

THE LEGAL ASPECT OF MONEY

*With special reference to
Comparative Private and Public
International Law*

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at a sterling value of about 60p per rand. The Court of Appeal was for this reason fully entitled to treat the coins as subject to forfeiture, irrespective of the historical interpretation of the word 'goods' in customs legislation and irrespective of the unsatisfactory decision of the European Court of Justice.¹³⁹

IV

The foregoing considerations are concerned with the question, in what circumstances may circulating objects rightly be described as money? They have, however, nothing to do with a different problem; what is money in an abstract sense, what is its essence, its intrinsic attribute, its inherent quality?

The answer given by economic theory is that money is 'wealth power', is 'purchasing power in terms of wealth in general'.¹⁴⁰ This conception deserves to be, and has been, approved of by the law.//

As far as can be ascertained, the first lawyer to express it was Savigny.¹⁴¹

In the first place money appears in the function of a mere instrument for measuring the value of individual parts of wealth. As regards this function, money stands on the same basis as other instruments of measurement. . . . But money also appears in a second and higher function, viz. it embraces the value itself which is measured by it, and thus it represents the value of all other items of wealth. Therefore ownership over money gives the same power which assets measured thereby are able to give, and money thus appears to be an abstract means to dissolve all property into mere quantities. Therefore money gives its owner a general wealth power, applicable to all objects of free intercourse, and in its second function it appears as an independent bearer of such power, placed at the side of, and equivalent to, and equally efficient as all particular objects of wealth. Such wealth power, characterizing money, has, moreover, the attribute of being independent of individual abilities and necessities, and consequently of having equal usefulness for all and under all circumstances.

¹³⁹ In *R. v. Behm*, the Quebec Court of Appeal correctly held Canadian silver coins to be 'goods', the Chief Justice making the clear distinction between coins as instruments of exchange and coins as 'the substance of which money is constituted': 12 (1970) D.L.R. (3d) 260. For a case in which money was 'goods' within the meaning of an insurance policy see *Prudential Staff Union v. Hall*, [1947] K.B. 685. Where a statute includes in the definition of goods 'matters or things' laden on board a ship, gold coins clearly are covered: see the South African case of *Commander v. Collector of Customs*, 1920 A.D. 510. In *Morris v. Ritchie*, (1934) N.Z.L.R. 196 it was held that a dealer in gold coins could not avoid obtaining a licence on the ground that sovereigns were still legal tender: 'the giving of thirty shillings in exchange for a gold sovereign is a purchase of that sovereign. It is taken by the purchaser, not as a current coin of the realm, but as a piece of gold of standard fineness'.

¹⁴⁰ R. G. Hawtrey, *Encyclopaedia Britannica*, 14th ed. xv. 693. It is needless to say that this view is not undisputed.

¹⁴¹ *Obligationenrecht*, i. 405.

The idea that, according to its intrinsic nature, money is abstract purchasing power, though not unopposed, has been widely accepted by German jurists,¹⁴² and it has also been expressed by Lord Macmillan when he said¹⁴³ that money¹⁴⁴ is 'purchasing power in terms of commodities'. Indeed, it is a useful guide for appreciating one of the essential features of the memorable case of *Banco de Portugal v. Waterlow & Sons Limited*,¹⁴⁵ the principal facts of which were as follows. The defendants were employed by the plaintiffs, the Portuguese bank of issue, to print a series of bank notes, known as Vasco da Gama 500 escudo notes, and they delivered 600,000 of these to the plaintiffs, who put them into circulation. Subsequently, an ingenious criminal managed to obtain from the defendants 580,000 notes of the same type, printed from the original plates and indistinguishable from the first set. A great part of these notes was put into circulation in Portugal, but when the plaintiffs discovered the circulation of these unauthorized notes, they withdrew the whole of the issue of Vasco da Gama notes and undertook to exchange them for other notes. When the plaintiffs brought an action against the defendants in the English courts, many difficult questions connected with the measure of damages and banking law fell to be decided. But one of the most important problems was whether the plaintiffs were entitled to damages on the basis of the face value of the genuine notes issued by them in exchange for unauthorized notes, or whether the damages suffered by them consisted only of the cost of printing notes to replace the genuine notes with which they had parted. The latter view commended itself to Scrutton L.J. in the Court of Appeal and to Lords Warrington and Russell of Killowen in the House of Lords, while the former view was accepted by a majority both in the Court of Appeal (Greer and Slesser L.JJ.) and in the House of Lords (Lords Sankey, Atkin, and Macmillan). In this connection it is of special interest to note that Lord Atkin as well as Lord Macmillan

