villages, it is until Friday night (*Erev Shabbat*), which is considered to be a longer period. The distinction must be premised on the absence of moneychangers in villages wherein the local expert is the shopkeeper to whom the coin will be tendered in payment of food before the Shabbat<sup>101</sup>.

<sup>99</sup> This issue is not fully resolved in the Talmud and even later commentaries disagreed on this point. Shulchan Aruch sides with the Rif and Rambam who take the opinion of R' Shimon, while Ramah sides with Rosh and Ramban, who side with Rav Yehuda. See Shulchan Aruch, *Choshen Mishpat*, Section 227 Rule 16 for a detailed account of the diverse views on this unsettled point.

<sup>100</sup> And yet not for food. Rashi explains that that one buys clothes to protect his body even when they are expensive but will not overpay for food. Talmud, *Bava Metzia*, at 52A, D"H 'Ashik legabecha' and 'Ve-shavei likresich'. But the 1/6 limit applies for also for items other than clothes (except for coins other than according to R' Shimon). Cf. Tosafot, *ibid.*, D"H 'Ashik legabecha'.

<sup>101</sup> A true expert is needed for coins but not necessarily to other chattels. Possibly, it is for this reason that in the case of fraud with respect to the value of goods sold, the time limit of an overpaying buyer is by reference to consultation with a merchant or relative. At the same time, in the case of fraud by a buyer of goods, there is no time limit on the right of the seller to raise his claim against the underpaying buyer,

## d) Erosion beyond the limit of fraud

Per previous discussion, coins eroded beyond the limit of fraud are dealt with by reference to their weight. Accordingly, a Baraisa discussing the limit of fraud concludes by stating that if a coin is deficient beyond the limit (and according to Abayee, even down to another Isar<sup>102</sup>), the holder “sells it for its worth,” namely for actual present value according to its weight, rather than for face value according to its denomination<sup>103</sup>. Yet, this is so only where the erosion is up to 50%. One may not retain as money a coin that eroded more than 50%. Nor may he sell it even at its present value, “neither to a merchant, nor to an extortioner, nor to a murderer”. This is so since payees are liable to deceive others with it. A merchant is suspect to pass off such a coin to his customers as a good one, and a lawless person, such as an extortioner or murderer, may intimidate even a person who realizes the coin is deficient to accept it at the value at which it is tendered. Rather, the holder of a coin that eroded more than 50% is under a specific obligation to demonetize it and destroy its appearance as a coin.

The 50% erosion limit for the monetary use of a coin may be explained by the nature of the erosion process. That is, typically, the erosion of a coin affects its thickness, not the diameter that remains the same. Thus, the thinner appearance of an eroded coin plainly alerts people that it is not worth its full weighted value. At the same time, the large diameter of a coin might mislead people into thinking that it contains at least half of its weight, that is, half of its original value. Here lies the rationale for the prohibition to use a coin eroded more than 50% as money, even at its actual weighted value, and the attached obligation to conspicuously demonetize it.

There is a disputation as to the treatment of a coin that eroded to a point above the 50% limit. R' Ami is of the view that its holder may use such a coin as money according to its true metallic value. Rav Huna is cited to hold the opposite view. Possibly, he feared that a coin

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presumably, since the defrauded seller is out of possession. See Talmud, *Bava Metzia*, Mishna at 49B and Gemara at 50B-51A.

<sup>102</sup> The Isar is a small-value coin worth 8 Perutot and 1/24 dinar. See table in STEINSALTZ, *Reference*, above note 15 at 292.

<sup>103</sup> Talmud, *Bava Metzia*, at 52A.

eroded less than 50%, namely, so that its remaining metallic contents is more than 50%, may be misrepresented as a fully weighted coin circulating at its face value. Suspecting that such a misrepresentation may occur, he thus argues that coins eroded beyond the fraud limit (perhaps as adjusted by Abayee), are to be “cut up”<sup>104</sup>, presumably, demonetized. This is so at least as long as erosion beyond that limit is gradual, and has not reached the 50% weight. At the same time, Rav Huna appears to concede that a coin reduced at once to 50% of its value, such as by falling to fire, can be used as money in its present reduced weighted value. Commentators agreed with the rationale of Rav Huna. However, in purporting to follow him they interpreted his position with respect to erosion that left more than 50% of the metal. Rav Huna is thus understood to require the holder to “cut up”, namely, eliminate, only the excess above the 50% weight and keep this balance as metal, so as to be use the remaining 50% metallic content left in the coin as money worth its present metallic weighted value<sup>105</sup>.

