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LEGAL THEORIES OF MONEY

PHANOR J. EDER

One of the penalties paid for the blessings of stability of the currency is that the law finds itself unprepared for unexpected and revolutionary changes in the monetary system. Money constitutes the most vital part of the substructure of the entire legal system, but when its stability is taken for granted, monetary questions rarely come before the courts and no analysis of underlying legal theories becomes necessary.

In England and the United States, so far as we are informed, no complete book has ever been published on the subject of the law of money¹ and with the exception of the recent output of papers on the gold clause only a few articles and chapters have appeared. These discuss isolated questions with especial emphasis on constitutional aspects. No attempt appears to have been made to correlate the special topics to the much broader field of monetary legal theory.² Lacking a comprehensive treatment of the whole subject, not alone the bar and the courts, but also the legislative and executive authorities may fall into errors, of language at least, that may tend to distort in unexpected ways the whole legal structure. In view of recent legislation and of the acute emphasis on monetary policies that always accompanies crises and depressions, a brief survey of the whole law of money is deemed of interest.³

The first requisite for clear analysis is to sharply differentiate the legal field from the economic and political fields. The methods of approach are necessarily different. It is no part of the ordinary duty of the courts to examine controverted economic and political theories; their decisions are based on precedents and experience, though the economic and practical results of laying down rules for the future cannot be wholly ignored. In discussing constitutional questions, it is true, the field of examination is necessarily broader and in the interpretation of statutes, the economic theories that underlie new legis-

¹The second part of MALYNES, *LEX MERCATORIA* (1622), the first English book on the Law Merchant, is entitled "Money", but deals chiefly with matters now assigned to other topics. *LEADING CASES ON THE LAW OF MONEY* was published by J. J. CRANDELL, Camden, N. J. 1899. The *Continental Literature* is voluminous. The writer is especially indebted to Nussbaum, Ascarelli and Mater.

²Oliphant, *Money* (1920) 29 *YALE L. J.* 606 is a notable exception.

³"Money is an institution, not of one nation, but of the world, and the institution, in order to be understood, must be studied as a whole." HORTON, *THE POSITION OF LAW IN THE DOCTRINE OF MONEY* (1882) 9.

lation occasionally may have to be studied, but frequently such study in view of the haziness of the ideas underlying emergency and political legislation will be sterile. Modern economists, unlike the pioneers, seem often to have lost touch with the day-to-day actualities of monetary matters as they come up in legal practice and before the courts. Hence it is, perhaps, and not because of any inherent conservatism that judges are more apt to be influenced by the views of the older economists who, to them, seem more cognizant of daily legal realities, than by present day theorists. In monetary matters especially, it is not to be expected that customs and traditions dating in their origin to the dawn of history, crystallized and expanded through the Renaissance development of the Roman law, the evolution of the law merchant and its incorporation into the common law and finally reshaped without perverting their fundamental content to meet modern complex conditions of banking, trade, credit and industry, will be lightly cast aside.

The history of the law of money evidences a constant struggle between the customs of trade and the doctrine of freedom of contract, on the one hand, and on the other, the exercise of the political power for the needs of the government or the relief of private debtors. Courts and commentators have been influenced by this struggle in determining whether the intention of the parties to contracts should be enforced or the paramount fiat of the political authorities be mitigated to avoid injustice. Nearly all the questions and theories of modern days find their prototype in the discussions of early jurists. From early days, the difficulties of the subject have been recognized. Modern discussions turn rather on the application of old theories to new conditions, such as inconvertible paper currency and bank or deposit money, than on the elaboration of new principles. The thread of continuity in the law is strong. Cases seemingly possessing only an historical interest suddenly are endowed with renewed life and interest as the result of changing laws and conditions reproducing analogous situations. Most of the fundamental notions were formulated at an early date and still hold. Confusion it is true exists in the cases. This is due in part to defective legislation, in part to ignoring distinctions long ago pointed out.

We cannot here review the history of legal theories in the light of prevailing economic and political concepts and schools of jurisprudence.⁴ A few high spots however stand out. Legal monetary doctrines

⁴For continental history in general, see especially ASCARELLI, *LA MONETA* (1928), and for France, MATER, *TRAITÉ DE LA MONNAIE* (1925). No similar research as far as we are aware has been undertaken for England and the United States.

played their part in the struggle against political autocracy. Early writers among the Canon and Civil lawyers attempted to curb the abuses of devaluation of the currency by princes, by formulating the doctrine that debasement could only be effected *cum assensu populi*.⁵ Coke⁶ and Blackstone⁷ were of the opinion the King had no prerogative to debase the currency. In practice, however, the sovereign exercised this prerogative and with the growth of centralized autocratic power beginning in the latter part of the 15th Century on the Continent and in England reaching its climax under the Tudors, control of the coinage became definitely unquestioned as a sovereign prerogative. The domain of legal tender also in effect fell within sovereign sway.⁸ Later as part of the ensuing struggle for civil and political liberty, the principle of the sanctity of the mint weights of the standard money became firmly established under the leadership of John Locke, never to be again questioned⁹ until the year of grace 1933.

Clashing theories as to the legal nature of money were early developed and are still constantly echoed in discussion. Is the law to treat money as having a real, intrinsic value, based ultimately on the precious metals, which alone can serve as an international medium of exchange?¹⁰ In other words, is the mercantile view that money arises spontaneously from use in trade and must be essentially cosmopolitan, to be given full play, when not expressly barred by sovereign fiat, or is money, always and for all purposes, to be deemed merely an ideal numerical unit created solely by action of the State, which declares and maintains what its nominal value shall be?¹¹ English and Ameri-

⁵ASCARELLI, *LA MONETA*, 12 *seq.*

⁶2 COKE, *INST.* 577, as cited and refuted by HALE, P. C. 194; and see 6 HALSBURY, *LAWS OF ENGLAND* (2d ed. 1932) § 688 (h.).

⁷Vol. 1, 278 (14th Eng. ed.)

⁸*Le Case de Mixt Moneys*, Sir John Davies Rep. 18, 80 Eng. Rep. 507 (Eng. tr. 1762) 48 (1605) (The actual decision goes no further than to hold that an engagement to pay current money in the future may be discharged by whatever has been made lawful money at the date of maturity). HALE, P. C. 194; BRECKINRIDGE, *LEGAL TENDER* (1903). The first express full legal tender statute in England was not enacted until 1816.

⁹FEAVERYEAR, *THE POUND STERLING* 121, 136 *seq.* The reduction in the gold content of the dollar in 1834 was merely an attempt to maintain the market ratio with silver, the then primary standard.

¹⁰HORTON *op. cit. supra* note 3, at 32; dissenting judges in *Legal Tender* cases, 79 U. S. 457, 20 L. ed. 287 (1871).

¹¹HORTON *op. cit. supra* note 3, at 33. See argument of counsel in *Hague v. Powers*, 39 Barb. (N. Y.) 427 (1863). The leading expositor on the Continent of a moderate and rational "nominalism" is Nussbaum. The opposition to this theory was never more eloquently stated than by Canning, in the debate (1811) on the

can courts, wisely it seems to us, have abstained from completely espousing either extreme.

These two contrasting theories, with modifications of varying degrees of content and application, furnish some clue to the maze of judicial language and thought, but a better approach towards harmonizing, in part, conflicting decisions in our courts lies in an analysis of the functions of money. Of the various functions of money recognized by economists, the courts have heretofore been concerned with only three:

1. Money as a medium of exchange.
2. Money as a measure of value or more accurately phrased perhaps, as a common denominator of value.
3. Money as a medium of discharge or satisfaction of obligations and specifically as a medium of payment of debts.

While in practice these three functions are often interwoven, they are nevertheless, in law, separate and distinct and rules properly applicable in the solution of problems under one function are not necessarily valid for the other functions. Properly drafted legislation should recognize the distinction between these three functions. Recent legislation has not clearly done so and hence offers not only difficulties of interpretation but also presents new constitutional and legal problems.

MONEY AS MEDIUM OF EXCHANGE

A number of important legal doctrines flow from the function of money as a medium of exchange or circulating medium. These are concerned (a) with the title to money and the remedies for its recovery; and (b) with the validity or invalidity and effect of transactions based on current money.

