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Citation for published version:
Fox, D 2020, Money, law and institutions. in S Battilossi, Y Cassis & K Yago (eds), *Handbook of the History of Money and Currency.* Springer, pp. 159-176. https://doi.org/10.1007/978-981-13-0596-2_6

Digital Object Identifier (DOI):
10.1007/978-981-13-0596-2_6

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Published In:
Handbook of the History of Money and Currency

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Download date: 17. May. 2022

Money, Law and Institutions

David Fox

Monetary law – state theory of money – coinage – ius cudendae monetae – legal tender - debasement

Abstract

A version of Georg Knapp's state theory of money has represented the mainstream view of money applied in the civil law and common law traditions of Western Europe since medieval times. Following the understanding of Roman law, money was identified with the payment media issued by the sovereign body in the state. Legal doctrine recognised that the right to strike coin and to give it a value in payments belonged distinctively to the sovereign. The sovereign was entitled to change the monetary standard by altering the metallic content of the coinage or by raising or lowering its valuation in monetary units. Private law doctrines on the tender of money translated the monetary valuations made by the sovereign into practical results when the courts enforced actions for the payment of debts.

000.1 Introduction

Georg Knapp's *Staatliche Theories des Geldes* first published in 1905 identified the law and the state as the key institutions in the creation of money. Units of monetary value and the payment media representing them were "created by the state in its capacity as guardian and maintainer of the law" (Knapp (1905, 1924), 39). Their status as valid payment media and their value in payments depended on the fact of legal proclamation rather than their intrinsic substance. Knapp argued that it was impossible to tell from the physical form of payment media whether they were genuinely money. Since their status depended on "a certain relation to the laws", it was always necessary to "refer to the Acts and statutes, which alone can give the information" (Knapp (1905, 1924), 34).

Knapp's understanding of the role of law in the creation of money has not gone uncriticised, particularly in its application to developments of the twentieth and twenty-first

centuries (Proctor (2012)). Even when Knapp's state theory was first proposed, it stood in opposition to Karl Menger's societal explanation for the origin of money (Menger (1892)). Menger explained the origin of money as a spontaneous social fact. Participants in economic exchange settled on one commodity as their preferred medium of exchange because it was more highly saleable than other commodities in the market. They would willingly accept it because they were confident they could exchange it for other commodities that were directly useful to their needs.

Whatever its more general merits, the state theory represents the mainstream view of money accepted in the civil law and common law traditions of Western Europe. (The civil law systems are those of continental Europe and Scotland which are descended from classical Roman law. The common law system is identified with the rules and processes developed by the courts of England.) On this view, the phenomenon of money cannot be explained solely by social recognition and use. The view is traceable to classical Roman law. The Roman emperors minted coins and legislated for criminal offences to protect the exclusivity of their right. Lawyers since then have rarely attempted any comprehensive definition of money. But the institutions of the law – legislatures, courts, practitioners and learned commentators – have generally identified money with the payment media issued by a sovereign body, acting to implement its exclusive powers over the monetary system. Money emerges from networks of reciprocal obligations owed between a sovereign body and the public at large. It embodies a promise of value redeemable against legal debts, including debts owed to the state (Desan (2014)). Its value in units is given to it by legal enactments issued under the authority of a sovereign body. The capacity of money to discharge debts is recognised by the private law of the jurisdictions where it is issued. The courts that determine disputes over the performance of monetary debts recognise and enforce its value.

When legal systems recognised innovations in constitutional and monetary practice, they extended their theory of money to accommodate them. In Great Britain, for example, the new constitutional settlement established in the later seventeenth century brought about a change in institutional practice. Money was issued under the authority of Acts of Parliament. It was no longer created through the untrammelled exercise of prerogative powers resting in the King or Queen. Monetary sovereignty came to be identified with representative institutions which, in the new constitutional order, drew their authority from the King or Queen without being wholly subject to his or her will. When banknotes began to circulate in the seventeenth and eighteenth centuries, Parliamentary legislation gave certain of them a privileged status. It put them on the same legal footing as coins.

In explaining the relationship between money, law and institutions, this chapter concentrates on the legal history of the constituent jurisdictions of Great Britain. The English and Scots law of money proves to be fundamentally similar to that of other Western legal systems. They all exemplify – in varying degrees of directness and at different stages – a common body of principles that was first clearly articulated in the monetary law of classical and post-classical Rome. The monetary law of continental Europe during the medieval and early modern period was directly fashioned from original Roman sources (Rüfner (2016)). By a continuous tradition of exegesis, European jurists worked the Roman sources into a practical system of rules that was suitable for the commercial and monetary conditions of their time (Ernst (2016)). The monetary rules of English common law do not draw directly on the Roman legal tradition. But the fundamental similarities in monetary practice between England and Europe meant that the rules developed in each system are more alike than their separate doctrinal origins might first imply.

