1

THE CONCEPT OF MONEY

> Words are the tokens current and accepted for conceits as moneys are for values.
>
> Francis Bacon (1561–1626), *The Advancement of Learning* (1605)

A. Introduction

1.01 The troublesome question, 'what is money?' has so frequently engaged the minds of economists that a lawyer might hesitate to join in the attempt to solve it. Yet the true answer must, if possible, be determined. For 'money answers everything'.[1] Money is a fundamental notion, not only in the economic life of mankind,[2] but

[1] Ecclesiastes, 10:19 See also Grotius, *De Jure Belli ac Pacis, ii* 12.17. It has been said that 'Next to language, money is the most important medium through which modern societies communicate'—see Widdig, *Culture and Inflation in Weimar Germany* (University of California, 2001) 79. Further, as the US Supreme Court noted in *Briscoe v Bank of Kentucky* (1837) 11 Peters 255, 'there is no principle on which the sensibilities of communities are so easily excited, as that which acts upon the currency'.

[2] The significance of money for the evolution of modern society can scarcely be overstated. A society could not have moved from subsistence production to specialized production and distribution

also in many spheres of law. It therefore seems appropriate for the lawyer to seek a definition of money, given the frequent use which is made both of the term itself and its many derivatives, including debt, damages, payment, price, capital, interest, tax, pecuniary legacy, and doubtless many others. All of this terminology may have further consequences; for example, only an obligation expressed in money can involve any obligation of payment or repayment, or carry any right to interest. Money is a term so frequently used and of such importance that one is apt to overlook its inherent difficulties, and to forget that the multitude of its functions necessarily connotes a multitude of meanings in different legal situations.[3] The universality of money and monetary systems no doubt also contributes to a certain complacency in seeking to identify a working definition.[4]

1.02 The following examples may provide an initial outline of some of the difficulties caused by this elusive term:

(a) If a contract is to fall within the scope of the Sale of Goods Act 1979 then it must involve a transfer of goods 'to the buyer for a money consideration, called the price'.[5] If the consideration moving from the buyer is not 'money', then the contract is one of barter, which in many respects differs from a contract for the sale of goods.[6]

(b) Likewise, a contract for the transfer of land only involves the 'sale' of that if the buyer is to pay a consideration in money.[7]

(c) For the purposes of the Bills of Exchange Act 1882, a bill of exchange must require the drawee to pay 'a sum certain in money'.[8] An instrument requiring the transfer of something other than 'money' is thus not a negotiable instrument for the purposes of that Act.

of goods and services unless a medium of exchange had been created—see Silard, *International Encyclopaedia of Comparative Law*, Vol XVII (1975) ch 20 and sources there noted. In a work of this kind, it is not possible to consider the history of money in any detail, although the general subject is a fascinating one. For interesting surveys, see Davies, *A History of Money from Ancient Times to the Present Day* (University of Wales, 1994); Chown, *A History of Money from 300 AD* (Routledge, 1994); Sinclair, *The Pound—A Biography* (Arrow Books, 2001). A major work in this area is Simmel, *The Philosophy of Money* (Routledge, 2nd edn, 1990).

[3] This state of affairs necessarily complicates the search for a single and comprehensive definition of 'money'.

[4] The general statements made in this opening paragraph are subject to various reservations expressed below. As will be seen, some have doubted the value or purpose of a definition of 'money'.

[5] See s 2(1) of the 1979 Act. The term 'goods' therefore necessarily excludes money—see s 61(1) of the 1979 Act.

[6] See Chitty, para 43-013; Goode, Commercial Law, 220–1; *Simpson v Connolly* [1953] 1 WLR 911, 915; and *Robshaw v Mayer* [1957] 1 Ch 125. Similar distinctions are recognized in the German Civil Code—see Markesinis, *The German Law of Obligations* (Clarendon, 1997) 35.

[7] There is thus no 'sale' if the land is to be transferred in order to extinguish some other, pre-existing obligation of the transferor—*Simpson v Connolly* [1953] 1 WLR 911.

[8] Bills of Exchange Act 1882, s 3(1).

(d) In the United Kingdom, the taking of deposits in the course of a deposit-taking business is prohibited, in the absence of appropriate authorization. For these purposes, a 'deposit' is a 'sum of money' paid on terms that it will be repaid at a later date, whether with or without interest.[9] Clearly, in determining whether authorization is required (or an offence has been committed), it is important to establish the precise meaning of 'money' in this context.

(e) The terms of a given statute may create an obligation to pay 'money' and it may be necessary to decide in what manner the obligation is to be performed. Thus, where a statute required payment 'in current coin of the realm' it was held that only payment in physical cash would suffice—payment in goods or in other manner would not discharge the obligation.[10]

1.03 The instances just noted suggest a narrow and technical approach to the meaning of 'money', perhaps because each of them has a specific and distinct statutory derivation. But a much broader approach is adopted in other cases. For example:

(a) The action for 'money had and received' can be brought where the subject matter is not money itself but some form of security therefor or other equivalent.[11]

(b) Whilst an individual may claim to have 'money in the bank', it is clear that he no longer owns physical notes and coins which he handed over to the bank, for property in those items will have passed to the bank itself.[12] Instead, he has become a creditor who can recover his debt by action. He does not 'own' anything at the bank, nor is the bank a trustee of the money deposited with it.[13] Yet, as will be seen, the credit balance standing at his disposal may be used as a means of discharging financial obligations, and thus may be regarded as 'money' to that extent.

(c) Equally, for the purposes of the equitable doctrine of tracing, the term, 'money' is by no means confined to physical cash—it extends to all assets capable of being identified in or disentangled from a mixed fund.[14]

[9] For the relevant legislation and the detailed definition of 'deposit' see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), art 5.

[10] See *Hewlett v Allen* [1892] 2 QB 662, 666 approved in *Williams v North's Navigation Collieries (1899) Ltd* [1906] AC 136 and *Penman v The Fife Coal Co* [1936] AC 45. An obligation requiring payment 'in current coin' includes banknotes—see Currency and Bank Notes Act 1954, s 1. In the modern context, however, such antiquated terminology is only infrequently encountered.

[11] *MacLachlan v Evans* (1827) 1 Y & J 380; *Pickard v Bankes* (1810) 13 East 20. See also *Spratt v Hobhouse* (1827) 4 Bing 173, where it was stated (at 179) that, in the context of an action for money had and received, everything may be treated as money 'that may be readily turned into money'.

[12] In practice, the funds will usually have been paid in by cheque or bank transfer, but the same principle applies.

[13] *Foley v Hill* (1848) 2 HL Cas 28; *R v Davenport* [1954] 1 WLR 569; *Midland Bank Ltd v Conway Corporation* [1965] 2 All ER 972; *Grant v The Queen* (1981) 147 CLR 501; *Space Investments Ltd v Canadian Imperial Bank of Commerce* [1986] 3 All ER 75 (PC).

[14] A point established in *Re Diplock* [1948] Ch 465, 517 et seq. The meaning of 'money' is specifically discussed at 521. The decision was affirmed by the House of Lords (*Ministry of Health v Simpson* [1951] AC 251) but without reference to this specific point.

(d) In the context of a will, the term 'money' will generally carry a rather broader meaning. At any rate, it has no fixed meaning, and it is the duty of the court to ascertain the testator's intention upon a reading of the document as a whole. Thus, 'money' could include the whole of the personal estate and a reference to 'all my money' could in some cases extend to the testator's entire real and personal estate.[15]

1.04 These few examples have, however, merely reinforced the original assertion, namely that 'money' has a variety of different meanings in different situations, and individual cases require separate scrutiny; no hard and fast rule exists in this area. As a result, it becomes tempting to ask at this point whether the search for a general definition of money serves any useful purpose. As with so many legal expressions, all may depend upon the language which accompanies the term and the circumstances under which it is used. That the ease of recognition may be contrasted with the difficulty of definition is emphasized by the evidence of a London accountant given to the Committee on the Resumption of Cash Payments in 1819. When asked to explain a 'pound', he said 'I find it difficult to explain it, but every gentleman in England knows it . . . It is something which has existed in this country for eight hundred years—three hundred years before the introduction of gold'.[16] It may be objected that this evidence is now of some antiquity. Yet even today, many would find it difficult to provide a more satisfactory response. Equally, differences of emphasis may occur depending upon the location in which the question arises; for example, in less developed societies, a definition of 'money' may adhere more closely to traditional interpretations associated with banknotes and coins, whilst a broader approach (perhaps comprising government securities, bank money, and other instruments) may have to be adopted in the context of more advanced economies.[17] Further, as will be seen at a later stage, an obligation expressed in money will generally be discharged provided that the creditor receives the 'commercial equivalent' of cash or money, and this formulation by itself tends to suggest that a precise definition of money will be both elusive and perhaps even unhelpful.[18] Finally Professor Goode has asserted that 'much of the debate on what constitutes

[15] *Perrin v Morgan* [1943] AC 399 (HL); *Re Taylor* [1923] Ch 920. Thus, notwithstanding the authorities mentioned in n 10 above, the terms 'cash' and 'money' will, in this particular context, frequently include credit balances with banks and building societies, and may extend to holdings of government bonds: *Re Collings* [1933] Ch 920; *Re Stonham* [1963] 1 All ER 377; *Re Barnes Will Trusts* [1972] 1 WLR 587.

[16] The episode is noted by Silard, *International Encyclopaedia*.

[17] This statement is made for the purposes of illustration. However, it will later be suggested that government securities cannot constitute 'money'; they are merely evidence of indebtedness, or of an obligation which is itself payable at a later date.

[18] On the 'commercial equivalent' of cash and the performance of monetary obligations, see *The Brimnes* [1975] QB 929, considered at para 7.11.

money in law is rather sterile and has few implications for the rights of parties to commercial transactions, where payment by bank transfer is the almost universal method of settlement';[19] in his view, the notion of payment is a far more important legal concept. Given the work upon which he is engaged, the present writer has searched diligently for grounds to disagree with this view; but at least in the context of commercial and financial transactions, it is necessary to admit that the notion of payment is of more practical importance. As will be seen, there is much case law which deals directly with the concept of payment, but there have been very few occasions on which the court has been directly concerned with the meaning of money or has attempted to address that subject in a meaningful way. Can one therefore conclude that a generally applicable definition of 'money' would have to be so broadly written that it would serve no real purpose and that, in any event, a satisfactory definition of 'payment' would be far more useful in practical terms? Alternatively, is it preferable to avoid a definition of 'money' altogether, and simply deal with practical problems on a case-by-case basis?

1.05 Tempting though this approach may be, it is plainly inappropriate simply to abandon the search, at least in the context of a book of this kind. One cannot complete a work on the subject of money without at least attempting a definition, even if both the discussion and the conclusion are in some respects inconclusive or unrewarding. It must also be recognized that the concept of money does not only arise for consideration in commercial transactions. For example, many references will be made to the sovereignty which a State enjoys over its monetary system;[20] again, it would be odd if that discussion were to proceed without any attempt at a definition of 'money'.

1.06 It has already been noted that money is a fundamental notion within the economic life and activities of mankind. It seems to follow that an attempt to formulate a *legal* definition of 'money' cannot proceed in isolation, but must take at least some account of economic theory. In addition, as will be seen, technological and other developments over recent years do have consequences for an attempt to formulate a legal definition of 'money'—as the available means of payment multiply, the meaning of 'money' must correspondingly broaden.

B. The Meaning of 'Money'—A Functional Approach

1.07 As noted above, a legal definition of 'money' requires at least some consideration of its economic functions. Without attempting a detailed review of a complex area,

[19] See Goode, Commercial Law, 488.
[20] See in particular Ch 19 below.

it may be noted that economists have tended to define money by reference to some of its functions, namely:[21]

(a) as a medium of exchange;[22]
(b) as a measure of value or as a standard for contractual obligations;[23]
(c) as a store of value or wealth;[24] and
(d) as a unit of account.[25]

1.08 The emphasis placed by economists on each aspect of this definition has tended to vary at different times[26] but it seems that the role of money as a medium of exchange is now regarded as its key feature.[27] As will be seen, the proposed legal definition of 'money' reflects some of these economic considerations. Nevertheless, it is necessary to proceed with caution in this area because, as noted earlier, 'money' can have very different meanings in different contexts. The law must provide a framework within which money has a role and its use has specified legal consequences. It is for this reason that bank deposits may be 'money' to the economist,[28] but they have

[21] eg see Crockett, *Money, Theory, Policy and Institutions* (Nelson, 2nd edn, 1979) 6; Lewis and Mizen, *Monetary Economics* (Oxford University Press, 2000) 5–6; Lipsey, Purvis, and Steiner, *Economics* (Harper Collins, 7th edn, 1991) 695–8. Mishkin, *The Economics of Money, Banking and the Financial Markets* (Little Brown & Co, 1986) 9, defines money as 'anything that has a fixed and unvarying price in terms of the unit of account and is generally accepted within a given society in payment of debt or for goods and services rendered'. For a more recent discussion, see Mishkin, *The Economics of Money, Banking and Financial Markets* (Addison Wesley, 2007) 8.

[22] That is to say, as a convenient proxy or method to facilitate the effective exchange of goods and services—see, eg, Jevons, *Money and the Mechanism of Exchange* (Kegan Paul, 14th edn, 2002) 1875; Bannock and Mansor, *International Dictionary of Finance* (S. Wiley & Sons, 2000) 181.

[23] See Crockett, *Money, Theory, Policy and Institutions* (Nelson, 2nd edn, 1979) 6; Macesich, *Issues in Money and Banking* (Praeger, 2000) ch 3.

[24] That is to say, it acts as a store of value between its original receipt and its subsequent utilization by the holder as a means of payment—see, eg, Butler, *Milton Friedman: A Guide to His Economic Thought* (Gower, 1985) 67 and Lewis and Mizen, *Monetary Economics* (Oxford University Press, 2000) 10–11.

[25] It may be noted that these criteria are to some extent reflected in Art 10(1) of the Treaty between the Federal Republic of Germany and the German Democratic Republic dated 18 May 1990, which states that (in consequence of the currency union and subsequent unification of the two States), the Deutsche mark would be the 'means of payment, unit of account and means of storing value'.

[26] See Lewis and Mizen, *Monetary Economics*, 4.

[27] See, eg, Robertson, *Money* (London, 1927)—'money is anything that is widely accepted in payment for goods or in discharge of other kinds of business obligations'; Brunner, 'Money Supply' in Eatwell, Milgate, and Newman (eds), *The New Palgrave: Money* (W.W. Norton & Co, 1989) 263—'money is still best defined in the classical tradition to refer to any object generally accepted and used as a medium of exchange'. For an alternative formulation, see Hayek, *The Denationalisation of Money* (3rd edn 1990, re-issued by Institute for Economic Affiars, 2008) 46—'to serve as a widely accepted medium of exchange is the only function which an object must perform to qualify as money, though a generally accepted medium of exchange will generally acquire also the further functions of unit of account, store of value and standard of deferred payment'.

[28] See, eg, Perry, *Elements of Banking* (Methuen, 4th edn, 1984) 22; see also Mishkin, *The Economics of Money, Banking and the Financial Markets* (2007) 21: 'to define money as currency is too limited for economists, because travellers cheques and savings deposits can be used to pay for goods and services [and] they can be converted quickly into currency.'

not always been regarded as such by the lawyer, who may see them as a debt or an obligation on the part of the bank to repay money.[29] It is, of course, unsurprising that economists and lawyers should differ in their approaches to questions of this kind, for their areas of concern and objectives are also entirely different. The economist may be concerned with such matters as monetary policy, exchange rate policy,[30] and the supply and soundness of money within an economic area as a whole. Lawyers, on the other hand, tend to be more concerned with the protection of the purely private rights of contracting parties and the discharge of monetary obligations.[31] The lack of common objective between the two disciplines inevitably results in the lack of a common approach or definition.[32] In other words, the lawyer must take account of the functional and economic purposes of money, but he will not alight upon a legal definition which is wholly derived from economic considerations. On the contrary, he must necessarily focus upon money as a means of performance of contractual or other legally enforceable obligations.

1.09 So where does the lawyer begin his search for a definition of 'money'? The following starting points are suggested:

(a) First of all, the role of money as a medium of exchange has already been emphasized. If a country's system of trade and commerce is to be based on money as a means of exchange, then the law must buttress that position and allow for the assured discharge of monetary debts by payment in that medium. Thus,

[29] It is for this reason that, in earlier editions of this work, Dr Mann stated that 'a distinction must be drawn between money in its concrete form and the abstract conception of money. It is with respect to the former that we ask: What are the characteristics in virtue of which a thing is called money? It is with regard to the latter that we enquire: What is the intrinsic nature of the phenomenon described by the word "money"?' (fifth edition, 5). In strict terms, this remains a valid distinction, although, at least in terms of the private law of obligations, the distinction is of diminishing importance (see below). The formulation just noted was approved in *Conley v Deputy Commissioner of Taxation* [1998] 152 ALR 467 (Federal Court of Australia).