Title to Money. In order to subserve its purpose as a medium of exchange, no question as to the title to or validity of the money given in an exchange on an honestly consummated transaction should be allowed to arise. If money could be followed up by the person from whom it has been stolen as other personal property can be (with certain exceptions) into the hands of a bona fide holder for value, and reclaimed, no one would be safe in selling goods, no wage-earner could safely receive his pay, no creditor could safely receive payment of his debt, all the ordinary exchanges of a civilized community would come

Bullion Committee's Report. SUMNER, HISTORY OF AMERICAN CURRENCY (1874) 276, 277. It is refreshing to recall that in these debates on the Bullion Report, it was insisted that to use gold and silver was barbarous and behind the age. SUMNER, *id.* at 258.

to a standstill. This then is the reason for the old doctrine of the common-law that "money has no earmark."¹² The taker in good faith for a valuable consideration of money that has been stolen,¹³ embezzled¹⁴ or fraudulently obtained,¹⁵ acquires title to it.¹⁶ So, too, the ancient rule that the finder of lost chattels has title against all the world except the true owner is especially applicable to money. The general rule as to lost chattels does not under some decisions include choses in action, but bank notes are not considered for this purpose as choses in action, but as money, passing as such from hand to hand by delivery and circulating as a medium of exchange equally with coined money. The finder of lost money, as in the case of stolen money, transmits a perfect title to a bona fide recipient for value.¹⁷

¹²Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398 (1758); Moss v. Hancock, [1899] 2 Q. B. 111; Sinclair v. Brougham, [1914] A. C. 398; See Hatch v. Fourth National Bank, 147 N. Y. 184, 191, 192, 41 N. E. 403, 404-405 (1895). For the origin of the doctrine see 2 POLLOCK & MATTLAND, HIST. OF ENG. LAW (1895) 149, 150.

¹³27 HALSBURY, LAWS OF ENGLAND (1913) 902, 903; Moss v. Hancock, cited *supra* note 12. The doctrine was extended from coined money to bank notes by Lord Mansfield in the leading case of Miller v. Race, cited *supra* note 12, and has been constantly applied ever since even against the issuing bank. Solomons v. Bank of England, 13 East 155 n. 104 Eng. Rep. 319 n. (1791); Lowndes v. Anderson, 13 East 130, 104 Eng. Rep. 317 (1810); City Bank v. Farmers Bank, Fed. Cas. No. 2738 (1847); Worcester Bank v. Dorchester & M. Bank, 64 Mass. 488, 57 Am. Dec. 120 (1852); Wyer v. Dorchester & M. Bank, 65 Mass. 51, 59 Am. Dec. 137 (1853); Pelletier v. State National Bank, 114 La. 174, 38 So. 112 (1905). But see: Sylvester v. Girard, 4 Rawle (Pa.) 185 (1833). The doctrine applies to checks. Hatch v. Fourth National Bank, cited *supra* note 12.

¹⁴Merchants Loan & Trust Co. v. Lamson, 90 Ill. App. 18 (1899); First National Bank v. Gibert, 123 La. 845, 49 So. 593 (1909); see Newell v. Hadley, 206 Mass. 335, 92 N. E. 507, 29 L. R. A. (N. S.) 908, 916 (1910).

¹⁵State Bank v. United States, 114 U. S. 401, 5 Sup. Ct. 888, 29 L. ed. 149 (1885); Merchants Loan & Trust Co. v. Lamson, *supra* note 14; Ball v. Shepard, 202 N. Y. 247, 254, 95 N. E. 719, 721 (1911); see Stephens v. Board of Education, 79 N. Y. 183, 186, 188 (1879).

¹⁶For a different theory of the basis of this rule see Note (1905) 19 HARV. L. REV. 55. It is now generally held and may be considered settled that a pre-existing debt constitutes a valuable consideration for this purpose. Holly v. Missionary Society, 180 U. S. 284, 21 Sup. Ct. 395, 45 L. ed. 531 (1901); Stephens v. Board of Education, cited *supra* note 15; Liberty Trust Co. v. Haggerty, 92 N. J. Eq. 609, 113 Atl. 596 (1921); *aff'd.*, 115 Atl. 926 (1921). *Contra*: Porter v. Rosenman, 74 N. E. 1105 (Ind. 1905), commented (1905) 19 HARV. L. REV. 55; *cf.* N. Y. NEGOTIABLE INSTRUMENTS LAW § 25, and see note (1925) 38 HARV. L. REV. 800, 801 *seq.*

¹⁷*In re Savarino*, 1 F. Supp. 331 (D. C. N. Y. 1932) and cases therein cited; Roberson v. Ellis, 58 Ore. 219, 227; 114 Pac. 100, 103 (1911); Hamaker v. Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664 (1879); Tancil v. Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380 (1877); Miller v. Race, cited *supra* note 12.

The ancient maxim that money has no earmark must be carefully limited; its literal application caused confusion in early cases of commingling of monies and funds¹⁸ and still occasionally springs up to cause trouble.

Remedies. The character of money as a circulating medium of exchange, its passage by delivery from hand to hand, and hence normally its indistinguishability, was reflected also in the early rule that the common-law remedies of detinue,¹⁹ replevin²⁰ and trover²¹ do not lie for money unless it is specifically identified, "unless in a bag." There is considerable confusion as to the details and the application of the rule both in the early and the modern cases, a confusion which has been added to by the needless iteration of the maxim that money has no earmark. But it has been continuously held that money may be a subject of conversion and trover when it can be specifically described or identified as a specific chattel, there being nothing in the nature of money which makes it an improper subject of such an action²² and some courts are liberal in permitting this action in tort.²³ The modern cases turn not so much on the nature of money as on whether there is a duty on the defendant to return or pay over the specific money received by him or whether the relation is that merely

¹⁸Scott, *The Right to Follow Money Wrongfully Mingled with other Money* (1913). 27 HARV. L. REV. 125. For an early case see *Ward v. Ayre*, 21 Bulst. 323, 80 Eng. Rep. 1157, Cro. Jac. 366, 79 Eng. Rep. 314 (K. B. 1615).

¹⁹Co. Litt. 286 b. as quoted in *Graves v. Dudley*, 20 N. Y. 76, 79 (1859); *Banks v. Whetson*, Cro. Eliz. 457, Moore K. B. 394, 78 Eng. Rep. 711 (1596); *Bretton v. Barnett*, Owen 86, 76 Eng. Rep. 918 (1599); *Clarke's Case*, Godb. 210, 78 Eng. Rep. 128 (1613); *Isaack v. Clarke*, 2 Bulst. 306, Moore K. B. 841, 80 Eng. Rep. 1143 (1615); BL. COMM. bk. III, c. IX.

²⁰*Graves v. Dudley*, 20 N. Y. 76 (1859); *Sager v. Blain*, 44 N. Y. 445 (1871).

²¹*Watson v. Smith*, Cro. Eliz. 723, 78 Eng. Rep. 957 (1600); *Holiday v. Hicks*, Cro. Eliz. 638, 661, 746, 78 Eng. Rep. 878, 900, 978 (1601); 27 HALSBURY, LAWS OF ENGLAND (1913) 888. *Contra*: *Hall v. Dean*, Cro. Eliz. 841, 78 Eng. Rep. 1068; *Draycott v. Piot*, Cro. Eliz. 818, 78 Eng. Rep. 1045. These seem to have been cases of bailment. *Davies v. Dyer*, Aleyn 91, 82 Eng. Rep. 931 (1648) was clearly so. In *Isaack v. Clarke*, cited *supra* note 19, the judges were in disagreement as to whether trover would lie for money. Coke's view ultimately prevailed. 7 HOLDSWORTH, HIST. OF ENG. LAW (1926) 404, 410.

²²*Rivers v. Oodskirt*, Cro. Eliz. 568, 78 Eng. Rep. 812 (1597); *Moody v. Keener*, 7 Port. 218 (Ala. 1838); *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661, 20 L. R. A. (N. S.) 35 (1908); *Pettola v. Western Workman's Pubg. Co.*, 113 Wash. 283, 193 Pac. 691, 20 A. L. R. 378 (1920), and cases collated in (1927) 50 A. L. R. 1170.