000.2 Sovereign power over money

The sovereign power over the monetary system was originally identified with the right to strike coin (*ius cudendae monetae*). The rule consistently recognised across Western legal systems was that the minting of coin was an exclusive prerogative of the sovereign. The rule is traceable a rescript of the Roman Emperor Constantine dated 326, and was reproduced in the Codex of Justinian:

> If anyone mints coins through counterfeit casting (*falsa fusione*), We instruct that all his property shall be bound over to Our Treasury. For We wish that the practice of striking coins be conducted only in Our mints … Whoever can be discovered to be a forger of coins or is exposed as such by anyone, shall be made over, immediately, with all delay removed, to the searing flames (to be burned alive) (Justinian, Frier (ed) (2016), C.9.24.2).

Constantine's rescript criminalised the minting of false coin. The offender's crime was treated as treason (*maiestatis crimen*) since it touched upon a right and interest of the Emperor himself. The rescript was specifically directed at the coining of money in private mints. It aimed to

preserve the exclusivity of the Emperor's own mints and to suppress all competing minting activity.

In the form that it took in the Codex, the rule doubtless reflected a much older constitutional practice. In systems where law-making power was identified with the sovereign's will, what the sovereign did was an expression of his or her right in law. Coins had long been struck bearing the Roman emperor's image. The explanation in classical Roman law of the distinction between barter and sale rested on the same principle. The jurist Paulus, writing about 200 AD, identified money as an exchange object that had been struck in a prescribed form by the mint and ascribed a stable value by the state (Rüfner (2016)). He wrote:

> But since it did not always and easily happen that when you had something which I wanted, I, for my part, had something that you were willing to accept, a material was selected which, being given a stable value by the state, avoided the problems of barter, by providing a constant medium of exchange. That material, struck in due form by the mint, demonstrates its utility and title not by its substance as such but by its quantity, so that no longer are things exchanged both called wares but one of them is termed the price (Justinian, Watson (ed) (1985), D.18.1.1.pr)

We see in this definition what Georg Knapp later called a "morphic proclamatory" theory of money (Knapp (1905, 1924), 31). Roman money derived its status from the fact that it was issued by the Emperor in a form authorised by him.

With the medieval revival of Roman law in western Europe, rules modelled on Constantine's rescript were promulgated in new codes and expounded upon in the commentaries of continental and English jurists. A version appears in the *Liber Augustalis* (1231) promulgated by Frederick, King of Sicily and Holy Roman Emperor:

> We inflict capital punishment on and confiscate the property of those who coin adulterine money or who knowingly receive it and use it. We also inflict this penalty on those who conspire with them, (Powell (1971), III, XLII, 40).

The English commentator, Henry de Bracton (c 1210-1268), explained a variety of coinage offences punishable as lese-majesty (Bracton, Thorne (ed) (1968)). He associated the coining of false money with the counterfeiting of the King's seal. The association emphasised the distinctive wrong of usurping the King's right to confer the status of money on coined metal.

The power of authenticating money lay with the King alone. The falseness of money was analysed as a legal rather than a material characteristic. The counterfeiter's crime would have been the same even if the coins had been made to the same weight or fineness as the King's own money.

Legal commentators came to identify the minting of coin with the reglia of the sovereign. In Scotland, Thomas Craig's *Jus Feudale* (c 1600) explained the King's *ius cudendae monetae* as belonging to a standard list of regalia derived from the *Liber Augustalis* of the Emperor Frederick II (Craig, Dodds (ed) (2017)). It belonged alongside other exclusive rights associated with the sovereign such as the levying of taxes, the maintenance of arsenals and the levying of fines. In the seventeenth and eighteenth centuries the English commentators, Sir William Hale and Sir William Blackstone, used more conventional common law terminology describing the right to issue coin as the sovereign's "prerogative" (Hale (1736, 1847), Blackstone (1765)). Whichever term was used, the association of *ius cudendae monetae* exclusively with the King established that the right was an inalienable incident of his sovereign power. The King held the right in the public interest. It could never be granted away. This is the significance of the dictum reported in the decision of the English Privy Council in *Gilbert v Brett* (1604): *monetandi ius principum ossibus inhaeret* ("the right of issuing money reposes in the very bones of princes"). The right to mint coin was no more separable from the King himself than were his bones from his body. Any other person minting coins was either exercising a limited permission from the King or was a treasonous usurper of the King's right. The burden was on him to prove his authority from the King, on pain of criminal penalties if he failed.

00.3 Incidents of the sovereign right

Legal commentary and practice recognised that *ius cudendae monetae* included other powers beyond the basic right to strike coins. The most important of these was the sovereign's right to ascribe a legal value to coins. In law, coins were more than conveniently transferable quantities of precious metal, the weight and fineness of which had been authenticated by the sovereign. They also carried the distinctive capacity to discharge debts. The parties who used coins in payments needed to know how many coins debtors had to tender to secure a valid discharge from their debts. Coins needed a value in the same monetary units as were used to denominate the debts.

