Legal Studies Research Paper Series

UNIVERSITY OF CAMBRIDGE

Faculty of Law

PAPER NO. 11/2011

FEBRUARY 2011

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THE *CASE OF MIXT MONIES*: CONFIRMING NOMINALISM IN THE COMMON LAW OF MONETARY OBLIGATIONS

D. Fox•

Abstract

Brett v. Gilbert (1605), commonly known as the Case of Mixt Monies, confirms the principle of monetary nominalism in the common law of obligations. It is fundamental to the modern understanding of the legal nature of obligations to pay money and goes far to define a distinctive conception of what money means in the law. This paper considers the historical origins of the principle of nominalism in English law. The paper demonstrates the use made of civil law monetary theory from the medieval and early modern periods in the development of common law reasoning. It argues that English law applied a principle of monetary nominalism long before it was explicitly adopted in the Case of Mixt Monies. The coinage proclamations of the English sovereigns all assumed a legal theory of nominalism.

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Note: all references to Irish Royal Proclamations follow the system of numbering in *Simon's Essay on Irish Coins, and the Currency of Foreign Monies in Ireland* (G.A. Proctor, Dublin, 1810) (cited as *Simon* (1810)). Exact dates are provided to distinguish Proclamations issued within a short time of each other. References to English Royal Proclamations of the Tudor era follow the numbering in J.F. Hughes and P.L. Larkin, *Tudor Royal Proclamations*, vols 1-3 (Yale University Press, New Haven and London, 1964-69) (cited as *Hughes and Larkin (Tudor)*). English Royal Proclamations of James I follow the numbering in J.F. Larkin and P.L. Hughes, *Stuart Royal Proclamations*, vol. 1 (Clarendon Press, Oxford, 1973). References to later Stuart Proclamations are, where possible, to the printed copies held at the National Archives (NA), and, failing that, to the Patent Rolls or Mint Records.

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Brett v. *Gilbert* (1605),[1] commonly known as the *Case of Mixt Monies*, confirms the principle of monetary nominalism in the common law of obligations. It is fundamental to the modern understanding of the legal nature of obligations to pay money and goes far to define a distinctive conception of what money means in the law.

To a modern observer, the principle established by the case may seem obvious to the point of being trite. If a creditor is owed £100, then the debtor can make a valid tender by proffering banknotes with a face value of £100. Putting the same point differently, banknotes with a face value of £100 are worth £100 in the estimation of the law. So long as the face value of the debt and the money tendered correspond to each other, then the creditor is in peril if he refuses the debtor's tender. If the obstinate creditor later brought court proceedings to enforce the debt, then he would be subject to penalties. He would have to carry the costs of the action, and would be barred from claiming any interest on the debt between the dates of tender and judgment.[2]

But this very simple example obscures some of the monetary complexities that gave rise to the litigation in the *Case of Mixt Monies*. It overlooks the point that the purchasing power of a given number of units of currency is not fixed. It may rise or fall relative to commodities, as happens in periods of deflation or inflation of prices. The units of one currency can be priced in terms of the currency of another system. If the exchange ratios between them vary, then the purchasing power of one currency relative to the other varies in step with it. The final way that the purchasing power of money may rise or fall is no longer relevant in modern monetary systems but precipitated the litigation in the *Case* itself. In the days when value of money was pegged to its intrinsic precious metal content, the relevant monetary authority might alter the fineness or weight of coins in circulation by debasing or enhancing them (and more often than not they were debased). The effect of the *Case* was that the creditor had to bear the risk of fluctuations in the purchasing power of the currency arising from any one of these reasons. If he sued on the debt, then he would only recover its face value. The court would not seek to revalue the debt to take into account the variation in the purchasing power of money between the time when the debt was incurred and when it fell due for payment. In other

[1] (1605) Davis 18; an English translation of the case appears in (1605) 2 *Howells State Trials* 114.

[2] *Edmonson* v. *Copland* [1911] 2 Ch. 301.

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words, the case is authority against applying a legal theory of "valorism" to money and monetary obligations.[3] The functional purchasing power of money in terms of a fixed debt is not something that the law need have regard to when it considers how the debt can be discharged.[4]

Francis Mann in his *Legal Aspect of Money* argued that nominalism is a fundamental principle of modern monetary law in all Western jurisdictions:

> The extent of monetary obligations cannot be determined otherwise than by the adoption of *nominalism.* The nominalistic principle, in so far as it relates to the extent of liquidated sums, means that a monetary obligation involves the delivery of chattels which at the time of delivery are money, and of so many of such chattels as represent units of measurement which, if added together according to their nominal value, would produce the owed sum of money. In other words, the obligation to pay £10 is discharged if the creditor receives what at the time of performance are £10, regardless of both their intrinsic and their functional value.[5]

The nominal theory of money is also essential to a distinctively legal conception of the nature and value of money. Economists may describe money in terms of its functions, one of which is to serve as a medium of exchange.[6] Money is one thing exchanged for another thing, in a transaction that ensures that the mutual wants of each participant are satisfied, and where the preference of each participant for the thing possessed by the other can be presumed to exceed their preference for the thing they already have. The participants' preferences about each thing may differ even though the price of the seller's thing and the nominal value buyer's money are equivalent.

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[3] F.A. Mann, *The Legal Aspect of Money* (1st ed., Oxford University Press, London, 1938), 60-61 (cited as *Mann* (1st ed.)).

[4] This is not to say that the law has no regard to valorist approaches to monetary obligations. Valorism is relevant when a debt has to be transferred or treated as security, as in a debt factoring arrangement. The exchange value of the debt is a function of the debtor's creditworthiness and the delay till the debt falls due for payment. These may cause the nominal value of the debt to be discounted.

[5] *Mann,* (1st ed.), 63. For a somewhat less forceful statement of the principle in the current edition, see C. Proctor, *Mann on the Legal Aspect of Money* (6th ed., Oxford University Press, Oxford, 2005), 9.03, 9.09 (cited as *Mann* (6th ed.)).

[6] The classical expositions are W.S. Jevons, *Money and the Mechanism of Exchange* (King and Co., London, 1875), 1-4; P.K. Menger, "On the Origins of Money" (1892) 2 *Economic Journal* 239.

But the law is primarily concerned with exchanges so far as they involve the performance and discharge of legal obligations. Hence the primary legal conception of money is narrower than the economist's. What matters is that the money is a valid means of payment,[7] and that by tendering it, the debtor can force the creditor to discharge him from his legal obligation.[8] And although monetary obligations may ultimately be discharged by the transfer of things – banknotes, coins or the value represented by the adjustment of bank balances – those obligations stipulate for delivery of quantities expressed in generic monetary units. The creditor needs so many United Kingdom pounds, New Zealand dollars or Japanese yen. Every legal system therefore needs to adopt a principle for valuing the things that are tendered in payment of monetary obligations.

Aside from its legal significance in confirming the principle of nominalism in common law, the *Case* is of great interest. The intellectual richness of the material cited in the report is extraordinary for a common law court. Among others, the court drew on the writings of a 16th century French jurist, Charles Du Moulin whose *Tractatus contractuum et usurarum* of 1546 was influential in establishing the principle of monetary nominalism in French civil law. Through Du Moulin, the court in the *Case* linked back to the monetary analyses of the medieval doctors of the civil law, and ultimately to the works of the Roman jurists preserved in Justinian's *Digest*. Underlying this entire tradition, and cited in the report, is Aristotle's definition of money. The Aristotelian conception of money as a measure of value was a lynch-pin of medieval economic thought.

This paper seeks to explain the context and origins of the reasoning in the *Case of Mixt Monies*. It identifies the long tradition of economic thought and civil law reported in the *Case* and how the Judges manipulated it when they formulated the common law theory of monetary nominalism. It proposes a reason why the common law authorities before the *Case* on the effects of currency revaluation were so sparse compared with the

[7] L. von Mises, *The Theory of Money and Credit*, translated by H.E. Batson (Jonathan Cape, London, 1953), 69–74.

[8] *Mann* (1st ed.), 54, citing K. Helfferich, *Money* (trans. L. Infield, London, 1927), 309 describes the legal conception of money as a "medium of final compulsory liquidation or as a medium of final tender".

enormous body of writing generated by civil law jurists on the legal nature of money and monetary obligations. It shows how the *Case* assisted in the development of a distinctively legal conception of money, and helped to make possible the modern forms of token money that we now use.

The origins of nominalism in the common law have not been studied before. Dr Mann was familiar with the *Case* and some of the civilian authors cited in it. But his brief account of the *Case* is that of a textbook writer mainly concerned to expound the meaning of the modern law.[9] The historical context to Sir John Davies' report of the *Case* was explained by Professor Pawlisch in 1985. His emphasis, understandably, was on the enforcement of Tudor government policies in Ireland rather than on the legal significance of the reasoning reported in the *Case*.[10] There are now the beginnings of a body of writings on the history of monetary obligations in the civil law from medieval times through to the early modern period.[11] These show how civil law systems gradually moved from a valorist to a nominalist theory of monetary obligations at about the same time as the *Case* was decided. The development was erratic and more research is needed before it can be said when they generally accepted the nominalist theory of obligations so strongly affirmed in the common law in 1605.

I. FACTS AND POLITICAL BACKGROUND

The defendant, Brett, was a merchant in Drogheda near Dublin. In April 1601 he had bought certain wares from the plaintiff, Gilbert, who was resident in London. Brett's obligation was expressed as a conditional penalty: he would become liable to pay the larger sum of 200 *l.* unless by the due date he paid 100 *l.* "sterling, current and lawful

[9] *Mann* (1st ed.), 68-69.

[10] H.S. Pawlisch, *Sir John Davies and the Conquest of Ireland* (Cambridge University Press, Cambridge, 1985) (*Pawlisch* (1985).