²³*E. g.* *Gordon v. Hostetter*, 37 N. Y. 99 (1867); *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65 (1896), and the New York cases generally. See AMES, CASES ON TRUSTS (2d ed. 1893), 10 n. 2.

of debtor and creditor.²⁴ This distinction was recognized in very early times.²⁵

Illegal Money. The courts have had frequent occasion to deal with money, in current use as a means of exchange and circulating medium, which they have been bound to treat as illegally issued, either because in violation of general principles of law or of specific statutory prohibitions or as issued without proper governmental authority. In the history of money in the United States, three types of such currency stand out (a) Confederate money; (b) bank notes issued in violation of statutory requirements; (c) emergency money.²⁶ With some slight fluctuation of opinion, the general rule is well established that bona fide consummated transactions will be upheld, notwithstanding the illegality or lack of positive authority of the currency which serves as a medium of exchange or consideration in such transactions.²⁷

The cases dealing with Confederate money are especially instructive on this and many other phases of monetary legal problems, but space does not permit a review of them. The paper money issued by the Confederate States, though not formally made a legal tender, was the only currency in circulation in many sections. Being issued in aid of the Rebellion, the courts after the termination of the Civil War, were obliged to consider this issue of paper money as wholly illegal.²⁸ But the question was frequently presented as to what if any effect should be given to transactions consummated in such illegal currency, and to debts paid with it, or executory contracts entered into on the basis of this money. Early decisions in several of the state and lower federal courts in the South held that no effect whatever could be

²⁴*Hazelton v. Locke and other authorities*, *supra* note 22; *Melnick v. Kukla*, 228 App. Div. 321, 239 N. Y. Supp. 16 (4th Dept. 1930); 2 COOLEY, TORTS (4th ed. 1932) § 330, pp. 495 *seq.*

²⁵*Game v. Harvie*, Yelv. 50, 80 Eng. Rep. 36 (1603).

²⁶*E. g.* Clearing house certificates in the panics of 1893 and 1907, private token and scrip or barter money. Whenever the legal monetary system breaks down or the Government fails to provide adequate currency, emergency money spontaneously springs up to such an extent as to refute any exclusivist state theory of money.

²⁷The rule as to counterfeit or forged money is not in contradiction to the general principle. Upon discovery, it ceases to be current. Nevertheless, such money presents interesting problems. For an extraordinary and instructive case, plumbing the depths of the nature of paper money, see *Banco de Portugal v. Waterlow*, [1932] A. C. 452. Commented on at length in KISCH, THE PORTUGUESE BANK NOTE CASE (1932).

²⁸*Thorington v. Smith*, 75 U. S. 1, 19 L. ed. 361 (1869); *cf.* *Hoagland v. Post*, 1 N. J. L. 32 (1790); And see *Hale v. Sharp*, 44 Tenn. 275, 280 (1867); *Houston & Texas C. R. Co. v. Texas*, 177 U. S. 66, 90, 20 Sup. Ct. 545, 554, 44 L. ed. 673, 685 (1909).

given by the courts to contracts the consideration for which was this illegal currency. A contract payable in such money it was said was so tainted with the illegality of its original issue as to render the contract void.²⁹ In other states, however, this extreme view was not taken and contracts, the consideration of which was Confederate currency, not made directly in aid of the Rebellion, were held valid and the decision of the Supreme Court in *Thorington v. Smith*³⁰ definitely established the validity of such contracts.³¹ The general principle of the validity of contracts and payments in Confederate currency notes being thus established, subsequent decisions of the Supreme Court and of the state courts were concerned with its detailed application or with the construction, constitutionality and effect of the Scaling Acts passed by the states.³² These cases are worthy of study *in extenso* because they present crucial problems in the theory of money. The problems were complicated by the fact, in addition to the currency being necessarily considered illegal, that at best it was subject to violent fluctuations, that in the later years of the Civil War, it depreciated enormously and finally became utterly worthless. Many of the cases were in equity and the courts felt empowered to render decision with due regard to equitable principles rather than on the stricter prevalent rules of law, in order to mete out what appeared to them as fair and just. From the mass of decisions and the divergent theories displayed by the judges, it is not easy to draw many definite conclusions, but the following principles may be deduced with reasonable safety from a review of the cases:

1. Currency, however illegal, if actually used as a circulating medium in a widespread community, will be given the same effect for all consummated transactions, as lawful money.
2. Executory contracts, based on illegal or depreciated currency so

²⁹*Latham v. Clarke*, 25 Ark. 574, 585 (1869).

³⁰75 U. S. 1, 19 L. ed. 361 (1869).

³¹In *Hanauer v. Woodruff*, 82 U. S. 439, 21 L. ed. 224 (1872), the Supreme Court refused to extend the rule to local state issues, erroneously, it would seem, if the general principle as to the validity of transactions in illegal currency be sound. The *Hanauer* case was followed in *Taylor v. Thomas*, 89 U. S. 479, 22 L. ed. 789 (1874), but seems impliedly overruled by *Houston & Texas C. R. R. Co. v. Texas*, 177 U. S. 66, 20 Sup. Ct. 545, 44 L. ed. 673 (1900).

³²The leading Supreme Court cases are reviewed in *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495 (1885); *New Orleans Waterworks v. Louisiana Sugar Co.*, 125 U. S. 18, 31 L. ed. 607 (1888); *Baldy v. Hunter*, 171 U. S. 388, 43 L. ed. 208 (1898). For state court cases, see 11 AM. DIG. "Contracts" § 675; and notes 19 L. ed. 362 (1868); (1900) 48 L. R. A. 813; (1903) 58 L. R. A. 183; (1911) 31 L. R. A. (N. S.) 236; (1922) 19 A. L. R. 588; (1929) 61 A. L. R. 739, 747; (1931) 71 A. L. R. 569; *Hendry v. Benlisa*, 37 Fla. 609, 34 L. R. A. 283 (1896), a belated but un successful suit for specific performance.

circulating, will be enforced to the extent of their just obligations, and the general principle of law that debts are solvable in the money which is current or legal tender at the time of payment is subject to important qualifications and exceptions in order to attain justice between the parties.

3. Payment of debts and obligations made and received in good faith in illegal or depreciated currency constitutes a full discharge or satisfaction of the debts and obligations.

The principle as to the validity of transactions consummated in illegal currency is also sustained by cases involving state bank notes, put out in violation of statutory requirements, which frequently came before the courts before state bank notes were taxed out of existence. Such unlawful notes, according to the weight of the decisions,³³ were given full effect, equally with lawful money, as a circulating medium between third parties, that is where the issuing bank itself was not a party to the litigation. The leading case is *Orchard v. Hughes*.³⁴ In litigation with the bank itself that issued the bank notes illegally, there was a difference of opinion. Some cases, but not all, held the bank liable and almost invariably so, if the notes had been transferred to a bona fide holder for value.³⁵

One final but fundamental consideration must be pointed out. There is a limit in fact to the power of the State to create fiat money. The confidence of the people and the cooperation of the trading community are necessary to complete money. The state can give paper money or extremely debased coin debt-cancelling power enforceable by the courts, but the experience of history proves that it is powerless to enforce it upon the community as a medium of exchange. It cannot against the general resistance of the people force them to render services or sell goods for money which the community, through lack of confidence, will have none of. The classical example is furnished by the latter days of the *assignats* and *mandats* of the French revolutionary period.³⁶ They ceased to be really money.³⁷

³³Cases collated (1929) 48 C. J. 608, § 38. Cf. *Ontario Bank v. Lightbody*, 13 Wend. (N. Y.) 101 (1834). ³⁴68 U. S. 73, 17 L. ed. 560 (1863).

³⁵*Atlas Bank v. Nahant Bank*, 44 Mass. 581 (1842); see also *Cooke v. U. S.*, 91 U. S. 389, 23 L. ed. 237 (1875) (The Government liable for Treasury notes, circulating as currency, genuinely printed but unlawfully put in circulation). In *Thomas v. Richmond*, 79 U. S. 349, 20 L. ed. 453 (1870) the Supreme Court refused to hold the City of Richmond liable on its notes, put out during the Civil War and freely used as currency, but in violation of statute. But see *supra* note 31.

³⁶WHITE, FIAT MONEY INFLATION IN FRANCE (1933). An instance in our own history was California's rejection of the greenbacks. 1 SEDGWICK, DAMAGES (9th ed. 1912) 537; MOSES, *Legal Tender Notes in California* (1892) 7 QUART. J. ECON. 1.