The civil law analysis of the high middle-ages distinguished between *moneta in obligatione* and *moneta in solutione* in payments (Ernst (2016)). These terms referred respectively to the monetary units measuring the value of the debtor's obligation and the kinds of coins that the debtor was required to tender to get a good discharge from the debt. Like all other material commodities coins could be given a valuation in terms of monetary units. The difference was, however, that the valuation of coins was fixed by law through the exercise of the sovereign's prerogative. The courts that enforced debt transactions were bound to take notice of these valuations. They enforced them to the exclusion of any competing market values. The value of the sovereign's money in his own jurisdiction was not a question of fact which the court was free to decide by evidence.

The Scots and English legal sources of the seventeenth century were explicit in identifying the right to fix the value of coin with the sovereign's prerogative. Thomas Craig's *Jus Feudale* (c 1600) described the formal valuation of money as that "official mark" with which money was "stamped" in accordance with the authority of the prince (Craig, Dodd (ed), (c 1600, 2017)). Craig's reference to a "mark" on the coins was a legal metaphor: the coins themselves were not stamped with numbers to show their monetary valuation. But the impressions on the coins identified them with the physical descriptions in the legal documents by which the sovereign authorised the mint to strike a new issue of coins (these were called "warrants" in Scotland and "indentures" in England). The documents usually contained elaborate descriptions of the iconography and lettering to be stamped on each type of coin, and ascribed a valuation to them.

As an adjunct to the sovereign's power to fix the legal valuation of his own coins, it also lay within his prerogative to adopt foreign coins into the local monetary system. In the trading centres of continental Europe and of Scotland a large proportion of the coins in circulation was made up of foreign coins. They circulated at informal market rates agreed by the traders who used them. The market rates sometimes overvalued the coins relative to their intrinsic bullion content, which misled the public as to their intrinsic worth and prejuded the circulation of the sovereign's own money. The sovereign's response was to ban the foreign coins entirely (England's status as an island made this a feasible legal response in that country), or more usually to ascribe them a valuation in the local money of account, which would allow them to circulate on a par with the sovereign's own money. The fixing of the valuation was usually effected by a proclamation from the sovereign. The adopted foreign coins were then indistinguishable in payments from the local coins minted under the sovereign's *ius cudendae monetae*.

More controversially, the sovereign's right to fix the valuation of the coins extended to changing the monetary standard. He was entitled to alter the valuation of coins already in circulation or to make a new issue of coins with a different weight or fineness. Thomas Craig accepted as much, although he regretted the way the Scottish Kings abused their right. In his own lifetime he had experienced a five-fold debasement of the Scottish coinage: "Little by little, by skulduggery and dishonesty, we are being cheated" (Craig, Dodd (ed) (2017), 479).

The English common law understanding of the sovereign's right to change the monetary standard was the same as Craig's. The leading case was *Gilbert v Brett* (1604), which was a dispute heard by the judges of the English Privy Council after Elizabeth I's debasement of the Irish silver coinage in 1601 (Fox (2011)). Gilbert sold goods to Brett for a price of £100. Between the date of sale and the due date for payment a proclamation by the Queen withdrew the old silver coinage and replaced it with a new coinage struck from debased silver. The proclamation decreed that the new currency had to be tendered and accepted at its nominal legal value. The proclamation made no allowance for the depreciation of the currency in terms of its silver content. Brett tendered £100 in newly minted coins when the debt fell due for payment. Gilbert rejected the tender and held out for payment in old coins or at least for enough new coins to give him an equivalent amount of silver.

The Privy Council held that Brett had made a good tender with the new debased coins, and that Gilbert was in contempt of the Queen's prerogative by rejecting them. It strongly affirmed all aspects of the sovereign's prerogative over coinage. It lay in the sovereign's prerogative to make coins of whatever metallic composition she pleased and to fix their value in the money of account. It necessarily followed that she could change the monetary standard by reducing the bullion content of the coinage (which was a debasement in the strict sense of the word) or by ascribing it a higher or lower valuation in money of account. Ultimately, she could demonetise the coins so that they reverted to bullion. This was what the Queen had done to the former Irish currency. Gilbert's insistence that the debt be paid with the pre-debasement coins was an impossible legal demand. Those coins were no longer money in legal estimation. The debtor would not have been making a valid tender that complied with the terms of his obligation to pay the price in money.

Significantly for later developments, the Privy Council held also that the sovereign's prerogative to change the monetary standard did not require the consent of Parliament. The many past occasions when the King had changed the standard of the English coinage without Parliamentary consent were taken as evidence of his unconstrained prerogative. This view would change after the constitutional struggles of the English civil war and the restoration of

Charles II to the throne of Great Britain. Sovereign control over the monetary system would eventually be recognised as resting in Parliament (see section 4).

The legal process for ascribing a valuation to coin locates *ius cudendae monetae* in the larger scheme of economic regulation falling within the sovereign's powers. The striking and valuation of coin were not ends in themselves. They served more diffuse economic purposes from facilitating domestic payment transactions to controlling the balance of international trade. Blackstone (1765) saw the connection more clearly than other writers such as Craig, who located *ius cudendae monetae* in a conventional, but eclectic, list of prerogative rights (Craig, Dodd (ed), (2017)). Blackstone linked it instead with the sovereign's general responsibility as the arbiter of domestic commerce. He associated it with other sovereign powers of the King that included the standardization of weights and measures and the grant of charters to hold public markets.