[11] W. Taeuber, *Molinaeus' Geldschuldlehre* (Fischer, Jena, 1928); H.A. Miskimin, *Cash, Credit and Crisis in Europe, 1300-1600* (Variorum Reprints, London, 1989), ch. 9; T.J. Sargent and F.R. Velde, *The Big Problem of Small Change* (Princeton University Press, 2002), ch. 6; W. Ernst, "The Glossators' Monetary Law", ch. 9 in J.W. Cairns and P.J. du Plessis, *The Creation of the Ius Commune* (Edinburgh University Press, Edinburgh, 2010).

money of England, at the tomb of earl Strong-bow in Christ-church, Dublin". The parties met at the due date and place, and Brett tendered 100 *l.* in newly minted Irish currency. On its face, this was a good tender which Gilbert should have accepted. The stipulation that the tender be made in "money of England" was construed as a reference to the place where the money had been minted and not to the country that had issued it.[12] The coins tendered by Brett were minted at the Tower of London, which satisfied the description.

The reason for Gilbert's refusal of the tender was that the coins belonged to a new issue that had recently been minted in a scheme for the debasement of the Irish currency.[13] The costs of suppressing the rebellion of Hugh O'Neill, Earl of Tryone, were proving prohibitively expensive to the English government. The debasement of the Irish coins paid to the Crown's forces and their local suppliers was a means of making the Crown's limited resources stretch further. Moreover, by replacing the existing coinage with a token coinage which had a relatively low silver content, it was planned to deprive the rebels of the hard currency they needed for buying supplies from abroad.

The scheme for debasement saw the issue of shilling coins weighing 2 *oz* 18 *dwt* fine silver and pennies made of copper. The extent to which the coins were merely tokens of nominal value can be seen from the face values of the coins that would be cut from a pound of the alloy used to make them. "One pound of silver 2 *oz.* 18 *dwt.* fine had an intrinsic value of 16 *s.*, 1 ¼ *d.* and yet was planned to circulate at 62 *s. per lb.*, while 1 *lb.* of copper which was valued at 6 ¾ *d.* was to have a face value as coin of 16 *s.*"[14] The proclamation declaring the new issue current had been issued on 20 May 1601, that is, after Brett and Gilbert entered into their contract but before due date for performance. The question was whether Gilbert could refuse tender of the new debased coin, and hold out for tender in the old coin or at least for an equivalent amount of the new coin assessed according to the silver content of the old currency.

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[12] (1605) Davis 18, 25. See further text at n. 89 *infra*.

[13] For the historical and numismatic context, see *Simon* (1810), 37-43; C.E. Challis, *The Tudor Coinage* (Manchester University Press, Manchester, 1978), 268-274 (cited as *Challis* (1978)); and *Pawlisch* (1985), ch. 8.

[14] *Challis* (1978), 268.

Given the terms of the proclamation and the political realities, Gilbert's argument seemed destined to fail. The proclamation provided:

> Her majesty doth hereby publish and make known to all men to be from henceforth, immediately after the publishing of this proclamation, her coin and moneys established and authorized to be lawful and current within this her realm of Ireland and proper to this kingdom, and doth expressly will and command the same to be so used, reputed and taken of all her subjects of this realm and of all others conversing here, that they nor any of them shall not after the day of publishing hereof refuse, reject or deny, to receive in payment of wages, fees, stipend or payments of debts, or in bargain, or for any other matter of trade, commerce or dealing between man and man, any of the said monies of either kind mixt of silver or of pure copper, but that they shall receive and accept the same at such values and rates as they are coined for, *videlicet*, Shillings, for shillings, pieces of six pence, for six pence, and so of all other the several coins respectively.[15]

To support the circulation of the new debased currency, the proclamation further provided that from 10 July 1601 all other coins circulating in Ireland would cease to be lawful currency. They would henceforth only rank as bullion, suitable for melting down and re-issue as new coin according to a fixed rate of exchange decreed by the proclamation. It seems, however, that this order was generally ignored and that for some time afterwards the two currencies circulated alongside each other, each carrying the same nominal value but with appreciably different silver contents (and consequently with different degrees of acceptability to creditors). In holding out for payment in the old currency, Gilbert seems to have been asking for something that was no longer money in estimation of the law. In any event, the proclamation made his strategy a risky one. It also provided that a creditor who failed to accept a tender of the new coinage was liable for contempt and to be punished by prerogative powers.

Amidst the confusion, paralysis of trade[16] and rampant price inflation[17] that followed the introduction of the new currency, *Brett* v. *Gilbert* was referred to the Chief

[15] Irish Proclamation 20, Elizabeth I (20 May 1601).

[16] The supply of commodities dried up since some merchants preferred not to part with their goods in return for the new coinage. Others accepted the new coins but at a heavily discounted rate. They would then profit by exchanging them for English sterling at the official rate: see Irish Proclamation 22, Elizabeth I (24 January 1602).

Judges of the Privy Council for decision. It was a test case on an important point of public policy, and there were many other cases before the Irish courts where the same point was in dispute. The judges ruled that Brett's tender of the new debased coin was valid. It was the Queen's prerogative to issue coin from whatever material she pleased and to set its standard value.[18] Accordingly, she could change her money in substance and impression, and enhance or debase its standard.[19] In setting the standard value of money, a distinction was to be drawn between its intrinsic worth (*bonitas intrinseca*) consisting in its weight and fineness, and its extrinsic worth (*bonitas extrinseca*) consisting in its legal valuation or denomination.[20] The implication of the decision is that a debt denominated in money could be discharged by payment of coins with an extrinsic worth equivalent to the debt. Finally, the Judges ruled that Gilbert was liable for contempt and would be punished.[21] The proclamation of 20 May 1601 does not specify the punishment to which a contemnor was liable. But in Tudor times the standard penalty from breach of the Sovereign's legal tender proclamations was imprisonment and a fine.[22] Perhaps this was Gilbert's fate.

The authorship of the report of the *Case* is significant to understanding the range and purpose of material cited. It appears in a series of reported decisions first published by Sir John Davies in 1615. (His name is spelt variously as "Davies" or "Davis". "Davies" is the more common spelling although his reports consistently go under the

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[17] Prices charged in the new coinage were anything from 25-100% higher than those in the old coinage. See the contemporary accounts preserved in *Calendar of State Papers relating to Ireland, Henry VIII, Edward VI, Mary and Elizabeth* (1601-1603): Exchange Master at Cork to Exchange Master in London (14 January 1602), 280-282; President and Council of Munster to Lord Buckhurst (10 October 1602), 501.

[18] (1605) Davis 18, 19.

[19] *Ibid.*, 20-21.

[20] *Ibid.*, 24-25.

[21] *Ibid.*, 28.

[22] See, *e.g.*, English Proclamation 25, Henry VII (1491); English Proclamation 38, Henry VII (1497); English Proclamation 95, Henry VIII (1522); English Proclamation 180, Henry VIII (1538); and English Proclamation 379, Edward VI (1551) where the further penalty was added that coin accepted other than the proclaimed legal tender rate would be forfeit to the Crown. There is reason to think that in England coinage offences might have been tried in local mayoral courts or in the Court of Exchequer: R.W. Heinze, *The Proclamations of the Tudor Kings* (Cambridge, Cambridge University Press, 1976), 262-279.

name “Davis”). He was the Solicitor-General and then Attorney-General in Ireland under James I, and would have had a part in arguing the *Case* before the Justices of the Privy Council. It is unclear how much of the reported decision represents the reasoning of the Justices in their judgment, as opposed to Davies’ later embellishment of it or his own his submissions to them. Even if the latter were true, the significance of the report is not diminished. It stands as the published record of the proceedings in the *Case*. Recent scholarship has shown how Davies used his reports to affirm and publicise important statements of policy in the Stuart government of Ireland.[23] The report went far to legitimise the English Sovereign’s control over the Irish monetary system, which was an important plank in the Crown’s attempts to suppress the Tyrone rebellion. Davies’ law studies at Oxford and a sojourn in Leiden would also explain his exposure to the principles of civil law cited in the report.

II. The Early Modern Monetary Environment

To understand the significance of the *Case of Mixt Monies* it is necessary to appreciate certain features of the early modern British monetary system that are markedly different from our own. As a medium of exchange, money was for the most part still identified with metallic coin minted from precious metals. Monetary law consisted in the great many royal proclamations and statutes that regulated the issue, circulation and value of coins, and which protected the locally-minted coinage from corruption by unlawful practices such as counterfeiting, clipping or illegal export.[24]

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[23] *Pawlisch* (1985).

[24] As an indication of the volume of early modern monetary law, it will be seen that the index to *Hughes and Larkin (Tudor),* vol. 3 contains more entries for matters relating to the coinage than almost any other topic regulated by proclamation. The main statutes controlling the integrity of the issued coinage and prohibiting its corruption or export were: the Statute of Money, 20 Edward I, stat. 3, 4; the Statute of False Money, 27 Edward I, stat. 3; the Statute of Money 9 Edward III, stat. 2; 17 Edward III, stat. 3; 5 Richard II, stat. 1 cap. 2; stat. 17 Richard II, cap. 1; stat. 2 Henry VI, cap. 6; stat. 19 Henry VII, cap. 5. For their use in regulating commodity exports and international bullion flows, see J.H. Monroe, “Bullionism and the Bill of Exchange” ch. 7 in Centre for Medieval and Renaissance Studies, *The Dawn of Modern Banking* (Yale University Press, New Haven and London, 1979).

The main circulating medium of exchange in Tudor times was metallic coin issued by one of the Royal mints. For the most part the coin was made of silver and gold. As we shall see, its value as a circulating medium derived in part from the possibility of converting bullion to coin at an official price set by the Sovereign and the mint.[25] The system was therefore one of commodity money, that is, one in which the medium of exchange could be transformed into a commodity, useful in production or consumption. It had an intrinsic utility through the possibility of being transformed in this way.[26] Paper money, in the form of transferable claims to receive payment in coin and redeemable against the issuer of the instrument, did not figure in the monetary landscape until the middle of the 17th century.[27]

During the reign of Elizabeth I, there had been experiments with the issue of token coins made from base metals.[28] Later James I attempted to establish a Royal monopoly on the issue of tokens, and to suppress their issue by private traders.[29] These tokens tended to be in low-value denominations and went some way to meet the chronic shortage of small change for use in low-value transactions. Without them, the poor – whose earning and purchases were very small – would have hardly been able to participate in transactions that required the actual tender of coin. The denominated value of token coins did not derive from any price – whether official or set by the market – of

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[25] See text at n. 54 *infra*.