³⁷NUSSBAUM, DAS GELD (TEORIA JURIDICA DEL DINERO) (Sp. ed. 1929) 62, 73.

MONEY AS MEASURE OF VALUE

In order to serve as a medium of exchange, money must perform the function of a common measure or standard of value, as it is usually phrased. This function of money is recognized generally by the courts in definitions or expositions laid down or adopted by them. It would avoid confusion of thought, however, if the notion were expressed by the term common denominator of value.

The perplexities in the minds of the judges arising from the phrases, occasionally differentiated, "measure of value" or "standard of value" were brought vividly to light in all the opinions in the *Legal Tender* cases,³⁸ both those of the majority as well as of the dissenting judges. The dissenting judges strongly emphasized that as distances cannot be measured without a unit of extent itself having a certain definite length, or weights without standards having definite gravity, so a measure of value must itself have intrinsic value. This they maintained, in the light of international requirements, could only be gold or silver. Even the majority judges were in agreement that money must possess an intrinsic value in order to serve as a standard of value. Mr. Justice Strong did adumbrate the more prevalent notion today when he recognized that "value is an ideal thing", but he did not follow out the logical consequences of this notion, his opinion and Bradley's being based on the premise that the Government would eventually redeem its promise to pay in real money, that is specie. The view, that only that which has an international value can serve as a measure of value, has been generally supported by the mercantile community and is the one favored by orthodox economists. However advisable from an economic viewpoint, its soundness as a matter of law is open to doubt. On the contrary, the distinction between the internal value of money and its external value, especially for purposes of the foreign exchange market, has been recognized from early times³⁹ and it is consequently the national money, independently of its foreign exchange or other intrinsic value, that serves (except in cases of extreme depreciation) as the common denominator of value for internal legal purposes.

The same thing happened with the Continental and state paper money of the Revolutionary period and with many post-war European currencies.

³⁸79 U. S. 457, 20 L. ed., 312, 313, 315, 322-324, 328, 330, 333, 344 (1871). "Probably the history of philosophy furnishes no instances of an equally mischievous result from the use of a false terminology than that which has followed the phrase 'measure of value' in its application to money" 2 PALGRAVE, *DICTIONARY OF POLITICAL ECONOMY* (1896) 793.

³⁹MALYNES, *LEX MERCATORIA* (1684) 213, following Continental jurists.

The function of serving as a common denominator is much broader than that of the function of money as a medium of exchange. It is constantly necessary in daily life, and consequently in law, to set a pecuniary valuation on tangible and intangible property which does not enter into exchanges. Property must be assessed for tax purposes regardless of whether the owner has any intention or possibility of selling it. Books of account must be kept in money and for accounting purposes generally, items such as capital assets must have a numerical monetary valuation, although not intended to enter the field of commerce. Public utilities must be valued for the purpose of determining the rates which may be charged to the public. Values must be determined at the expiration of long term leaseholds for the purpose of determining future rentals on renewal options. In the assessment of damages, under condemnation proceedings, for breach of contract, in actions for torts, a pecuniary valuation has to be made. Criminal penalties, especially for minor offenses, often take the form of a money fine. In numerous other instances, it becomes necessary to translate property or claims into pecuniary values for the purpose of dealing with them in a practical way.

The law in practice, contrary to the mercantile theory, has in general deemed the internal standard money to be, for the purposes of the law, the only permissible standard; in other words, the courts usually give consideration only to the nominal value of money as laid down by legislation. But there have been occasions, in addition to the frequent dicta, when the courts have adhered to the mercantile theory and based decisions on the principle of finding the actual value of money in reference to a specie standard or in reference to the purchasing power of money, disregarding the nominal value given to it by the legislature. A complete legal theory of money if deemed necessary at all should, it seems, strive to reconcile and embrace in a still broader concept both these theories. On the one hand it must be recognized that money is delivered and received even in business transactions (other than foreign exchange dealings), not for what it represents in physical gold or silver, but as a fraction, equivalent or multiple of an ideal unit. The "Value" concepts of money on the other hand, are derived directly or indirectly from the value of some basic material (gold or silver in modern times) of which money is assumed to be representative. Metaphysical abstractions apart, when paper money is redeemable on demand into specie or when coins of one metal of an intrinsically lower market value than current coins of another metal, more valuable in the market, are redeemable into coin or bullion of the latter, this theory, with all its consequences, holds true,

but it fails when these conditions of convertibility are suspended or terminated. The concept of money as an ideal unit then necessarily comes into play. But this concept, expressed by the phrase a "dollar is always a dollar" should not, by a fiction, be carried to the point of ruling that the value of a dollar at one time is its value for all times. The true value of money is not excluded from legal consideration.⁴⁰ If the legislature were to lay down a rule in effect that a dollar is always a dollar, it may be expected that the courts whenever the necessity for doing justice arises, will construe such legislation very strictly and hold it within the narrowest possible limits.

Any currency may be a medium of exchange, but it is only the standard money that normally serves as a common denominator of value. When any currency is depreciated in the market relative to the standard money, a preliminary calculation of its ratio to the standard money becomes necessary in order to fix prices and determine payments. It is the general rule of English and American law, that except in the rare instances where a court of equity grants the remedy of specific performance, all damages for breach of contract or of obligations resting in quasi-contract and tort, must be assessed in the standard money of the country and judgments can only be rendered in such standard money. Since 1792,⁴¹ that has meant in the United States that judgments must be entered in dollars and cents. Consequently, it is erroneous to enter a judgment in foreign money.⁴² In an action on an obligation in foreign currency, the judgment should be entered for its value in domestic money.⁴³ On obligations payable in state bank notes, the judgment had to be in the standard money.⁴⁴ Depreciated bank notes were not considered an ultimate standard of

⁴⁰NUSSBAUM, *op. cit. supra* note 37.

⁴¹During the transition period after the adoption of the dollar as the monetary unit, but before its use became general, judgments were frequently rendered in pounds, shillings and pence, and such judgments were upheld, *e. g.* Telfair v. Stead, 6 U. S. 407, 2 L. ed. 320 (1804), despite the express language of the Act of April 2, 1792 (R. S. 3563, 31 U. S. C. A. § 371), "The money of account of the United States shall be expressed in dollars or units, and all proceedings in the courts shall be kept and had in conformity to this regulation."

⁴²*Frontera Transportation Co. v. Abaunza*, 271 Fed. 199 (C. C. A. 5th, 1921); *The Edith*, Fed. Cas. No. 4281 (1871); SEDGWICK, DAMAGES (9th ed. 1912) § 273; 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 91. On the Continent, judgments in many countries may be entered for foreign money. NUSSBAUM, LA CLAUSE—OR DANS LES CONTRATS INTERNATIONAUX (1934) 79. And *semble*, a declaratory judgment with us might be entered with reference to foreign money.

⁴³*Liberty National Bank v. Burr*, 270 Fed. 251 (D. C. Pa. 1921); FREEMAN, *op. cit. supra* note 42.

⁴⁴Cases collated in (1924) 33 C. J. 1207, note 87 (d).

value, but their actual market value was frequently taken into consideration by the courts.⁴⁵ The same rule applies to contracts dischargeable in goods, even gold: the judgment must be for the value of the gold in money.⁴⁶

In the years following the Civil War, when there were two authorized currencies, gold and silver coin on the one hand, and depreciated legal tender notes (green backs) of fluctuating value in terms of gold, it was generally held that in the absence of a contract expressly stipulating for payment in coin, or of statutory authority in the case of torts, judgments should be entered generally for dollars and that a judgment for coined dollars or gold was erroneous. But contracts calling for payment in gold and silver coin were enforced, judgments being rendered either in gold dollars or in the equivalent in dollars generally of the gold value. The subject has been so ably and fully discussed recently⁴⁷ that it is unnecessary here to give it consideration, other than to point out that the wavering views of the Supreme Court judges as to whether the gold clause imported a commodity or was a debt, would have been avoided had they recognized the true character of the gold clause, as pointed out in recent decisions, viz: that it fixes a standard of value.⁴⁸

FLUCTUATING VALUE OF THE STANDARD MONEY

It is not merely in cases where there are two currencies simultaneously in circulation, one of which is depreciated in value in respect to the other, that the courts have to take into consideration the fact that the value of money itself changes. This fact, in the forefront today in economic and political controversies, is constantly brought to the attention of the courts and for the first time in our history, we believe, has in the recent monetary legislation been expressly referred to in currency statutes. In view of the current trend of economic discussions, seeking methods to stabilize the value of money, it is likely in the future that the courts will more and more be asked, in order to arrive at the proper interpretation of currency legislation, to con-

⁴⁵*Robinson v. Nobles*, 33 U. S. 181, 8 L. ed. 910 (1834); *Boswell v. Clarksons*, 24 Ky. 48 (1829); *Gamble v. Hatton*, 7 Tenn. 130 (1823); *Edmunds v. Digges*, 42 Va. 359, 549, 42 Am. Dec. 561 (1845); and see *State v. McPetridge*, 84 Wis. 473, 513, 54 N. W. 1, 10 (1893).