The full detail of the sovereign's monetary powers is apparent from the legal instruments that implemented them rather than from the standard legal sources, such as legislation, judicial decision or learned commentary, that authorised or explained them. The records of Acts of the English and Scottish Privy Council throughout the seventeenth century are replete with examples of the monetary prerogative in action. The sovereign would intervene by proclaiming measures intended to stimulate exports, encourage positive bullion flows into the country, and protect the local currency against damaging competition in the foreign exchange markets. It is common to find Privy Council proclamations that revalued the local currency to reflect changes in bullion prices abroad; proclamations requiring merchants to bring foreign coin to the mint so it could be reissued in the local currency; proclamations prohibiting the unauthorised melting of coin for bullion; and proclamations criminalising the acceptance of foreign coins that had been banned from circulation (Larkin and Hughes (1973); Cochrane-Patrick (1876)). The fixing of coin values was integral to this larger network of macroeconomic policies. If the local coin was undervalued against foreign currencies then it would tend to be exported, causing a damaging drain of specie and a scarcity of coin at home.

00.4 Later developments in the sovereign right over money

In Great Britain, the later seventeenth and eighteenth centuries saw important legal changes in the sovereign's prerogative control over the monetary system. In one sense the prerogative was curtailed. Monetary sovereignty shifted from the King and his advisers in the Privy

Council to the King operating through Parliamentary legislation. In another sense, sovereign control over the monetary system expanded in response to innovations in monetary practice. Banknotes, which at first fell outside the exclusive prerogative to issue coin, were eventually encompassed within Parliament's sovereign control over the monetary system. The developments illustrate the open-ended nature of monetary sovereignty: "historical and political developments established certain facts in the first place and the related concept [of sovereignty] was developed only at a later stage, in an attempt to analyse reality as part of a legally coherent framework" (Zimmermann (2013), 9). While the sovereign prerogative over money was originally identified with the right to strike coins, that usage did not constrain the exercise of sovereign control once new kinds of money came into circulation.

The restoration of King Charles II to the English and Scottish thrones in 1660 marked a turning point in the legal history of the monetary system of Great Britain. The King's sole prerogative to control the monetary system ceased to be the constitutional norm. By the statute 18 & 19 Car II, c 5 (1666) ("An Act for encouraging of Coinage") the English Parliament enacted that the cost of assaying, melting and striking coins was to be met by the government out of tax incomes. The individuals who brought bullion to the mint no longer bore the cost of coinage, as they had under the old free minting system (Desan (2014). That system had also allowed the King to deduct a seignorage tax from each new batch of coin sold by the mint, which created an incentive to debase the coinage. The task of setting an appropriate mint price for bullion was a delicate one. All too often it was not fixed at a rate that successfully encouraged an steady flow of bullion to the mint. To remedy this problem, the statute spared the individuals who brought bullion for coining the direct costs of the minting process.

The principle that the costs of minting should be borne by taxation became the new norm in Great Britain. The costs of William III's recoinage of the English silver currency during 1696-69 were met from taxation (Li (1963)). When in the Scottish silver currency was recoined between 1707 and 1709 after the 1706 Articles of Union between England and Scotland the cost was met from the "Equivalent fund" paid by the English government (Murray (1997)).

The other significance of the statute of 1666 was that it was an Act of Parliament. Previously, English or Scottish legislation concerning coinage had originated in the King's Privy Council. It was publicised and implemented by official proclamations, which in England at least were direct sources of prerogative law. The change in practice became more marked after the Revolution of 1688 which deposed King James II/VII and installed King William and Queen Mary. From then onwards English legislation on coinage, and on the monetary system

generally, emanated from Parliament. The most obvious instance was the legislation enacted to govern the recoinage of England's silver currency in 1696-69. A series of Acts of Parliament provided for the demonetisation of the old clipped coinage and its replacement with new coins struck to restored standards of weight and fineness (Li (1963)). The change in monetary practice was consistent with the shift in constitutional norms represented by the Bill of Rights 1688 enacted by the English Parliament. The Bill made no provision for the coining of money. But the new constitutional order that prohibited the levying of taxes and the suspension of laws without Parliamentary consent was unlikely to countenance the King's untrammelled exercise of prerogative powers over the monetary system.

Acts of Parliament concerning money frequently appeared on the statute book throughout the eighteenth century. They set the main structures of the United Kingdom monetary system on a legal foundation defined by Parliament. In 1774 the statute 14 George III, c 42 defined an upper legal tender value on silver coin of the realm:

> That no Tender in the Payment of Money made in the Silver Coin of this Realm of any Sum exceeding the Sum of Twenty five Pounds … shall be reputed in Law, or allowed to be a legal Tender … for more than according to its Value by Weight … and no Person to whom such Tender shall be made shall be any ways bound thereby; any Law, Statute or Usage to the contrary notwithstanding.