[26] *New Palgrave Dictionary of Economics Online,* "Commodity Money".

[27] On the historical origins of paper money in England, see W.R. Bisschop, *The Rise of the London Money Market* (King and Son, London, 1910), 38–68; E.T. Powell, *The Evolution of the Money Market 1385-1915* (Cass, London, 1966), 57–68; J.K. Horsefield, "The Beginnings of Paper Money in England" (1977) 6 *Journal of Economic History* 117; and R.D. Richards, *The Early History of Banking in England* (King and Son, London, 1958), ch. 2.

[28] *Challis* (1978), 205-211.

[29] See English Proclamations, James I 128 (1613); 137 (1614); 155 (1615); 164 (1617). Token issues became widespread during the Commonwealth after the execution of Charles I removed the sovereign's monopoly on coin issue: M. Dickinson, *Seventeenth Century Tokens of the British Isles and their Values* (Seaby, London, 1986), 4. The King's prohibition on private tokens was duly renewed after the Restoration: *e.g.*, English Proclamation (16 August 1672), 24 Ch. II Rot. Pat. p.4 n.2d., (printed copy at NA SP45/12); English Proclamation (5 December 1674) 26 Ch. II Rot. Pat. p.9 n.4d., (printed copy at NA SP45/12).

their commodity metal content. The practical force of their denominated value depended on the willingness of traders to accept them at that value, and, ultimately, on the possibility of exchanging them at par value for commodity money issued by the mint.

But these token monies were outliers in the early modern monetary system. The notion of an entire monetary system consisting in non-convertible token monies did not really take hold in the United Kingdom until the 20th century. The suspension of convertibility of Bank of England notes to gold sovereign coins in 1914 was the key event in this process.[30] So as an experiment in creating an entire token-based money system with nominal values of the circulating media far exceeding the intrinsic values, the Irish debasement of 1601 was nearly 400 years ahead of settled monetary practice.

Only in the 19th century did it become common for coins to be stamped with their denominated money values. Until then, coins were mainly identified by the name of their generic type, by the Sovereign who issued them, and often by the mint where they were struck. The variety of coins circulating in Tudor England was extraordinarily diverse by any modern standard. The extent of the variety can gathered by reading a typical proclamation dated 1554 from the reign of Philip and Mary.[31] It refers to a new issue of locally-minted sovereigns, royals, angels, half-angels, shillings, half-shillings and groats though omits reference to the pennies that had served as the primary media of exchange in England since Anglo-Saxon times.[32]

To these there had to be added the many foreign-issued coins that circulated in England.[33] In the 1550s, for example, these included Portuguese crusados (both "long-cross" and "short-cross") and pistolets;[34] French crowns of the sun; crowns of the Holy Roman emperor; Spanish double ducats, single ducats, double royals, single royals and

[30] See G. Davies, *A History of Money from Ancient Times to the Present Day* (6th ed., Cardiff, 2002), 366–75; and A. Feavearyear, *The Pound Sterling*, (Clarendon Press, Oxford, 1931), ch. 12 (cited as Feavearyear (1931)). The suspension of convertibility was made permanent by the Gold Standard Act 1925, s. 1(1).

[31] See English Proclamation 419, Philip and Mary (1554), and for more examples, *Challis* (1978), 214-218.

[32] Spink and Son, *Coins of England and the United Kingdom*, 41st ed., (Spink, London, 2006), 98

[33] For the full diversity of foreign coin circulating in England, see *Challis* (1978), 214-218.

[34] See English Proclamation 412, Mary I (1554).

half-royals.[35] The foreign coins listed here were proclaimed as legally current in England. The bulk of them probably arrived as part of the marriage dowry of Mary I provided by Philip of Spain in 1554. They were officially "adopted" into the local monetary system. Similarly, when James VI of Scotland acceded to the English throne in 1603, he and his retinue brought quantities of Scottish money into the country which they needed to defray their immediate expenses. Certain denominations of these were duly proclaimed as legal tender in England.[36]

Without the legal exercise of prerogative power no coin – locally-minted or foreign – would pass as current and lawful coin of the realm. They were not the *legalis moneta Angliae* that a creditor pleaded in an action to enforce a monetary debt.[37] To be sure, many sellers and creditors were willing to take them at conventionally-established values without assaying or weighing them. For ordinary commercial purposes therefore their status was something above that of bullion. But their acceptability depended entirely on the willingness of individual creditors to take them. They were under no legal compulsion to do so. Their transformation from being a generally-acceptable medium of exchange to the *legalis moneta Angliae* depended entirely on the Sovereign's prerogative power to monetise them. They had to be proclaimed current within the realm and assigned a value expressed in what were called "units of account".[38]

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[35] See English Proclamation 408, Mary I (1554). The French coins named were only a small sample of the real monies actually circulating in France. For a fuller list, see E. Szlechter, "La monnaie in France au XVIe siècle; droit public – droit privé" (1951) 29 *Revue Historique de Droit Français et Étranger* (4th) 500, 503.

[36] See Proclamation 3, James I (1603), and Proclamation 47 James I (1604).

[37] Co. Lit., [207*b*]. *E.g.*, *Wade's Case* (1601) 5 Co. Rep. 114a, 114a. Other expressions to the same effect were "lawful money of England": *Hawes* v. *Davye* (1565) noted in (1993) 109 S.S. 119; or "good and lawful money of the King of England": *Dynis* v. *Rerysby* (1430) noted in (1993) 109 S.S. 118.

[38] See, *e.g.*, English Proclamation 419, Philip and Mary (1554) for the standard wording: "All such pieces of coins of monies of gold and silver, the King's and Queen's majesties' will and pleasure is, shall be current within this their highness' realm of England and the dominions of the same, after such value and in such manner and form as above is declared".

The early modern British monetary system, in common with all other European systems, depended on a distinction between real money and money of account.[39] Real money referred to the coins actually in circulation. These were the money chattels that were tendered to discharge a monetary obligation. Money of account referred to an abstract system of measurement in which the values of debts, goods and the many coins in circulation could be expressed on a common basis. The distinction is harder to grasp since English uses the one word "money" to refer to each kind of money. The distinction appears more clearly in the French distinction between the words *l'argent* on the one hand and *la monnaie* on the other. As we have seen, the real monies in the form of coins were identified by the name of their type, that is to say, by their identification as sovereigns, royals, angels or the like. But in naming a price, a creditor did not stipulate, for example, for payment of five English sovereigns or two French crowns of the sun. An obligation of this sort would effectively have been one for the delivery of fungible chattels, no different, say, from the delivery of a specified weight or volume of corn. Rather, the debt due to the creditor would be denominated in terms of monetary accounting units that prevailed at the time. It would be discharged by acceptance of coins with assigned values totalling the value of the debt. All coins therefore needed to have a money of account value given to them by the market or by legal proclamation if they were to fulfil their function.[40]

In England, these accounting units were the penny (or *denarius* in Latin), the shilling (or *solidus*, which was a unit equal to twelve pennies), and the pound (or *liber*, which was the unit equal to twenty shillings or 240 pennies).[41] This system of reckoning,

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[39] J.M. Keynes, *Treatise on Money* (Macmillan, London, 1930), vol. 1, 3-4; L. Einaudi, "The Theory of Imaginary Money from Charlemagne to the French Revolution", ch. 14 in F.C. Lane and J.C. Riemersa (eds), *Enterprise and Secular Change* (George Allen and Unwin, London, 1953).

[40] J.M. Keynes, *Treatise on Money* (Macmillan, London, 1930), vol. 1, 3-4.

[41] Prices, accounts and monetary fines were sometimes denominated in an alternative unit of account, the mark (see, *e.g.*, English Proclamation 114, Henry VIII (1526)). A mark was 160 pennies, equivalent to 13 *s*., 4 *d*. But use of the mark as a unit of reckoning gradually declined. Gold noble coins rated at a half-mark (or 6 *s*., 8*d*.) were still being issued in the reign of Henry VIII (see English Proclamation 112, Henry VIII (1526) for the new issue of the George Noble). Thereafter, it became more common for coins to be issued units corresponding to convenient divisions of pounds, shillings and pence. Thus, Elizabeth I's new

which made the penny the primary unit of account, had been established by Charlemagne, and was the basis of the system of monetary reckoning in most countries of western Europe.[42] The names given to the reckoning units were the same across many countries but each reckoning unit was specific to its own jurisdiction – an English and an Irish penny were not equivalent. Each was a unit within its own jurisdictionally-contained system of reckoning.

The coinage commissions and proclamations provide many examples of how named coins were assigned a legal value in money of account. In the 1554 proclamation of Philip and Mary already mentioned,[43] the sovereign was assigned a value of 30 *s.*, the royal 15 *s.*, the angel 10 *s.*, the half-angel 5 *s.*, the shilling 12 *d.*, the half-shilling 6 *d.* and the groat 4 *d.*[44] The valuation of coin types did not stay fixed over time, partly because their gold or silver content might be changed from issue to issue, or because the rise in market values of gold or silver bullion required the nominal values of coins to be uprated accordingly. So the 1554 valuation of Philip and Mary's sovereign was set at 30 *s.* This represented in increase in its nominal value of 20 *s.* originally assigned by Henry VII when he first issued the fine sovereign coin in 1489.[45]

The legal money of account value of individual coins already issued was also liable to change. In 1526 Henry VIII cried up the legal tender value of the fine sovereign to 22 *s.* and then 22 *s., 6 d.* to align the domestic value of the coin with its bullion abroad, and to maintain its intrinsic parity with his new issues of debased coinage.[46] Since 22 *s., 6 d.* was not a convenient reckoning unit, he introduced a new kind of sovereign made of so-called "Crown gold" in 1544. It passed current at 20 *s.* (Crown gold had a lower ratio

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issue of 1558 comprised gold coins rated at 30 *s*., 20 *s*., 10 *s*., 5 s. and 2 *s*., 6 *d*: see the mint commission at 1 Elizabeth I Rot. Pat. m. 19d. (31 December 1558).