⁴⁶See *Betts v. Butler*, 1 Idaho 185, 188 (1868).

⁴⁷*Nebolsine, The Gold Clause in Private Contracts* (1933) 42 YALE L. J. 1051; Note (1933) 84 A. L. R. 1499.

⁴⁸*Serbian & Brazilian cases*, Permanent Court of International Justice, July 12, 1929. Judgments Nos. 14, 15, Series A/B Nos. 34, 35, Series A. No. 20/21; reasoning followed by the unanimous opinion of the House of Lords in *Feist v. Société Intercommunale*, [1934] A. C. 161, 28 AM. J. OF INT. LAW 374 (1934).

sider mooted economic theories as to the relation between money and prices.

Heretofore the courts have had no occasion to consider these theories. The general fact that changes have occurred in the price-level has been sufficient for the work they have had to do. Some dicta are to be found in which it is implied that the courts cannot consider the fluctuating value of money. The most notable of these dicta is that of Mr. Justice Holmes in *Deutsche Bank v. Humphrey*:⁴⁹ "Obviously in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same."

Nevertheless, in concrete cases, the courts decline to carry out the doctrine that to the law that establishes it, the dollar is always the same. The courts can and do take judicial notice of the purchasing power of money, of a general rise or fall of prices and of the consequent loss or augmentation of the purchasing power of the dollar,⁵⁰ especially in questions of damages.⁵¹ The subject has been most frequently discussed in personal injury cases. In a number of these cases, the discussion as to the value of money may be irrelevant; in a few, owing to instructions given to the jury or other special reasons, the point would seem to be directly involved. In one of the leading cases⁵² holding that the jury could consider the then impaired purchasing power of the dollar, a dissenting opinion by Judge Watson upheld the conception that a dollar is always a dollar. His argument cannot be dismissed as merely a verbal quibble as to what is the value of money. He is right to the extent that there is no logical distinction to be drawn between debt and tort cases. In strict logic, the rule should be the same. Practical considerations however and the punitive ideas that remain as a relic from early law in the treatment of torts, have established a different rule. In tort cases,⁵³ in equity,⁵⁴ in

⁴⁹272 U. S. 517, 519, 71 L. ed. 383, 385 (1926). This dictum was cited with approval in *Matter of James*, 248 N. Y. 1, 6, 161 N. E. 201, 202 (1928).

⁵⁰*Los Angeles G. & E. Corp. v. Railroad Commission*, 289 U. S. 287, 308, 311, 77 L. ed. 1180, 1194, 1196 (1933); *Missouri Pac. R. Co. v. Elvins*, 176 Ark. 737, 4 S. W. (2d) 528 (1928); *Stromer v. Dupont*, 150 So. 32 (La. 1933).

⁵¹Cases collated and discussed in notes (1919) 3 A. L. R. 610, (1921) 10 A. L. R. 179, (1922) 18 A. L. R. 564, (1929) 60 A. L. R. 1395.

⁵²*Halloran v. New England Tel. & Tel. Co.*, 95 Vt. 273, 115 Atl. 143, 18 A. L. R. 554 (1921); and see Note (1922) 35 HARV. L. REV. 616.

⁵³*The Telegraph and Vaughan* 81 U. S. 258, 20 L. ed. 807 (1871); *Simpkins v. Low*, 54 N. Y. 179 (1873); *Clarke v. Nevada Land & Mining Co.*, 6 Nev. 203 (1871); See Note (1921) 34 HARV. L. REV. 422.

⁵⁴*Willard v. Tayloe*, 75 U. S. 557, 19 L. ed. 501 (1870); *Deering v. Parker*, 4 Dallas (Pa) xxiii (P. C. 1760) (opinion by Lord Mansfield); *Wharton v. Morris*, 1 Dallas (Pa) 124 (1785).

quasi-contracts,⁵⁵ and perhaps in contracts other than for pecuniary debts,⁵⁶ the courts are free from the restrictions imposed by statutes enacting a legal tender for debts. The essential principles which should guide the courts seem to have been well laid down in the case of *Hurst v. Chicago B. Q. R. Co.*⁵⁷

The subject of the fluctuating value of money has been discussed also in valuation and rate cases.⁵⁸ There are many other fields where the discussion would be pertinent, but there has been little case-law on the subject heretofore. With the definite, mathematically calculable, devaluation of the dollar under Act of Congress and Presidential Proclamation, it can be expected that the subject will loom large in future litigation. When fair compensation is to be awarded, no legislative magic can blind the courts to the fact that 100 of the present dollars are the equivalent of only 59.06 of the former dollars.⁵⁹

The present meaning and extent of the power of Congress to "regulate the value" of money⁶⁰ has never been adequately discussed. Does it mean any more than the common law prerogative of the Sovereign to set the denominations at which money shall pass current and be a

⁵⁵1 SUTHERLAND, DAMAGES (4th ed. 1916) 603, 604.

⁵⁶*Simpkins v. Low*, 54 N. Y. 179 (1873); 1 SUTHERLAND, *ante* note 55.

⁵⁷280 Mo. 566, 219 S. W. 566, 10 A. L. R. 179 (1920) ("The dollar is at best merely a unit for the measurement of values. It is a fluctuating and variable criterion and therefore an imperfect one . . . when radical, material and apparently permanent changes in social and economic conditions confront mankind, courts must take cognizance of them—not too hastily, lest that which seems to be permanent should prove to be transient, nor yet too tardily lest justice fail. The humane and just intent of the law is at all times to afford fair compensation to one who has suffered wrong. Compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy.")

⁵⁸Notably in the O'Fallon case, 124 I. C. C. 3, 30, 34 *seq.*, 41, 53 *seq.*, 59 *seq.* (1927); *St. Louis & O'Fallon R. R. Co. v. U. S.*, 279 U. S. 461, 49 Sup. Ct. 461, 73 L. ed. 798, 810, 815 (1929); Strawn, *Monetary Stabilization and the Law* (1929) 14 IOWA L. REV. 420; Matthews, *Supreme Court Decisions on Reproduction Costs* (1924) 37 HARV. L. REV. 436.

⁵⁹The *Telegraph and Vaughan*, 81 U. S. 258, 20 L. ed. 807 (1871) (In assessing damages, jury may take into consideration the fact judgment can be paid in legal tender notes).

⁶⁰U. S. CONST. Art. I, § 8. Nor has the power of congress to regulate the value of foreign money. *Ibid.* Foreign coin probably must be understood in the light of the Legal Tender cases to include foreign money in any form, not only currency, but bills of exchange and cable transfers. See 31 U. S. C. A. § 372 (1927). Has Congress the constitutional power (subject of course to contest in international courts) to decree, by "regulating" the value of the pound at, say, one dollar, that an American debtor may satisfy a debt of £1000 by payment of \$1000?

legal tender?⁶¹ If the courts once admit that Congress has the power to enact into legislation any of the diverse quantity theories of money, it would follow not merely that Congress has the right, which it has heretofore exercised and which seems undoubted, to regulate directly or indirectly through the monetary authorities, the volume of currency and of bank or deposit money, but that it equally has the power to regulate another factor involved in any quantity theory, namely, the volume of goods. If so, there would seem to be no constitutional limit whatsoever to the exercise by Congress of complete control over the whole economic field of production, distribution and consumption of wealth. A conclusion so shocking to our present democratic standards may well make us pause before taking the initial plunge into a sweeping torrent. State rights would vanish even more rapidly than they have been vanishing. Once saddled with the quantity theory of money, it could scarcely be denied that full control over the volume of goods, at any stage in the economic process, was an appropriate means, plainly adapted to the end⁶² of regulating the value of money.