[30] There may, however, be more overlap than was previously thought to be the case. Monetary policy and exchange rate policy are subject to a degree of legal regulation (see, for example, the discussion on the legal framework of the European Central Bank, at para 27.07).

[31] Thus, whilst a bank deposit may be 'money' so far as the economist is concerned, to the lawyer the arrangement creates an obligation to pay money—see *Foley v Hill* (1848) 2 HL Cas 28; *Universal Adjustment Corp v Midland Bank Ltd* (1933) 184 NE 152, *Richardson v Passumpto Savings Bank* 13 A 2d 184 (1940). Yet, as will be shown below, this does not necessarily disqualify a bank deposit from the status of 'money'.

[32] That legal and economic definitions of money cannot be uniform was noted by von Mises, *The Theory of Money and Credit* (translated by H.E. Batson, Jonathan Cape, 1953) 69: 'The fact that the law regards money only as a means of cancelling outstanding obligations has important consequences for the legal definition of money. What the law understands by money is in fact not the common medium of exchange but the legal medium of payment. It does not come within the scope of the legislator or the jurist to define the economic concept of money.' This statement reinforces a point which has already been made, namely that the lawyer's preoccupation with private and commercial rights and the performance of financial obligations tends to diminish the importance of 'money' as an independent legal concept, because the notion of 'payment' usually plays a greater role in those cases in which a dispute does arise. Nevertheless, the point must not be overstated: see, in particular, the discussion of the institutional theory of money at paras 1.30–1.44.

the law must require that creditors accept payment through that medium—in other words, the creditor must accept payment in legal tender.[33]

(b) Equally, it has been shown that money functions as a unit of account. Money could only discharge this function if the unit of account is uniform throughout the monetary area concerned. The required uniformity can only be achieved with any degree of permanence if the unit of account is prescribed by law. The essential features of money as a medium of exchange and as a unit of account thus require the underpinning of the law, or the State.

(c) The requirement that money should act as a 'store of value' is perhaps less easily reflected in a purely legal definition of 'money'. And yet it may be possible (or even necessary) to accommodate this aspect in various ways. If money is to act as a store of value, then that value must be identified in a manner which the law can recognize and support. This, again leads to the conclusion that money must, with the support of the law, be denominated or expressed by reference to an identified unit of account, which effectively preserves the nominal value of the medium of payment.[34]

With these initial thoughts in mind, it is now appropriate to consider the formulations attempted in decided cases and other legal sources.

1.10 Blackstone[35] defined money as 'the medium of commerce . . . a universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained, or it is a sign which represents the respective values of all commodities'. Perhaps the best known judicial definition in England is that used in *Moss v Hancock*[36]—money is:

> that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without

[33] This is inherent in the very notion of legal tender. Yet the importance of this point should not be overstated. As others have pointed out, the growth of modern systems of payment mean that the legal concept of money can no longer be linked purely with physical tokens and, in any event, case law in which legal tender issues have been disputed is virtually non-existent: see Sáinz de Vicuña, 'An Institutional Theory of Money' in Giovanoli and Devos (eds), *International Monetary and Financial Law—The Global Crisis* (Oxford University Press, 2010) paras 25.15–25.16 (although, conversely, it may be argued that the merit of legal tender laws is that their application is accepted without litigation or dispute). As also there noted, 'Scriptural money has won the day with regard to the basic function of money as a means of payment'. As will be seen, the courts have stepped in to decide when payment has been achieved by means of bank transfer or other instrument, for there is no equivalent notion of legal tender in that sphere.

[34] The view that the 'store of value' feature must be recognized in a legal definition of money may also have additional consequences, eg it may support the view that the formal demonetizations of a currency may only occur as a result of legislative action in the State of issue—a proposition discussed at para 1.25. Furthermore, it may support the view that a State which substitutes its currency is obliged to provide for a 'recurrent link' between debts expressed in the old and the new currencies; this point is considered at para 2.34.

[35] i, 276. Blackstone did, however, add that the coining of money also represented an act of sovereign power (i, 277).

[36] [1899] 2 QB 111, 116, drawing upon Walker, *Money, Trade and Industry* (London, 1882). The latter part of this definition both describes and emphasizes the character of money as a means

> reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities.

The Supreme Court of Canada has, in some respects, adopted an even broader definition, describing money as 'any medium which, by practice, fulfils the function of money which everyone will accept in payment of a debt is money in the ordinary sense of the words, even though it may not be legal tender'.[37]

1.11 These definitions have not strayed very far from the economists' view of money; they tend to adopt a purely functional approach. Moreover, they do not emphasize the legal framework within which money must exist if it is to be used as a final and complete means of discharging financial obligations; indeed, the Canadian Supreme Court appears to have taken the view that 'money' could exist without any such legal support. By contrast, however, the definitions employed in the Uniform Commercial Code of the United States describe money as 'a medium of exchange authorised or adopted by a domestic or foreign government as part of its currency'. This language clearly indicates that the authority of the State is a necessary ingredient of the definition of money.[38] The point is reinforced by Article 1 (section 8, paragraph 5) of the Constitution, which reserves to the Federal Government the exclusive right to issue money. Moreover, even some economic commentaries have suggested that money must exist within a legally defined framework, or else it is not money at all—Keynes noted that 'money is simply that which the State declares from time to time to be a good discharge of money contracts'.[39] It seems fair to note that more modern definitions of 'money' have tended to adopt a broader approach by including not only bank deposits but even government debt securities, which can readily be converted into cash. Thus Article XIX(d) of the Articles of Agreement of the International Monetary Fund states that the term 'currency . . . includes without limitation, coins, paper money, bank balances,

of exchange, even though the term itself is not used. The phrase quoted in the text is perhaps more of a functional description, rather than a definition. A note or coin thus only constitutes 'money' when it is being used as a medium of exchange or payment: see *Ilich v R* [1987] HCA 1 (High Court of Australia) referring (at para 25), to the fourth edition of this work, 8. The Hancock formulation was adopted by the Federal Court of Australia in *Travelex Ltd v Federal Commissioner of Taxation* [2008] FCA 196. The same court in *Messenger Press Pty Ltd v Commissioner for Taxation* [2012] FCA 756 referred to paras 1.07–1.14 of the sixth edition of this work and noted that the definition would exclude settlement funds held with a central bank, which would form a significant part of the monetary base.

[37] *Reference Re Alberta Statutes* [1938] SCR 100, 116. The final part of this statement recognizes the undoubted truth that 'money' is a much broader concept than 'legal tender'—see para 2.25. The statement in the text was approved by the High Court of Australia in *Bank of New South Wales v Commonwealth ('Bank Nationalisation Case')* (1948) 76 CLR 1, at para 46.

[38] See s 1-201(2.4) and the comment on s 3-107.

[39] See Keynes, *Social Consequences of Changes in the Value of Money* (1923) reprinted in *Collected Writings*, ix, 63. Adam Smith also noted that money required a 'public stamp' although this remark seems to have been directed at the need to protect the integrity of money by preventing forgery; he therefore contemplated the State as the guardian of the quality of money, not necessarily as the exclusive issuer—see *The Wealth of Nations*, Vol 1 (reprinted 1904) 27.

bank acceptances and government obligations issued with a maturity not exceeding twelve months'.[40]

1.12 It must also be said that monetary sovereignty is one of the attributes of a modern State under international law.[41] The right to regulate the monetary system resides with the State; and the obligation of other States to recognize that monetary system can only apply where the relevant money has been created under the legal authority of the first State. Now, the notion of State sovereignty implies the right to legislate in specific fields falling within the ascertained scope of that sovereignty.[42] Considerations of this kind suggest that, whilst a *legal* definition of money must necessarily contain or reflect at least some of the elements of the functional approach (and, hence, the realities of commercial and economic life), it must also include an element which reflects the international law requirement just noted—namely that 'money' must exist within some form of legal framework, because it reflects an exercise of sovereignty by the State in question.

1.13 It is pertinent to note that the State's monopoly over the issue of money is occasionally challenged, not merely through the mundane medium of counterfeit production, but on more technical grounds. A recent example is offered by the prosecution of a Mr Bernarnd von NotHaus in a Federal Court in North Carolina.[43] Mr von NotHaus had promoted the use of the so-called 'Liberty Dollar' as a private currency for the use in the United States. The paper currency was said to be backed by, and exchangeable for, gold and silver held in storage by the issuing company. This was apparently intended to provide a counterweight to the national unit, which was said to have lost the confidence of the public. But, having used the symbol '$' and labelled his currency 'dollars' (albeit 'liberty dollars') and used the expression 'Trust in God', it is perhaps unsurprising that a jury convicted him of a counterfeiting offence.[44]

[40] Even this already broad definition is stated to be non-exclusive. Yet foreign government securities would not generally be regarded as 'money' in a legal sense, for their value in terms of the domestic currency will vary according to prevailing interest rates and other factors. Further, as noted previously, even domestic currency securities represent an obligation to pay money at a later date; it is therefore difficult to see how, in law, such securities could themselves be regarded as 'money'.

[41] See the discussion at Ch 19, and see Carreau and Juillard, *Droit international économique* (Dalloz, 2003), who describe money as 'L'un des elements essentiels de la souveraineté de l'Etat moderne' (para 1428). In the light of points that will be made later, it is suggested that this assertion remains accurate notwithstanding the transfer of sovereignty involved in the creation of a monetary union—see para 31.03.

[42] See, eg, Brownlie, *Principles of Public International Law* (Oxford University Press, 6th edn, 2003) ch 15. If international law is to provide, at least in part, the source of a definition of money, then it must not be forgotten that such a sovereignty can be restricted, delegated, or transferred by treaty. This point is relevant in the context of economic and monetary union, and is discussed in Ch 31.

[43] For the background, see Department of Justice Press Release (Western District of North Carolina), 18 March 2011 and 'When Private Money Becomes a Felony Offense', *Wall Street Journal*, 31 March 2011.

[44] ie under 18 USC section 486, which provides that an offence is committed by any person who 'except as authorised by law, makes, or utters or passes or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of coins of the United States or foreign currencies, or of original design'.

Yet concerns about the state of the national currency are not confined to minority individuals or organizations. In March 2011, the Senate of the State of Utah introduced legislation—the Substitute Currency Amendments Bill—designed to provide for the use of gold and silver coins issued by the Federal Government as legal tender with the State's borders.[45] The legislation may be no more than symbolic, since the market value of gold coins would inevitably be significantly greater than the value which they could carry in terms of legal tender. Various other States, including Virginia, have considered the adoption of similar legislation. However, the political objective is to voice concern about the state of national currency and to send that message to the Federal Government. The monetary law implications are unlikely to be significant in practice. **1.14**

With these considerations in mind, it becomes attractive to adopt a functional approach—money is that which serves as a means of exchange—subject to the crucial proviso that its functions must have the formal and mandatory backing of the domestic legal system in the State or area in which it circulates. For anything which is treated as 'money' purely in consequence of local custom or the consent of the parties does not represent or reflect an exercise of monetary sovereignty by the State concerned, and thus cannot be considered as 'money' in a legal sense. **1.15**

It is necessary to conclude that a definition of 'money' in law must recognize both the functions of money and the legal framework within which it must be created. Against that background, it is possible to turn to theories of money which have previously been formulated. **1.16**

C. The State Theory of Money

The role of the State in the establishment of the monetary system and in the creation of physical money led Dr Mann to conclude[46] that, in law, the quality of money is to be attributed to all chattels that are: **1.17**

(a) issued under the authority of the law in force within the State of issue;
(b) under the terms of that law, denominated by reference to a unit of account; and
(c) under the terms of that law, to serve as the universal means of exchange in the State of issue.

It is apparent that the definition relies heavily upon the role of the State in establishing a monetary system and in authorizing the issue of notes and coins. It is thus

[45] Art 1, s 10 of the US Constitution provides that 'No State shall . . . emit Bills of Credit [or] make any Thing but gold and silver Coin a Tender in Payment of Debts.' The States thus have a limited right to issue money consisting of gold or silver. That right was clearly not available to Mr von NotHaus in the context of the Liberty Dollar (para 1.13).

[46] See the fifth edition of this work, 8. As Rosa Lastra points out, the State theory is implicitly recognized in the constitutional law of a number of countries: see Lastra, Legal Foundations, 18.

necessary at the outset to review this approach in broad terms, and to consider two competing theories. It will then be appropriate to return to Dr Mann's definition in a little more detail.[47]

1.18 Under the definition just outlined, money must be issued under the central authority of the State concerned. This approach reflects the State (or Chartalist) theory of money developed by G F Knapp,[48] who opined that only chattels issued by the legal authority of the State could acquire the character of 'money', and that the value to be attributed thereto is fixed by law, rather than by reference to the value of the materials employed in the process of production. Dr Mann supported this approach partly in the light of the universal acceptance of the principle of nominalism.[49] The State theory of money is the necessary consequence of the sovereign power or the monopoly over currency which States have assumed over a long period and which is almost invariably established by modern constitutional law.[50] It cannot be open to doubt that the United Kingdom currently retains and exercises sovereignty in monetary matters;[51]

[47] If this definition is accepted then there can be no difference between money and the legal tender of any particular State. Money, therefore, would exist as a result of a direct exercise of sovereign power, and thus could readily be distinguished from other forms of payment such as cheques and letters of credit and which function as such by consent of the parties. The point is made by Gleeson, *Personal Property Law* (FT Tax & Law, 1997) 142–3, noted by Brindle & Cox, para 2.1. For reasons discussed below, the emphasis on the *physical* aspects of money must now be discarded.

[48] Knapp, *Staatliche Theorie des Geldes* (4th edn, 1923), translated by Lucas and Bonar, *State Theory of Money* (1924; abridged edn, A.M. Kelley, 1973). Knapp's theory provoked both strong support and vehement criticism—for discussion and further materials, see Hirschberg, *The Nominalistic Principle, A Legal Approach to Inflation, Deflation, Devaluation and Revaluation* (Bar-Ilan University, 1971) 11–30. The State theory was subjected to withering criticism by Ludwig von Mises in *The Theory of Money and Credit*—eg, he states (at 69) that 'the concept of money as a creature of law and the State is clearly untenable. It is not justified by a single phenomenon of the market. To ascribe to the State the power of dictating the laws of exchange is to ignore the fundamental principles of money—using society'. Against this, one may quote the judgment of Strong J in the *Legal Tender Cases* (see 1.70): 'Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power.' For a discussion of the evolution of the State's modern monopoly over money, see Glassner in Dowd and Timberlake (eds), *Money and the Nation State: The Financial Revolution, Government and the World Monetary System* (Transaction Publishers, 1997) ch 1.

[49] The principle of nominalism is discussed in detail in Part III.

[50] The powers of the State in currency matters plainly include the right to issue money, but also include a number of other matters affecting the regulation of money—eg the right to introduce exchange controls. The extent of State sovereignty in monetary matters and its recognition under customary international law are discussed in Ch 19. On the long-standing historical nexus between the monetary system and the State, see Carreau, *Souveraineté et coopération monétaire international* (Cujas, 1970) 23–47. In terms of history and chronology, however, it must be noted that forms of money came into use before the State had legislated for a monetary system and that, in many respects, the law merely provided a juristic imprimatur to that which had already become common practice. On the whole subject, see Kemp, *The Legal Qualities of Money* (Pageant Press, 1956) 131. The State theory thus cannot explain the meaning of money against a historical background. It may be that the Societary theory of money, considered at para 1.29 is of greater assistance in that respect.

[51] For certain limitations imposed upon that sovereignty as a result of the United Kingdom's membership of the European Union and the introduction of the euro, see Ch 31. But these factors do not affect the general principle described in the main text.

accordingly, the State theory of money may be regarded as a part of English law.[52] The right of coinage had for many centuries been recognized as a part of the Crown's prerogative, and was thus exercisable without parliamentary or other sanction.[53] Whilst the right to issue coinage has now been placed on a statutory basis, the exclusivity of the privilege to issue coins has been specifically preserved.[54] It should be added that the introduction of the euro does not detract from the State theory of money; on the contrary, it is an illustration of that theory, for the creation of the single currency is directly traceable to an exercise of monetary sovereignty by the individual participating Member States.[55] The State theory thus does not prevent a group of States from introducing a common currency. Likewise, it does not prevent a single State from introducing more than one currency. Examples of the latter phenomenon tend to have something of a historical flavour, but China affords a modern example; the currency of mainland China is the yuan, but Hong Kong continues to issue the Hong Kong dollar, which is an entirely independent monetary unit.[56]

1.19 It should be appreciated that the law relating to banknotes, or paper money, developed in a rather different way, for their history is connected with that of bills of exchange and banking.[57] Banknotes in the modern sense were not always distinguishable from other negotiable instruments, although even in an early case, it had been held that banknotes would usually be regarded as 'money' in a legal context.[58]

[52] The point is implicit in decisions such as *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122.