[42] See W. Taeuber, *Geld und Kredit im Mittelalter*, 2nd ed., (C. Heymann, Frankfurt, 1968), 249-267; and P. Spufford, *Money and its Use in Medieval Europe* (Cambridge University Press, Cambridge, 1988), 33-34.

[43] See text at n. 35 *supra*.

[44] For illustrations, see Spink and Son, *Coins of England and the United Kingdom*, 41st ed., (Spink, London, 2006), 232-235.

[45] For the mint commission, see 5 Henry VIII Rot. Pat. m. 6(30) d. (28 October 1489).

[46] English Proclamations 111, 112, Henry VIII (22 August 1526, 5 November 1526).

of gold to alloy than the original sovereign of fine gold). Individual coins might also have their legal values cried down. This was the fate of Elizabeth I's debased Irish coins issued during 1601. By the time the *Case* was being argued, James I had already issued two proclamations that reduced the denominated values of the debased silver coins to one third and then to one quarter of their values proclaimed under Elizabeth I. The copper penny and half-penny pieces kept their original proclaimed values, which had the effect of altering the nominal exchange rates between them and the other coins in the debased issue.[47] The move was the precursor to reinstating a new coinage for Ireland with a higher intrinsic content.[48] The nominal values of the debased coins still in circulation had to be cried down to establish their intrinsic parity with the new currency which would have a stronger purchasing power relative to its denominated values in money of account.[49]

When foreign coins were adopted into the English monetary system they had to be assigned a legal value in English money of account by proclamation. To take the foreign coins mentioned above, in 1554 Portuguese long-cross crusados were assigned a value of 6 *s.,* 4 *d.*; short-cross crusados 6 *s.,* 8 *d.*; and pistolets 6 *s.,* 2 *d.*;[50] a French crown of the sun at 6*s.,* 4*d.*; crowns of the Holy Roman emperor at 6*s,* 4*d.*; Spanish double ducats at 13*s.,* 4*d.*; single ducats 6*s.,* 8*d.*; double royals 13*d.*; single royals 6 ½ *d.*, and half-royals 3 ¼ *d.*[51] The fixing of English legal values to these coins was what distinguished them from the many other foreign coins that circulated in England purely as a matter of social convention. They were required to pass current in England in discharge of monetary obligations at the proclaimed rates, just like the other coins that were minted

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[47] See Irish Proclamation 26, James I (11 October 1603); and Irish Proclamation 27, James I (22 January 1604).

[48] See Irish Proclamation 26, James I (11 October 1603).

[49] The crying down of nominal coin values was strictly an enhancement rather than a devaluation of them. After crying down, the same nominal unit of value corresponded to a higher silver content.

[50] See English Proclamation 412, Mary I (1554).

[51] See English Proclamation 408, Mary I (1554).

locally under the own Sovereign's authority. The proclaimed values of these adopted foreign coins mattered to traders conducting purely domestic transactions.[52]

The denominated coin values expressed the money of account ratios between the coins and prices, and between the coins themselves. They indicated the number of coins of a certain type that a debtor would need to proffer if his tender was to equal the price or correspond to the par value of the debt he owed. But they could not secure the effective purchasing power of the coins or ensure that the creditor would regard the coins as things of worth that he would willingly accept in return for parting with his goods. These aspects depended instead on the weight and fineness of precious metal that the coins contained.

According to AE Feavearyear's classical exposition, the efficiency of a metallic standard for controlling the value of money depends, among other things, on the costless and unrestricted convertibility of chattel bullion to coin and *vice versa*.[53] Neither of these conditions was completely adhered to in practice. A member of the public was free to bring bullion to the mint and have it converted to coin but he was charged for the service.[54] The mint would withhold some of the new coins to cover the costs of minting and as a source of revenue to the Sovereign. The extraction of this "seignorage" could be enormously profitable to the Sovereign, and goes far to explain the frequent debasements of the coinage until more efficient systems of taxation superseded it as a source of revenue.[55] It was the primary motivation for the successive debasements of the English coinage by Henry VIII and Edward VI between 1542 and 1551.[56] The melting and export of coin were regulated by law, though often rather ineffectively. Melting of coin was

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[52] *Wade's Case* (1601) 5 Co. Rep 114a is reported example of the problems encountered when is a debtor tendered foreign coin with an English money of account value in discharge of a debt.

[53] *Feavearyear* (1931), 2.

[54] See J.D. Gould, *The Great Debasement* (Clarendon, Oxford, 1970), 10-13; and generally A. Redish, *Bimetallism: an Economic and Historical Analysis* (Cambridge University Press, Cambridge, 2000), 27-40.

[55] On debasement, see generally P. Spufford, *Money and its Use in Medieval Europe* (Cambridge University Press, Cambridge, 1988), ch. 13.

[56] The net profits of the English and Irish mints between 1542 and 1551 may have been as high as £1,285,000: C.E. Challis, "The Debasement of the Coinage, 1542-1551" (1967) 20 *Economic History Review (NS)* 441.

prohibited by statute.[57] A long series of statutes forbade the export of coin, something which happened when its bullion value abroad exceeded its domestic value in English money of account.[58]

The importance of the intrinsic gold or silver content of a coin relative to its nominal value was well understood by the general public. They knew well that in the long term a Sovereign could not simply respond to an increase in commodity prices by issuing new coins with a higher proclaimed value. Similarly, the Sovereign knew that he or she could not cry up the value of the existing coins or reduce their intrinsic value without commodity prices rising in step, though he might attempt to break this link by imposing mandatory controls on wages and commodity prices. Writing to Mary I in 1553 on proposals to remedy the debased state of the English coinage, Sir John Price said:

> … that like as no prince can set the price of any wares to endure for any time, no more can he bring to pass that his coin shall be better esteemed specially any long time, than the goodness of the metal of that coin doth require, because every realm must have traffic with other, and metals must have their prices set certain, one above an other in their degrees through the whole world … And if a prince might value his money at his pleasure, then he might provide that there should never be dearth of anything in his realm, but as the price of corn, or other thing doth rise, he might rise likewise the price of his money.[59]

Complaints about the price inflation were rife in last years' of Henry VIII's reign and during that of Edward VI. Contemporary writers made the connection between the debasement of the coinage and the rise in commodity prices.[60]

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[57] 9 Edward III, stat. 2, cap. 3; 17 Richard II, cap. 1; and stat. 17 Edward IV, cap. 1.

[58] Principally stat. 2 Henry VI, cap. 6 and stat. 17 Edward IV, cap. 1. The latter was periodically revived and extended during the Tudor era.

[59] J. Price, "A discussion on the Coinage", (1553) reproduced in C.H. Williams, *English Historical Documents 1485-1558* (Eyre and Spottiswoode, London, 1967), 1016.

[60] See, *e.g.*, Document 7, "Letter from Sir John Mason to Cecil", 4 December 1550; Document 9, "Rise in the Price of Cloth Goods", 10 July 1551; Document 10, "Memorandum on the Reasons Moving Queen Elizabeth to Reform the Coinage", *State Papers Domestic*, Elizabeth I, vol. XI, No. 6, in R.H. Tawney and E. Power, *Tudor Economic Documents*, vol. 2 (Longmans, London, 1924), 189-195.

Over a century later, in 1692, John Locke argued against the lowering the intrinsic content of the new coinage that was proposed to replace the existing stock of worn and clipped silver monies. Locke's argument expresses the same popular sentiment but in a way that was by then out of line with the legal analysis of the situation:

> [Silver] is the thing bargain'd for, as well as the measure of the bargain; and in Commerce passes from the buyer to the seller, as being in such a quantity equivalent to the thing sold: And so it not only measures the value of the measure of the Commodity it is apply'd to, but is given in Exchange for it, as of equal value … Men in their bargains contract not for denominations or sounds, but for the intrinsick value; which is the quantity of Silver by publick Authority warranted to be in pieces of such denominations.[61]

It may well have been the aspiration of every seller or creditor to obtain payment in the greatest weight of silver possible, and that in practice coined money was an object of worth in exchange precisely for the silver it contained. But as we shall see, Locke was mis-describing the legal effect of money debts as contracts for the delivery of certified quantities of silver. The legally proclaimed values of coin were their essential values for the purpose of discharging debts valued in the money of account.

Against this background, we can begin to study the key elements in the reasoning of the Judges in the *Case of Mixt Monies*. This paper concentrates on the private law aspects of the case, particularly the capacity of coins to procure the effective discharge of a monetary obligation. The constitutional aspects of the case, namely the power of the Sovereign to mint coin, to assign values to it, and to debase it are a separate study in themselves.[62]

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[61] J. Locke, "Some Considerations of the Consequences of the Lowering of Interest and Raising the Value of Money" (1692), [4]-[5], [9], reproduced in P.H. Kelly (ed.), *Locke on Money* (Clarendon Press, Oxford, 1991).

[62] For brief accounts, R. Ruding, *Annals of the Coinage of Britain and its Dependencies*, vol. 1 (London, Lackington, Hughes *et al*., 1819), 3-8; S.P. Breckinridge, *Legal Tender: a Study in English and American Monetary History* (Chicago, University of Chicago Press, 1903), chs 2-4.

III. The *Case*

i. Money as measure

The first element of the court's reasoning had a long intellectual pedigree. The court affirmed the need for each state to have "a certain standard of monies", which would serve as a public measure of prices and exchangeable commodities. For this proposition it principally cited Renerus Budelius' *De Monetis et Re Nummaria*, a tractatus published in Cologne in 1590.[63] Budelius was the mint warden of the city of Roermand in the Netherlands.[64] The court cited him as saying:

> Moneta est justum medium et mensura rerum commutabilium; nam per medium monetae fit omnium rerum quae in mundo sunt conveniens et justa aestimatio.[65]

The first clear expression of the idea of money was a measure was in Aristotle's *Nicomachean Ethics*, and Budelius' description is traceable to it. Money was a universal denominator in which the exchange values of disparate commodities could be expressed. By serving as a measure, money made goods commensurate and equated them. Aristotle was clear in affirming that the monetary standard was not something naturally established but that it was determined by law or conventional acceptance of society at large: [66]

> All goods must therefore be measured by some one thing … Now this unit is in truth demand, which holds all things together (for if men did not need one another's goods at all, or did not need them equally, there would be either no exchange or not the same exchange); but money has become by convention a sort of representative of demand; and this is why it has the name

[63] Reproduced in a compilation of essays in the library of Gaspar Antonius Thesaurus on the variation of monetary standards in *De Monetarum Augmento Variatione et Diminutione Tractatus Varii* (1609), 386 *et seq.*

[64] A. Nussbaum, "The Idea of a World Money" (1949) 4 *Political Science Quarterly* 420, 420-421.