Could Congress, without constitutional amendment, entirely abolish money as we now know it and substitute some scheme that happened to gain temporary popularity, of the many that have been proposed from time to time to replace money, such as coupon-books with an elaborate system of accounting and clearing houses, or a vast extension of the check system, without reference to a metallic or other tangible base, or "social credit", or so-called free money constantly diminishing in value if unspent, *etc.*? It goes without saying that vast legal difficulties would be created by such revolutionary change. On the other hand, the problems involved by a uniform international currency, on a metallic base, would appear to be political and practical rather than legal or constitutional in nature.

Another phase of the constitutional power of Congress to regulate the value of money also seems to have been heretofore not discussed. Can Congress, as it has attempted to do in part in the Joint Resolution of June 5, 1933, prohibit parties to private contracts from setting up their own standards of value for the measurement of their obligations? It has constantly been stated on the authority of the language in the case itself, that *Bronson v. Rodes*⁶³ involved no consti-

⁶¹Le Case de Mixt Moneys, cited *supra* note 8; HALE, P. C. 194; 1 BL. COMM. (14th Eng. ed.) 277, 278. See Smith, *The National Industrial Recovery Act* (1934) 20 A. B. A. J. 275, 276.

⁶²McCulloch v. Maryland, 17 U. S. 316, 421, 4 L. ed. 579, 605 (1819).

⁶³74 U. S. 229, 19 L. ed. 141 (1869) (upholding the gold clause); *reaff'd.* after the Legal Tender decisions, by *Trebilcock v. Wilson*, 79 U. S. 687, 20 L. ed. 460 (1872), and subsequent cases. The rule of *Bronson v. Rodes* does not always work to favor the creditor. *Johnson v. Ash*, 142 Pa. 45, 21 Atl. 754 (1891).

tutional question. But a constitutional question was really implicit in the decision. The case in fact upholds the freedom of contract between parties, to determine, as between themselves, a standard of value, notwithstanding legislative fiat creating another standard of value, paper instead of gold and silver. It seems to imply that the power of Congress over money is *not* plenary⁶⁴—Congress may create a new medium of exchange, it may decree that such new medium of exchange shall be a legal tender even for pre-existing currency debts, but this power of Congress does not extend to abrogate the freedom of contracting parties to determine, for their transactions, a standard of value other than the statutory dollar; that the determination of an absolute standard of value, which cannot be departed from in private contracts, is *not* a necessary part of the currency power, is not an appropriate means, plainly adapted to a legitimate end. On no other theory can the case be understood or Mr. Justice Miller's dissenting arguments be adequately met. Either *Bronson v. Rodes* was wrong, or if it is to be upheld, it follows that Congress has no such power as that embodied in the declaration of the Joint Resolution of June 5, 1933, in effect that a clause in a contract calling for a different measure of value than the paper dollar shall be void. This is a totally different matter to that of declaring a legal tender for debts. If in order to regulate, or under the pretext of regulating, the value of money and as an appropriate means to that end, Congress may prohibit reference to gold or other metal as a standard of value, may it not also prohibit reference to other commodities or measures? And still further, under the combined authority of its power to declare a legal tender and to regulate measures of value, order a contract for the delivery of wheat to be satisfied by the delivery of corn or iron or feathers. This the Supreme Court once said Congress could not do.⁶⁵ Will it say it again?

MONEY AS MEDIUM OF PAYMENT

The courts have almost invariably treated the function of money as a medium of payment as a separate and distinct function, although some economists are inclined to treat it as merely a special and extended instance of its function as a medium of exchange. Many courts indeed have gone to the extent of saying that only that is money

⁶⁴And see *Lane v. Oregon*, 74 U. S. 71, 19 L. ed. 101 (1868) (The prohibition against the states to make anything but gold and silver a legal tender implies that they may constitutionally decree that taxes due them shall be paid in gold or silver.)

⁶⁵*Legal Tender Cases*, 79 U. S. 549, 566, 20 L. ed. 311, 317 (1871).

which is made by law a legal tender, but this doctrine is clearly erroneous and will not bear critical analysis.⁶⁶ Such a doctrine is in conflict with daily usage. By far the greater number of payments are made by check and, if important, by certified or cashier's check. The strict rules of tender are waived, effectively, by the creditor. Around this practice, much law has been built up, which calls for no special comment. No comprehensive legal theory of money accordingly can ignore bank or deposit money, which outranks currency in the proportion of approximately 8 to 1 in the nation's monetary stock and at least 20 to 1 in the nation's business turnover. The important thing to note is that money serves as a medium of discharge of obligations either by usage, historically the older, or by declaration of statute as legal tender.

Judges who adopt the theory that the only true money is that based on or representative of metal, are inclined to the view that gold and silver coins are by the common law a legal tender to the amount of their respective denominations for all contracts or payments payable in money, without any legislative enactment to make them so; and that the provisions in coinage Acts that the coins to be struck shall be such legal tender are merely declaratory of their effect when offered in payment and are not essential, although expedient, to give them that character.⁶⁷ The history of English legislation and the early decisions tend to confirm this view.⁶⁸ However this may be, it is clear that as to other kinds of money, that is paper money of any kind, commodities (frequently in colonial days made a legal tender), foreign coins and possibly in the not distant future, bank money, affirmative statutory action is required. Such statutes being in derogation of the common law are strictly construed.⁶⁹

In the absence of express stipulation in contracts providing for a specific coin or currency or standard of value, it is well settled that the obligation of a contract to pay money generally is to pay that which

⁶⁶Oliphant, *supra* note 2, at 608 *seq.*

⁶⁷*E. g.* Field & Clifford in *Legal Tender Cases*, 79 U. S. 457, 20 L. ed. 287, at pp. 326, 344.

⁶⁸Lord Holt in *Dixon v. Willoughs (Willows)*, Holt K. B. 471, 90 Eng. Rep. 1160; 2 *Salkeld* 446, 91 Eng. Rep. 387; 3 *Salkeld* 239, 91 Eng. Rep. 800 (1696); BRECKINRIDGE, *LEGAL TENDER* (1903).

⁶⁹*Bronson v. Rodes*, 74 U. S. 229, 19 L. ed. 141 (1869); *Lane v. Oregon*, 74 U. S. 71, 19 L. ed. 101 (1869); *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569 (1884); *Phila. & R. R. Co. v. Morrison*, Fed. Cas. No. 11,089 (C. C. Pa. 1864); *Clarke v. Nevada Land & Mining Co.*, 6 Nev. 203 (1871); *Shotwell's Exec. v. Denham*, 1 N. J. L. 174 (1793); *Grigby v. Oakes*, 2 Bos. & Pul. 526, 126 Eng. Rep. 1420 (1801); *Feist v. Société Intercommunale*, [1934] A. C. 161.

the law shall recognize as money when the payment is to be made.⁷⁰ And for this purpose, one lawful money is as good as another; the debtor can take his choice indiscriminately. *Alia pro alia solvitur*. This ties in with the rule as to the indistinguishability of money discussed above under the heading of medium of exchange. The legal difficulties arise when the creditor has endeavored to protect himself by safeguards against depreciation or devaluation of the currency. These safeguards, almost as ancient as money itself, take various forms. The most frequent in this country have been gold, gold coin or other specie clauses. On the Continent and, to a lesser extent in bond issues in the United States, foreign exchange clauses or options have been frequently resorted to. Payment in, or measurement by, commodities has not been uncommon and has a long and honorable lineage in certain classes of contracts, especially farm leases. It is in this field of attempted safeguards that the clash of opposing theories has been most marked, and has found its concrete application in the interpretation of currency statutes. Long prior to definitive statutory enactments, the distinction between money of account and current money was developed. Our dollar at its inception was merely a money of account.⁷¹ The distinction is revived by the recent legislation.⁷² It is practically acted on in the modern world of inconvertible paper monies, by reference to the universal medium, gold. Hence the efforts of even nations which are on an inconvertible paper basis to build up their gold stocks, sterile as far as internal transactions are concerned.