The effect of the statute was to enact that the United Kingdom operated on a gold standard. It had previously been on a fully bimetallic standard where gold and silver coins circulated on the same terms, with no upper limits on their legal tender status. The statute made silver a subsidiary coinage. Its legal status as money continued only so long as it was tendered in payments not exceeding £25 in value. Above that limit it reverted to bullion. The provision also demonstrates the interrelationship between the private law rules governing the discharge of debts and the definition of money in the public law of the realm. Coin carried its status as money by its capacity to compel the discharge debts. On this view, gold coin of the realm was always money in legal estimation. A debtor could tender it to discharge a debt for any amount.

Acts of Parliament also established a new place for banknotes in the monetary system. Since the seventeenth century, private banks had been free to issue their own banknotes because the notes fell outside the sovereign's *ius cudendae monetae*. Seen as circulating credit instruments, banknotes were different in kind from the coins over which the sovereign had traditionally asserted an exclusive prerogative. Parliament eventually came to recognise the

special status of notes issued by the Bank of England. At the onset of the Napoleonic wars, Parliament enacted the statute 37 George III c 45 ("Bank Restriction Act 1797"). It suspended the Bank's duty to pay coin on notes presented to it for payment. The statute changed the legal status of the notes. They circulated on a footing almost equivalent to that of coin. Convertibility was restored in 1821 after the end of the wars. The status of notes was again enhanced by legislation in 1833. The statute 3 & 4 William IV c 98 ("The Bank of England Act 1833") made Bank of England notes legal tender for all sums above £5. At least in private payments (although not for the purposes of redemption against the Bank), the notes were legal tender equivalent to gold coin.

This development in practice eventually earned legal recognition in the courts' rationalisation of monetary sovereignty. In *Emperor of Austria v Day* (1861) the English Court of Appeal in Chancery granted an injunction to restrain the printing of banknotes by a political opponent of the Austrian Emperor and King of Hungary. The notes were intended for circulation in Hungary. The court confirmed the Emperor's authority to control the circulation of money in his own territories. The right to issue notes followed from the *ius cudendae monetae* belonging to the supreme power in every state. It was not confined to the coining of precious metals but also included the issue of base metals or paper instruments made to represent varying amounts in value of gold and silver. That sovereign right could be enforced as exclusively for new forms of circulating money as it could for the old forms consisting in coins struck from precious metals (Proctor (2012)).

00.5 The nominal value of money

The sovereign's right to ascribe a money of account valuation to coins was essential to the legal analysis of monetary value and the proper discharge of monetary obligations. Until circulating paper money came into common use in the late seventeenth and early eighteenth centuries, the circulating media of most European states consisted in coins struck from precious metals. Money had a strong physical foundation. It was as much a material substance as other kinds of valuable treasure, such as plate or jewels, that were also used to store personal wealth. What distinguished coin from other kinds of treasure was the homogeneity of its physical form and the fixing of its value by a legal act of the sovereign (Blackstone (1765)). Coins simultaneously carried two values: an intrinsic value based on their bullion content and an extrinsic value based on the valuation ascribed to them by the sovereign. A perennial legal question confronting

jurists and courts throughout the medieval and early modern periods was how coins were to be valued for the purposes of discharging debts.

The long-standing assumption of the English common law was that monetary debts had to be discharged according to the extrinsic value of the coins tendered by the debtor on the due date for payment. The common practice among lawyers of the late medieval and early modern periods was to denominate debts as generic money of account sums. Debts were expressed for example in the form "xx li of lawful English money" rather than as requiring the delivery of any particular combination of coins equal to that value. The legal forms of action used for enforcing debts in court were also expressed in money of account sums (Desan (2014)). The effect was to preclude any inquiry into a change in the intrinsic value of the coinage between the date when the debt was incurred and the date when the debtor paid it. This, as we shall see, was the result enforced in *Gilbert v Brett* (1604), which gave special weight to the sovereign's untrammelled prerogative to change the monetary standard. The case confirmed that English law took a nominal approach to the valuation of money and monetary obligations. The creditor bore the risk of debasement.

The writings of Viscount Stair in his *Institutions of the Law of Scotland* (1681) confirmed that the same was true for the law of Scotland (Stair, Walker (ed), (1681) (1981)). In this, Stair disagreed with Thomas Craig who had argued that the legal value of money should equate to its intrinsic value as bullion and that debts should be repaid at their original intrinsic value (Craig, Dodd (ed) (2017)). Stair's reasons drew upon the civil law tradition of monetary thought. They referred to the explanation of the defining characteristics of money given by Roman jurist Paulus (see section 2). Stair read Paulus as saying that money was a fungible token of exchange, the physical substance of which was immaterial to the discharge of the debt. Its extrinsic value imposed by the King was therefore to be respected. It did not matter whether the intrinsic value of the coins tendered by the debtor was less than the value of the debt, assessed in intrinsic terms, when the debt was first contracted.