[65] (1605) Davis 18, 19.

[66] Aristotle, *Nichomachean Ethics,* trans. D. Ross (Oxford University Press, Oxford, 1988), V.5.1133^{a}7-1133^{a}11, cited later in the *Case* (1605) Davis 18, 25.

> "money" [νόμισμα]– because it exists not by nature but by law [νόμος] and it is in our power to change it and make it useless.

The notion that money was a measure proved problematic to lawyers and theologians in the centuries before the *Case*. Measurement was but one of two separate monetary functions. True it was that money was a purely conventional standard for expressing prices in terms of a unit of account. But so far as money was identified with real coins in circulation it was also a medium of exchange which was tendered and received in return for other goods with a use value.[67] The scholastic philosophers had come down firmly in favour of the view that money was principally a conventional measure of values. This was the foundation of their argument that money was a sterile thing, incapable of natural increase by the accretion of interest, and incapable of having a value in exchange that differed from its nominal value established by law or convention. This was one of the key arguments against the legitimacy of lending at interest.[68] Their analysis downplayed the separate function that money was also a medium of exchange, with an exchange value that might vary from time to time.

The same ambiguity in the functions of money lay at the heart of the *Case*. The value of Brett's debt to Gilbert had been denominated in Irish monetary units of account. As abstract units of reckoning, they were unchanging standards, taking their meaning from themselves rather than from any other referent.[69] For example, a shilling unit was worth a shilling even when the weight or fineness of the coin it was assigned to by legal proclamation had been altered by the exercise of the Sovereign's prerogative power.

But the distinction between money as measure and the real money that circulated as a medium of exchange was less clear in practice than in theory. The identification of a

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[67] The distinction is more clearly articulated in the modern economic definitions of money: J.M. Keynes, *A Treatise on Money* (Macmillan, London, 1930), ch. 1; P.J. Eder, 'Legal Theories of Money' (1934) 20 Cornell L.Q. 52; A. Nussbaum, *Money in the Law* (Foundation Press, Chicago, 1939), 5–8; and L. von Mises, *The Theory of Money and Credit*, translated by H.E. Batson (Jonathan Cape, London, 1953), chs 1–2.

[68] See J.T. Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, Cambridge Mass., 1957), 51-53.

[69] An idea developed by A. Nussbaum, *Money in the Law* (Foundation Press, Chicago, 1939), 5-8.

particular coin with a certain number of monetary units of account tended to establish that the coin was also a measure of value. Measure and medium of exchange were identified in the same object.[70] (Strictly, the status of coin as a standard of measurement was derivative rather than primary but this distinction was unlikely to figure in the estimation of the general public). This phenomenon is perhaps special to monetary standards of measurement. The court in the *Case* exploited this ambiguity about the meaning of monetary values. A one-penny unit of monetary value came to be identified with whatever one-penny coin happened to be lawful coin of the realm at the time that the payment fell due. This reasoning deliberately ignored the way that the intrinsic purchasing power of a one-penny coin might have changed each time a new set of coins was issued.

The practical result was to establish the equivalence between a certain number of coins and the price of goods or the value of a debt. By extension, the legal proclamation of the current values of coins meant that their purchasing power could be made to appear as static as the value of the abstract units of the money of account. This reasoning ensured a perfect equivalence between the value of real coins in circulation and the prices of goods for which they were tendered in discharge of debts. The principle of equivalence between money and price was important: "For no commonwealth can subsist without contracts, and no contracts without equality, and no equality in contracts without money".[71] This statement was a vestige of the just price doctrine that had figured in medieval canon law theories of economic exchange, and to a degree in state control of prices.[72] Inherent within all goods was a just and proper value. If the transaction was not to be unbalanced – and therefore exploitative of one party over the other – then the seller should only charge the just price for the goods he sold. Brett could not complain that he was not receiving a just and proper value for the discharge of the debt due to him.

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[70] A phenomenon described in W. Taeuber, *Geld und Kredit im Mittelalter*, 2nd ed., (C. Heymann, Frankfurt, 1968), 259.

[71] (1605) Davis 18, 19.

[72] J.T. Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, Cambridge Mass., 1957), ch. 4.

But the equivalence between the assigned value of coins and the denominated value of a debt was purely formal. In practice, as we have seen, commodity money, as a medium of exchange, derived its primary purchasing power from the precious metal that it contained.[73] Its value in exchange would therefore vary as a function of its fineness and weight, notwithstanding that the nominal value assigned to it by law might have remained static. Even Aristotle's theory of money as measure had noted that the value of precious metals was liable to fluctuation, although not to the same degree as other commodities exchanged for it.[74] It was only the *relative* stability of bullion values that made it suitable for use as a universal denominator of values instead of some other, more variable, commodity.

By the time the case was decided early modern theorists – including the political theorist Jean Bodin and the jurist Charles Du Moulin, both authors cited in the *Case* – were attempting explanations for the great increase in prices they witnessed around them and the apparent diminution in purchasing power of the money they used from day to day.[75] Theory aside, common experience proved that the value of money – particularly on the international exchanges – was as variable as that of any other commodity.[76] It was clear to those who managed the national stock of money that certain denominations of coin were liable to be driven out of circulation if their money of account values were set too low relative to those of other coins which were lighter or less fine.[77] Bad money, in the form of clipped or worn coins, drove out good money, in the form of full-weight

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[73] See text at n. 53 ff. *supra*.

[74] Aristotle, *Nicomachean Ethics*, V.5.1133.[b]14.

[75] Jean Bodin articulated the idea that the purchasing power of money varied in inverse proportion to the quantity of it in supply. He explicitly attributed the price inflation of the 16th century to the influx of silver to Europe from South America: see R. Knolle (trans.), *J. Bodin, The Six Bookes of the Commonweale* (London 1606), Book VI, 666-667. For doubts about the attribution, see J. Blanc, "Beyond the Quantity Theory: a Reappraisal of Jean Bodin's Monetary Ideas", ch. 9 in A. Giacomin and M.C. Marcuzzo, *Money and Markets: a Doctrinal Approach* (Routledge, London and New York, 2007). For Bodin's and Du Moulin's explanations of money quantity and price inflation in the context of 16th century economic theory, see P. Vilar (trans. J White), *A History of Gold and Money* (NLB, London, 1976), chs 17-19.

[76] For 16th century theory and practice in exchange rate fluctuations, see R. de Roover, *Gresham on Foreign Exchange* (Harvard University Press, Cambridge Mass, 1949), 128-158.

[77] A Redish, *Bimetallism* (Cambridge University Press, Cambridge, 2000), 27-34.

coins. Compared with the bad money, the good money had too low a money of account value compared with the amount of precious metal that it contained.[78] An increase in international bullion prices could cause certain coins to be exported if their bullion value exceeded their domestic money of account value as coin. These were the main reasons why it was necessary to enact prohibitions on the export of coin from the realm. All these instances of variation in coin values and their relative purchasing power were common commercial experience.

The view taken by the court in the *Case* that the assigned legal values of the debt and the coins tendered by Brett were equivalent represented a deliberate decision to exclude an assessment of the real purchasing power of money from the legal conception of money and monetary obligations. The legal conception of monetary value was being separated out from the conception that obtained in contemporary economic theory and common commercial experience.

ii. The legal conception of money and the discharge of the debt

This was the foundation for the distinctively legal conception of money developed by the court and the view it took as to the effectiveness of the tender made by Brett to Gilbert. Real money was a construct of law. It belonged to that closed list of chattels that had been validly declared by proclamation to pass current in the jurisdiction. The *Case* is a strong expression of what would later be analysed by Georg Knapp, the early twentieth century monetary theorist, as a state theory of money.[79] Knapp argued that money was a creature of law. Its validity was established by legal ordinance, rather than by the social fact of its use as a generally acceptable medium of exchange. Its status as money depended on compliance with legal tests of validity rather than on its material composition.[80] Indeed, there was no reason why money should not be a pure token

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[78] W. Taeuber, *Geld und Kredit im Mittelalter*, 2nd ed., (C. Heymann, Frankfurt, 1968), 264-267.

[79] See G.F. Knapp, *The State Theory of Money*, translated by H.M. Lucas and J. Bonar (Macmillan, London, 1924), ch. 1, and A.M. Innes, 'What is Money?' and 'The Credit Theory of Money' in L.R. Wray (ed.), *Credit and State Theories of Money* (Edward Elgar, Cheltenham, 2004), chs 2 and 3.

[80] Knapp, *op. cit*, 27, 33.

lacking any intrinsic value. (This explains why Knapp's theory is often described as "chartalist", derived from the Latin for a sheet of paper *charta*; Knapp argued that paper tokens denominated in monetary units of account could pass as money.)

The court's view of this question arose through the proper construction of Brett's payment obligation stipulated in the bond. It required him to pay "100 *l.* sterling, currant & loyall [ie, lawful] money; Dengleterre".[81] An effective tender requires the obligor to deliver a thing that complies with the contractual specification. We have seen already the great diversity of coins circulating in the British Isles in early modern times. Consequently, it was legally important to identify which of them could compel the discharge of a debt denominated in the money of account of the local jurisdiction. The questions for the court were therefore whether the debased coins proffered by Brett were: first, sterling monies; secondly, monies of England; and thirdly, lawfully issued as current monies. Each involved mixed issues of general law and construction.