⁷⁰Legal Tender Cases, 79 U. S. 548, 20 L. ed. 311 (1870); *Juilliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204, 215 (1884); *Reinback v. Crabtree*, 77 Ill. 182 (1875); *Poug v. de Lindsay*, 1 Dyer 82a, 73 Eng. Rep. 178 (1552) and note 1 Dyer 82 b, 73 Eng. Rep. 179, where the distinction is suggested between a debtor tendering debased money at maturity and a debtor in default who cannot take advantage of devaluation. *Le Case de Mixt Moneys*, cited *supra* note 8. The distinction, which would seem to be reasonable, made also in that case and in *HALE*, P. C. 193, between payment at maturity and payment after default, seems generally to have been lost sight of. 1 *SUTHERLAND op. cit. supra* note 55, at 618. In the latter case, it might well be held, enlarging on what Hale says ("but if the day had been passed before the proclamation, then he must have answered the value as it was when payment was to have been made") that the creditor is entitled to fair compensation for depreciation of the currency, and not merely interest. It is so held by some Continental authorities, and it was so held in cases dealing with promises to pay in state bank notes. See *Moore v. Clines*, 247 Ky. 605, 57 S. W. (2d) 509 (1933). There is a case involving devaluation as early as 1300. 23 *SELDEN SOCIETY*, 1 *SELECT CASES ON THE LAW MERCHANT* (1908) 80.

⁷¹COINAGE ACT April 2, 1792, ch. 6, § 20; 1 *STAT.* 250. Clifford, J. in *Legal Tender Cases*, 20 L. ed. 326 (1870).

⁷²The new gold dollar of fifteen 15/21 grains is not coinable. *GOLD RESERVE ACT* of Jan. 30, 1934, § 5; 48 *STAT.* 340.

The distinction between the internal or local value of money and its external or foreign exchange value is more sharply accentuated today than ever before in history. Gold, as the sole medium of settling international balances resulting from the flow of goods, services and credits, remains the ultimate factor in foreign exchange rates. It might be called the international money of account and the only international legal tender. Currency wars, no new phenomenon,⁷³ center on gold.

The importance in the economic field of the foreign exchange value of a country's currency, and the reciprocal value of foreign money in terms of a nation's domestic money, finds its reflection in the rapidly growing volume of decisions as to damages in fluctuating exchanges and as to conflict of laws. In no field of monetary law does greater confusion reign. Equally with the saying that "money has no earmark", the phrase "foreign money is a commodity" has been used as a shortcut to decisions, befuddling rather than helping to elucidate the problems. Mercantile circles recognize of course that exchange rates fluctuate, just as the general community recognizes that the purchasing power of domestic money fluctuates. But otherwise the mercantile community does not see any fundamental difference between foreign money and domestic money. It does not treat foreign money as a commodity. One regards a deposit in a London bank substantially in the same light as a deposit in a New York bank. So the courts in crucial cases, where the measure of damages is not involved, treat foreign money as substantially alike with domestic money⁷⁴ and do not resort to the stock phrase that foreign money is a commodity. Similarly a contract to pay foreign money, or a breach of duty in tort or quasi-contract resulting in an obligation to pay foreign money, should be treated on the same footing as an obligation concerned with domestic money and the same rules as to damages applied, viz: that the date of breach should normally fix the time for assessing damages.⁷⁵ The date of judgment rule⁷⁶ is more open to practical ob-

⁷³Edward III and Henry VIII engaged in currency wars. Sir Thomas Gresham was in charge of an Exchange Stabilization Fund in 1552. FEAVEYER, *op. cit. supra* note 9, at 15, 69; MALYNES, *op. cit. supra* note 39, at 214.

⁷⁴Tsivoglou v. U. S., 31 F. (2d) 706 (C. C. A. 1st, 1929); Brown v. Perera, 182 App. Div. 922, 176 N. Y. Supp. 215 (1st Dept. 1918); cf. Reisenfeld v. Jacobs, 107 Misc. 1, 176 N. Y. Supp. 223 (1919); and see SUTHERLAND, DAMAGES (4th ed. 1916) § 205, p. 594; BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) 161; King v. Hamilton, 12 Fed. 478, 480 (C. C. Ore. 1882).

⁷⁵DICEY, CONFLICT OF LAWS (5th ed. 1932) 728; Parker v. Hoppe, 257 N. Y. 333, 178 N. E. 550 (1931), and Note (1932) 45 HARV. L. REV. 1119.

⁷⁶Deutsche Bank v. Humphrey, 272 U. S. 517, 71 L. ed. 383 (1926); NUSSBAUM, *op. cit. supra* note 42, at 87, points out the opinion proceeded on wrong assumptions as to the German law.

jections as well as being in conflict with the general principles relating to damages.⁷⁷ When its application results, as it frequently does, in the plaintiff not receiving the reparation to which he is justly entitled, it would seem to be unsound. Only when it is applied so as to put the claimant back in as good a position as he was in before, would it seem to have any justification. Then an analogous rule to that applied by the courts in personal injury cases in which the fluctuating purchasing power of money is taken into consideration, would not seem improper. But in no event would the dictum that foreign money is a commodity seem to have any place in a critical discussion.

RECENT LEGISLATION

Leaving aside the strictly emergency proclamation of the President, March 5, 1933, and the National Banking Emergency Relief Act⁷⁸ giving the President powers over the currency not only in time of war, but also during "any other period of national emergency", and the regulations as to gold hoarding, gold export and foreign exchange, the new currency legislation comprises the Thomas amendment to the Emergency Farm Relief and Price Inflation Act,⁷⁹ the Joint Resolution of June 5, 1933,⁸⁰ the Banking Act of June 16, 1933,⁸¹ the Gold Reserve Act of January 30, 1934,⁸² the Presidential Proclamation⁸³ reducing the content of the gold dollar to 59.06% of its former gold content, and the Silver Purchase Act of 1934⁸⁴ and Executive order thereunder "nationalizing" silver. The authority of the President is not exhausted by the proclamation of devaluation; further action is possible.⁸⁵ The Federal Deposit Insurance Corporation Act⁸⁶ of June 16, 1933, also may have influence on the future of monetary theory. In line with the tendency to assimilate bank money to currency, the next logical step flowing from the guaranty of bank deposits under Government auspices, would be to make cashiers' or certified checks a legal tender.

It is not our purpose to discuss here the constitutionality of these measures. The Gold Reserve Act, clearly unconstitutional⁸⁷ on the

⁷⁷On the general subject see Note (1927) 40 HARV. L. REV. 621, expressing a contrary view, founded on an underlying theory of conflict of laws and authorities therein cited; and Note (1930) 43 HARV. L. REV. 1307.

⁷⁸48 STAT. 2.

⁷⁹48 STAT. 52.

⁸⁰48 STAT. 113.

⁸¹48 STAT. 162.

⁸²48 STAT. 337.

⁸³Jan. 31, 1934, No. 2072; 31 U. S. C. A. § 821 (May 1934) Cum. Pamph. 242.

⁸⁴June 19, 1934; 31 U. S. C. A. s. (July 1934) Cum. Pamph. 267 *seq.*

⁸⁵GOLD RESERVE ACT sect. 12, and express reservation in the Proclamation.

⁸⁶48 STAT. 168.

⁸⁷*Monongahela Co. v. U. S.*, 148 U. S. 312, 37 L. ed. 463 (1893); *National City Bank v. U. S.*, 275 Fed. 855, 859 *seq.* (D. C. N. Y. 1921), *aff'd.* 281 Fed. 754 (C.

point that the just compensation to be paid for the gold taken over by the Treasury was fixed by Congress and the Executive and not by the courts, has been acquiesced in, on the practical ground that if there was to be a paper profit resulting from devaluation, it should enure to the Government and not to the private bank stockholders of the Federal Reserve Banks. Strong practical arguments have also been urged in support of the nullification of prior gold contracts.⁸⁸ Our purpose is to point out, apart from constitutional questions, and in addition to the fact already alluded to that the Joint Resolution and the Thomas Amendment in effect enact the quantity theory of money and confuse the different functions of money, that these new enactments do not form a body of legislation consistent with itself⁸⁹ or with such parts of prior statutes⁹⁰ as are not repealed. Neither do they lay down rules sufficiently definite adequately to guide the courts in the solution of problems, apart from constitutional questions, that are bound to be presented if the legislation continues to be upheld.