[53] For cases on this point, see *Case de Mixt Moneys* (1604) Davis 18; *Dixon v Willows* 3 Salkeld 238; *Pope v St Leiger* (1694) 5 Mod 1. The coins issued pursuant to an exercise of the royal prerogative thus constituted legal tender for the settlement of debts in this country. Only later did the courts accept that only Parliament had the right to ascribe the quality of legal tender—*Grigby v Oakes* (1801) 2 Bos & Pul 527. Parliament considered that its control over the monetary system extended to the American Colonies and, in 1751, passed 'An act to regulate and restrain paper bills of credit in His Majesty's Colonies or Plantations of Rhode Island and Providence, Connecticut, the Massachusetts Bay and New Hampshire in America and to prevent the same being legal tender in Payments for Money' (24 Geo II, c 503, 1751).

[54] See the Coinage Act 1971, s 3 (as amended). Section 9(1) of that Act (as amended) renders it an offence to make or to issue any piece of metal as a token for money, unless the authority of the Treasury has been given for that purpose.

[55] This point is discussed in more detail in Ch 31.

[56] Furthermore, China and some other countries have in the past issued two separate units of account—one for use by nationals, and the other for use by foreign visitors.

[57] This is apparent from the 'promise to pay the bearer' language employed on banknotes. In this context, it may be noted that s 3 of the Currency and Bank Notes Act 1954 simply defines banknotes as 'notes of the Bank of England payable on demand.' In a slightly broader context involving note issuers in Scotland and Northern Ireland, s 208 of the Banking Act 2009 now defines a banknote as a 'promissory note, bill of exchange or other document which . . . records and engagement to pay money . . . is payable to the bearer on demand and . . . is designed to circulate as money'.

[58] *Wright v Reed* (1790) 3 TR 554. In *R v Hill* (1811) Russ & Ry 191, it was held that banknotes were not 'money, goods, wares etc' for the purposes of a criminal statute which created the crime of obtaining property by false pretences. Whatever may have been the position in the early 19th century, such a view is plainly unacceptable in the modern context. See also *Klauber v Biggerstaff* (1879) 47 Wis 551, 3 NW 357 and *Woodruff v State of Mississippi* (1895) 162 US 292, 300.

When the Bank of England was established in 1694,[59] it was not a central bank of issue in the modern sense. The legislation did not even state whether the Bank was intended to issue notes at all, still less did it seek to confer upon it an exclusive, note-issuing monopoly which would have been consistent with the State theory of money.[60] Nevertheless, the Bank began to act as a bank of issue and circulation immediately after its incorporation. But in addition, many country banks continued to issue notes without government control.

1.20 As a result, the growth of money in circulation was not subject to any effective form of regulation and the quality of money could clearly be affected by the solvency of the particular issuer.[61] This state of affairs in turn became the chief topic of discussion between the Currency and Banking Schools during the early part of the nineteenth century. The former school considered that the term 'money' should be ascribed only to notes and coin, and that the issue of money should be undertaken directly by the Government or under its control.[62] As a result, the *creation* of money would rest in official hands, whilst the *distribution* of money would occur through banks and through private transactions.[63] This approach was endorsed by the Bank Charter Act 1844 which established the modern position. Subject to certain transitional arrangements, the privilege of issuing notes constituting 'money' and enjoying the status of legal tender in England and Wales was made exclusive to the Bank of England.[64]

1.21 The Bank Charter Act appears rapidly to have pushed the English courts towards the State theory of money. Less than twenty years later, the court in *Emperor of Austria v Day* said that the right of a foreign government to issue notes as paper money followed from powers vested in the State itself, as a result of which the court restrained the defendant from printing notes which claimed to be legal tender in

[59] Bank of England Act, 1694.

[60] *Bank of England v Anderson* (1837) 3 Bing NC 590, 652.

[61] This factor must have influenced the decision in *Ontario Bank v Lightbody* (1834) 13 Wend (NY) 108 where Lightbody had tendered notes in payment of a debt due to the Ontario Bank. Unknown to both parties, the issuer of the notes had become insolvent. Lightbody's argument that payment had both been tendered and accepted was dismissed by the court; notes could not form the subject matter of a valid tender where the issuer was insolvent. See also *Ward v Smith* (1868) 7 Wall 447.

[62] The Currency School held that the regulation of money supply was the key to sound economic policies.

[63] The Banking School took a much broader view of the nature of money, holding that the unrestricted creation of money by means of bank credit was acceptable provided that it was linked with the genuine needs of trade.

[64] For the current legislation in this area, see Currency and Bank Notes Act 1954, s 1(2). On the status of the Bank of England see Bank of England Act 1946, s 4 and Currency and Bank Notes Act 1928, s 3. The amount of the notes issued by the Bank of England must be covered by securities as directed by the Treasury, and is subject to such limit as the Treasury may from time to time prescribe—Currency Act 1983, s 2. On the special arrangements for note issuance in Scotland and Northern Ireland, see paras 2.29–2.36.

Hungary, even though they bore no resemblance to the official currency.[65] The same theory was also applied in twentieth-century cases decided by the House of Lords and the Privy Council, and to which it will be necessary to return at a later point.[66]

1.22 If the State theory of money appears to have gathered early momentum in England, matters took a slightly more tortuous course in the United States of America. The Constitution[67] confers upon Congress the power 'to coin money, regulate the value thereof, and of foreign coin'. Thus, the Supreme Court has noted that 'to determine what shall be lawful money and a legal tender is in its nature and of necessity a governmental power. It is in all countries exercised by the governments'.[68] It followed that Congress had the power (and, it may be added, the *sole* power) 'to issue obligations of the United States in such form, and to impress upon them such qualities as money . . . as accord with the usage of sovereign governments. The power . . . was a power universally understood to belong to sovereignty'.[69] In view of these considerations, the power of Congress to 'coin' money was held to extend to the issue of greenbacks, or paper money.[70] Under these circumstances, it will be appreciated that the circulation of any other chattels claimed to have the quality of money would be inconsistent with the established monetary prerogative

[65] (1861) 3 DeG F & J 217; see in particular 234 and 251. Although the case is useful in many respects, the actual decision was criticized by Dr Mann, *Transactions of the Grotius Society* 40 (1955) 25, or *Studies in International Law* (1973) 505. The decision effectively amounts to the enforcement within England of the sovereign prerogatives of a foreign State, which should be impermissible in the light of the principle established in *Government of India v Taylor* [1956] AC 597 (HL) and many other cases.

[66] See in particular *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 (HL) and *Bonython v Commonwealth of Australia* [1950] AC 201 (PC), discussed in Ch 2.

[67] See Art I, s 8, para 5.

[68] *Hepburn v Griswold* (1869) 75 US 603, 615. This case nevertheless held the legal tender legislation to be unconstitutional on the grounds that it required creditors to accept payment in a depreciated medium of exchange and thus constituted a deprivation of property 'without due process of the law', contrary to the relevant provision of the Fifth Amendment. The case held that the constitutional power 'to coin money' meant precisely what it said; coins could be made legal tender, but notes could not. This followed the similar decision in Indiana in *Thayer v Hayes* (1864) 22 Ind 282. The effect of these decisions was reversed by *Knox v Lee* and *Parker v Davies* (see n 70).

[69] See *Juilliard v Greenman* (1883) 110 US 421, 447 relying on the decision of the English court in *Emperor of Austria v Day* (1861) 3 DeG F & J 217, discussed at para 20.04. It may be said that the State theory of money became firmly entrenched as a part of federal law as a result of the *Juilliard* decision. The case arose from an Act of Congress in 1878, which had provided for the reissue of greenbacks in peacetime, and confirmed their quality as legal tender. The Supreme Court held that the power to issue such notes was an extension of the powers of Congress to borrow money—an interesting approach which equates the public law concept of money with the essentially private law of obligations which flow from a bill of exchange.

[70] *Knox v Lee* and *Parker v Davis* (1870) 79 US 457. It is perhaps unsurprising that issues surrounding national monetary sovereignty have tended to arise in the context of a federal State. Thus, in the Federal Republic of Germany, the Constitutional Court held (20 July 1954, BVerfGE 60) that an enactment by a *Land* which, 'in its economic result' allowed revalorization of executed obligations in order to adjust the effects of a *national* currency reform, related to the monetary system of the State as a whole and thus fell within the exclusive jurisdiction of the Federal Government.

of the Federal Government[71] The first 'greenbacks' were issued as part of the Government's efforts to finance the Civil War; for this purpose, Abraham Lincoln signed the first Legal Tender Act in February 1862. The Act authorized the issue of notes which were 'lawful money and legal tender in payment of all debts, public and private within the United States'. Until that time, the issue of banknotes had essentially been a function of private issuers.[72] If the Federal Government had now established the exclusive right to issue notes, then it was necessary to decide whether action by the individual States might infringe the monopoly. By Article 1, section 10 of the Constitution, individual States could not 'coin money, emit Bills of Credit, make any Thing but gold and silver Coin a Tender in Payment of Debts'. The Court in *Craig v Missouri*[73] held that 'the emission of any paper medium by a State government for the purpose of common circulation' would be caught by the prohibition. But a few years later, paper 'money' issued by a State-owned banking corporation was held to fall outside the prohibition—it was not issued by the State and on the faith of the State.[74] Later cases held that notes and coupons issued by State banks—which were essentially departments of State governments—were not 'bills of credit' for these purposes even though they could be accepted in payment of taxes and other sums owing to the State.[75] Of course, the exclusive right to issue banknotes enjoying legal tender status is now vested in the Federal Reserve, although the notes represent obligations of the Federal Government, rather than the Federal Reserve.[76] In a series of cases, the Supreme Court further held that the

[71] In this context, see the Utah legislation discussed at para 1.14. The point made in the text is in some respects illustrated by the decision of the Supreme Court in *Veazie Bank v Fenno* 75 US 533 (1869), where a federal tax on notes issued by private institutions was, in part, justified as a measure designed to protect the national currency. The sovereignty of the United States over its own monetary system also justified a power to ban the export of silver coins: *Ling Su Fan v United States* 218 US 302 (1910). The case in fact relates to a law passed in the Philippines which, at that time, were administered by the US.

[72] Such banknotes could be put into circulation without any official authorization—see *Bank of Augusta v Earle* (1839) 38 US 519.

[73] (1830) 4 Peters 410.

[74] See *Briscoe v Bank of Kentucky* (1837) 11 Peters 255. In part, the decision relies on the fact that the issuing bank had set aside funds to meet its obligations under the notes in question, constituting obligations of that institution which could be enforced by action. They were not currency notes, where in many respects the promise to pay is in effect illusory—see in particular p 328 of the judgment. The main decision was followed in *Darrington v The Bank of the State of Alabama* (1851) 13 Harvard 12. It was later decided that a State did not contravene the provisions of Art 1, s 10 by passing legislation which stipulated that the holders of certain cheques could be paid by means of drafts drawn on another bank, because this did not have the effect of converting the drafts into a form of legal tender—see *Farmers and Merchants Bank of Monroe, North Carolina v Federal Reserve Bank of Richmond, Virginia* (1923) 262 US 649. These cases throw light not only on the prerogative of issuing banknotes, but also on the problem of separate legal persons within the structure of a State. See generally, Hurst, *A Legal History of Money in the United States* (University of Nebraska Press, 1976); *From Rags to Riches: An Illustrated History of Coins and Currency* (Federal Reserve Bank of New York, 1992).

[75] See the *Virginia Coupon Cases, Poindexter v Greenhow* (1884) 114 US 270 and *Houston & Texas CR Co v State of Texas* (1900) 177 US 66. The cases are discussed by Nussbaum, *Money in the Law, National and International* (The Press Foundation, 2nd edn, 1950) 90.

[76] Federal Reserve Act 1913, s 16.

power to determine the value or convertibility of legal tender[77] likewise rested with the State. The State theory of money may thus be regarded as a part of the law of that country.[78]

1.23 If one accepts the State theory of money as formulated by Dr Mann, then it becomes necessary to consider its practical consequences. Two points should be made in this context.

1.24 First of all, circulating media of exchange in law only constitute 'money' if (a) they are created by or with the supreme legislative authority of the State, and (b) the relevant law confers upon those circulating media a nominal value which is independent of the intrinsic value of the paper/metal from which they are made, of their actual purchasing power, and of their external value measured against other currencies. It follows that gift vouchers, tokens, and similar items—even though exchangeable against the provision of goods or services by their issuers—do not constitute 'money' because they lack the support of the supreme legislative authority within the State concerned. For the same reason, promissory notes issued by a commercial or industrial company are not 'money', even if they were to circulate and to be accepted as such throughout the community. Likewise, where a statute, without further definition, refers to 'gold coin', it must be taken to refer to coin issued under the authority of the State and not to some privately produced replica.[79]

1.25 A currency issued by an insurgent authority and forcibly imposed upon the local population in the course of a civil war is to be regarded as lawful money in the geographical area concerned, because the insurgents exercise de facto supreme authority in governmental matters, which makes obedience to their authority not only a necessity but a positive duty. This position is established by a number of decisions of the Supreme Court of the United States,[80] which held, amongst other things, that a contract could not be rendered void or unenforceable on public policy grounds merely because the consideration had been expressed in the Confederate dollar. In the present context, this approach has the merit of consistency with the State theory of money, as formulated earlier. It is, however, not entirely clear that the English courts would adopt a similar approach; on occasion, they have refused to

[77] See *Perry v US* 294 US 330 (1935); *Nortz v US* 294 US 317 (1935) and *Norman v Baltimore & Ohio Railroad* 294 US 240 (1935). It may be added in passing that the exclusive powers of the Federal Government to issue money necessarily implies the further power to punish counterfeiting of the currency—*US v Marigold* 50 US 560(1850).

[78] For further support for this proposition, see *Stephens v Commonwealth* (1920) 224 SW 364, where reference is made to money as the 'circulating medium by the authority of the United States'.

[79] *Freed v DPP* [1969] 2 QB 115, a case arising under the Exchange Control Act 1947.

[80] See *Thorington v Smith* 75 US 1 (1869); *Hannauer v Woodruff* 82 US 439 (1872); *Effinger v Kenney* 115 US 566 (1995); *New Orleans Waterworks v Louisiana Sugar Co* 125 US 18 (1888); *Baldy v Hunter* 171 US 388 (1898); *Houston and Texas CR Co v Texas* 177 US 66 (1900), but see (to different effect) *Thomas v Richmond* 79 US 453 (1871).

recognize the legislative or official acts of an insurgent government.[81] However, the English courts have indicated a willingness to apply laws made by unrecognized governments to the extent to which these deal with private rights and there are no countervailing considerations of public policy.[82] It is suggested that the English courts could, on this basis, recognize such a monetary law under appropriate circumstances, even though the relevant State or government is not formally recognized by the United Kingdom.

1.26 Similar questions may arise where the conflict is of an international nature, as opposed to a civil war. Notes issued and made legal tender by a belligerent occupant in the course of an international war are 'money' because they are imposed by the body which de facto (and even if only temporarily) exercises supreme authority and is responsible for public order and administration.[83] As a consequence, a debt contracted in the national currency prior to the onset of hostilities can subsequently be discharged in the occupation currency by payment of so many occupation currency notes as are—under the occupant's legal tender legislation—equivalent to the nominal value of the debt.[84]

1.27 The second consequence of the State theory is that, in law, money cannot lose its character except by virtue of formal demonetization—that is to say, the introduction of a subsequent law which deprives the earlier money of its character as such.[85] The statement just made implies that money cannot lose its character by custom, or by any other means. As a matter of law, it is suggested that this proposition remains accurate, even though history supplies many examples of the operation of Gresham's Law, where bad money drove good money out of circulation.[86] Gresham's Law has usually been applied to coins which were perceived to have a nominal value below the intrinsic value of their metallic (gold or silver) content. Inevitably, holders of the undervalued coins would tend to withhold them. But

[81] See in particular *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC); *Adams v Adams* [1971] P 188; and *Re James* [1977] Ch 41 (CA). All of these cases arose from Rhodesia's unilateral declaration of independence in 1964. More specific to the present context is the decision in *Lindsay, Gracie & Co v Russian Bank for Foreign Trade* (1918) 34 TLR 443, where it was suggested that notes issued by the Soviet Government could not be treated as 'money' by the English courts, because that Government was not then recognized by the UK.

[82] *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 (HL).

[83] It is doubtful whether the international renunciation of the use of force could be taken to affect the rule stated in the text. On the subject generally, see, Oppenheim, para 268.

[84] Supreme Court of the Philippine Republic in *Haw Pia v China Banking Corp* (1948) 13 The Lawyer's Journal (Manila) 173. This decision was discussed and followed in *Madlambayon v Aquino* [1955] Int LR 994 and *Aboitz & Co v Price* 99 F Supp 602 (District Court, Utah, 1951). These points are discussed in more detail at para 20.08.

