

Nussbaum, A., *Money in the Law, National and International* (New York, 1950)

- 3 The metallistic 19C concept of money meant that bank notes, though a common medium of exchange, were legally denied the status of "money". Once the state decreed currency to be "legal tender", such a prejudice became untenable.

See Laughlin, *Money, Credit and Prices* (1931), 626

Metallistic definition made impracticable also by the reduced fineness of token coins, which nevertheless traded at their nominal value. "Metallism simply did not see the real problem of how and why certain things became "money"".
- 4 The mere fact of legislation compelling agencies of the state to preserve or work toward a specified link between metal and the national money "makes sense" -- even when no coin is intended to be struck.

See Footnote 12 on 'What is a pound?' [The "respectable Mr. Smith" was right!]
- 5 'Money is what the state declares to be money' -- "Too facile." Money has circulated without legal tender status. Moreover, in emergencies, other media of exchange have entered circulation.
- 6 Such monies inevitably are legally recognised ex-post. ["Societary theory of money"]
- 7 Foreign money sometimes circulates locally. Mexican dollar in the Far East.

"Generally speaking, new financial needs and habits may bring about circulating media in respect to which the application of the rules on money would be reasonable and logical." California gold rush produced local coins.
- 8 Conversely, "the government might be unable to force its money upon the people". E.g. belligerents or revolutionaries. "In conclusion we may say that the attitude of society, as distinguished from the state, is paramount."

"The societary process which gives life to money is not exactly a process of 'customary law'... The process only widens the range of things to which a pre-existing body of rules -- in this case the rules of monetary law -- may be applied."
- 9 Societary theory especially well-grounded in the Anglosphere.
- 10 Societary theory can be traced back to Medieval thought -- enunciated in a decision by Pope Innocent IV (1243-54).
- 11 "There is a marked uniformity of political opinion" that 'common medium of exchange' is a basic characterisation of money.
- 12 'General medium of payment' is problematic: "Payment" presupposes a debt, and debt presupposes the knowledge of what money is, 'debt' being the monetary obligation."
- 13 Money must be fungible -- any unit the same as another unit. "Money, the concrete object, thus is a thing which, irrespective of its composition, is by common usage given and received as a fraction, integer or multiple of an ideal unit."

The Ideal Unit

13 [Laidler] "Pound" and "Mark" came into being via weight. But convenience dictated coinage: it saves the trouble of weighing, thereby adding to the value of the metal piece. "Thus the value of the monetary unit becomes more or less disconnected from its physical substratum."

14 Example: When USA off gold in 1933 March, people still had a solid idea of what a dollar meant.

"The existence of a monetary unit is apparently a phenomenon of social psychology."

You can trace back the etymology but not the definition of the ideal unit. E.g. "dollar" comes from the Spanish "milled dollar" or peso, "the value of which was adopted by Congress in 1792 as the basis for the American monetary system.... But the dollar concept existing at any given time is as little susceptible of definition as, say, the concept of 'blue'."

15 There is not "monetary dualism", i.e. legal and economic money. The "monetary unit" IS the "ideal unit".

16 "Unit of account" not ideal because other units of account, e.g. in inflationary circumstances, for the purposes of contracts etc.

Crucial that "'money' refer only to the tangible thing. 'Money of account' ought definitely to be avoided."

F/N 63: "A regular bank deposit would involve 'money of account'; yet, being used in discharge of contracts, i.e. as a medium of payment, it would, at the same time, be 'money itself.'" In other words: Keynes' distinction between "money of account" and "money itself" is nonsense.

17 Nominalistic Doctrine, as opposed to valoristic. "Token" and "symbol" for nominalistic concept are not precise. "A silver dollar or a one-dollar silver certificate is not a token or symbol of a dollar; it is the thing (money) itself." In other words: 'token money' isn't.