On the whole, the civil law jurists of continental Europe were slower to reach this same nominalist conclusion than the English common law. The continental jurists' views were shaped by their analysis of the contract of loan for use in classical Roman law (*mutuum*) (Ernst (2016)). *Mutuum* was contracted when a lender transferred fungible property to a borrower for the borrower's own use. The typical example was a loan of money. The ownership of the property passed to the borrower subject to the borrower's duty to restore property of the same essential kind and quality to the lender. The question of how the debtor should repay the loan forced jurists to consider the essential quality of the coins lent by the creditor. From late in the

twelfth century the orthodox view had been that the debtor was required to repay coins having the same intrinsic value as the coins originally advanced to him. The rule entailed that the risk of a debasement in the currency lay with the debtor. It rested on an assumption about the essential quality of coin. Coin was analysed as a special kind of bullion, the weight and fineness of which was certified by the sovereign. It was as if money debts were obligations for the transfer of bullion in the form of coin.

This remained the predominant view until the late seventeenth and the eighteenth centuries. A pivotal figure in the change of view was the French jurist Charles du Moulin (1500-1566). His *Tractatus contractuum et usurarum* (1584) made a sustained argument that the extrinsic value of money was primarily relevant to its value in the discharge of debts (Dondorp (2016)). Du Moulin argued that the value of money consisted in a social convention. It was established and enforced by the legal decree of the sovereign. The form and substance of money therefore lay in the sovereign's legal act of monetizing coins and decreeing the legal value at which they had to pass. It did not consist in the material substance from which coins were struck. Debts were discharged when the money of account value of the debtor's obligation equated to the money of account value of the coins tendered by the debtor.

Du Moulin's view eventually became the norm among writers in the civil law tradition. The Dutch jurist, Johannes Voet (1647-1713), argued that when money was given on loan it was not so much the coins that were to be considered but the legally-decreed monetary amounts that they represented. He wrote:

> It follows that if the public value of coins is increased [the debtor] can obtain release by repaying fewer than he had received on loan; but if it has been lessened, he is held liable to pay back proportionately more. And if he perhaps has received coins made of purer metal, he can then pay back others which … have been made of a cheaper substance, so long as those coins, though cheaper in respect of their intrinsic goodness, have not been deprived of their currency by public authority (Voet, Gane (ed) (1955-58), XII.I.24(iv).

The French understanding of the eighteenth century was the same. The French jurist Robert Joseph Pothier (1699-1772) noted that the value of money was fixed by the sovereign's prerogative. Debts therefore had to be paid according to the monetary standard at the date of repayment rather than at the date when the debt was incurred (Pothier (1773), Part I, ch II § III).

The legal recognition of nominalism was an important step in monetary development. It assisted the development of new forms of money that derived their value from legal fiat rather than from their intrinsic content. It facilitated the circulation of paper money and token currencies from the seventeenth century onwards, and enabled their eventual recognition as legal tender.

00.6 The homogeneity of money as a construct of law

So long as money consisted of intrinsically valuable coins, the ideal of perfect homogeneity among all coins presented a technical and legal problem. To take an example from English monetary practice, all penny coins valued at 1 *d* needed to be equally acceptable in the discharge of debts expressed in penny units. Six penny coins had to be as acceptable to discharge a debt for 6 *d* as one sixpence coin which had been ascribed a money of account value of 6 *d*. As a matter of law, the value of a coin in payment was fixed in the warrant or indenture by which the sovereign authorised it to be issued. But that value depended at least partly on its intrinsic value. The value of a coin represented a fractional part of the official mint price paid by the sovereign for bullion received at the mint (Redish (2000)).

The problem was that coins were not all physically homogeneous even though the legal rules of monetary valuation presumed that they had to be. The process of refining metals was subject to inevitable technological limitations (Challis (1978)). Even coins of the same denomination could not all be minted to a consistent standard of fineness. The process of cutting coin blanks from sheets of assayed metal meant that some coins were unavoidably heavier than others. The problem grew worse once the coins were put into circulation. Coins lost weight by natural abrasion as they passed in circulation. They came to weigh less than they did when they were first issued. When enough heavy or light coins were sorted and gathered, the accumulated differences in their weights created possibilities for arbitrage between their extrinsic and their intrinsic values. Criminals added to the problem by coin clipping. They would pare silver from the circumference of coins before putting them back into circulation at their extrinsic value. The accumulated quantities of silver removed from the coins could then be sold as bullion.

At all stages in the life of a coin, legal regulation applied to protect the ideal of homogeneity against these physical differences. The mint indentures authorising each new issue of coin specified so-called “remedies of the assay and the shear”. So long as the fineness

and weight of coins stayed within bands of permitted variability, then the coins would carry the legal status of money and pass at their legally decreed values. Coins that exceeded the remedies were not money. They remained bullion despite the imperfect technical transformation that had been wrought upon them. Stringent criminal penalties were imposed for clipping coins and for culling and selling them at rates exceeding their legal value. All offences were treated as violations of the sovereign's *ius cudendae monetae*.

00.7 Money, property and liquidity

Jurists and legal practitioners of the medieval and early modern periods rarely attempted any comprehensive legal definition of the range of things that served as money. Consistently with the analysis of the Roman jurist, Paulus, it was generally sufficient to identify money with the coins issued by the sovereign, and then to explain their distinguishing feature, which was that they were the price given in exchange for an object of sale. The legal distinction between barter transactions and sale transactions was easily drawn so long as money was identified with the sovereign's coins. The distinction was less clear once legal claims to the payment of coins came to be treated as functionally equivalent to the coins themselves.