[85] See *Marrache v Ashton* [1943] AC 311, 318 (PC). The statement in the text does, of course, presuppose that the issuing State itself continues to exist. If a State ceases to exist or to enjoy independent status, then its notes and coin will thereby lose the necessary legal authority necessary to apply the State theory, and will thus cease to be money—*US v Gertz* (1957) 249 F 2d 662.

[86] For a description of Gresham's Law, see Galbraith, *Money* (Bantam, 1975). As will be seen, Gresham's Law applies to coins because they can have a metallic value which exceeds their face value. It cannot apply to notes, which have virtually no intrinsic value.

they retained their status as 'money', for they were still legal tender for the number of units of account by reference to which they were denominated; and coins do not lose their legal tender status merely because some of the holders elect to save, rather than spend. If a coin—such as a gold sovereign[87]—can be sold for a price in excess of its nominal value, then it is being sold in the character of a commodity, and not as money.[88] Apart from such 'commodity' cases, however, the courts will apply their national legal tender laws and will ignore any premium which the market may happen to place on particular coins.[89] Equally, the courts will generally ignore the fact that a long-term monetary obligation may lose its effective value over a period. Thus, the annual rental of three shillings a year payable under a 1,000-year lease from 1607, now has very little value, but it remains a money obligation which can be discharged at its nominal value.[90] These rules flow in part from the principle of nominalism, which will be considered at a later stage.[91]

1.28 It may be added that States have occasionally minted gold coins without ascribing to them a specific value in terms of the local monetary unit—the South African Krugerrand is a case in point. Whilst it was (indirectly) described as legal tender, no specific monetary value was placed upon it.[92] It follows that such coins are not 'money', and must be regarded as a commodity. This aspect of definition can be important and is considered later.[93]

The Societary theory of money

1.29 Although it is not adopted as the key starting point in the present work,[94] reference must be made to the 'Societary theory of money' which holds that it is the usage

[87] Gold coins are legal tender in this country—see the Currency Act 1983, s 1(3).

[88] On this subject, see para 1.43. For a discussion of a law which demonetized gold coins, thus leaving them to be treated as commodity by reference to their intrinsic metallic value, see *Ottoman Bank v Menni* [1939] 4 All ER 9, 13.

[89] See *Treseder-Griffin v Co-operative Insurance Society* [1956] 2 QB 127, 146 (CA). The statement in the text is reinforced by the practice of the American courts during the 'greenback' period (1861–79). Gold dollars were at a premium to notes, but the courts insisted on treating them as legal tender for equivalent units. See in particular *Thompson v Butler* (1877) 5 Otto (95 US) 694; *Stanwood v Flagg* (1867) 98 Mass 124; *Start v Coffin* (1870) 105 Mass 328; *Hancock v Franklin Insurance Co* (1873) 114 Mass 155. A particular example is *Frothingham v Morse* (1864) 45 NH 545, where the plaintiff had deposited $50 in gold coin as bail. It was held that the return of $50 in currency was sufficient to discharge the debt owed to him; he could not claim more on the grounds that the gold dollar commanded a market premium.

[90] *Re Smith & Stott* (1883) 29 Ch D 1009n. This may be contrasted with *Re Chapman & Hobbs* (1885) 29 Ch D 1007, which involved a 500-year lease from 1646 at an annual rent of one silver penny. The lease was found to have no value in money—a silver penny may have had a market (or commodity) value, but was no longer money.

[91] See Part III.

[92] See The Mint and Coinage Act (No 78 of 1964).

[93] See 'Money as a Commodity' (para 1.61).

[94] The Societary theory does have some value in defining money by reference to its function as a means of payment—see 'The Modern Meaning of Money' (para 1.67 below). It has also been shown that the theory is of some value when money is viewed in its historical context.

of commercial life or the confidence of the people which has the power to create or recognize 'money'. In other words, it is the attitude of society—rather than the State itself—which is relevant in identifying money. Now, to the economist, there is no doubt that public acceptance and confidence are important criteria within the definition of money; people will enter into contracts in terms of money and accept payment in it, because they are confident that other members of the same society will behave in like manner.[95] This, in turn, leads to the view that anything is money if it functions as such; but, taken by itself, this definition is unsatisfactory in seeking to define the attributes of money from a legal perspective. As demonstrated earlier in this chapter, a purely functional approach to money cannot of itself provide an adequate basis for a legal definition; the Societary theory cannot be reconciled with the undeniable monopoly of modern States over their currencies[96] and the effective recognition of that monopoly by international law. Whether in situations of crisis or otherwise, money cannot be created—or lose its character—purely by the will of the community;[97] legal sanction is required for that purpose. The recognition of Confederate notes as 'money' by the US Supreme Court does not lend support to the Societary theory; on the contrary, the Court recognized that the acts of the insurgent Government within its territory could not be questioned, for it represented the de facto supreme authority at that time.[98] The Supreme Court was thus giving effect to the State theory in that case. Nevertheless, the usefulness of the Societary theory cannot be denied. It has already been seen that the theory is of some value in the context of money as a means of payment and, as will be shown below, it is also of some assistance in the context of eurocurrencies. It must be borne in mind that, especially in the modern world, States are frequently unable to control the external value of their currencies and that,[99] as will be seen, the sovereignty of the State over its own monetary system is now a relatively limited concept.[100] Indeed, in Zimbabwe, hyperinflation reached such a

[95] See, eg, Lewis and Mizen, *Monetary Economics*, 22.

[96] It may well be that the Societary theory of money could claim a greater importance when banks began to issue notes and put them into circulation at a time when their legal status was not settled—see para 1.19. That point is now of purely historical interest, although it should be said that support for the Societary theory can be drawn from some of the cases decided during that period—see, eg, *Griffin v Thompson* (1884) 2 How 249.

[97] It is submitted that this statement is true as a purely legal proposition, but inflation and other factors may erode that principle in practical terms. It has been pointed out that, under conditions of rampant inflation, money 'ceases to be an instrument to work or to produce; it loses its most important quality of being respected as a value in itself for future use. Distrust of the currency leads to hoarding by the farmer, and disinclination to deliver his agricultural products for money . . . It leads to disinclination on the part of the manufacturer to sell his goods for money unless he receives other tangible goods in return'—Nussbaum, *Money in the Law*, 194, quoting the *Monthly Report of the Military Governor US Zone*, No 77 (1945–6), published by the Military Government of Germany, Trade and Commerce.

[98] *Thorington v Smith* 75 US 11 (1869).

[99] Resort to systems of exchange control of the kind described in Part IV is an increasingly rare phenomenon.

[100] The full force of the State theory is necessarily diminished by the factors just described. The point is made by Sáinz de Vicuña, in the materials about to be discussed in the context of the

level that it effectively ceased to be used, and foreign currencies were exclusively used for a period, even though this would have contravened Zimbabwe's system of exchange control.[101] The situation became so difficult that the use of hard currencies was authorized in January 2009 and, ultimately, the use of the local dollar was 'suspended' by an announcement to that effect by the Ministry of Economic Planning on 12 April 2009.[102] The suspension was intended to continue for at least a year because, according to the announcement, 'there is nothing to support and hold [the Zimbabwean dollar's] value'. There was, therefore, a period in which the population of Zimbabwe determined the medium of exchange for local transactions, abandoning the rapidly depreciating local currency for US dollars and other units. It may thus be said that the Societary theory of money applied for a period, until the legal position was apparently regularized by the announcement described here. At that stage, the State theory may be said to have re-asserted itself, even though the local currency was suspended. It is possible to conclude that the Societary theory will play a greater role in times of monetary chaos and hyperinflation. In addition, and as will be discussed, the existence of the Eurodollar market may also offer some support to the theory. Under these circumstances, there is no doubt that the Societary theory of money plays a greater role than the adherents of the State theory would wish to admit.

D. The Institutional Theory of Money

1.30 In more modern times, an alternative theory has been advanced, namely, an 'institutional theory of money'. This theory views money as:

> no more than credit against an obligor, whose acceptance as a store of value and as a means of payment by the public is dependent on a comprehensive legal framework that ensures stable purchasing power, its availability even in time of banking stress and its functional capability to settle monetary obligations. It is no longer a chattel, but a transferable credit within an overall institutional framework.[103]

1.31 The new theory notes the traditional functions of money as a measure of value, a store of value, and as a means of payment. It is noted that the State and Societary theories of money were developed at a time when national currencies were linked to gold, and it could thus legitimately be said that the value of money was fixed

institutional theory of money. As will be seen, the present edition adopts a variant of the State theory as its working model, largely because this deals more closely with the use of money in a private law context.

[101] The scale of the crisis is illustrated by the redenomination of the Zimbabwean dollar at a ratio of 1,000,000,000,000 old units to a single new unit.

[102] See 'Zimbabwe shelves own currency for a year: report', Reuters, 12 April 2009.

[103] See Sáinz de Vicuña, 'An Institutional Theory of Money', in Giovanoli and Devos, *International Monetary and Financial Law: The Global Crisis* (Oxford University Press, 2010), para 25.01. The points discussed in this section are largely derived from that chapter.

or determined by the State. This view of money is now effectively obsolete, since the value of money is principally determined by (i) the monetary policy of central banks, and (ii) market forces.[104]

1.32 The creation of the euro is cited in support of the institutional theory, noting that the single currency was not established with any intrinsic or objective value; rather, it was merely defined in terms of its equivalence with a series of participating currencies which were themselves only defined by reference to their market values.[105] Further, the value of the euro since its original launch date has been determined in part by the monetary policy of the European Central Bank (ECB) and the eurosystem central banks—neither the European Union nor the participating Member States can determine the value of the euro.

1.33 The theory also notes the reducing role of notes and coin in the modern era.[106] The use of these physical media of exchange is now largely confined to face-to-face retail transactions and, even in that context, cash faces challenges from debit and credit cards and other payment methods. Indeed, the introduction of the euro itself provides evidence that a monetary system can exist without physical cash. For three years following the creation of the single currency, it was possible to make bank transfers and payments in euros, but a cash payment could only be made in the relevant legacy currency at the prescribed substitution rate.[107] In the view of the present writer, this argument is reinforced by two factors. First of all, *national* banknotes and coins were legal tender for euro obligations only within the original State of issue, and not across the Eurozone *as a whole*.[108] Whilst national currencies thus 'represented' the euro, they only did so in a limited, territorial sense. Secondly, it was provided that an obligation denominated in a legacy currency could be discharged by a bank transfer in euro. Legal force was thus given to the use of the euro, even though it did not then exist in physical form. These considerations tend to emphasize that the notion of 'legal tender'—which is in many respects linked to the State theory of money—is of ever-diminishing importance. This is a necessary consequence of the increasing importance of scriptural money as a means of payment. Although States still retain their legal tender laws in a formal sense, the move away from physical cash is in some respects supported by other legal developments. For example, the fight against tax evasion and money laundering requires an audit trail, and many laws passed in this area encourage the move towards 'bank' money.[109]

[104] There is, of course, some degree of linkage between these two points, but the market value of a currency is not *exclusively* determined by the monetary policy of the central bank. Exchange controls and other administrative measures may also have an impact on the value of a currency.

[105] Sáinz de Vicuña, 'An Institutional Theory of Money', paras 25.08–25.10.

[106] Statistical information is given by Sáinz de Vicuña, 'An Institutional Theory of Money', paras 25.13–25.14.

[107] On these transitional arrangements, see paras 29.16–29.21.

[108] On this point, see para 29.18.

[109] For further discussion, see Sáinz de Vicuña, 'An Institutional Theory of Money', para 25.15. See also para 7.27.

Against this background, the institutional theory of money emphasizes that money consists primarily of a claim against the issuing central bank, but also includes the credit balance of sight deposits made by the public with commercial banks.[110] Claims within the latter category are considered 'money' because they can be transformed on demand into banknotes, so that they become a direct claim on the central bank.[111] The difficulty with the latter part of the analysis is that 'commercial bank' money necessarily involves a credit risk on the institution concerned, because it may not have sufficient assets to place with the central bank in return for notes. But, in reality, individuals and companies only have access to 'commercial bank' money and cannot hold accounts direct with the central bank.[112] **1.34**

In the absence of any link between the value of money and an external asset such as gold, the institutional arrangements for the creation of money will become crucial, because they will determine (i) the value of money and its stability, (ii) the fungibility and equivalence of central bank and commercial bank money, and (iii) the functionality of money as a means of exchange.[113] The value (ie, the purchasing power of a currency in terms of goods and services) will to large measure be determined by the monetary policy of the central bank. Again, in the absence of a formal link to gold or some other commodity, the value of the currency must be determined by that policy and by public confidence in the central bank. The preservation of the value of the currency depends upon the achievement of price stability—ie, avoiding excess money supply that diminishes the value of the currency through inflation. Given that the *external* purchasing power of the currency will also be important in an open economy, central banks may also influence the value of the domestic currency through the holding of foreign reserves. **1.35**

Considerations of this kind lead to the conclusion[114] that 'money' is defined as: **1.36**

(a) a direct or indirect claim against a central bank;
(b) a claim which can be used by the public as both a means of exchange and a store of value; and
(c) a claim which is originated and managed by a central bank in a manner that preserves its availability, functionality, and purchasing power.

The institutional theory therefore places a focus on the role of the central bank and its role in controlling the amount of money (physical or scriptural) within the national economy. This is a necessary part of its role in controlling inflation and, **1.37**

[110] Sáinz de Vicuña, 'An Institutional Theory of Money', paras 25.17 and 25.18.
[111] Compare the Bank of England's 'promise to pay' on sterling banknotes: see para 1.46.
[112] Central bank money does not involve such a risk because such an institution can create liabilities without supporting payment or collateral. These points are made by Sáinz de Vicuña, 'An Institutional Theory of Money', para 25.20.
[113] Sáinz de Vicuña, 'An Institutional Theory of Money', para 25.21.
[114] On the points about to be made, see Sáinz de Vicuña, 'An Institutional Theory of Money', paras 25.24–25.33.

hence, preserving the value of the currency. The theory thus has the following practical consequences:

(a) the principal objective of the central bank must be the achievement of price stability;
(b) the central bank must have the functional capacity to achieve price stability through its market operations;
(c) the central bank must have autonomous decision-making processes, so that political pressures cannot influence or dilute its primary objective;[115]
(d) given that commercial bank money is also 'money' for the purposes of the definition, the central bank must be able to influence the content of relevant legislation, including the regulatory framework applicable to banks and the financial infrastructure; and
(e) the central bank must oversee payment systems in order to ensure that scriptural money is a fully reliable mode of payment.

1.38 In the modern world, therefore, public confidence in the currency in many respects equates to confidence in the central bank. The need for central bank independence in pursuing the price stability objective necessarily leads to a reduced role for the State itself in monetary affairs.[116] The State is responsible for the creation of a legal framework corresponding to the above criteria, for the designation of the title of the unit of account and (where applicable) for setting any recurrent link.[117]

1.39 Nevertheless, the role of the State should not be underestimated. The institutional theory implies that the State will pursue sound fiscal policies in order to support the success of monetary policy.[118]

1.40 In any event, to revert to the essential points, it may be said that money is merely a form of contractual claim, whether against the central bank, in the form of banknotes issued or deposits accepted by such an institution, or against a credit institution, in the form of deposits accepted by it.[119] As a corollary, it is argued that 'payment' merely refers to the transfer of such a claim. This is certainly true where a payment is made in cash, since the banknotes are effectively negotiated to the

[115] In other words, the central bank must be independent of the Ministry of Finance and other arms of government.

[116] As Sáinz de Vicuña, points out ('An Institutional Theory of Money', para 25.32), the independence of the ECB is taken a step further, in that the ECB is prohibited from lending to the public sector, since this may have inflationary consequences: see Art 123, TFEU. In this context, the role of the ECB in the ongoing financial crisis is considered at paras 27.20–27.32.

[117] See Lastra, Legal Foundations, 21. The reduced role of the State and the enhanced role of commercial banks in the definition of 'money' bear some similarity to the present writer's efforts to reformulate the State theory of money in the sixth edition of this work: see now paras 1.67–1.71.

[118] In a Eurozone context, this is intended to be achieved through the Stability and Growth Pact, originally established in 1997 and revised in June 2005. On this Pact, see Sáinz de Vicuña, 'An Institutional Theory of Money', paras 25.32–25.33. See also paras 26.21–26.27.

[119] On these issues and the points about to be made, see Sáinz de Vicuña, 'An Institutional Theory of Money', paras 25.35–25.37.

payee.[120] It is also in many respects true in the context of a payment in bank or scriptural money.[121]

1.41 There nevertheless remains the difficulty that 'commercial bank' money involves a degree of credit risk which is absent in the case of 'central bank' money.[122] An essential part of the institutional theory of money therefore includes a regulatory framework that helps to reinforce confidence in 'commercial bank' money. That framework includes prudential rules for credit institutions, compulsory deposit protection schemes, and the regulation of payment systems.