18 Also wrong to posit that "money does not need a value of its own" due to its allegedly symbolic character. Viz. German philosopher Simmel. Just look at hyper-inflations: "Usability for exchange is the motor of circulation, and the ending of circulation is the ending of money." [cf Laidler]

F/N 67: US courts have said that "money" connotes value. [Laidler]

"Nominalism must necessarily ensue" where money derives from the state's fiat. "But it is erroneous to believe that the societary approach as such leads to metallism (valorism)."

"The conception of the ideal unit, product of a process of social psychology, is actually disconnected from the notion of metal value." [cf Laidler]

In sum: "The societary theory of money and nominalism go well together."

On ancient media of exchange, see Burns, A.R., *Money and Monetary Policy in Early Times* (1927).

F/N 71: Excellent quote from Turgot 1770: If sheep is the standard unit, it will take on a significance all its own, ultimately departing from the worth of the tangible thing itself (the sheep). ('A sheep will be worth two sheep'). → Money has a value to society. This is the "nominalistic feature", which in later times became dominant. [SU: So why are some people so afraid of it? E.g. afraid of 'fiat' money.]

- 19 "Money" is a ubiquitous term or concept. "Even such a fundamental concept as 'value' presupposes gauging in terms of money."

Interpretation of "money" is dictated by circumstances.

Meanings of money: Broad: "wealth"

- 20 Broad: Securities and bank deposits.

- 21 Sometimes also furniture and property.

English law: money in a will should refer only to coins, cash and bank deposits. (Not so USA).

- 22 Commodity theory of money: "Money as a commodity" is only half right. Recall the distinction between sale and barter.

Yes, related insofar as both are subject to market supply and demand. Hence, "the fiat of the lawgiver is not the essence of money and cannot ultimately determine its value." [Laidler]

- 23 Just look at French Revolution: State could not 'fiat' value into its currency -- money-changers proliferated, as did reference to specie in contracts. Even the law abolishing these (made after mob outrage at the money-changers) nodded to the practice by incorporating a grandfather clause.

- 24 While commodity theory is wrong, we must admit that money has a "second use", i.e. to be purchased or exchanged! As Thomas Aquinas said: When money is sold or exchanged, it is "measured, not a measure."

Money has an intrinsic/exchange value as distinct from an extrinsic/nominal ("face") value. "The latter is a matter of the law; the former is the result of economic conditions."

- 25 Borderline problems.

US "commemorative coins" are not really money because "intention and actual chance of general circulation are absent."

- 26 When bad money replaces good, the latter is no longer "money"; "though the statute books still call them legal tender." (They have been "demonetized".)

- 26 "Securities are not money". They are seen as representatives of rights incorporated in them, "not merely as" multiples, fractions of the monetary unit. "Even a certified check is not money."

- 27 Bank notes are money. As for coins and notes: If trading at a discount or premium, they are not money. Partial circulation (e.g. CA but not MA) does not exclude the coin from being money.

- 28 Bank deposits are sometimes near money.

Money value -- Purchasing power.

Index numbers and purchasing power are two centuries old but have only recently been known to the public, especially since WWI.

[Dismisses the notion of a 'tabular standard']

- 29 Tabular standard cannot be likened to a gold standard; the former is only "a scheme of contractual provisions." High hopes for the tabular standard are "entirely unwarranted." Even worse is Fisher's "compensated dollar".
- 30 "Fisher's attempt to tie the value of the dollar closely to purchasing power only brings into relief the necessarily independent character of the monetary unit." [Index numbers are not a panacea or substitute for sound money.]
- 32 Government prerogative.
"Coinage monopoly was to the [state] a financial resource of the first magnitude."
- 33 "Brassage" is a charge merely for coinage. "Seigniorage" is when part of the metal is retained as a duty exceeding expenses. Sometimes the state leased the coining privilege.
- 34 "Bodin, founder of the modern doctrine of sovereignty, held that prerogative was one of the very criteria of sovereignty."
- 37 Moneta Imaginaria
- 39 It is a "historically given arithmetical scheme which is superimposed upon a miscellany of coins."
- 40 Easily misused by rulers.
- Penal Law
- 41 In France since 1347 the punishment for counterfeiting was boiling to death.
- 42 Transformed to mere execution during the Enlightenment.
- 43 US code applies "counterfeiting" to both coin and cash (18 USC 471, 485)
- 44 Is monetary law part of public or private law? [Only relevant for continental countries]
- 45 Legal Tender
"Money which a creditor is not privileged to refuse."
- 46 A matter of legislation, not custom. The concept is modern and universal. Up to the 18C, it would have been a question. But bank notes in England and France changed that.
- 47 "The legal tender experiment with paper money turned out disastrously" e.g. Continentals and Assignats. But "the notes of the Bank of England, without being legal tender, gained high reputation." This inspired many governments, from the end of the 18C, to eschew legal tender status. US bank notes were not made legal tender till 1933.