There may be some controversy as to the fate of a demonetized coin. The principal Beraitha maintains that the holder of a coin that cannot be retained due to its excessive erosion beyond 50% “should pierce it and hang it as a pendant on the neck of his son or on the neck of his daughter<sup>106</sup>”. Stated otherwise, he is under a specific obligation to demonetize the deficient coin and destroy its appearance as a coin, upon which he is at liberty to use it as an ordinary chattel. This is stated to be supported by another Mishna<sup>107</sup>. Thereunder, a coin that was disqualified, namely was either withdrawn by the government from circulation or became heavily eroded, and used as a weight, is susceptible to become ‘impure’; stated otherwise, the disqualified coin is considered to be a utensil, namely, an ordinary chattel, and not money. On the other hand, there is a discussion in our Gemara on the duty of the holder to cut the demonetized coin into two, that is, to destroy it altogether. More specifically, our Gemara brings another Beraitha precluding the holder of a coin that eroded beyond the retention limit from making it a weight among its weight or from

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<sup>104</sup> *Ibid.*

<sup>105</sup> Particularly see Rambam, *Nezikin: Hilchot G'nevah*, Section 7, Rule 5 and the Magid Mishna there. See also Chidushei HaRitva, *Bava Metzia*, at 52B; Rif, *Bava Metzia*, at 31B and Pnei Yehoshua, *Bava Metzia*, at 52B.

<sup>106</sup> Talmud, *Bava Metzia*, at 52A.

<sup>107</sup> Keilim 12:7.

throwing it among his piles of fragments of his silver utensils. Nor is he allowed to pierce it and hang it as a pendant on the neck of his son or the neck of his daughter. Rather, “he should either grind it up, or melt it down, or cut it up, or bring it to the Dead Sea and throw it in<sup>108</sup>”.

Ultimately, our Gemara explains away the inconsistency by the nature of the physical act of demonetization. Thus, the first Beraitha is talking about piercing the coin in the middle, in which case demonetization is irreversible; a coin with a hole punched through it will not be accepted as currency. Conversely, the second Beraitha refers to piercing at the edge, in which case demonetization is reversible; the outer edge into which the hole was pierced might be removed and the coin may be passed on as money. In conclusion, an irreversible conspicuous demonetization transforms the coin to a chattel.

#### 4. *Property rules applicable to coins: facilitating circulation*

According to the Talmud, a person who finds a chattel having an identifying mark is required to announce, guard, and return it to the owner<sup>109</sup>. Conversely, a person who finds a chattel with no identifying mark need not publicly announce of his finding and may keep the chattel for himself<sup>110</sup>; this is so since the original owner is deemed to have despaired from recovering a chattel that cannot be identified, thereby relinquishing ownership thereto<sup>111</sup>.

The application of the despair rules to the acquisition of coins requires further explanation. Thus, it is contested whether a relinquishment of ownership of any lost chattel requires the owner's awareness of the loss<sup>112</sup>. Stated otherwise, an issue arises as to whether a person who does not know he has lost a chattel is to be considered as abandoning it. The prevailing view is that without knowledge of the

<sup>108</sup> Talmud, *Bava Metzia*, at 52B.

<sup>109</sup> The biblical source for the finder's obligation to return a lost chattel is Deuteronomy 22: 1-3. See, Talmud, *Bava Metzia*, at 21A.

<sup>110</sup> Rambam, *Nezikin: Hilchot G'zela Ve-aveda*, Section 14 Rule 2.

<sup>111</sup> Rambam, *Ibid.* Also see Rashi at Talmud *Bava Metzia* 21A, D”H ‘Nityashu Mihem’. Since the original owner cannot be identified the question of the finder's possible liability to compensate him does not arise.

<sup>112</sup> See Talmud, *Bava Metzia*, at 21A-21B. The disputation is between Abayee and Rava.

loss there is no abandonment by the person who lost possession and hence no acquisition by the finder<sup>113</sup>. In principle, this rule applies equally to coins as to any chattels<sup>114</sup>. However, it was observed that a person is likely to check his pocket frequently and hence to become aware very quickly that he lost coins<sup>115</sup>. Hence, it is agreed that practically the finder of a coin, as a chattel without an identifying mark, is permitted to assume the owner's despair and hence be able to acquire it<sup>116</sup>.