On the first point, the word "sterling" had a long history in the English monetary system. The sterling standard of silver had been established at least by the time of William I. Silver pennies were then cut from an alloy containing 925 parts of pure silver in 1,000 or 11 *oz.,* 2 *dwt.* in the Tower pound weight.[82] This entered popular consciousness as the classical standard of fineness. The use of the word "sterling" was open to a series of different constructions, all of which seemed to favour Gilbert. It might be taken to be mean that Gilbert was stipulating for payment of the debt in coin of a certain fineness, or that he was to be paid a quantity of the debased coin that contained 100 *l.* worth of fine silver according to the current mint price. Since the silver content of the debased coinage was so low (2 *oz.* 18 *dwt.* fine silver *per* pound weight), the nominal value of new coins made from 100 *l.* worth of fine silver would far exceed 100 *l.* in the new coin.

[81] (1605) Davis 18, 18.

[82] See Feavearyear (1931), 8.

This question marked the beginning of a long digression – much of it fanciful – into the historical origins of the word "sterling".[83] Was it a reference to Stirling Castle in Scotland where it was said that the coins might once have been minted? Was it a reference to a certain standard of fineness? If so, what was the period when that standard of fineness should be taken as fixed? For the court noted that the standard of purity of the English coinage had declined since its inception.[84] The coins minted from it nonetheless continued to be referred to as "sterling".

In the end, the court put the historical controversy aside as irrelevant. As a matter of established legal usage, it held, sterling was a synonym for lawfully issued current money that had been put into circulation by the English Sovereign.[85] Coins issued since the Conquest had been called "sterling" even when they fell short of the fineness of the original sterling standard. "Esterling" was the common name for an English penny throughout this whole period, even when it no longer circulated at the original weight and fineness established at the Conquest.[86]

More difficult was the expression "Dengleterre". There was a real question about which national currency the obligation in the bond was denominated in and which coins

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[83] (1605) Davis 18, 23-25. Other interpretations are that the word comes from the word *stoerra*, a star, since some of the early coins bore a small star, or that it is a corruption of *staer*, a starling, since some of Edward the Confessor's pennies were stamped with the likeness of four birds: *Feavearyear* (1931), 8.

[84] (1605) Davis 18, 24.

[85] (1605) Davis 18, 22, 25. This usage continues to this day but now with two layers of fiction. The currency of the United Kingdom is still called sterling although it is not convertible to coins minted from any precious metal. Even when it still was, the foundation of the sterling currency was its convertibility to gold rather than silver coin. Great Britain formally converted from a silver to a gold standard in 1774. The silver coins that still circulated were given a maximum legal tender value of 25 *l.* whereas gold coins were legal tender for any amount: stat. 14 George III, cap. 42, s. 2. Hence gold coins became the primary currency units. The silver coins were essentially fiduciary media convertible to gold coins.

[86] (1605) Davis 18, 24, citing the usage in *Pong* v. *Lindsay* (1553) 1 Dyer 82a, 82b that "two pollards" were current in England at a rate equal to "one sterling". A pollard was the name generally given to a foreign-issued imitation penny (T. Snelling, *Miscellaneous Views of the Coins Struck by the English Princes in France, Counterfeit Sterlings etc.* (London, 1769), 23), but in this case it probably refers to one of Henry VIII's debased 1 *d.* coins after Edward VI devalued it to ½ *d.* in 1551: English Proclamation 379, Edward VI (1551).

should be tendered to discharge it. Since the parties had entered into the bond in London, they might have meant the debt to be denominated in English units of account and to be discharged by payment of coins that were then current in England. Gilbert would therefore have been immune from any risk in the devaluation of the Irish currency. The identification of the relevant *lex monetae* of a contract can be difficult, particularly when the money of account of two separate countries uses the same units – such as pounds, shillings and pence – but where the real money circulating in each of them carries different legal or market valuations.[87] This was the case in Ireland and England. The coinages of both countries were rated according to the system of pounds, shillings and pence. But even before the 1601 debasement, the Irish currency had circulated at an exchange value one quarter below that of the English currency. A coin rated at 1 *s.* in Ireland was worth 9 *d.* in England. This difference partly explains the regular attempts to stem the flow of low-value Irish coins into England. They were often confused with English coins even though their intrinsic values differed.[88]

The court held that the debased Irish coins tendered by Brett complied with the stipulation for "lawful money of England". First, Ireland had been annexed to and united to the Crown of England.[89] On these terms, the Irish coinage was a specialised variety of English money. This first reason is perhaps tenuous. It seems that Irish contracts commonly stipulated for England as the *lex monetae* and supposed English coin valuations to express the amount of the debtor's or buyer's obligation. They were not stipulating for payment in Irish coins at all. As evidence of the practice and the confusion it caused, James I was led to proclaim a year after the decision in the *Case* that contracts should refer specifically to "current and lawful money of Ireland" when that was currency intended.[90] This confusion about the *lex monetae* of Irish debts continued

[87] *Adelaide Electric Supply Company Ltd* v. *Prudential Assurance Company Ltd* [1934] A.C. 122 is a modern example arising from the separation of the Australian monetary system from that of Great Britain during the suspension of the international gold standard.

[88] Stat. 17 Edward IV, cap. 1; stat. 19 Henry VII, cap. 5; English Proclamation 197, Henry VIII (1540).

[89] (1605) Davis 18, 25.

[90] Irish Proclamation 28, James I (11 November 1606).

for the following two centuries. It ceased only in 1825 when the currency and money of account of Ireland were assimilated with those of Great Britain.[91]

Secondly, the court held that stipulation of England should be taken to refer to the place where the coins were minted rather than the jurisdiction where the coins were intended to circulate.[92] The debased coins had been minted at the Tower of London and so complied with the contractual description. This second reason is perhaps more easily understood in the light of the minting practices of the time. It was common practice for the issuing mint to stamp its identifying mark on the coins it produced. Although by the early 17th century the Tower mints were the only remaining mints in operation in England, the identification of particular coins with the output of certain mints would still have been a real feature of the prevailing monetary practice. It was tenable to regard coins as chattels with an identified provenance as much as media intended for circulation in a certain country.

The third condition that Brett's tender had to comply with was that it be made in lawful and current money. The court's reasoning on this point is especially significant in defining the special legal conception of money, and in exemplifying Knapp's chartalist theory of money. The outcome of Brett's tender of debased coins to Gilbert depended on their compliance with legal tests for validity. The court identified six conditions to the coins' status as current and lawful money: "1. Weight, 2. Fineness, 3. Impression, 4. Denomination, 5. Authority of the Prince, 6. Proclamation."[93] The debased coins complied with the first four conditions. They had been issued in the physical form required by the original mint indenture sent by the Queen to the mint. The indenture had denominated their legal values in money of account. As to the fifth condition, the court recognised that the issue of coin was an exclusive prerogative of the Sovereign.[94] The debased coins were issued under the Queen's authority. As to the sixth, the Queen's proclamation of 20 May 1601 established the status of the coins as lawful and current money and fixed their money of account values. The legal status of the coin was thereby

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[91] Stat. 6 George IV, cap. 79.

[92] (1605) Davis 18, 25-26.

[93] *Ibid.*, 19.

[94] *Ibid.*, 19-20.

transformed from chattel bullion into money. It became invested with the legal capacity to compel the discharge of debts expressed in monetary units of account (*le pouvoir libératoire* is the telling French expression for this capacity).[95]

The significance that the court attached to legal proclamation needs some explanation. Some new coins seem to have been issued without a proclamation to assign them a value. Although the legal proclamation of new coins and their denominated values was the standard practice during the time of Henry VIII till James I, it may not have happened consistently before and afterwards. There are, for example, no surviving proclamations for Henry VII's new issue of the sovereign coin, although a statute of 1503-1504 enacted in general terms that the coins minted by him were to "go and be current in Payment, for the Sum that they were coined for".[96] When the guinea coin was first issued in 1663 there was no proclamation to accompany it. This point arose in *Dixon* v. *Willoughes*.[97] In that case, Holt CJ seems to have been satisfied that the guinea coins were coined at the mint and stamped with the King's insignia. The mint commission issued by the Sovereign was sufficient to denominate the values at which the coins would pass current.

But proclamation was clearly relevant to the demonetisation of coins or to altering the money of account values of coins already in circulation. This perhaps explains why the court insisted upon it as a condition to the status of coin as lawful and current money. Consistently with Knapp's state theory, the status or value of money was alterable by law. Recent events would have brought these points home to the court. The Queen's proclamations had demonetised the former Irish currency. By act of law it had reverted to its original status as bullion.[98] The court was familiar with the proclamations of Edward VI that lowered the denominated values of English shilling coins in 1551,[99] and

[95] See E. Szlechter, "La monnaie in France au XVIe siècle; droit public – droit privé" (1951) 29 *Revue Historique de Droit Français et Étranger* (4th) 500, 502.

[96] Stat. 19 Henry VII, cap. 5.

[97] *Dixon* v. *Willoughes* (1696) 2 Salk. 446; *sub nom Dixon* v. *Willows* (1696) 3 Salk. 239. The order to the mint is held at NA MINT 1/4, fol 57.

[98] See text at nn. 15-16 *supra*.

[99] (1605) Davis 18, 21. See further text at n. 114 *infra*.

we have seen how James I did the same to the debased Irish currency at about the same time the *Case* was decided.[100]

In consequence, the court was not bound to take notice of any money that was not current by proclamation.[101] So the old Irish currency that had been demonetised by the Queen's proclamation was beyond legal recognition. Gilbert's insistence that Brett pay the debt in the old currency could not be given any credence; it amounted to an ineffectual attempt to make a unilateral variation of the contract by stipulating for the delivery of bullion. Creditors who accepted the old coinage were effectively engaging in barter.[102] Of course, any creditor was free to waive an existing monetary debt on whatever terms he pleased. But the creditor's decision to do so was a variation of the original obligation. Tender of the old coin could not force the discharge of the debt in the way that tender of the new coin could.

The effect of the court's reasoning was to distinguish sharply between a specifically legal conception of money as a means of payment and a more general economic conception of money as a medium of exchange, generally acceptable as a matter of social practice.

iii. The legal theory of monetary value

By enforcing the nominal values of money against the creditor, the court was following an analysis that was emerging in other European systems by the early modern period.[103] The theory of nominalism seems by then to have been gathering force as the legal method for valuing commodity money and monetary obligations. The earlier, contrary, view of

[100] See text at n. 11 *supra*.