1.42 It might be thought that the financial crisis which dominated world markets in the period between 2007–2009 serves to emphasize the difficulties involved in treating commercial bank money as 'money' for the purposes of this definition. Some credit institutions came to the edge of formal insolvency procedures, when deposits would have been lost. Yet concerted action taken by central banks during this period helped to preserve confidence in, and the availability of, scriptural money.[123]

1.43 It is thus concluded that the institutional theory recognizes the parameters of a modern economy, where scriptural money prevails over cash because the legal and institutional framework ensures the availability, functionality, and reliability of money in its dematerialized form. The theory also recognizes that money has no intrinsic or extrinsic value, and that its value at any given time depends upon confidence in the central bank and its monetary policy, and the regulatory framework put in place to support scriptural money.[124]

1.44 The institutional theory, therefore, has a number of attractions, not least because the State theory as designed some decades ago now appears rather dated and is difficult to accept in its original form. The institutional theory takes account of the many developments which have affected the nature and role of money during the intervening period. The principal difficulty with the new theory is that, especially in its focus on the requirement for an independent central bank, it cannot provide a *universal* theory. It is true that this particular requirement reflects developments in the more advanced economies, and especially in Europe, where the concept of central bank independence lies at the heart of the eurosystem. But there are many countries in which the central bank does not enjoy such independence, or where

[120] In the case of Bank of England notes, see the analysis at para 1.46

[121] On payments in bank money, see paras 7.15–7.27. As Sáinz de Vicuña points out, the institutional theory of money thus frees us from the need to regard money as an object or chattel, which was one of the core points of Dr Mann's original work. This is true, although it may be pointed out that the definition of 'money' had been significantly widened from that narrow base by the present writer in completing the sixth edition of this work in 2004: see paras 1.67–1.71.

[122] The point has already been noted at para 1.40.

[123] For the details, see Sáinz de Vicuña, 'An Institutional Theory of Money', paras 25.38–25.46.

[124] On these points, see Sáinz de Vicuña, 'An Institutional Theory of Money', para 25.49.

such independence may be more apparent than real. As will be seen, considerations of this kind have led the present writer to adopt a modified version of the State theory of money.[125]

E. Money as a Chattel

1.45 Following this theoretical detour, it is necessary to return to some of the details of the definition of money put forward by Dr Mann—in particular to his fundamental starting point that money could only exist as some form of chattel, in physical form. In the past, these chattels would consist of commodities or quantities of metal; in modern times they consist of coins and banknotes of the kind now familiar in all countries.

1.46 Both coins and notes are chattels in possession, in the sense of the rights which may be exercised over them. The consequences of this position will be discussed shortly.[126] But it must be appreciated that banknotes additionally constitute a chose in action. In the case of the United Kingdom, they express a 'promise to pay the bearer on demand the sum of . . . pounds'; in the case of other countries, a similar promise will be implied.[127] In other words, banknotes are promissory notes within the meaning of section 83 of the Bills of Exchange Act 1882.[128] But it must not be overlooked that a banknote 'is not an ordinary commercial contract to pay money. It is in one sense a promissory note in terms, but no one can describe it simply as a promissory note. It is part of the currency of the country'.[129]

1.47 The precise features of banknotes and coins in circulation within a particular country will be defined by the legislation which establishes the monetary system. It therefore seemed more appropriate to deal with those details in a separate context.[130]

[125] See para 1.67.

[126] See 'The Status of Money as a Means of Payment' (para 1.72).

[127] See *Banco de Portugal v Waterlow & Sons* [1932] AC 452, 487; but see German Supreme Court, 20 May 1926, RGZ 1926, 114, 27; 20 June 1929, JW 1929, 3491.

[128] In similar vein, Currency and Bank Notes Act 1954, s 3 defines banknotes as 'notes of the Bank of England payable to bearer on demand'.

[129] *Suffel v Bank of England* (1882) 9 QBD 555, 563, and 567; see also *The Guardians of the Poor of the Lichfield Union v Greene* (1857) 26 LJ Ex 140. A Bank of England note thus embodies a promise to pay which could only be discharged by proffering a replacement note or equivalent coins in exchange. This curious state of affairs—the note is at the same time both a promise to pay and 'money'—is perhaps the most eloquent confirmation of a view expressed earlier, namely that the concept of 'payment' may be more important than the definition of 'money' itself. A Bank of England note only constitutes *money* because it incorporates a promise of payment. The point was neatly expressed by the observation that 'paradoxically enough, the claims on the central bank are always good because they can never be honoured. Payment does not come into question, since there are no media of payment available'—see Olivecrona, 'The Problem of the Monetary Unit', 62–3, quoted by Goode, Commercial Law, 487. In other words, a central bank discharges its own monetary obligations by delivering a further obligation to pay.

[130] See Ch 2.

But it is necessary to consider whether the existence of a chattel issued by or under the authority of the State is a necessary feature of the definition of 'money'. In the light of the development of the financial markets and modern experience, it is submitted that this aspect of the definition can no longer be supported.[131] One of the principal purposes of money is, of course, to serve as a means of discharging obligations which are expressed in that money. It may well be that, in formal terms, the *public* law of a State will only compel a creditor to accept payment in notes and coins in compliance with its legal tender laws. But laws of this kind are of ever-diminishing importance. They tend to invoke an image of a creditor who, for his own reasons, is keen to avoid receiving payment on highly technical grounds or who wishes to place tiresome legal obstacles in the path of his debtor.[132] Of course, the reality is entirely different; creditors will often accept large numbers of small denomination coins or notes which do not strictly comply with legal tender requirements, for they will always be in a position to re-use the money so offered to them. Likewise, creditors will frequently accept cheques, bank transfers, credit cards, and any other form of payment that is commercially reasonable in the circumstances. Instruments of this kind are readily accepted in payment of monetary obligations, even though they are issued, arranged, and administered by private entities, as opposed to the State itself. As a technical matter, it may well be that the express or implied consent of the creditor will be required as to the selection of such a means of payment, but that consent will be forthcoming in almost every case; it seems unrealistic to impose any further, legally relevant distinctions based solely upon the requirement for a consent which will almost invariably be forthcoming as a matter of course. In one sense, therefore, the focus ceases to be the legal tender laws, which have a *public* character. Rather, it becomes necessary to consider issues of *private* law; under the circumstances of the case, had the creditor expressly or impliedly[133] undertaken to accept payment

[131] It should be noted that other commentators continue to adhere to the view that 'money' can only exist in the form of a physical token. For example, one writer has observed that: 'Money simply consists of the chattel held by its owner; other forms of credit—such as banking accounts or bills of exchange—involve the creation of *obligations*. Thus, in the case of a bank account, the bank owes a debt to the account holder, which is a purely personal obligation. The account holder has no proprietary claim in any money. Where there is payment in money, an object is transferred and, apart from the *in rem* consequences of ownership, no other rights are created. If there is payment by other means, personal obligations are either created or changed': Smith, *The Law of Assignment* (Oxford University Press, 2007) para 21.43, noted with approval in Law of Bank Payments, para 2.001. This assumes that money must display a single, homogenous set of characteristics and that the existence of a chattel is a necessary part of the definition. A wider approach to the subject appears to be supported by Fox, *Property Rights in Money* (Oxford University Press, 2008) ch 1. Likewise, the institutional theory of money (see paras 1.30–1.41) necessarily supports a broader view to the effect that money includes contractual claims on central banks and credit institutions.

[132] As far as is known, litigation concerning legal tender legislation as a means of discharging monetary obligations is virtually non-existent, but the observations made in n 33 should be borne in mind in this respect.

[133] In many cases, the point will be obvious. If a creditor sues on a dishonoured cheque, then it is plain that he had originally accepted it as the method of payment. Equally, if the beneficiary of a letter of credit seeks to present compliant documents under its terms, then it is clear that the credit was the accepted means of payment.

in the manner proffered to him? If so, and if the means of payment does not fundamentally alter the monetary character of the obligations,[134] then the instrument tendered to him has the effect of discharging the monetary obligation arising under the transaction concerned.[135]

1.48 Money thus continues to exist within a legal framework, and, to that extent, the State theory of money remains valid. However, it is submitted that the creation and existence of money cannot be dependent upon its issue in physical form by or on behalf of the State.[136]

F. Denomination and the Unit of Account

1.49 Under the terms of the traditional State theory, only those chattels issued by the State which are denominated by reference to a distinct unit of account can, in law, be regarded as 'money'. The requirement that money be denominated in this way appears long established—Blackstone noted[137] that denomination is 'the value for which the coin is to pass current'. Such distinct unit of account is peculiar to the State which creates it and is therefore the characteristic feature of a national currency system. The unit of account provides a standard of value against which the value of commodites can be measured.[138]

[134] This condition should not be overlooked; if the essential character of the consideration is altered then the contract may cease to involve a monetary obligation at all.

[135] Once again, it is necessary to observe that any discussion of the legal definition of money tends unavoidably to veer towards the notion of payment. As noted earlier, traditional legal theory has refused to ascribe the title of 'money' to bank deposits, largely on the ground that bank deposits are to be categorized as a debt of the institution concerned. This approach is unrealistic in practical terms, because a bank deposit and transfer may be used as a means of payment. In the view of the present writer, it is also unattractive as a matter of legal theory; that a particular relationship can be classified as a 'debt' does not necessarily exclude it from other categories of legal relationship, if it meets the relevant criteria. As has already been shown, banknotes themselves are an illustration of this kind of dual classification. There can be no doubt that notes issued by the Bank of England constitute 'money'; yet they also incorporate a promise to pay a 'sum certain in money' and thus also constitute promissory notes within the meaning of the Bills of Exchange Act 1882. Those chattels which constitute 'money' in this country even according to the strictest definition of that term thus exhibit the form of dual characterization which has just been described. Support for this approach may be found in *Bank v Supervisors* 74 US 26 (1868) where the court regarded US banknotes as both 'certificate of indebtedness' and as 'currency'. In similar vein, see *Howard Savings Institute v City of Newark* 44 A 654 (1899).

[136] This apparently technical departure does, of course, mean that a far wider range of instruments may now fall to be treated as 'money', where they would not have been so treated under the more traditional State theory. It may be objected that a claim on a financial institution may be lost in the event of the insolvency of that institution, and that it is thus inappropriate to treat its deposit obligations as 'money'. This is, of course, true, but the holder of physical money also accepts risks of loss (eg through fire or theft). The view expressed in the text is also consistent with the institutional theory of money (see paras 1.30–1.41).

[137] i. 278.

[138] For a discussion of this principle from an economic perspective, see Simmel, *The Philosophy of Money* (Routledge, 2nd edn, 1990) ch 2.

1.50 While denomination with reference to a specific unit of account is necessary to confer the quality of money, it should be appreciated that not everything which is so denominated is money. Thus, Treasury bills are expressed in terms of a unit of account, but they represent merely claims to money, and their use of the unit of account is simply a reference to the monetary system. The same general remark may be made in the context of certificates of deposit issued by banks, and many other debt instruments.[139] In contrast, a Bank of England note is nothing but the corporeal form, the embodiment of the unit of account, its fraction, or its multiple; further, and in contrast to the forms of instrument just described, a banknote represents an *immediate* right to payment. Herein lies the distinction between Treasury bills and similar instruments (on the one hand) and banknotes and coin (on the other). The former *represents* or *evidences* a claim to money; the latter *is* money.[140]

1.51 The definition of the unit of account (pound, dollar, euro, yen) is supplied by the various monetary systems and will thus be discussed elsewhere.[141] Here, it must suffice to say that a chattel cannot in law be regarded as money if it represents anything more than the simple embodiment of a unit of account, its fraction, or its multiple, and a liability on the part of the issuing central bank.[142] Despite their history within national monetary systems, neither gold nor silver can be regarded as 'money', for their value may fluctuate in terms of money and is determined according to market demand; neither commodity is denominated by reference to a unit of account.

G. Universal Means of Exchange

1.52 Money can only serve its required function if it is intended to serve as the universal means of exchange in the State of issue.[143] It is this aspect of the legal definition which is perhaps closest to that adopted by economists; this is necessarily the case, for neither

[139] These general remarks must be treated with some caution, for even instruments of this kind can be treated as 'money' if the parties so agree. The importance of private law in this context has already been discussed. Yet it is unattractive to treat as 'money' an instrument which has a deferred maturity date, which bears interest, and the value of which may vary over time according to prevailing interest rates and other factors.

[140] Thus the possession of a £20 note is not evidence of entitlement to £20; it is £20; see *Hill v R* [1945] KB 329, 334. In another sense, however, the note is evidence, eg, that the owner is entitled to have a new note issued to him by the Bank of England in the event that the original note is damaged.

[141] See Ch 2.

[142] Knapp's State theory of money has been criticized on the grounds that it does not take account of one of the essential functions of money, ie to serve as a measure of value—see, eg, Hirschberg, *The Nominalistic Principle, A Legal Approach to Inflation, Deflation, Devaluation and Revaluation* (Bar-Ilan University, 1971) 20–4, and sources there noted. Yet this may not be entirely fair, for the unit of account is itself the independent measure of value established by a monetary system. Mr Justice Holmes touched upon the point in *Deutsche Bank Filiale Nürnberg v Humphrey* (1926) 272 US 517, 519: 'Obviously, in effect, a dollar or mark may have different values at different times. But to the law which establishes it, it is always the same.'

[143] It should be appreciated that references to the 'State of issue' may include (as in the case of the euro) a group of States participating within a single currency area. But the State theory of money is

discipline can adopt a definition of money without reference to its cardinal function. Indeed, the English courts have occasionally felt this aspect of the definition to be sufficient on its own, without reference to the other criteria noted in the text.[144]

1.53 Now, if money is the *medium* of exchange, it cannot be an *object* of exchange; in other words, money is not generally to be regarded as a commodity.[145] This is not to say that money is immune from the economic rules relating to supply and demand; but the quality of serving as the universal means of exchange within a given economic area is an essential and indispensable requirement of money. For this reason, let it be repeated, bills of exchange, cheques, Treasury bills, and similar instruments cannot of themselves be described as money in the public law sense which has been discussed earlier. Rather, they *represent* or *evidence* a claim to money.[146] Likewise, gold may be an object of exchange by reference to its prevailing value, but it is an *object* of exchange rather than a *medium* of it; gold is thus not 'money'. Gambling chips represent money in specific circumstances but plainly lack the universal acceptance necessary to clothe them with the quality of money.[147]

1.54 In view of growing interest in Islamic banking and Shariah-compliant financial products, it may be helpful to add that, from this perspective, the *only* function of money is to serve as a medium of exchange, or as a benchmark for the value of other assets. Money has no intrinsic value of its own. From this it follows that it is not permissible to make money out of money by charging interest,[148] or by speculation on future exchange rates.[149] A detailed discussion of this subject lies beyond the scope of the present work.[150]

H. Money as a Store of Value

1.55 That money is to be regarded as a store of value or measure of wealth perhaps reflects the economic view of money, rather than its purely legal aspects. Nevertheless, it is suggested that this particular aspect of money does find some support with the case authorities.

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not undermined by this qualification, for the authority for the existence of the currency is ultimately still derived from an exercise of monetary sovereignty by the States within the zone. For a discussion of this subject in the context of the euro, see paras 31.03–31.10.

[144] See the discussion of *Moss v Hancock*, at para 1.10.

[145] For those particular occasions on which money may be regarded as a commodity, see para 1.61.

[146] Cf discussion in *Hill v R* (n 140).

[147] *CHT Ltd v Wood* [1965] 2 QB 63, followed in *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10 (HL).

[148] The well-known prohibition against *riba*.

[149] The prohibition against *qimar*.

[150] For further discussion of monetary issues, see, for example, Siegfried, 'Concepts of Paper Money in Islamic Legal Thought', Arab Law Quarterly, Vol 16 no 4 (2001), 319. For a discussion of Islamic banking issues, see Proctor, *Law and Practice of International Banking* (Oxford University Press, 2010) Part F.

1.56 In this context, it may be recalled that money functions as a medium of exchange. But a person in possession of money is not legally bound to buy anything, or to exchange his money for goods or services. In such a case, money does not become valueless merely because it is not in use as a medium of exchange; on the contrary, it serves as a store of value, representing the wealth of the holder and his abstract or future purchasing power.[151]

1.57 This definition of money in its abstract sense—as a store or representation of value or wealth—can usefully be borne in mind in considering the very unusual case of *Banco de Portugal v Waterlow & Sons Ltd*.[152] In that case, the Portuguese central bank commissioned the defendant printers to produce 600,000 banknotes, known as Vasco da Gama 500 escudo notes. This was duly done and the notes were put into circulation in Portugal. Subsequently, a criminal group succeeded in fraudulently obtaining from the defendants a further 580,000 notes of the same type, printed from the original plates and indistinguishable from the first set. The fraudster managed to put a large number of these notes into circulation in Portugal. Upon discovery of the fraud, Banco de Portugal found themselves compelled to withdraw from circulation the entire issue of Vasco da Gama notes, and to replace both the genuine and fraudulent notes with a new issue.