Since medieval times, merchants had commonly used written payment orders to remit money of account sums between themselves to avoid the hazards and inconvenience of transferring transfer metallic coin across long distances (de Roover (1948); Geva (2011)). The payment networks operating between them depended on the creation, set-off and cancellation of debt relations rather than on the transport of specie between the transacting parties. For the most part, these transactions fell outside the conventional juristic analyses found in the civil law tradition. Indeed, when jurists did attempt to analyse them, they often found that the payment transactions made a bad fit with the received categories of legal analysis

One legal problem, however, that jurists and courts were forced to confront in the eighteenth century was the way the conventional rules of property applied to banknotes. Privately-issued banknotes had been in circulation in England since the latter half of the seventeenth century. With the foundation of the Bank of England in 1694 and the Bank of Scotland in 1695 notes came to be issued by corporations operating under statutory authority. In legal form, banknotes were transferable instruments entitling the bearer to enforce a debt for the payment of coin. Their value in payments between private parties depended on the certainty that the bearer could present the note to the issuing bank for payment in coins. They needed

the same liquidity as coins, both in being easily transferable and in giving the holder the same security of title as was enjoyed by a person in possession of coins.

Until the development of banknotes, English and Scots law had relied upon the physical homogeneity of coins to explain their liquidity. The general rule governing the transfer of ownership in property is that the transferee can have no better title than the transferor had. If property is stolen then it still belongs to the victim of the theft. All transferees who receive the property through the thief hold it subject to the victim's surviving ownership. But English and Scots law recognised an exception for stolen money. In this they followed the analysis of the classical Roman law. In Scotland, the reliance on the Roman analysis was explicit (Stair, Walker (ed), (1681, 1981)).

The Roman rule facilitated the liquidity of money. It secured the title of the current holder against claims brought by a former holder from whom the money might have been stolen. Judging by the surviving legal texts, it seems that the specific recovery of money or its value by a vindicatory action was relatively common in Roman legal practice (Thomas and Boraine (1994)). The common feature of all of these instances was that the action lay to recover money contained in a bag or purse that was traceable to the former owner. Money was commonly remitted in sealed bags to moneychangers for assaying or to be held on safe deposit.

But a vindicatory action for recovery did not lie if the former owner's money was no longer contained in a bag or if it had become inextricably mixed with other coins belonging to the defendant. So if a thief stole A's money and paid it to B who then mixed it, A's only action was to sue the thief for the debt arising out of the theft. A's ownership was entirely extinguished by the mixture. B's ownership of the money was complete and unchallengeable even though the money derived from the tainted transaction between A and the thief. The rule even seemed to bar A from claiming a right of co-ownership of the mixture proportionate to his contribution to it.

Until the eighteenth century, the English and Scots law legal sources took the same approach. In the English case law sources it was said that money was "not to be known" once it had passed indistinguishably into a mixture with other money (eg, *Banks v Whetston* (1596)). The mixture extinguished the title of any former owner and made the title of the current holder indefeasible in law. An action in detinue would not lie for recovery of the money or its value unless it stayed sealed in a bag. Detinue would only lie for property that remained identifiable among the defendant's belongings. Otherwise, defective titles to money were cleansed by the fact of mixture. Once the money was mixed, the title of any subsequent transferee became

more secure. The transferee could accept the money confident in the knowledge that his title to it was practically secure against challenge by any former holder of it.

The rule followed from the physical similarity of all pieces of coined money. They were minted so as to be physically and legally homogeneous in the payment of debts. They were also treated as homogeneous when they were seen as property in the hands of a third person. The person in possession of the money was presumed to be the owner and the burden of proving otherwise fell on the person who tried to challenge that possession. Since all coins were presumptively identical, the challenger would invariably fail to discharge the burden of proof. Stair's *Institutions of the Law of Scotland* (1681) was explicit in making the connection between the identification of coins and the commercial imperative of ensuring their liquidity.

> [I]n fungibles and all such things as are not discernible from others of that kind, possession is generally esteemed to constitute property, which is most evident in current money, which if it be not sealed, and during its remaining so, is otherwise undiscernible, it doth so far become the property of the possessor, that it passes to all singular successors without any question of the knowledge, fraud, or fault of the author; without which commerce could not be secured, if money, which is the common mean of it, did not pass currently without all question, whose it had been, or how it ceased to be his": (Stair, Walker (ed), (1681, 1981), (II.i.34).

Banknotes presented a new legal problem, which the established rules about title to coins were ill-adapted to solve. Ordinary use among commercial parties treated banknotes as functionally equivalent to coins. As Lord Mansfield Chief Justice of the English Court of King's Bench said, banknotes were treated "as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes" (*Miller v Race* (1758), 401). But banknotes, unlike coins, were specifically identifiable by their unique serial numbers. It was common practice for holders of notes to record these numbers as a precaution against loss or theft. If the title of a person holding the note was successfully open to challenge by a former holder who had lost the note, then their functional equivalence to coins would be lost. The issuing bank might face competing claims to payment of the note from the former and the current holders. The aim that notes would pass, as Stair said, "currently without all question, whose it had been, or how it ceased to be his" would be frustrated.