¹⁴² Wolff, *Geld*, p. 569; Düringer-Hachenburg-Breit, iv, pp. 742 sqq. See also G. Simmel, *Die Philosophie des Geldes* (3rd ed., 1920), pp. 87 sqq., where he also discusses the reciprocity and relativity as a feature of the essence of money, the conclusion being that (p. 98) money is 'die entschiedenste Sichtbarkeit, die deutlichste Wirklichkeit der Formel des allgemeinen Seins, nach der die Dinge ihren Sinn *aneinander* finden und die Gegenseitigkeit der Verhältnisse, in denen sie schweben, ihr Sein und Sosein ausmacht' (the most decisive image, the clearest reality of the formula of all being, according to which things acquire their meaning by their relation to each other and the reciprocity of the surroundings in which they find themselves signifies their existence and quality). An English translation of Simmel's work, *The Philosophy of Money*, by Bottomore and Frisby appeared only in 1978. The above sentence is based on, but slightly different from, the translation at pp. 128, 129 of that work.

¹⁴³ *Banco de Portugal v. Waterlow & Sons*, [1932] A.C. 452, 508.

¹⁴⁴ Lord Macmillan spoke of issued notes, but his remark applied to money in general.

¹⁴⁵ [1932] A.C. 452; on this case see Sir Cecil Kisch, *The Portuguese Bank Note Case* (London, 1932); R. G. Hawtrey, 52 (1932) *Economic Journal*, 391; M. T. Hollond, 5 (1932) *Cambridge L.J.* 91 (all of them from the point of view of economics).

made it clear that, having regard to their note-issuing power, the plaintiffs, when issuing the new notes, were parting with and putting into circulation a portion of their wealth, or in other words, were parting with money.¹⁴⁶ Thus Lord Macmillan said:¹⁴⁷

In my opinion this argument (that the Bank had only sacrificed some stationery) is fallacious. It overlooks the cardinal fact that a note when issued by the Bank of Portugal becomes by the mere fact of its issue legal tender for the sum which it bears on its face. The issued note represents so much purchasing power in terms of commodities. It can be used by the holder of it to purchase at current prices any commodity in the market, including gold and securities. It can equally be used by the Bank to purchase commodities, including gold and securities, or to discharge debts due by it. It must be accepted by the Bank in discharge of debts due to it.

Or to quote Lord Atkin:¹⁴⁸

I therefore find the position to be that the Bank by issuing its note like the trader issues its promise to pay a fixed sum: issues a bit of its credit to that amount; like the trader, it is bound to pay the face value in currency; like the trader it is liable on default to judgment for the face value exigible out of its assets; and like the trader, if it is compelled by the wrong of another to incur that liability, its damages are measured by the liability it has incurred.

These words also permit the general conclusion that according to its intrinsic nature money represents and, of course, has purchasing power.¹⁴⁹

¹⁴⁶ Lord Atkin, pp. 487 sqq.; Lord Macmillan, pp. 507 sqq.

¹⁴⁷ p. 508.

¹⁴⁸ p. 489.

¹⁴⁹ Nussbaum's criticism of the decision of the House of Lords (pp. 84 sqq.) is mainly based on the fact that in normal circumstances a bank of issue cannot create the conditions of issue by its own action, but discounts commercial paper offered to it. The author concludes that the only loss suffered by the bank was the discounting profit and the cost of printing new notes. But the loss suffered by the bank was measured by the increase of its liabilities resulting from the necessity for issuing new notes in replacement of the discredited Vasco da Gama notes. In other words, the bank paid both the genuine and the spurious notes. The decision was, therefore, clearly correct.