1.58 When Banco de Portugal succeeded in its claim for breach of contract against the printers,[153] it was necessary for the court to determine the appropriate measure of damages. In particular:

(a) was the central bank entitled to damages calculated by reference to the face value of the new notes which they were obliged to issue in order to replace the fraudulent notes; or
(b) was it entitled only to recover the cost of the physical printing and production of the new notes?

1.59 The minority in both the Court of Appeal and the House of Lords believed that only the cost of reprinting the necessary stationery could be recovered. In each case, however, the majority opined that the face value of the notes in money could be recovered. When issuing notes, the central bank was effectively parting with, or

[151] See Lewis and Mizen, *Monetary Economics*, 11–13; Savigny, *Obligationenrecht*, i, 405.

[152] [1932] AC 452. For discussions of this case from an economic viewpoint, see Kirsch, *The Portuguese Bank Note Case* (London, 1932); Hawtry (1932) 52 *Economic Journal* 391; Holland, 'The Portuguese Bank Note Case' (1932) 5 Cambridge LJ 91. For a case in which the owner of a patent in relation to security paper issued proceedings against a commercial bank in England which held stocks of foreign currency allegedly infringing the patent, see *A Ltd v B Bank* [1997] 6 Bank LR 85 (CA). The claimant was allowed to proceed because the defendant was a commercial bank. Had the proceedings been commenced against the issuing bank then—notwithstanding suggestions to the contrary in the judgment—the court would have lacked jurisdiction on grounds of State immunity.

[153] It was, of course, an implied term of the contract that notes should only be printed with due authority from Banco de Portugal itself.

putting into circulation, a portion of its wealth or was parting with money. The new notes, when issued, became legal tender for their face value and represented purchasing power in terms of commodities; they had to be accepted by the Portuguese Government in payment of taxes and other debts due to it, and the notes thus represented the credit or obligations of the central bank.[154] In other words, the notes constituted a monetary *asset* of the holder; they must correspondingly constitute a monetary *liability* of the central bank or other issuing authority. Waterlow's breach of contract had thus resulted in the creation of further liabilities on the part of the central bank, and it was entitled to be indemnified against those liabilities.[155]

1.60 The decision in this case accordingly leads to the conclusion that—in legal terms—money represents both purchasing power and a store of wealth or value. The value of money in terms of its purchasing power is wholly unrelated to the cost of materials involved in its production.

I. Money as a Commodity

1.61 It was noted above that money is not generally to be regarded as a commodity.[156] Expressions such as 'goods, wares and merchandise' and 'goods and chattels' will therefore usually be construed so as to exclude money, whether in a physical or in any other form,[157] although the general principle must give way if the explicit terms of the relevant statute or other instrument so require.[158] Since the rule is not

[154] On these points, see the speeches of Lord Atkin at 487–9; Lord Macmillan at 507–8.

[155] For a different view of this case and for criticism of the outcome, see Nussbaum, *Money in the Law*, 84–9. It may be said that the decision in this case—with its focus on the value of money as issued or created by a central bank—is in some respects consistent with the institutional theory of money, as explained at paras 1.30–1.41.

[156] Yet this was not always so; it was often stated that foreign currencies generally fell to be treated as commodities, rather than money—see the discussion under 'Status of Foreign Money' (para 1.83). Some of the confusion in this area might have been avoided had more attention been paid to the decision in *Acceptance Corp v Bennett* 189 NW 901, 904 (1992), where it was noted that money as a medium of exchange 'is not an article of commerce'.

[157] Note to *John Howard's Case* (1751) Foster CC 77; *R v Leigh* (1764) 1 Leach 52; *R v Guy* (1782) 1 Leach 241; *R v Hill* (1811) Russ & Ry 191. Similarly, at common law, nothing could be taken in execution unless it was capable of being *sold*, with the result that money could not be seized for these purposes—see *Knight v Criddle* (1807) 9 East 48 and *Francis v Nash* (1734) Hard 53. Given the purpose of execution of a judgment, this position was anomalous and was remedied by s 12 of the Judgments Act 1838—see *Wood v Wood* (1843) 4 QB 397. But the analysis does support the conclusion that money and commodities have legal characteristics which are separate and distinct. Thus, eg, 'goods' has been found not to include currency filled into wage packets for the purposes of s 7(1)(e) of the Capital Allowances Act 1968—see *Buckingham v Securitas Properties Ltd* [1980] 1 WLR 380.

[158] See, eg, Theft Act 1968, s 34 (2)(b) where the term 'goods' is specifically defined to include money. The meaning of the term 'goods' will, of course, depend upon the statutory context in which it is used—see *The Noordam (No 2)* [1920] AC 909. In the US, a package of gold coins were held to be

absolute, it is necessary to examine those few occasions on which money *will* be treated as a commodity.[159] This will usually arise where coins are being traded or used for their rarity value, or where coins are sold by reference to their intrinsic metallic (as opposed to monetary) value. Money may thus be regarded as a commodity in the following instances:

(a) The decision in *R v Dickinson*[160] concerned Regulation 30E of the Defence of the Realm Regulations, which made it an offence to 'melt down, break up, or use otherwise than as currency any gold coin which is for the time being current in the United Kingdom'. Regulation 58 allowed the Court to 'order that any *goods* in respect of which the offence has been committed shall be forfeited'. The defendant was found to have committed an offence under Regulation 30E, and a forfeiture order was made in respect of £1,800 of gold sovereigns to which the offence related. The Court appears to have accepted that, in principle, gold coin—as legal tender—could not be regarded as 'goods' for these purposes. However, the forfeiture order was upheld on the grounds that the sovereigns had been acquired with a view to melting them down. They had thus been acquired as a commodity, and not in the character of money.

(b) Coin sold 'per weight' is being sold by reference to its metallic value—it is not being used as a medium of exchange. It thus cannot be described as 'money' for the purpose of the transaction at hand, even though it may later be used as money for the purposes of a subsequent transaction.[161] If the purchaser pays an amount in excess of the legal tender value of the coin in question, then this would plainly indicate that it is the metallic content (rather than the money) which is the subject matter of the transaction.[162]

(c) Equally, a coin purchased for its rarity or curiosity value cannot be regarded as 'money' in relation to that specific transaction, even though it may otherwise

'goods, wares and merchandise' for the purposes of the statute at issue in that case: *Gay's Gold* (1872) 13 Wall 358; the New York courts have likewise held that, in certain circumstances, gold coins could form the subject matter of a sale requiring the application of the Statute of Frauds—*Peabody v Speyers* (1874) 56 NY 230; *Fowler v New York Gold Exchange Bank* (1867) 67 NY 138, 146. Further, in Germany, the Federal Administrative Court, 5 March 1985, held that a law restricting the sale of commodities included a bureau de change because the term 'commodities' applied to banknotes and coins 'in so far as they are not the means, but the subject matter of the turnover of goods'.

[159] The theory that money should be regarded as a commodity was pressed by Mater, *Traité juridique de la monnaie et du change* (Dalloz, 1925). As others have pointed out, this was a very difficult exercise given that a sharp distinction between money and commodities lies at the very core of monetary legal analysis—see Nussbaum, *Money in the Law*, 23. It should, however, be emphasized that the starkness of this legal distinction does not necessarily find acceptance in other disciplines. In economic terms, money is in some respects amenable to the law of supply and demand, and may thus be regarded as a commodity in that sense.

[160] [1920] 3 KB 533. See also *R v Goswani* [1968] 2 WLR 1163. For a New Zealand decision to similar effect, see *Morris v Ritchie* [1934] NZLR 196.

[161] See *Taylor v Plumer* (1815) 3 M & S 562 and *Banque Belge v Hambrouck* [1921] 1 KB 321, 326.

[162] This point is very clearly illustrated by the decision of the New Zealand court in *Morris v Ritchie* [1934] NZLR 196.

retain its formal status as legal tender.[163] Indeed, the very fact that one would refer to the *purchase* of a coin in such circumstances will indicate that the coin is being treated as an *object*—and not a *medium*—of exchange.

(d) There may be cases in which the surrounding circumstances make it plain that money is in fact being deployed as a commodity. If an employer distributes gold sovereigns to his employees by way of bonus, it may be inferred that they are intended to acquire the market (rather than the nominal) value of these coins, and they will be liable to income tax accordingly.[164]

(e) It is perhaps legitimate to infer from the above cases that money will generally be treated as a commodity where this reflects the intention of the parties concerned.[165]

1.62 In more recent times, the distinction between money as 'money' and money as a 'commodity' has engaged the attention of both the European Court of Justice and the Court of Appeal. The decisions arose in connection with coins minted in South Africa and in this country. Given that South African Krugerrands were only indirectly described as legal tender, and were not stated to have a specific value by reference to a unit of account expressed in rand,[166] it must follow that they were traded by reference to their metallic value; as a result, they should be regarded as 'goods' (or a commodity) and not as money. Likewise, British silver alloy coins—such as a half-crown—should not be regarded as money because they have ceased to be a means of payment. Notwithstanding these considerations, in *R v Thompson*,[167] the European Court of Justice held that Krugerrands were 'treated as being equivalent to money'. This statement was of very doubtful factual accuracy and in any event the wrong test was applied. The wording just quoted virtually amounts to an application of the Societary theory of money and, as noted earlier,[168] this is not by itself an adequate *legal* definition of money. Applying the State theory, Krugerrands could not be 'money' because they were not denominated by reference to a unit of account. In contrast, the Court was correct in finding that half-crowns were not legal tender and thus had to be regarded as 'goods' for the purposes of Article 30 of the EC Treaty (now Article 34, TFEU), which prohibited

[163] *Moss v Hancock* [1899] 2 QB 111, noted at para 1.10 above. In that case, a dealer in curios received a stolen five pound gold piece which formally amounted to legal tender which had never been put into circulation. The dealer could not rely on the monetary character of the coin, since he had received it as 'goods' with a view to resale at a profit. As a result, the thief could not confer upon the dealer a title which he did not himself possess. On this point, it may be observed that the *nemo dat* principle does not apply to notes and coin: see para 1.55.

[164] *Jenkins v Horn (Inspector of Taxes)* [1979] 2 All ER 1141.

[165] This point is neatly illustrated by a decision of the Quebec Court of Appeal which draws a clear distinction between silver coins as a means of exchange and their metallic content: *R v Behm* (1970) 12 DLR (3d) 260 and a New Zealand decision, where gold coins were traded at a price in excess of their legal tender value: *Morris v Ritchie* [1934] NZLR 196.

[166] See the South African Mint and Coinage Act (No 78 of 1964).

[167] [1978] ECR 2247.

[168] See para 1.27.

quantitative restrictions on imports and measures having equivalent effect. In view of this line of reasoning:

(a) the Court wrongly held that Krugerrands were a form of money, and fell outside the provisions of Article 30 of the Treaty;
(b) the Court correctly held that half-crowns were 'goods' for the purposes of the Treaty, and restrictions on their transfer were, in principle, incompatible with the provisions of the Treaty guaranteeing the free movement of goods. However, British rules restricting the export of these coins could nevertheless be upheld on public policy grounds, because the national right to mint coinage was traditionally regarded as involving the fundamental interests of the State.

1.63 The Krugerrands at issue in this case should have been treated on the same basis as the silver alloy coins.[169] In each instance, it was the intrinsic value of the coins (rather than their value as legal tender) which should have been at issue.

1.64 Subsequently, matters became a little clearer when the Court of Appeal, in a case arising from the same facts,[170] found that the Krugerrands mentioned previously were 'goods' for the purposes of section 52 of the Customs and Excise Act 1952, and were thus liable to forfeiture following an attempt to smuggle them into this country. In the circumstances, it was plain that the smugglers had handled and used the Krugerrands by reference to their metallic value, and not by reference to their value as a form of currency. The judgment of the Court of Appeal was thus clearly right notwithstanding the difficulties posed by the unsatisfactory decision of the European Court of Justice.

1.65 There may be other specialized cases in which money ought properly to be treated as a commodity. For example, a security printer who contracts to produce a quantity of notes and to deliver them to a foreign central bank would be liable in damages for its subsequent failure to produce the notes or for any defect in their design. But the loss suffered by the central bank is the cost of obtaining notes from an alternative source, not for the face amount of the notes themselves.[171] But cases of this type will clearly be the exception, rather than the rule. Where the question has arisen in recent times, courts have refused to categorize money as goods or commodities.[172]

[169] Relying on similar views expressed in earlier editions of this book, the Federal Supreme Court of Germany (8 December 1983) BGHS 32, 198 or NJW 1984, 311 and the Supreme Court of Zimbabwe (*Bennett-Cohen v The State* 1985 (1) ZLR 46 or 1985 (2) SA 465) have decided that Krugerrands are not money, but goods or commodities. As a consequence, a sale of a Krugerrand should attract VAT in appropriate cases.

[170] *Allgemeine Gold & Silberscheidanstalt v Commissioners of Customs & Excise* [1980] QB 390.

[171] That the contract to produce such notes involves money as a commodity was suggested by Simon Brown LJ in the *Camdex* case. This must be carefully distinguished from the situation which arose in *Banco de Portugal v Waterlow & Sons* [1932] AC 452, which was discussed in paras 1.39–1.42.

[172] Thus, the ECJ has held that trading in foreign currencies with counterparties must be regarded as a provision of *services*, rather than *goods*, since the money is not 'tangible property': see Case C-172/96, *First National Bank of Chicago v Commissioners of Customs & Excise* [1998] ECR I-4387.

1.66 It may be concluded that notes and coins are being handled as money where—as in the vast majority of situations—these are being used by reference to their legal tender value. Where, however, notes and coins are sold by reference to their curiosity or rarity value, or by reference to their metallic value, then they are being traded as goods or commodities. It will be apparent that this distinction will depend largely upon the intention of the parties concerned, as drawn from the circumstances surrounding the transaction in question. The cases in which money will be regarded as a commodity will necessarily be exceptional.[173]

J. The Modern Meaning of Money

1.67 The foregoing analysis has examined a number of aspects of money and it is clear that the State retains a significant role in the creation of a monetary system; only the State can define and replace the unit of account and—in the case of physical cash—provide it with legal tender status. But it can no longer be accepted that money can exist only in a physical form or that the State has the monopoly over its creation.[174] It therefore seems to be plain that the State theory of money can no longer be accepted in terms of the formulation proposed by Knapp and those who accepted his views. The dominance of scriptural money and the role of private institutions in the creation of money is now so great that the original theory has an air of unreality about it. However, changing circumstances rarely create new wisdom; they merely provide new insights into ideas that may have been current for many years. The State theory does not necessarily have to be discarded in its entirety; it may be sufficient to modify it to reflect developments that have occurred since it was originally formulated.[175]

1.68 If the requirement that money should exist in the form of a chattel is no longer tenable, then it must follow that the expression 'money' is an essentially abstract

[173] This comment would appear to be further justified by reference to *Camdex International Ltd v Bank of Zambia (No 3)* [1997] 6 Bank LR 43 (CA); the case will be discussed below in the context of foreign money.

[174] See 'Money as a Chattel' (para 1.45 above). The statement in the text draws some support from von Mises, *The Theory of Money and Credit*, 69: 'In determining how monetary debts may be effectively paid off, there is no reason for being too exclusive. It is customary in business to tender and accept payment in certain money-substitutes instead of money itself.'

[175] The conclusion that it is necessary to move away from a purely physical definition of money may derive some support from the decision of the ECJ in Case C-172/96, *First National Bank of Chicago v Commissioners of Customs & Excise* [1998] ECR I-4387, where the court held that the activity of trading in currencies for customers involved the provision of a 'service', since money did not amount to 'tangible property'. Admittedly, the decision turned on specific legislation relating to value added tax. See also the decision of the VAT Tribunal in *Willis Pension Fund Trustees Ltd* (VTD 19183).

rather than a physical concept. Looking at the State theory of money in the round, it seems that the essential legal characteristics of 'money' are as follows:

(a) it must be expressed by reference to a name and denominated by reference to a unit of account which, in each case, is prescribed by the law of the State concerned;[176]
(b) the currency and unit so prescribed must be intended to serve as the generally accepted measure of value and medium of exchange within the State concerned;[177] and
(c) the legal framework for the currency must include a central bank or monetary authority responsible for the issue of the currency, and including appropriate institutional provisions for its management through the conduct of monetary policy and the oversight of payment systems.[178]

1.69 This revised definition does not in any sense deny the undoubted fact that the issue of *physical* currency is usually a monopoly of the State or the central bank; it merely recognizes the fact that such physical notes and coins can no longer be treated as the *sole* form of money in use within a particular country.[179] It follows that the

[176] The monetary sovereignty of a State thus involves the right to create and to define a monetary system in the manner just described. This subject is discussed generally in Ch 19. Although not explicitly stated as part of the definition of 'money', it will invariably be the case that a central bank or similar authority will be established for the purpose of implementing monetary policy. It may be that the role of such institutions deserves more prominence in the definition of 'money' itself—see generally Sáinz de Vicuña, in 'An Institutional Theory of Money'.