At the same time, it is contested whether a thief, as opposed to a finder, may acquire a chattel based on the owner's despair to recover it<sup>117</sup>. The prevailing view is that in any event an acquirer from the thief of a chattel whose owner despaired will acquire ownership. Acquisition by the acquirer from the thief is rationalized on the basis of a change of the domain ("*shinue rashuth*") with respect to the chattel – from that of the thief to that of the acquirer from the thief – which follows despair by the prior owner from whom the chattel had been stolen<sup>118</sup>. Any remaining doubts as to the acquisition by the taker from the thief do not seem to apply to a chattel that does not have an identifying mark such as a coin<sup>119</sup>.

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<sup>113</sup> *Ibid.* at 22B

<sup>114</sup> Rambam, *Nezikin: Hilchot G'zela Ve-aveda*, Section 14, Rules 5 and 6.

<sup>115</sup> Rabbi Yitzhak in Talmud, *Bava Kamma* 118B,

<sup>116</sup> Talmud, *Bava Metzia*, at 21B, quoting with agreement Rabbi Yitzhak, *ibid.*

<sup>117</sup> Talmud, *Bava Kamma*, at 66A-68A. The view that the despair enables the thief to acquire the stolen chattel is adhered to by the Gemara in *Succah* at 30A (where the Gemara, per Rava, nevertheless rejects the view of an automatic despair upon a forcible robbery. The rejected view is that a forcible robbery victim, having been powerless to stop the robber in the first place, immediately, as he is robbed, despairs and abandons hope to recover the robbed chattel, so as to relinquish its rights to it, even when the chattel bears an identifying mark).

<sup>118</sup> Talmud, *Bava Kamma*, at 66A-68A. Nor is the buyer from the thief required to compensate the original owner, at least as long as the purchase was not from a notorious thief. See *Choshen Mishpat* Section 353 Rule 3.

<sup>119</sup> The remaining doubts are based on a Gemara in Talmud, *Bava Kamma* at 114A debating the duties of a robbery victim, to whom the robbers gave a substitute chattel robbed earlier from another person, to return the substituted chattel to the original owner. Rashi (*ibid.* D"H "Im ba") speaks of a moral obligation (based on piety). The case is plainly distinguishable from that dealing with a voluntary (and usually innocent) transferee of a chattel with no identifying mark, such as a coin, who is unlikely to be able to trace the original owner. See also Tosafot in Talmud, *Bava Kamma* at 114A (D"H "Tana") and in Talmud, *Bava Kamma* at 67A (D"H "Amar Ula").

A purse, whether empty or containing coins, and a pile of coins, may have an identifying mark. An example for a set of coins that can be identified is where coins are neither scattered nor placed in a haphazard pattern, but rather stacked like a tower in a stable arrangement, such as where they are of different diameters with the largest coin at the bottom and smallest coin in the top. It is evident then that they were deliberately placed there by the owner. However, by itself, a coin has no earmark; stated otherwise, coins are fungibles; one cannot identify a lost coin by asserting its features as new or bearing the image of a particular king or emperor. Moreover, even a lost coin marked by the claimant with his own name does not bear a valid identifying mark, since the claimant may have paid with it; inevitably, once it went into circulation, the coin was thus subsequently lost by another person<sup>120</sup>.

Some commentators consider this rule as neither absolute nor necessarily limited to coins. Thus, Nimukei Yoseph<sup>121</sup> and the Ramban<sup>122</sup>, do not rule out the possibility that a coin will bear an identifying mark, such as when it is cracked. Under such circumstances, the coin is to be treated as an ordinary chattel; presumably, even if a cracked coin is not necessarily demonetized, at least it does not circulate easily<sup>123</sup>. On his part, the Rashba does not rule out the possibility that a marked name even on an ordinary chattel will not be fit to serve as an identifying sign; this is so since the claimant may have sold the chattel marked by his own name so that now it belongs to another. And yet, as explained by the Ritva<sup>124</sup>, by their nature, coins are designed to be spent, that is, to pass on from hand to hand in circulation; hence, the rule is that a marked name on a coin is always inadequate to serve as a sign identifying the person whose name is marked on the coin as its owner at the time of the loss. At the same time, a marked name on an ordinary chattel will be

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<sup>120</sup> An extensive discussion is in Talmud, *Bava Metzia*, at 24B-25B. Among commentaries, in addition to Rashi, *ibid.*, particularly see Rambam, *Nezikin: Hilchot G'zela Ve-aveda*, Section 14, Rule 10 (together with Magid Mishna and Lechem Mishna), as well as Section 16 Rule 3; Ha-Meir, Beit Habchira, *Bava Metzia*, 25B.