- 48 British case. [1797?] Napoleonic wars → suspension. 1812 Act: Sheriffs collecting debts must accept banknotes. Creditors could choose to wait to collect after resumption (which came in 1821). 1833: Notes were made legal tender "for as long as the bank should maintain their convertibility". This met the main objection to legal tender decree, and it "was left intact during WWI". 1928: Unconditional legal tender. Much less opposition to state money being given legal tender status than bank notes.
- 48 Limitations of legal tender
- 51 "Almost everywhere all kinds of coin and paper money have become legal tender as a result of the abandonment of the gold standard."
- 54 Formerly one could see punishment for failure to accept legal tender. But "such provisions have not existed in Anglo-American or in Central European law at least since the 19C.... A creditor who does not take legal tender harms himself, since he is not entitled to anything else."
- Non-moneys, e.g. commodities, e.g. grain, have sometimes been decreed legal tender.
- 55 But incorrect to say that legal tender is money. Grain ain't money. Also: commemorative coins, and gold and silver coins where chased from circulation.
- "Lawful money" is a vague term, which, through "tortuous judicial discussion" came to be defined as "legal tender". E.g. US greenback.
- 56 But still some controversy. E.g. F/N 67: A Federal Bank's reserves are to be kept in "lawful money" (12 USC 413) but these cannot include its own notes.
- Cours forc e*: Legal tender status applied to inconvertible money. Contains two elements. (1) Legal tender rule (2) Inconvertibility rule. The first regards payor/payee relationship, the second the issuer/holder relationship.
- 57 On "territoriality"
- True that sovereignty doesn't extend beyond frontiers. But if a NYC contract entails payment in pounds sterling, then "the English legal tender rule operates outside of England." *Cours forc e* also applies to the foreigner.
- 58 "Public receivability" : Government must accept something which private folk don't. I.e. state money which only the Treasury must accept. It instils confidence in the money.
- The holder of legal tender possesses a "power effective against any creditor".
- 59 Coins and bullion
- 63 Wrong to speak of a "token coin" when the meaning is a less than full bodied coin.
- [Laidler] "Fiduciary money is real money and not merely a token of it."
- Fiduciary coins are those of substandard metal content.
- 64 Although "Pothier's theory vesting property of coins in the sovereign has long lost credence, one must admit that coins ... are subject to restrictive measures on the part

of the sovereign." Ditto paper money. "Debasement" has been replaced by "devaluation".

"The most drastic encroachment upon the circulation of gold coins is the product of recent development: the wholesale requisition of the entire gold holdings of a nation." [Why did the US public tolerate it?]

65 48 Statute 337 section 6, 31 USC 441

66 Bullion: A commodity, "but very closely related to money".

67 "The use of gold as a legal basis for the issuance of paper money is and has been more important than its coinage. Even if not used as a reserve against paper money gold held by the government or central bank has a potential monetary power as a means of increasing the volume of paper money or as a medium for the settlement of international balances." [Which preserves the exchange value of the paper money.]

F/N 48: See League of Nations, Yearbook 1934/35, "Legislation on Gold", re "gold redemption of paper money".

72 Paper money

French law tried to see bank notes as less like money than fiat notes. But in fact bank notes, where enjoying circulation, are money.