[101] (1605) Davis 18, 28.

[102] Without the official assignation of monetary status to certain kinds of thing, the distinction between barter and sale is difficult to draw. This point troubled the Roman jurists: see D.18.1.1 (Paulus) cited in the *Case* (1605) Davis 18, 19, and generally C. Nicolet, "Pline, Paul et la Théorie de la Monnaie" (1984) 62 *Athenaeum* (N.S.) 105. Goods might be exchanged by barter though their relative values were expressed in monetary units of account: see P. Grierson, *The Origins of Money* (Athlone Press, London, 1977), 16-17.

[103] See generally T.J. Sargent and F.R. Velde, *The Big Problem of Small Change* (Princeton University Press, 2002), ch. 6.

the early medieval doctors of the civil law was by then being superseded and dismissed as founded on an erroneous view of the nature of money. The early writers had argued that the value of money and monetary obligations depended on the intrinsic bullion values of the coins used to incur and discharge the obligation in question. The value of the debtor's obligation was fixed by the bullion content of the coins that were current when the debt was incurred. The position was summed up in the brocard of Azo late in the twelfth century: "eadem mensura vel moneta debetur, quae erat tempore contractus".[104]

Central to the reasoning of the court in the *Case* was its distinction between the intrinsic worth (*bonitas intrinseca*) and extrinsic worth (*bonitas extrinseca*) of coins. First and already mentioned was Renerus Budelius, of whose views the court said:

> "Intrinseca [bonitas] consistit in pretiositate materiae, et pondere," viz. fineness and weight. "Extrinseca bonitas consistit in valuatione seu denominatione, et in forma seu charactere." … And this *bonitas extrinseca*, which is called "aestimatio sive valor impositus, est formalis et essentialis monetae," and this form giveth name and being to money; for without such form, the most precious and pure metal that can be is not money".[105]

The other source was Charles Du Moulin, a 16th century French jurist and legal practitioner.[106] His vast *Tractatus contractuum et usurarum* of 1546, penned under the name of Carolus Molinaeus, is best known for its re-analysis and rejection of the prohibition on usury. But it also included a long chapter on the alteration of currency values and its effect on the discharge of monetary obligations. The work of the medieval glossators and legists on the point was analysed and criticised. The court paraphrased the significance of Du Moulin's views as follows:

> "Non materia naturalis corporis mo[net]ae, sed valor impositius est forma & substantia monetae, quae non est corpur [sic] physicum, sed artificiale" as Aristotle saith, Ethic. lib. 5. And so Polit.

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[104] See W. Taeuber, *Geld und Kredit im Mittelalter*, 2nd ed., (C Heymann, Frankfurt, 1968), 277-280; W. Ernst, "The Glossators' Monetary Law" , ch. 9 in J.W. Cairns and PJ du Plessis, *The Creation of the Ius Commune* (Edinburgh University Press, Edinburgh, 2010).

[105] (1605) Davis 18, 24.

[106] See J.-L. Thireau, *Charles Du Moulin* (Droz, Geneva, 1980).

> lib. 1 he saith to this effect, that money was first signed and imprinted with a certain character, to the intent, that the people might accept it on the credit of the prince or sovereign who publishes it, without examination or trial of the weight or purity. And to this purpose Molineus [sic] hath this rule, Q. 99. "de jure non refert sive plus sive minus argenti insit, modo publica, proba, et legitima moneta sit." Et Bal[d]us l. singulari, saith, "in pecunia potius attenditur usus et cursus quam materia".[107]

The expressions *bonitas intrinseca*, *bonitas extrinseca*, *aestimatio* and *valor impositus* were legal terms of art that had been developed in a long tradition of civil law writing on the nature of monetary obligations. The term *bonitas* derived ultimately from Roman law analyses of the essential nature of generic goods – such as corn, wine or money – that had been lent for consumption under a contract of *mutuum*. The civil lawyers' discussion of coin loans was the centrepiece for their understanding of monetary obligations in general. The debtor's duty arising from the delivery of coins to him was to repay like with like.[108] The medieval doctors' view, following the ordinary usage, was that the *bonitas intrinseca* referred to the weight and fineness of coins. They may not have regarded the gist of a *mutuum* of coins as simply consisting in the delivery of a quantity of precious metal. But they did regard the weight and fineness of the coined metal as the coins' primary characteristic for the purposes of discharging the repayment obligation under the *mutuum*. On this view, a debasement of the currency between the dates of loan and repayment did not affect the debtor's obligation to restore coins of the same weight and fineness as he first received from the lender. If that were not possible, the debtor at least had to repay a larger number of new debased coins, so that he restored an equivalent quantity of precious metal as had originally been advanced to him. The nature of the loan contract thus secured the lender against that risk of currency devaluation.

The advance made by Du Moulin was to argue for an entirely new understanding of the nature of coin and monetary obligations. He argued that the term *bonitas intrinseca* was better understood not as the precious metal content of coins but as their

[107] (1605) Davis 18, 24-25, referring to Molinaeus, *Tractatus*, 694.

[108] D.12.2.2.pr. (Paulus); D.12.2.3 (Pomponius).

valor impositus, that is, as their publicly assigned value in terms of money of account.[109] The essence of coin or, as Du Moulin preferred to see it, its *bonitas intrinseca*, consisted in its denominated value in the money of account (sometimes called *valor currens*).[110] In traditional legal usage, however, *bonitas intrinseca* was identified with the weight and fineness of the coins, which explained why a loan of money had to be repaid with coins having the same precious metal content. The corollary of Du Moulin's revised view of coin and *mutuum* should have been that a loan of money should be repaid at its nominal value, even if the coinage had been debased or its money of account valuation revised between the dates of contract and payment.[111] For this reason it is possible to read the passages cited by the court as laying down a nominalist theory of money and monetary obligations, though Du Moulin does not work out his theory comprehensively. To compound the confusion in his writing, Du Moulin still adhered to the traditional usage of the terms *bonitas intrinseca* and *bonitas extrinseca* when he explained existing legal doctrine, even though he took a different view about what was, in principle, the correct position.

Whatever the true meaning of Du Moulin's general theory, the passages cited by the court in the *Case* provided a foundation for the nominalist explanation of money that it enforced against Gilbert. The court in the *Case* took Du Moulin to mean that the publicly assigned value of coins was the "propria specifica, substantialis & formalis bonitas & essentia, quae dat ei esse".[112] Its view was a combination of Du Moulin's reasoning about the true essence of coin and the traditional usage of the terms of *bonitas intrinseca* and *bonitas extrinseca* that was still employed by Budelius. The court was adopting civil law terminology but none of the legal context that had informed it. The civil law learning surrounding the term *bonitas* did not figure in the common law understanding of a loan. In any event, the Brett's debt to Gilbert had arisen from a sale and so the theory of restoring like with like in a loan could not arise. Nonetheless Du

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[109] Molineaus, *Tractatus*, 696. For a close analysis of his argument, see W. Taeuber, *Molinaeus' Geldschuldlehre* (Jena, 1928), ch. 2.

[110] Molinaeus, *Tractatus*, 969 marginal note.

[111] *Ibid.*, 694.

[112] (1605) Davis 18, 24-25 citing Molinaeus, *Tractatus*, 694.

Moulin's understanding of coin that had evolved from the civilian analysis of *mutuum* was transposed to common law debts. For the purposes of discharging monetary debts, it was the current coin values assigned by legal proclamation that mattered.

It is unclear from his own writings whether Du Moulin advanced a consistently nominalist argument about the nature of money and monetary obligations. Other passages in the *Tractatus* indicate that he would have admitted exceptions to a nominalist theory. But for the court in the *Case* and the common law more generally, these inconsistencies can be put to one side. The report of the *Case* is selective about passages of Du Moulin that it relies on. The impression on reading the report is of a court picking out a few convenient passages from a heavy-weight author without much regard to their context. Du Moulin's writings lent credibility to the nominalist tenor of the Sovereign's proclamations that the court was enforcing.

In the court's view, this interpretation fitted with the Aristotelian conception of money as an artificial standard established by convention or law (νόμος) rather than by nature. The passages in Du Moulin to which the court referred are explicit in identifying the law as the basis of the conventional measure of value. Du Moulin translated νόμος as *lex*.[113] It was not given the weaker sense of a generally accepted convention. This enabled the court to identify the Aristotelian analysis of money with the Sovereign's common law prerogative to proclaim the current legal tender values of coin. By a two-stage process of translation and adoption, the court took Aristotle as authority for what Knapp would later develop into a chartalist theory of token money. Ironically, the court's reliance on Du Moulin's civilian writings perhaps gave the common law a more thorough-going theory of monetary nominalism than civil law systems had at the same time.

IV. THE SIGNIFICANCE OF THE *CASE* FOR THE COMMON LAW

Beyond its result in resolving the disputes arising out of the new Irish currency of 1601, how much of a difference did the *Case* make to the common law in its own time? Did it change the law?

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[113] Molinaeus, *Tractatus*, 696 citing Ar. *Eth.*, V.5.1133^{a}7-1133^{a}11, quoted in full at text at n. 66 *supra*.

The questions are not easily answered, for two main reasons. First, if we confine the inquiry solely to the reports of decided cases, it is unclear whether the common law took a consistently nominalist or valorist approach to monetary obligations before the *Case*. Accordingly, the title of this paper has been rather tentatively expressed as "confirming" nominalism in the common law rather than "establishing" it in a break from a previous valorist tradition. The second reason is that the question itself may be misdirected. To concentrate only on the common law cases on monetary revaluation would be to take a skewed perspective about the real sources of English law governing monetary revaluations. The better view may be that the proclamations themselves are a sufficient source of law. They are sufficient to show that English monetary law applied a generally nominalist approach to money and debts.