[177] The expression 'generally accepted measure of value' has been adopted to emphasize the fact that foreign currencies are now freely used and accepted in many countries. The definition previously adopted in this work used the term 'universal means of exchange' in the State of issue but for reasons just given, this would appear to overstate the position. It hardly needs to be said that the State can only prescribe that the specified unit of account is to be the usual medium of exchange *within the boundaries of the State itself*, for no State can require that another State allow the circulation of its currency within the territory of the latter State: *A Ltd v B Bank* [1997] 6 Bank LR 85 (CA). Nevertheless, the point is noted here because it assumes a certain relevance in relation to the eurocurrency market—see 'Eurocurrencies', para 1.91.

[178] This requirement recognizes the undoubted accuracy of some aspects of the institutional theory. However, the central bank is created and exists within a legal framework, and this aspect is accordingly consistent with the State theory of money. Lastra expresses similar views, in observing that the State theory of money remains valid, notes that it has to be 'broadly understood as the public legal framework in which the economic institutions of money and central banking operate', Legal Foundations, 8.

[179] For a different approach, see Crawford and Sookman, 'Electronic Money: A North American Perspective' in Giovanoli (ed), *International Monetary Law: Issues for the New Millennium* (Oxford University Press, 2000) 373–4. The authors hold that money must '(i) be commonly accepted as a medium of exchange in an area; (ii) be accepted as final payment, requiring no links with the credit of the transferor; (iii) pass freely and be fully transferred by delivery; and (iv) be self-contained, requiring no collection, clearing or settlement'. This definition obviously differs from that in the text, partly because of its greater emphasis on money as a means of payment and partly because it does not focus on the role of the State in defining the monetary system. It must, however, be said that the authors were discussing the rise of electronic money as a *new* medium of payment, and the State's underpinning of the basic monetary system was therefore perhaps presupposed. Further, the authors rightly point out that private forms of money (such as travellers' cheques) are not new, and thus apparently accept the view that rules of private law dealing with questions of payment may

definition of 'money' offered above is in some respects true to the State theory, but now defines money in a purely abstract manner. Thus, while monetary laws can define the monetary system and define the unit of account, they cannot now readily limit the definition of 'money' itself nor can they directly limit the amount of money in circulation. Such matters can be influenced, rather than be controlled through the conduct of monetary policy, but that is an entirely different matter.[180] Whether a particular asset or instrument constitutes 'money' in the sense that it can be used as a *means of payment* must be determined on a case-by-case basis and may in part depend upon changes in banking practice and technological developments; the nature of the instruments which fall within this definition may thus change from time to time. New forms of money may emerge as a means of payment as they gain a sufficient level of acceptance within the business world or the community generally.[181] It may be added that this broader approach to the meaning of 'money' appears to have met with the approval of the Federal Court of Australia in *Elsinora Global Ltd v Healthscope Ltd (No 2)*.[182]

1.70 It would follow that a bank deposit could be regarded as 'money' in the legal sense because payment by means of a bank transfer is now a widely accepted medium of payment; as has been shown, a bank deposit is not disqualified as 'money' merely because it represents a debt obligation of a private institution. However, in order to constitute 'money', the asset concerned must be available for the purpose of making immediate payment. On that basis, only monies standing to the credit of a current account or sight deposits should be regarded as 'money' for these purposes. On the other hand, term deposits, government bonds, or other securities do not constitute 'money'—and thus their transfer cannot constitute 'payment'—because the creditor or holder does not thereby acquire a right to the use of the money or its commercial equivalent;[183] he merely acquires the right to payment at a later date with interest in the meantime.[184]

1.71 In conclusion, it may be said that the State theory—in the somewhat attenuated form proposed above—provides the definition of money in its abstract sense, whilst the Societary theory contributes to a description of money as a means of payment, and to the development of new forms of 'money'. Whilst the institutional theory offers a new approach to the meaning of 'money', it will be appreciated that

now be of greater practical importance than the public law of money. See also the materials referred to in n 182.

[180] Furthermore, as has been seen, the conduct of monetary policy is now frequently placed in the hands of an independent central bank, free from interference by the State itself: see the discussion at para 1.30.

[181] See Crawford and Sookman, 'Electronic Money', 375.

[182] [2006] FCA 18, para 55. See also *Conley & another v Commissioner of Taxation* (1988) 88 FCR 98, at 104–5.

[183] *The Brimnes* [1973] 1 WLR 386; *The Chikuma* [1981] 1 WLR 314.

[184] The concept of payment connotes the discharge of a monetary obligation rather than the receipt of an instrument which might lead to its discharge at a later date.

this theory focuses on the central bank itself and its role as the central institution within the monetary system. At a very high level of generality, the institutional theory bears some of the characteristics of the State theory, in the sense that that the institutional framework of the system must necessarily rest upon sound legal foundations. Whilst obviously a relatively recently developed theory, it may be that the 'institutional' approach will gain further traction given the obvious importance of monetary policy and payment systems within a financial framework.

K. The Status of Money as a Means of Payment

1.72 It has already been noted that 'commercial bank' forms of money may be used as a means of payment, and may thus be regarded as 'money' in a legal sense. But what characteristics must an instrument display if it is to qualify for this title? In this context it may be helpful to have regard to some of the special attributes of physical cash, for if an instrument is to qualify as 'money', then the law must surely attribute to it characteristics which will enable it effectively to fulfil functions which are similar to those performed by notes and coins. If money is to exist in several different forms, then the law should certainly ensure that the rights of a person who receives 'money' are essentially the same, irrespective of the precise form in which that money is received.[185] If new means of payment are to constitute 'money', then consistency and the lawyer's respect for precedent demand that those new means must display characteristics which are in most respects similar to the more traditional, physical form of money. It thus becomes necessary to seek to draw parallels between the legal attributes of the two forms of money. Against that background, it is proposed to consider some of the special attributes of cash, and to examine the extent to which money in a non-cash form can be treated on the same basis.

1.73 First of all, the doctrine *nemo dat quod non habet* has apparently never been applied to notes and coins; these always passed by delivery and thus could not be specifically recovered from a person who had obtained possession of them honestly and in good faith.[186] The reason for this is that, 'by the use of money, the interchange of all

[185] That this should be the case was also recognized at a much earlier stage of monetary development. In 1820, in a case involving the use of banknotes, an English court remarked that 'the representation of money which is made transferable by delivery only must be subject to the same rules as the money which it represents': *Wookey v Poole* (1820) 4 B & Ald 1.

[186] *Higgs v Holiday* Cro Eliz 746; *Miller v Race* (1758) 1 Burr 452; *Wookey v Poole* (1820) 4 B & Ald 1; cf also s 935, para 2 of the German Civil Code. The rule should also apply where notes and coins have originally been stolen from the issuing authority for they are indistinguishable from currency which has lawfully been released into circulation. However, a District of Tennessee court held to the contrary in *US v Barnard* (1947) 72 F Supp 531; the State could recover a gold coin stolen from the Mint, on the grounds that it was merely a chattel and had not acquired the character of money. There is some justification for this view, in that physical cash only acquires the status of 'money' once it has been issued by the central bank concerned and delivered to a holder. This view is consistent with the status of a banknote as a promissory note under the Bills of Exchange Act 1882—see para 1.19.

other forms of property is most readily accomplished. To fit it for its purpose, the stamp denotes its value and possession alone must decide to whom it belongs'.[187] Or, in the words of Lord Mansfield, 'the true reason is upon account of the currency of it; it cannot be recovered after it has passed in currency. So, in the case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration, but before money has passed in currency, an action may be brought for the money itself . . .'[188] The same rule was applied to banknotes, on the grounds that they constituted 'cash', as opposed to goods or securities.[189] Thus, banknotes and coins came to be treated as negotiable chattels; if they 'were received in good faith and for valuable consideration, the transferee got property though the transferor had none. But both good faith and valuable consideration were necessary'.[190] The position was summarized by Lord Haldane LC:[191]

> In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease *ipso facto* to be the subject of specific title, as chattels. If a sovereign or bank note be offered in payment, it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason for this is that chattels of such kind form part of what the law recognises as currency and treats as passing from hand to hand in point, not merely of possession, but of property.

Money is, however, capable of being recovered specifically from a holder who received it in bad faith or for no consideration.[192] The common law remedy of

[187] *Wookey v Poole* (1820) 4 B & Ald 1 at 7.

[188] *Miller v Race* (1758) 1 Burr 452, 457. It was formerly said that money could not be recovered because it was not separately identifiable, ie it had no 'earmark'—see *Moss v Hancock* [1899] 2 QB 111 and the decision of the Supreme Court of Missouri in n 189 below. This approach does not seem to have any grounding in principle and is of no modern relevance.

[189] *Miller v Race* (1758) 1 Burr 452, 457. The same rule developed in the US. In *Newco Rand Co v Martin* (1948) 213 S W 2nd, 504, 509, the Supreme Court of Missouri said 'money is currency, is not earmarked and passes from hand to hand. There is no obligation on a transferee to investigate a transferor's title or source of acquisition of money when accepted honestly and in good faith. One may give a bona fide transferee for value a better title to money than he has himself'.

[190] *Banque Belge v Hambrouck* [1921] 1 KB 321, 329 *per* Scrutton LJ. The requirement of good faith is, of course, essential and should not be overlooked. Bad faith in a *general* sense will not defeat the transferee's title to the currency delivered to him; the bad faith must relate specifically to the receipt of the notes at issue: *R v Curtis, ex p A-G* (1988) 1 Qd R 546; see also *Grant v The Queen* (1981) 147 CLR 503.

[191] *Sinclair v Brougham* [1941] AC 398, 418.

[192] *Clarke v Shee* (1774) 1 Cowp 197, followed by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10. In so far as banknotes are concerned, these constitute promissory notes for the purposes of the Bills of Exchange Act 1882, so that both good faith and the provision of value are presumed—see ss 30 and 90. Mere possession of a banknote is thus *prima facie* evidence of ownership: *King v Milson* (1809) 2 Camp 7; *Solomons v Bank of England* (1810) 13 East 136; *Wyer v The Dorchester and Milton Bank* (1833) 11 Cush (65 Mass) 51. Money cannot be recovered by means of an action for wrongful interference with goods, unless the specific notes and coins can be identified: *Banks v Wheston* (1596) Cro Eliz 457; *Orton v Butler* (1822) 5 B & Ald 652; *Lipkin Gorman v Karpnale Ltd* (above) at 15.

tracing allowed the recovery of assets acquired with the money, provided that their identity could be ascertained.[193] The common law remedy stopped short of the point where the relationship of creditor and debtor suppressed the right *in rem*.[194] At this stage the equitable doctrine of tracing intervened,[195] allowing money to be followed *in rem* against a holder who acted in bad faith or gave no consideration, if it could be identified in or disentangled from a mixed fund.[196]

1.74 Secondly, banknotes import a promise to pay a stated sum in money and are thus promissory notes for the purposes of the Bills of Exchange Act 1882, although the Act only applies to promissory notes 'with the necessary modifications'.[197] Thus, a note stolen from the central bank prior to its issue is not a valid banknote because it remains inchoate until delivery to a person who takes it as a holder.[198] Yet it seems likely that a holder in due course of a Bank of England note, which is genuine but which has unlawfully been put into circulation, will be protected.[199] It would also appear to follow from sections 69 and 89(2) that an owner who loses a banknote is

[193] *Golightly v Reynolds* Lofft 88; *Taylor v Plumer* (1815) 3 M & S 652; whether or not a particular asset can be said to be derived from a particular fund can plainly be a difficult question: *R v Cuthbertson* [1981] AC 470. *Taylor v Plumer* was followed in *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10, where it was held that the defendant is relieved if he has so changed his position that it would be inequitable to allow the claimant to succeed.

[194] See the explanation of Lord Haldane in *Sinclair v Brougham* [1914] AC 398, 419.

[195] *Re Hallet's Estate* (1880) 13 Ch D 696, overruling *Re West of England and South Wales District Bank, ex p Dale* (1879) 11 Ch D 772, where the earlier cases are discussed.

[196] The principal authorities in earlier times were: *Sinclair v Brougham* [1914] AC 398 (departed from by the House of Lords in the *Westdeutsche Landesbank* case, below); *Banque Belge v Hambrouck* [1921] 1 KB 321; *Re Diplock* [1948] Ch 465, 517, affirmed on other grounds *sub nom Ministry of Health v Simpson* [1951] AC 251. See now *Agip (Africa) Ltd v Jackson* [1991] 3 WLR 116 and see Millet, (1991) 107 LQR 71; see also the discussion of restitution as a remedy in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669. The need for separate legal and equitable doctrines of tracing was discussed and doubted in *Foskett v McKeown* [2001] 1 AC 102 (HL), considered by Goode, Commercial Law, 495. The ability of a claimant to recover moneys from or to obtain restitutionary remedies against a third party who has received or dealt with money or property in which the claimant had an equitable interest has been the subject of significant judicial activity in recent years—see in particular *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2002] AC 164. The decision in the *Akindele* case was recently criticized by the House of Lords in *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28. On the subject generally, see Chitty, ch 29. It is not proposed to pursue the subject here, partly because a very detailed discussion would be required in order to do justice to the subject matter. It does, however, seem to be clear that the modern remedies in tracing and restitution would apply equally to the funds received in physical form and to funds received by any other means. Thus, for the purposes of the present discussion, it is sufficient to note that the owner of money in a non-physical form enjoys the same legal protection as would be available to a holder of physical notes and coins under corresponding circumstances.

[197] See Bills of Exchange Act 1882, s 89. On payment of banknotes see s 1(4) Currency and Bank Notes Act 1954.

[198] Bills of Exchange Act 1882, s 84 and see the remarks of Lord Atkin in *Banco de Portugal v Waterlow & Sons* [1932] AC 452, 490. See also *Baxendale v Bennet* (1878) 3 QBD 525.

[199] See ss 20 and 21 of the 1882 Act and authorities such as *Smith v Prosser* [1907] 2 KB 735 and cf *Cooke v US* (1875) 91 US 389. The bank of issue is *entitled* to honour suspicious notes of this kind—see *Banco de Portugal v Waterlow & Sons* [1932] AC 452; the case did not, however, decide whether the central bank was *obliged* to do so.

entitled to have a new one issued to him against appropriate security;[200] but a banknote destroyed by fire has to be replaced unconditionally.[201] A forged banknote will, in the absence of estoppel, be inoperative.[202] On the other hand, it is well established that, where a bill or note is given by way of payment, the payment is presumed to be conditional;[203] this plainly cannot apply to the Bank of England notes, for their delivery will constitute a final and unconditional payment.[204] Further, a bill of exchange may be reissued only in certain cases,[205] but a Bank of England note may always be reissued after payment in due course.[206] In the case of *accidental* alteration to a bill or banknote, the treatment in each case appears to be uniform; the holder will be entitled to payment if the content of the document can be proved.[207] But different treatment is accorded to the two instruments in the event of deliberate alteration. If the alteration is immaterial or latent, the holder of the bill may still be entitled to enforce it by virtue of the provisions of the Bills of Exchange Act 1882,[208] but Bank of England notes have been held to fall outside these provisions.[209] As a result, banknotes are subject to the common law rule that any material alteration[210] is a complete defence, even against a holder in due course who could not have detected the alteration. Finally, in the conflict of laws, the transfer of banknotes and bills is governed by the law of the place in which the asset is situate,[211] and the rules relating

[200] In this sense, see *Gillet v Bank of England* 6 (1889–1890) TLR 9. See also *Mayor v Johnson* (1813) 3 Camp 324: the owner of half a note cannot obtain payment without the other half, but Lord Ellenborough seemed to think that if the owner had lost both halves, then payment upon indemnity could be demanded.

[201] This was decided by the Court of Appeal in Ontario in *Bank of Canada v Bank of Montreal* (1972) 30 DLR (3d) 24, 1972 OR 881 and the decision was affirmed by a four-to-four decision of the Supreme Court of Canada: (1977) 76 DLR (3d) 385; for detailed commentary, see Mann (1978) 2 Canadian Business LJ 471. The effect of this decision was subsequently reversed by an amendment to the Bank of Canada Act.

[202] See Bills of Exchange Act 1882, s 24, which must apply equally to banknotes. Whilst payment in forged banknotes will thus usually be ineffective, this does not apply to a payment made in good faith to the bank of issue in its own notes, even though later found to be forged: *Bank of the United States v Bank of the State of Georgia* (1825) 10 Wheat (23 US) 333.

[203] On this presumption, see the discussion at para 7.13.

[204] Perhaps one can rely on the authority of MacKinnon LJ, who remarked that even though 'Bank of England notes, if subjected to the unusual treatment of being read, will be found to be promises by a third party to pay', nevertheless they are 'the best form of payment in the world': *Cross v London & Provincial Trust Ltd* [1938] 1 KB 792, 803.