<sup>121</sup> Nimukei Yoseph, Rif, *Bava Metzia*, at 14A, D"H 'She-ein siman le-matbea'.

<sup>122</sup> Chidushei HaRamban, *Bava Metzia*, at 25B.

<sup>123</sup> For the limited circulation of 'asimons' and 'bad coins' see above, paragraph containing notes 63-67.

<sup>124</sup> Chidushei HaRitva, *Bava Metzia*, at 25B



inadequate to serve as an identifying sign only where that chattel stands to be sold.

Thus, the currency quality of a coin, namely its transferability from hand to hand free from prior owner's adverse claims is explained in the Talmud not on the basis of an *á priori* principle facilitating the free circulation in commerce of the coin, as under the more modern doctrine of English law<sup>125</sup>. Rather, transferability free from adverse claims is explained in the Talmud on the basis of prior owner's relinquishment of ownership by way of despair. The despair leading to the relinquishment is however explained partially on the fungibility of the coin, and partly on its circulation. Circulation is thus a factor under both legal systems for the transferability of a coin free from adverse claims; however, under modern English law facilitating the circulation of money is the motive for the special rule while under the Talmud the circulation of money is part of the reason for the rule.

As under the more modern doctrine of English law, a good faith taker for value of the coin is protected under the Talmud. However, in English law this is the full extent of the protection, which at the same time is absolute. In contrast, under the Talmud, due to the different theoretical rationale, at least according to one view<sup>126</sup>, even a thief may be accorded a measure of protection. At the same time, in contrast to English law, under the Talmud, in theory, there may be circumstances of a valid identifying sign on the coin that will preclude even a good faith taker from value from being protected. However, inasmuch as under the Talmud protection is usually accorded to a good faith taker for value, free circulation of coins is thus provided, even if under a crude legal theory.

### 5. Conclusion

The Talmud contains a sophisticated discussion on what constitutes money<sup>127</sup>. It has also produced a pioneering doctrine facilitating the currency of money by means of its transferability from hand to hand free of adverse claims<sup>128</sup>. As well, the Talmudic

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<sup>125</sup> *Miller v. Race*, above note 2 at 457 (Burr.) and 401 (Eng. Rep.)

<sup>126</sup> For the controversy around this point see above text & note 117. Protection to the thief is in terms of the acquisition of ownership, though not as an exemption from the obligation to compensate the owner, if known. See cites in note 117 above.

<sup>127</sup> See particularly Part 2, above.

<sup>128</sup> See particularly Part 4, above.

monetary legal theory is cognizant of both the state and societal theory: that is, a valid coin is to be sanctioned by the state as well as accepted by the public<sup>129</sup>.

At the same time, the Talmudic legal theory on the value of a coin is premised on its metallic content<sup>130</sup> and is thus a far cry from nominalism<sup>131</sup>. However, even in that respect, the picture is not all that monolithic. Thus, in discussing the distinct value of the figure stamped on the coin, the Talmud effectively introduces nominalistic elements to the doctrine governing coined money.

Indeed, a few exceptions to metallism are apparent throughout the Talmudic discussions. Thus, the disqualification of the coin as both as an instrument and object of *Chalifin* has been based on a view that the value of the coin as being unstable due to the reliance on the figure in the assessment of its value<sup>132</sup>. That same figure is however recognized as a source of the monetary character of the coin<sup>133</sup>, as well as often, of its value<sup>134</sup>. Furthermore, the relative added value to the metal of the figure stamped on it is taken as a factor in the determination of the coin which constitutes money in relation to another<sup>135</sup>. All such considerations and discussions point at cracks in an orthodox strict metallic theory. The latter looks at the value of the metallic content as the exclusive source for determining the value of the coin. It is thus possible to conclude that so far as the Talmud is concerned, a 'purist' metallic doctrine did not exist.

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<sup>129</sup> See Parts 2 and 3(a), above.

<sup>130</sup> See particularly Part 3, above.

<sup>131</sup> For nominalism see text at note 1, above.

<sup>132</sup> See above, text at note 54.

<sup>133</sup> See above text at note 40.

<sup>134</sup> See above text at note 54. See also text around notes 60-62 (*asimon* as money).

<sup>135</sup> See Part 2, above, particularly concluding paragraph.