Turning first to the common law authorities, our reports of earlier litigation from the early modern period on the discharge of debts are inconclusive. We have two cases from 1554 in *Dyer's Reports* arising out of Edward VI's revaluation of his father's debased shilling and groat coins in 1551. In that year Edward issued two main proclamations that reduced the legal value of the teston coin from 12 *s.* to 9 *d.* and then to 6 d., and the groat coin from 4 *d.* to 3 *d.* and then to 2 *d.*[114] The debased coins were liable to counterfeiting and needed to be withdrawn from circulation. The crying down of the legal values was necessary to establish their intrinsic parity alongside a new issue of 12 *s.* and 4 *d.* coins that he planned to put into circulation later that year. Strictly, these cases were distinguishable from the *Case* since they involved a change to the money of account values of existing coins, rather than the issue of new, debased, coins of reduced weight or fineness. Each involved a peculiar problem that obscures the analysis, either the default of the creditor to whom the tender was made or delay by the debtor in making the tender. So it is difficult to read them as clear authorities for a nominalist or valorist approach at common law to valuing money and monetary obligations.

In the first case, *Barrington* v. *Potter*,[115] a tenant was bound to pay his half-yearly rent to his landlord on Lady Day and Michaelmas. On the relevant payment days between 1547 and 1548 the tenant tendered the rent in the form of debased English

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[114] See English Proclamations 372, 379 Edward VI (1551).

[115] (1554) 1 Dyer 82a.

shilling coins which were then rated at 12 *s.* He pleaded that on each occasion the landlord was not available to accept his tender. In 1554 the landlord sued for the whole rental sum due, and the tenant put in issue the tenders that he had previously made each rent day. Meanwhile, Edward VI had lowered the nominal money of account values of the coins in which each of those tenders had been made. So in 1554 when the *Case* was heard, the substance of the dispute was whether the tenant or the landlord had to bear the loss arising from the devaluation. If the tenant's tenders were held bad, he would have to pay the nominal rent but using other coins with a higher intrinsic value.

The report does not note the court's view on the legal consequences of the devaluation. In any event, the parties settled. The landlord backed down and accepted the rent according to the value of the shilling coins as they had been current at the time of tender.

In the second, an anonymous case,[116] we have only fragmentary notes of argument about a fiscal dispute. A receiver of the King's revenue had collected a large sum of money for which he had to account to the cofferer of the King's household. After the due date for payment, the shilling coins in the receiver's possession were devalued. Given that the receiver was at fault, did the cofferer now have to accept the same coins at their reduced value or could he claim for the difference between the original nominal value of the coins collected and their new, reduced, value? The resolution of this point is not reported. But a brief footnote to the report has Dyer and Weston JJ saying that the receiver would not have to bear the loss if the coin had been debased before he had been required to pay it over.

But to look exclusively in decisions of the common law courts for the English law governing money and monetary obligations may actually be to seek in the wrong place. The ordering of monetary law was a primary prerogative power or one that was exercised by the Sovereign through parliamentary legislation. This perhaps explains why the great preponderance of English monetary law is found in the Sovereign's proclamations rather than in the decisions of the common law judges. The proclamations are explicit not only in identifying which of the Sovereign's coins had to be accepted but also the rates at which they had to be taken in discharge of debts. Some of them even list the different

[116] (1554) 1 Dyer 82b.

kinds of monetary debt that were to be discharged by payment of the coins. They assume a straightforward nominal rate of discharge, even in debts where there would commonly have been a delay between the formation and discharge of the obligation.

The proclamations issued by Henry VIII followed a standard form of wording:

> "The King our sovereign lord … straightly chargeth and commandeth that from henceforth these moneys of gold and silver here expressed and not clipped shall be current and have course within all places throughout this his realm … to be taken, paid, repaid, by change, rechange, and all other payments, as well betwixt his subjects as between his subjects and all others, whatsoever they be, at the rate and value hereafter following …"[117]

Significantly the wording was similar to this standard form even when the proclamation accompanied a new issue of debased coins,[118] or when it was altering the money of account valuation of coins already in circulation.[119] The proclamation of the new debased currency in the *Case* followed a slightly different wording but still tied each new coin strictly to a money of account value. It required the public to "receive and accept the same at such values and rates as they [were] coined for, *videlicet*, Shillings, for shillings, pieces of six pence, for six pence, and so of all other the several coins

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[117] English Proclamation 88, Henry VIII (1522). For identical or similar wording, see also English Proclamations 100, Henry VIII (1524); 102, Henry VIII (1525); 103, Henry VIII (1525); 321, Edward VI (1549); 326 Edward VI (1549); 382 Edward VI (382);

[118] *E.g.*, English Proclamation 112, Henry VIII (5 November 1526): "all other such sums of money which upon any obligation, covenant, bargain, promise, bill, grant of parliament, or otherwise, was payable to the King's highness or any other person at any time between the date of the last proclamation made of coins, which was the 22nd day of August last past, and the date of this present proclamation, shall be paid, received, and taken after such rate as the moneys and coins of gold and silver by virtue of the said last proclamation was valued and current. And semblably all such other sums of money which upon like respects or otherwise shall be payable to the King's highness or to any other person from the date of this present proclamation forwards, shall be paid, received, and taken after such rate as the moneys and coins of gold and silver by this said proclamation be valued current and limited".

[119] English Proclamation 111, Henry VIII (1526) altering *inter alia* the money of account valuation of the French crown of the sun to 4 *s.*, 6 *d.*, from its former valuation of 4 *s.*, 4 *d.* established by English Proclamation 103, Henry VIII (1525).

respectively".[120] It was expressed to apply to obligations arising in payment of "wages, fees, stipend or payments of debts, or in bargaine or for anie other matter of trade, commerce or dealing betweene man and man". Occasionally, a proclamation explicitly provided transitional provisions to deal with accounting obligations incurred but not discharged before the change in currency standard. So when receivers, collectors and bailiffs collected customs, rents or subsidies in money of the former standard, they were barred from paying the monies on to the King or their landlords at the new, debased, rate. They were required to account for the full sum received and pay the money at the former rate.[121] They were not allowed to make a profit from the change in currency standard.

Debasement of the currency only offered benefits to the Sovereign and to the merchants who sold their bullion to the mint if the new coins issued by the mint could be spent at their nominal value. The merchants who dealt with the mint knew full well that they would receive back less bullion in the form of minted coin than they first supplied to it. They had nothing to gain from supplying old coins to the mint in return for new debased coins unless they expected they could spend the new coins at their nominal value. The whole policy of Sovereign currency management would have failed if the law had adopted anything but a nominal rate of discharge for monetary obligations. Justly or unjustly, the enforcement of legal tender values in the discharge of private debts made it possible for the Sovereign to exploit currency debasements to increase his seignorage revenues. Monetary nominalism was an essential plank in structure of his fiscal policy. The adjustment of the legal tender values of coins was an integral part of his powers to control currency flows in and out of the country in response to fluctuations in international market prices for bullion.[122] The recitals of certain proclamations setting new money of account values for coins were explicit in stating this policy.[123]

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[120] Irish Proclamation 20, Elizabeth I (20 May 1601).

[121] English Proclamation 112, Henry VIII (5 November 1526).

[122] See W. Taeuber, *Geld und Kredit im Mittelalter*, 2nd ed., (C Heymann, Frankfurt, 1968), 264-267; and D. Fox, "Legal Tender and Early Modern Monetary Management" (forthcoming).

[123] *E.g.*, English Proclamations 111, Henry VIII (1526); 112, Henry VIII (1526); 228, Henry VIII (1544); 47, James I, (1604); 122, James I (1611); 13 Charles II Rot. Pat. p.17, n.13d. (26 August 1661), printed copy at NA SP 45/11.

The identification of much English monetary law with the royal proclamations also goes far to explain an apparent anomaly about the common law compared with civilian legal systems. It has been seen that the doctors of the civil law generated an enormous body of literature about the effect of currency debasements and revaluation on the performance of monetary obligations.[124] We naturally look to the decisions of the common law judges to find the corresponding English law on the issue, and find that they hardly had anything to say before the *Case* in 1605. But from this absence it would be wrong to draw the conclusion that English monetary law had nothing to say on the subject or that it was undeveloped by comparison with civil law jurisdictions.

The better explanation for the difference is that it was not the constitutional function of the common law judges and commentators to define the monetary law of the realm. The Sovereign was the source of the relevant law. The many coinage proclamations meant that that law was abundant and that its terms were explicit. The absence of common law reasoning on monetary issues can be understood by drawing a modern analogy. Judge-made common law says nothing, for example, about the capital adequacy ratios of deposit banking institutions. But no modern observer would find that absence surprising. Regulatory law which is concerned with large questions of economic management is left to an executive body to define. So too in early modern times it was the place of the Sovereign, and not the judges, to determine how money and monetary obligations were to be valued. The *Case* was really a rationalisation and justification in common law of a nominalist approach to money that was already the prevailing law of England.

V. CONCLUSION

The *Case of Mixt Monies* confirms the principle of nominalism in the common law of monetary obligations. The route by which that principle was established is complex. On its face the *Case* involves a selective reception of civil law principles on monetary valuation and monetary obligations into the common law. But English law already seems

[124] See especially W. Ernst, "The Glossators' Monetary Law", ch. 9 in J.W. Cairns and P.J. du Plessis, *The Creation of the Ius Commune* (Edinburgh University Press, Edinburgh, 2010).

to have worked by a predominantly nominalist standard. The many Royal proclamations that preceded the *Case* assume that money would be taken in discharge of obligations according to its current nominal values. The advance made by the *Case* was to establish that judge-made common law would apply the same nominalist approach. What was strictly the common law for newly-conquered Ireland became the common law for England as well.

The *Case* establishes a distinctively legal conception of money which would later be identified by economic writers with chartalist theories. Money and monetary values were creatures of law. This recognition was hugely important for the evolution of the British monetary system. It is easy to assume that law is a passive instrument in economic development: all it does is to implement and enforce developments that originate in economic policy and commercial practice. The *Case* shows the common law driving the direction of economic change. By accepting that primary value of money was established by law and that money debts had to be discharged at their nominal value, the *Case* helped to distinguish the value of money in payment transactions from its intrinsic metallic value. It marked an important step towards the development of the token and fiat currencies that we now use. Their values do not derive from any intrinsically valuable metal content, or from any price relationship between those currencies and precious metals. The *Case* helped set the conditions for the British monetary system to move in this direction.