75 [Photocopy]. Paper money must be up to the task -- requiring of no further inspection or computation [in which case RMB is in trouble -- its authenticity is routinely tested and inspected at the point of acceptance]. Paper money doesn't bear interest because the resulting fractional value "would obviate free circulation" [and would violate the ideal of a perfect fraction or multiple of the ideal unit.]

76 [Photocopy] Redeemability is convertibility; not always in gold or specie, sometimes e.g. in government debt.

77 "Redemption" cannot be satisfied by replacement with the same thing.

78 "Bad as judicial frustrations of the note-holder's rights are, greater danger lurks in legislative or authorised executive action doing away with redemption."

[Urban's paradox of 'immutable' money] "Such enactments have all too frequently occurred in emergency situations." The state's solemn pledge to uphold its currency's convertibility is "more reprehensible than its breach" and is like making a promise not to become ill. [Citing Janssen 1911, 69]

79 In law, "suspension" is not distinguished from "cessation".

"The preservation of the redemption formula in irredeemable paper money must be explained in psychological terms."

80 Although notes still appear as central bank liabilities on the balance sheet, "the debtor has disappeared". [SU: So vital and effective is the part played by currency that in fact it is society's debt to the state -- which we happily pay in seigniorage.]

F/N 30: No real "debt" underlies the irredeemable note.

[Cover ratio]. "Provisions requiring the maintenance of specific reserves have in the past been universal for bank notes and not infrequently for government paper

money. The reserves are ordinarily composed of gold (or gold certificates), government securities or prime commercial paper; minimum percentages relative to circulating notes are defined by the law. The monetary and banking laws of the various countries differ in this respect."

[Photocopy]. Such provisions for reserves "are ordinarily not generators of private rights in the note holder." Note holders do not have a lien on the reserves.

85 Regarding "Portuguese Bank Note Case". It "offers a wealth of unexplored material on the peculiar nature of inconvertible paper money." Important difference between notes in hands of bank of issue and those in circulation.

86 [Urban: Yes, those of the bank are worth seigniorage to the state; those in circulation have already emptied their seigniorage value.] Nussbaum: The difference is that notes in circulation can be used by the holder at whim, which is not a prerogative enjoyed by the bank. "Hence, the inconvertible note in the hands of the bank has a potential value which is far below that of a circulating note."

[Urban: Too legalistic. It is the state which suffers, not the bank. For a given money demand, only so much currency can be injected without inflating away its value.

This can be spent by the state on real stuff.] Nussbaum: The transformation of note value from bank to public circulation constitutes "a sort of economic miracle."

[Laidler]

The Bank of Portugal lost only the profits on rediscounting.

89 US paper money. Article I, section 10, para 1 of the US Constitution forbids states from issuing "bills of credit".

90 But courts have been lenient in interpreting this clause, partly because they didn't want to relieve the states of their obligations. [Re 1930s:] "More recently, states have issued circulating sales tax tokens."

91 "Death tax": a levy of 10% on the users and issuers of illegal monies. It worked. "Diverse circulatory scrip of municipal governments, especially in form of 'tax anticipation notes' have emerged in the interwar period, but their legality seems not to have been questioned."

92 [On USD collateralization change in 1934]

Federal Reserve notes "constitute a first and paramount lien on all assets of the Federal Reserve bank, so the [Bank, in addition to the Government] is legally bound to the holders." [What?] Bank must keep a reserve of 25% of its notes in gold certificates. But thanks to 1934 these are no longer money; they are used only for the reserve. They don't even embody a claim on gold. The Treasury Secretary has discretion to decide how much to 'redeem' for the protection of the currency." [Gold Reserve Act of January 30, 1934, Section 6, 48 Statute 340, 31 USC 408a]

"Practically this redemption means release of gold for shipment abroad." The other 75% of notes not covered by gold certificates must be backed by: "collateral security consisting of": eligible commercial paper or US bonds, with consent of the Board of Governors. [Federal Reserve Act, Section 16, 12 USC 412]

Note that the "pledged collaterals" are pledged to the Federal Reserve Agent, whereas "reserves" are not so pledged.