The problem was resolved by the litigation in *Crawfurd v The Royal Bank* (1749) in Scotland and by *Miller v Race* (1758) in England. In each case the result was dictated by the courts' concern to protect the liquidity of banknotes and the stability of the banking system (Reid (2016) and Fox (1996)), although the formal justifications given drew upon the different civil law and common law traditions of each country. In Scotland the acquisition of the banknote was treated as a kind of consumption of property. Once property was consumed – whether in fact or by operation of law – the former owner's title to it was extinguished. In England, Lord Mansfield CJ formulated a common law rule adapted from the customary practice of merchants who handled banknotes and payment orders: "So, 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" (*Miller v Race* (1758), 457). In the analysis of both systems, transferees who acquired stolen banknotes in commercial transactions without any knowledge of their tainted provenance were assured of taking a secure title to them. Title no longer depended, as it did under the old rule, on the possibility that the note might be identifiable in the transferee's possession. In practice, this eliminated the need for the transferee to make any inquiries at all. Banknotes were assured of the same liquidity as coin.

00.08 Law and the construction of the monetary system

We have seen how the legal valuation of money depended on the private law rules on tender and discharge of debts (section 5). Thus the immediate question in *Gilbert v Brett* (1604) was whether the debtor had tendered money that complied with his obligation in the contract of sale. The creditor would have been free to reject an invalid tender. The £25 limit on the monetary status of silver coin, imposed by statute in 1774, was expressed in terms of tender. A tender of silver was only valid – and in that sense "a Legal tender" – if it was made in payment of debt of £25 or less. Beyond that limit, the creditor was free to reject it. The private law rules on tender, which the courts enforced by routine litigation in debt claims, translated the sovereign's public power of monetary valuation into practical results.

Legal tender rules defined the different categories of money into which the monetary system was organised. Money that enjoyed unlimited legal tender status was the primary kind of money in the system. The other forms of money were constructed from it. So until the change made in 1774 silver and gold coins were both the primary monies in the British financial system. A debtor could tender coins of either kind towards the payment of debts in any amount. Both counted as "the lawful money of England", which was the term often found in the

payment clauses of contacts drafted by lawyers during the late medieval and early modern periods. The 1774 change demoted the silver coinage to a subsidiary money. It stood some way between the token coinage struck from copper and the gold coinage which, with its unlimited legal tender status, became the primary money of the system.

Coins struck under sovereign authority did not make up all the money in the system. They were supplemented by running credit arrangements, paper monetary instruments circulating from hand to hand, and eventually by bank balances that were transferable by instructions given by the account holder. All these secondary forms of money consisted in legal debts. They were ultimately enforceable by a demand for payment in legal tender. Paper money and bank money derived their value from the fact that the holder or depositor might, at will, reduce the debt to payment in gold coin. Naturally, much of the convenience of issuing these secondary forms of money was that the creditor would not in fact enforce the debt in this way. Provided that a bank's credit was good, it was better for the holder of a bank account to hold his money as a debt than to reduce it to coin. Despite that practical preference, their legal form remained as debts capable of discharge by payment in coin.

When in 1833 Bank of England notes were made legal tender in England they too become a primary kind of money alongside gold coin. There was no upper limit on the debts that could be discharged by the tender of Bank of England notes. All bank balances were reducible to payment in Bank of England notes or gold coin. The notes themselves were still enforceable against the Bank of England if the holder demanded payment in gold. The Bank could not pay the debt embodied in the note by tendering another of its notes! So although Bank of England notes were themselves legal tender, gold coin remained the base of the British monetary system throughout the nineteenth century.

This legal ordering of the system changed only in 1914 when the Bank of England suspended gold payments on its notes. Gold was withdrawn from general circulation. The suspension rebased the legal ordering of the system. Bank of England notes became the primary form of money, as they were the only form with unlimited legal tender status. Silver coins remained merely subsidiary. Once convertibility was suspended, the Bank of England notes derived their value simply by force of Parliamentary enactment. To be sure, when the United Kingdom went back on gold standard in 1926, the relevant legislation went some way to rebasing the British monetary system in gold. The Gold Standard Act 1926 fixed the legal rate at which the Bank of England was bound to sell gold bullion to the public. But the effect of the Act was only to re-set the value of sterling against foreign currencies which were also based on a fixed price for gold. The Act did not authorise the Bank to pay its notes in gold

coin. Any duty to do so was specifically revoked. So in all domestic payment transactions, the legal position since 1914 was unchanged by the Act. Bank of England notes were legal tender. They represented debts but not ones that could be extinguished by payment of any other more basic form of money.

The system had reached the final, chartal position described by Knapp is his *Staatliche Theories des Geldes*. Money was a mere token. Its value in payments was decreed by law in the exercise of state power.

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