Where does this legislation leave monetary theory? All currency statutes are to be construed together.⁹¹ We then have a situation where the new gold dollar is, in contemplation of law and by statutory declaration, the standard unit of value, though no such dollar has been or can be coined and hence is merely a money of account and not a medium of exchange; where no gold is obtainable even for export settlement of balances except by the Government itself or at its arbitrary discretion; where the old gold coin, not having been demonetized or "decried",⁹² as the old common-law called it, and gold certificates are still a legal tender concurrently with, but at the same

C. A. 2d, 1922); *Dexter & Carpenter v. Davis*, 281 Fed. 385 (C. C. A. Md. 1922). The same objection applies to the Treasury Orders of Dec. 28, 1933 and January 15, 1934.

⁸⁸Paris, J. in *Re Missouri Pacific R. Co.*, 7 F. Supp. 1, 3 (D. C. Mo. 1934); Leffingwell, *The Gold Problem and Currency Revaluation* (1934) 16 ACAD. OF POL. SCI. PROC. 69.

⁸⁹Nor are even the isolated statutes self-consistent. PASVOLSKY, *CURRENT MONETARY ISSUES* (1933), 48, 49. See Payne, *The Gold Clause* (May 1934) 20 A. B. A. J. 370 as to whether the Joint Resolution of June 5, 1933, has been repealed by the GOLD RESERVE ACT of 1934.

⁹⁰Especially PARITY ACT March 14, 1900, 31 STAT. 45, 31 U. S. C. A. § 314 (1927); ACT of Dec. 24, 1919, 41 STAT. 370, 31 U. S. C. A. § 451 (1927); R. S. § 3563, 31 U. S. C. A. § 371 (1927) (from ACT April 2, 1792, 1 Stat. 250); THE SILVER ACT Feb. 28, 1878, 20 STAT. 25.

⁹¹*Bronson v. Rodes*, 74 U. S. 229, 252, 19 L. ed. 141, 147 (1869).

⁹²The Joint Resolution of June 5, 1933, expressly recognizes gold coins as legal tender. Sect. 5 of the GOLD RESERVE ACT of 1934, providing "all gold coin of the United States shall be withdrawn from circulation" would seem to be merely a direction to the Treasury.

rate as the new gold dollar of account and the paper dollar, although holding them is a penal offense; where the present and future status in our legal system of gold certificates⁹³ and silver and silver certificates, the issue of which bids fair to be greatly increased, is fraught with uncertainty; where the obligation of the government to ultimately redeem its currencies in gold coin remains unimpaired,⁹⁴ where private agreements using gold or silver as a measure of value are declared illegal⁹⁵ but commodities or foreign money may lawfully serve as a private standard of value.⁹⁶

Moreover the legislation would not seem applicable to private international transactions. The fundamental purpose was two-fold: (1) to relieve debtors; (2) to raise prices (the President's intention to move in the direction of a managed currency, understood as meaning a commodity or price-index dollar, is not reflected in the legislation). Obviously, Congress is not concerned to relieve foreign, but only domestic, debtors; and under the quantity theory of money, a greater not a lesser inflow of money from foreign debtors is required to help an upward trend of prices. Legal tender statutes are strictly construed⁹⁷ and currency statutes, like all legislation,⁹⁸ are presumptively territorial.⁹⁹

⁹³"Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?" *Bronson v. Rodes*, 74 U. S. 229, 19 L. ed. 141, at 147. Gold certificates are still held by the Federal Reserve Banks.

⁹⁴The Joint Resolution expressly excludes "currency" from the obligations of the United States to which it is applicable. Section 10 of the SILVER PURCHASE ACT of 1934, implies that part of the gold owned by the United States is "held as a reserve or as security" for part of the "outstanding currency of the United States." See *Legal Tender Cases*, *supra* note 38, and *N. Y. ex rel Bank of N. Y. vs. Supervisors, N. Y. County*, 74 U. S. 26, 28, 19 L. ed. 60, 61 (1869), decided expressly on the ground that the United States note or greenback was a promise to pay coined dollars. The obligation resting on the Secretary of the Treasury to maintain the currency at a parity with the gold dollar (R. S. 3699, PARITY ACT March 14, 1900, GOLD RESERVE ACT of 1934, §6, 8, 9, 15) does not now make sense.

⁹⁵Joint Resolution of June 5, 1933.

⁹⁶*Stranaghan v. Youmans*, 65 Barb. (N. Y.) 392 (1872). A commodity standard would render an instrument uncertain and hence not negotiable, but not so a foreign money provision.

⁹⁷Note 69 *supra*.

⁹⁸*The Apollon*, 22 U. S. 362, 6 L. ed. 111 (1824); *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 357, 53 L. ed. 826, 832, 29 Sup. Ct. 511, 512-13 (1909); *Sandberg v. McDonald*, 248 U. S. 185, 195, 39 Sup. Ct. 84, 86, 63 L. ed. 200, 204 (1918); *New York Central v. Chisolm*, 268 U. S. 29, 31, 32, 45 Sup. Ct. 402, 69 L. ed. 828, 832 (1925).

⁹⁹*Page v. Pendleton, Wythe (Va.)* 177 (Minor's ed. 211) (1793); 12 Ops. Att'y. Gen. 9 (1866); *Du Costa and Cole*, 1 *Skinner* 272, 90 Eng. Rep. 123 (1688). See

Hence the gold clause nullification Resolution should not be construed to govern, even indirectly, the *amount* of an indebtedness by a foreign debtor, even though it determines the medium in which such amount of indebtedness, once ascertained, is to be payable if payable in this country. On the other hand, this Resolution being limited in its language¹⁰⁰ to obligations payable in dollars and by the rule that it has no extra-territorial effect, does not serve to relieve American debtors who have contracted to pay foreign money abroad. The distinction between American holders and foreign holders, made by some corporations who have floated bond issues abroad, or at home with unquestionable options in the bondholder to receive payment abroad in foreign money, would seem to have no more justification in law¹⁰¹ than in morals.

Finally there is no clue to be found in the new legislation as to the treatment, other than for legal tender purposes, to be accorded the new standard of value in the multitude of cases where comparison with the old unit is inevitable. Too great a burden is thrust on the courts to thrash out these problems in their efforts to do equity and yet conform to the statutes. The interpretation of these statutes becomes mere guess work as to the intention of the legislature.

The Bar we conceive does not perform its full duty to the community by discussing merely constitutional questions. Legislation may well be constitutional and yet violate sound and accepted principles of law. The traditions of the common law should be no empty phrase. In so far as the common law has been the nursery of liberty in its stand against encroachments and abuse of sovereign power and in its maintenance of justice and of the principle that the welfare of the community is best served by upholding the sanctity of contracts in commercial dealings, its fundamental principles can be properly invoked to serve a useful and patriotic purpose. Currency legislation, warping every fibre of the legal texture and affecting the life of

U. S. v. Erie R. R. Co., 106 U. S. 327, 27 L. ed. 151 (1882). Place of payment creates only a presumption as to the intention of the parties: the intention of the parties is primarily determinative. *Searight v. Calbraith*, 4 U. S. 325, 1 L. ed. 853 (C. C. Pa. 1796); *Levy v. Cleveland C. C. & St. Louis R. Co.*, 210 App. Div. 422, 206 N. Y. Supp. 261 (1st Dept. 1924), *rev'g. on this point* 121 Misc. 681, 202 N. Y. Supp. 396 (1923).

¹⁰⁰“... as used in this section, the term ‘obligation’ means an ‘obligation... payable in money of the United States.’”

¹⁰¹*Levy v. Cleveland C. C. & St. Louis R. R. Co.*, 121 Misc. 681, 202 N. Y. Supp. 396 (1923); *rev'd.* 210 App. Div. 422, 206 N. Y. Supp. 261 (1st Dept. 1924), as to the interpretation of the word “francs”, and holding in the particular case the option was merely as to place of payment; and Note (1924) 37 HARV. L. REV. 1132.

every citizen in innumerable directions, should especially be subject to critical analysis on legal, and not merely constitutional, grounds. Hence we may well ask, apart from constitutional principles, whether unbridled monetary inflation will not produce disastrous legal as well as economic effects; whether an inhibition on the citizen from setting up his own measures of value is sound in principle; whether devaluation, without a definite code so regulating its effects as to minimize litigation, is wise legislation; whether, in short, a thorough well-studied revision of all this emergency legislation is not called for at the earliest possible moment.