The stated pledge to redeem ("Fed will pay Five dollars to the bearer ...") is nonsensical.

- 93 "Actually, the silver certificates have become the commonest type of American paper money."
- 99 "Exchanging foreign money for domestic money is a sale of the former."
- 103 Bank deposits
- 105 "A bank deposit is not a loan to the bank."
- 107 Bank deposits as money.
- 108 "the bank deposit is visualized as money"
- 109 But the difference "is of signal importance in law." Money is easily transferred, bank deposits aren't.
- 111 "Money" in wills certainly encompasses bank deposits.

115 The Monetary System

F/N 1: "Lack of the concept of a 'monetary system' has long impaired legal inquiry into money."

[Photocopy] Modern monetary system is built on the "ideal unit".

- 116 England alone clung to the Carolingian division: 1:20:12.
- 117 "The monetary systems as described are relatively new phenomena." A far cry from the universal circulation of the denarius (penny) of 8-12 century central Europe.

Modern monetary system emerged in the late 18th century and the 19th century. It's emergence is of signal economic and legal import.

- 118 By contrast, "the elements of monetary law were utterly confused" in the early modern period:
- * "multitude of coining potentates"
 - * poor coining technique
 - * heavy migration of coins
 - * ubiquity of clipping and counterfeiting
 - * "incessant official alterations of 'intrinsic' as well as 'extrinsic' value of coins."
 - * "calamitous intrusion of early paper money."

"All these evils evoked in that formative era of capitalism a habit on the part of creditors of seeking protection through elaborate clauses inserted into contracts and other deeds." There followed a "tremendous literature" on monetary problems and clauses. "With the introduction of the modern monetary system, these writings lost practically all value.... This situation changed again with the monetary troubles which followed WWI and have never ceased. Since then, numerous and momentous new problems of monetary law have arisen in national and international relations."

Gold Standard.

The first question in classifying a monetary system is the "standard".
"This refers to the metal" with whose value the system is tied up.

[SU: Such thinking is a piece with the legalist school which doesn't recognise a monetary system without rules or metal basis.]

119 Gold coin standard, Gold bullion standard, and gold exchange standard.

120 Britain's gold bullion standard retained "convertibility" but not "redeemability".

[Photocopy] The gold standard is not gone, but "Still the goal of stabilisation has remained and its principal means is still the correlation of money value and gold value." Replaced with "government-controlled purchase and sale of gold for national money".

121 Amid the varying degrees of legislative diktat and executive prerogative, "the monetary unit is still *linked to gold* by law.... In this sense a kind of gold standard still persists which one might call a "gold management standard". [my italics]

[SU: Consult the 1939 version -- crucial.]

Nussbaum: It is for such management that exchange stabilisation funds were created.

124 [Look how out of date this is!] [Photocopy]. "Plans for contriving a non-metallic standard have long been a favourite occupation of money inventors.... There is a good deal of quackery in these schemes."

"A currency foregoing any broader international use may do away with a standard entirely", e.g. Soviet rouble.

125 On maintaining the "fiduciary constituents" of a standard. [Remember, he defines a standard as a monetary system connected with gold, whether automatically or via state management.] US pennies, nickels, etc. can maintain their prescribed relation to the ideal unit despite their intrinsically substandard value, if "kept circulating in quantities not greater than necessary to satisfy the [transactions] demands of the community."

The legal tender status afforded to such nonstandard coins is termed "limping gold standard." But experience has shown that unlimited legal tender of silver coin need not impair "the tie-up of the basic unit with a gold value."

128 Bimetallism

131 Changes within and without a monetary system. Innovations needn't break up a monetary system but a new sovereign will.

133 The foreign exchange market is the arbiter of whether a currency is unique/different/new.

178 Note: The dollar appreciated 100%+ in 1864-1879 [presumably against gold]

223 Gold and silver clauses.