[205] See Bills of Exchange Act 1882, ss 37 and 39.

[206] Pending its reissue, a bank note retains the character of money—see *R v West* (1856) Deans & Bell 109; cf *R v Ranson* (1812) 2 Leach 1090.

[207] See *Hong Kong & Shanghai Bank v Lo Lee Shi* [1928] AC 181 where Lord Buckmaster said (at 182) that the notes issued by the appellant bank 'are not legal currency, but owing to the high credit of the appellants, they are used as if they were'.

[208] See the protection afforded to the holder by s 64 of the 1882 Act.

[209] *Leeds & County Bank Ltd v Walker* (1883) 11 QBD 84. The reasoning of Denman J (at 90) is perhaps not altogether convincing; that banknotes are in many respects different from ordinary promissory notes, that they do not require endorsement, and that they constitute legal tender, is quite certain, but this hardly demonstrates that s 64 should be regarded as inapplicable. Doubts about this decision may be inferred from Lord Buckmaster's opinion in the *Hong Kong & Shanghai Bank* case (n 207).

[210] The alteration of the number is material: *Suffel v Bank of England* (1882) 9 QBD 555.

[211] See Dicey, Morris & Collins, para 33-349.

to the identification of that place differ in each case. The debt represented by an ordinary bill of exchange may sometimes have to be treated as situate at the place where the debtor has bound himself to pay. Indeed, it has been held that bills drawn in India and payable in London and which, at the time of the holder's death were on board a ship on the high seas were assets situate in England and therefore subject to English death duty, because 'they represent, but they do not constitute, the asset'.[212] But this reasoning cannot apply to modern banknotes; they are situate where they are actually found, rather than where they can be enforced.

1.75 The principles just discussed were, of course, established at a time when physical money was really the only recognized form of 'money'. It was thus a happy chance that a number of the questions which might arise with respect to banknotes could be answered with reference to the Bills of Exchange Act 1882 or the principles which it sought to codify. However, the 1882 Act relates to promissory notes which are in writing and signed by the obligor.[213] Consequently, the 1882 Act can be of no real assistance in dealing with bank deposits or other, non-documentary means of payment as forms of 'money'. This state of affairs inevitably hinders the present attempt to draw parallels between traditional and more modern forms of payment. Nevertheless, having regard to some of the attributes of physical cash which have just been discussed, a few comparisons may be made:

(a) In the case of physical cash, a transfer of possession generally connotes a transfer of ownership, at least provided that the transferee has acted in good faith and given value, and will constitute 'payment' in respect of the debt obligation concerned.[214] If funds have been transferred to the payee by means of a bank transfer or through electronic means,[215] then the credit to the transferee's account will generally be irrevocable[216] and the credit to his account will constitute his possession of, and thus his *prima facie* entitlement to the funds concerned.
(b) If the transferee received the funds in good faith and for value, then he is entitled to retain them by way of payment and he is not required to enquire as to the transferor's original source of funds, or any other matter.[217]

[212] *Pratt v A-G* (1874) LR 9 Ex 140. In *Popham v Lady Aylesbury* (1748) Amb 69, Lord Hardwicke held that banknotes passed under the provisions of a will disposing of a house 'with all that should be in it at his death', the reason being that banknotes are ready money, not bonds or securities which are only evidence of the moneys due. It is suggested that this decision is plainly correct, notwithstanding the doubts expressed in *Stuart v Bute* (1813) 11 Ves 657. See also *Southcot v Watson* (1745) 3 Atk 228, 232, where banknotes were held to be cash, and not securities within the meaning of the will.

[213] See Bills of Exchange Act 1882, s 83(1).

[214] This point has been discussed at para 1.55.

[215] On e-money, see para 1.59.

[216] See *The Brimnes* [1973] 1 WLR 386; *Tayeb v HSBC Bank* [2004] EWHC 1529 (Comm).

[217] At least, this is the position so far as the private law of monetary obligations is concerned. Legislation designed to counteract money laundering may require the transferee to make inquiries in certain cases, but this regulatory requirement does not affect the general principle stated in the text.

(c) Non-physical forms of cash may constitute 'payment', so long as the transferee is immediately able to dispose of the full amount of the funds concerned and to apply them in discharge of his own obligations.[218] Payment in this form is, to this extent, equated with payment in physical cash.

(d) The recipient of a bank transfer acting in good faith would appear to acquire good title to the funds free of any prior equities.[219] In other words, the bank transfer enjoys some of the features, if not the formalities, of negotiability.

(e) A creditor who receives payment by means of a bank transfer is not in any sense concerned with the credit standing of his debtor,[220] nor will he usually be concerned with any error, mistake, or want of authority on the part of the bank that remits the funds to him.[221]

(f) In a private international law context, the ability to obtain a good title to notes and coins appears to be governed by the law of the place in which the transaction occurs and the moneys are physically handed over to the creditor. Likewise, in the case of a bank transfer, the creditor's entitlement to the funds and the validity of his title to them will be governed by the law of the place to which the funds are remitted to the account of the creditor.[222]

1.76 The foregoing analysis demonstrates that payment by means of a bank transfer shares many of the legal characteristics of a payment in physical money. This would seem to justify the earlier conclusion that funds standing to the credit of a bank account should be regarded as 'money' for legal purposes. It is also appropriate to conclude that a new form of payment may be regarded as 'money' if it broadly meets the criteria noted previously.[223]

[218] *The Chikuma* [1981] 1 WLR 314.

[219] This view is reinforced by the rule that having credited the relevant account, the bank can only reverse that entry—ie unilaterally cancel its own debt to the customer—under very limited circumstances. A particularly compelling example of this rule is offered by the decision in *Tayeb v HSBC Bank* [2004] EWHC 1529 (Comm).

[220] That is to say, the credit standing of his debtor under the original contract. He may of course be concerned about the credit standing of his bank, once it becomes his debtor in respect of the corresponding amount.

[221] In broad terms, this would seem to be the effect of the decision in *Lloyds Bank plc v Independent Insurance Co Ltd* [1999] Lloyd's Rep, Bank 1 (CA). The case is considered in *The Law of Bank Payments*, para 3-148. For a New York decision which considers the effect of Art 4A of the Uniform Commercial Code (relating to electronic fund transfers), see *Sheenbonnet Ltd v American Express Bank* 951 F Supp 403 (1995).

[222] This follows from the rule that the law applicable to a bank account is the law of the country in which the relevant branch is situate, and the property, represented by the remitted funds, will be located in that country—see *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 and other cases noted by Dicey, Morris & Collins, para 22-029.

[223] It may be added that credit cards are a very convenient form of payment, but they do not constitute 'money' within the criteria described above. Apart from other considerations, the creditor does not receive immediate access to the funds concerned; he merely acquires the right to payment from the card issuer at a later date: *Re Charge Card Services Ltd* [1989] Ch 497. In a sense, therefore, the use of a credit card involves the *novation* of a debt, rather than its payment; actual payment occurs at a later date. Furthermore, it would seem that interest-bearing securities would not be treated as 'money', even though they may have been issued by a State or by a central bank. If money

1.77 Nevertheless, issues of this kind continue to cause difficulty and new cases emphasize that 'money', 'payment', and cognate expressions will have different meanings in different contexts. For example, in *Visa International Service Association v Reserve Bank of Australia*,[224] Australia had introduced the Payment Systems (Regulation) Act 1998 which allowed the Reserve Bank to list particular organizations as a 'designated payment system' and to impose access regimes and other standards in relation to such a system. The Reserve Bank designated Visa and MasterCard for these purposes and imposed various rules on interchange fees and other charges. The card issuers challenged their designation as 'payment systems' and, hence, the ability of the Reserve Bank to regulate their charging structures. The 1998 Act defined[225] a 'payment system' as a 'funds transfer system that facilitates the circulation of money'.

1.78 The card issuers argued[226] that the 1998 Act was directed only to the final step in the payments process by which contractual promises to pay are transformed into the actual delivery of value through the banking system via transfers across accounts held at the Reserve Bank itself. In other words, 'payment system' refers exclusively to clearing, settlement or the transfer of monetary value by which promises to pay are settled through banks as intermediaries for the parties concerned. On the other hand, a credit card system merely created payment obligations which had to be settled through a payment system at a later date. The use of the card created various promises to pay but did not itself effect a transfer of funds. Based in part on the decision in *Re Charge Card Services Ltd*,[227] the court accepted that no actual funds transfer occurred at the point of time at which the credit card is presented to, and accepted by, the supplier.[228]

1.79 Ultimately, however, the court found against the card issuers on the basis that they operated a 'system that *facilitates* the circulation of money' for the purposes of the definition of that term in section 7 of the 1998 Act. The expression was not restricted to clearing and settlement systems but included other systems which supported the payments infrastructure.

is to operate as a medium of exchange, then it must have 'a uniform and unchanging value, otherwise it becomes the subject of exchange, and not the medium'. Whilst this statement is derived from an old decision of the US Supreme Court the point remains valid; money must have a constant and unchanging value under the law of the State of issue, and the existence of an interest coupon necessarily deprives an instrument of this essential feature: see *Craig v Missouri* (1830) 4 Peters 410.

224 [2003] FCA 977 (Federal Court of Australia).

225 See the definition of 'payment system' in s 7 of the 1998 Act.

226 On the points about to be made, see paras 245–305 of the judgment.

227 [1987] 1 Ch 150. The decision is considered at para 7.14.

228 See para 265 of the judgment.

L. Electronic Money

1.80 It is also likely that 'e-money' should also qualify for the label of 'money' in the light of the points noted above. E-money has been defined as monetary value represented by a claim on the issuer which is stored in an electronic device and accepted as a means of payment by undertakings other than the issuer.[229] The legal framework is designed to secure the continued availability of e-money once it has been issued to a holder. For example, an electronic money institution (i) is required to be authorized by an appropriate authority;[230] (ii) is required to meet minimum capital and 'own funds' requirements;[231] must 'ringfence' funds placed with it to purchase e-money;[232] (iv) must both sell and redeem e-money only at its face or par value;[233] and (v) is prohibited from paying interest.[234]

1.81 E-money may be stored on a card which may not disclose the name of the holder; the use of the card entails an immediate transfer of funds to the creditor's bank account, and he can thus accept e-money without reference either to the identity or the credit standing of the holder. Likewise, it would appear that, in the absence of bad faith, the creditor would obtain an unimpeachable title to the funds transferred to him. To this extent, e-money exhibits some of the characteristics of physical cash, and may thus qualify for the label of 'money'.[235] The fact that both bank deposits and e-money constitute obligations of, or are issued by, private organizations does, of course, further undermine the more traditional State theory of money. It has been argued by others[236] that e-money may qualify as 'money'

[229] The legal framework is now provided by Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, OJ L 267, 10.10.2009, 7. The definition just referred to is to be found in Art 2(2) of the Directive. For the provisions which implemented this Directive in the United Kingdom, see the Electronic Money Regulations 2011 (SI 2011/99). The general scheme of the legislation is to ensure that issuers of e-money are regulated institutions, thus ensuring the integrity of this new form of payment, and perhaps, to ensure that the conduct of monetary policy is not prejudiced by the increased use of private forms of money. For a general discussion of the subject, see the Committee on Payment and Settlement Systems, *Survey of Electronic Money Developments* (Bank for International Settlements, 2001).

[230] Art 10 of the Directive.

[231] Arts 4 and 5 of the Directive

[232] Art 7 of the Directive.

[233] Art 11 of the Directive.

[234] Art 12 of the Directive.

[235] For further discussion of this subject, including an analysis of the legal character of e-money and its monetary law consequences, see Crawford and Sookman, 'Electronic Money: A North American Perspective' and Kanda, 'Electronic Money in Japan' both in Giovanoli (ed) *International Monetary Law: Issues for the New Millennium* (Oxford University Press, 2000) chs 19 and 20; Effros, 'Electronic Payment Systems Legal Aspects' in Hom (ed), *Legal Issues in Electronic Banking* (Kluwer, 2002); Kreltszheim, 'The Legal Nature of Electronic Money' (2003) 14 Journal of Banking and Finance Law and Practice 161, 261.

[236] See, in particular, Geva and Kianieff, 'Re-imaging E-Money: Its Conceptual Unity with other Retail Payment Systems' in *Current Developments in Monetary and Financial Law*, Vol 3 (International Monetary Fund, 2005) 669.

if one accepts the functional definition proposed in *Moss v Hancock*[237] because (i) the issue of a chattel by the State is not an essential ingredient of 'money'; and (ii) the existence of formal, legal tender status is likewise not an essential part of a definition of money. Nevertheless, it would be necessary that the relevant instrument should be widely accepted by a range of merchants and service providers. Otherwise, it could not be said to pass freely throughout the community in the payment or discharge of debts.

1.82 It may be of passing interest to note that, when Germany implemented earlier EU legislation on e-money, it described electronic money as 'Werteinheiten in Form einer Forderung gegen die ausgebende Stelle' ('units of account in the form of a claim against the issuing entity'),[238] thus implicitly accepting the monetary status of such payment instruments. This provision has, however, recently been repealed and replaced by a more literal translation of the definition given in the 2009 Directive.[239]

M. The Status of Foreign Money

1.83 Thus far, the discussion has proceeded in relatively general terms and, broadly, has assumed that the currency under consideration was the pound sterling or, at least, was the domestic currency in the jurisdiction under consideration. It is now necessary to broaden this approach, and to discuss the position of foreign money under English law.

1.84 It is appropriate at the outset to make a few general points concerning the treatment of foreign currency and foreign money obligations in the present edition of this work. In earlier editions prepared by the original author, Dr Mann was careful to draw clear distinctions between obligations expressed in sterling and those expressed in other currencies; he stated[240] that it was his 'experience and conviction that this separation between domestic and foreign currency obligations is absolutely essential for a clear exposition of the subject'. The need for this distinction rested in part upon the commodity theory of foreign money—ie that where foreign money constituted an object (as opposed to a medium) of a commercial transaction, then it should be regarded as a commodity, rather than a means of payment.[241] It may

[237] On this case, see para 1.10.
[238] Section 1(14), Kreditwesengesetz.
[239] See Art 2(2) of the Directive, reproduced at para 1.80.
[240] See the preface to the first edition of this work.
[241] Foreign money could be the 'object' of a transaction where it was purchased under the terms of a foreign exchange contract. In other words, a party could be obliged to 'deliver' a foreign currency under circumstances which were not equivalent to 'payment'. The commodity theory was developed by Dr Mann, see the fifth edition of this work, 196–202. Whilst quoting various sources in support of the theory, Dr Mann did note that the validity of the distinction between *payment* and *delivery* of foreign money was 'not unquestioned'—see the fifth edition, 196—and that although it

well be thought by some that the distinction remains valuable, but (at least so far as English law is concerned) the commodity theory of foreign money can no longer stand in the face of the Court of Appeal decision in *Camdex International Ltd v Bank of Zambia*.[242] It will be necessary to return to this decision in other contexts, but, for the present, it must suffice to note some of the points made by the Court of Appeal in relation to the commodity theory. Phillips LJ accepted that coins or notes may be transferred by reference to a value attributable to their physical properties (for example, their metallic content or rarity value) and that an obligation to deliver such items should not be described as a 'debt'; rather, the transaction should be treated as a transfer of commodities.[243] He then went on to say:[244]

> Beyond this, however, I do not think it helpful, or even possible, to differentiate between money as a commodity and money as a means of exchange by reference to the nature of the transaction under which it falls to be transferred . . . It seems to me that whether money is lent or borrowed, whether it is used to buy goods or services, or whether it is exchanged against a different currency, it retains its character as a medium of exchange. In each case, the transaction will involve a particular specified currency or currencies. This reflects the fact that there exist different media of exchange, that their relative values fluctuate over time and that for

had been accepted in a number of courts in the US, it had been rejected in *Matter of Lendle* (1929) 250 NY Supp 502, 166 NE 182. The notion that there may be a *payment* in sterling but only a *delivery* of foreign money was criticized by Lord Radcliffe in *Re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007 at 1059, where he observed that 'to speak of such contracts [for the payment of foreign money] as being in English law contracts for the delivery of a commodity seems to me to be merely to confuse the issue and needlessly to suggest that for some reason best known to itself, our law regards a contract for the payment of a debt in a foreign money as if it were of a nature different to that which it obviously possessed'. Perhaps the best (albeit insufficient) argument for treating foreign money as a commodity is that it is not a measure of value *in England* and, hence, should not be regarded as money in this country: see, for example, the remarks of Dixon CJ in *Caltex Ltd v Federal Commissioner of Taxation* (1960) 106 CLR 205, at 220.

[242] [1997] CLC 714. It is also right to point out that Dr Mann did state (fifth edition of this work, 195–6) that in the vast majority of cases, foreign money would fall to be regarded as 'money' and he approved of the statement of Brandon J to the effect that the term 'money' includes 'money in foreign currency as well as in sterling': *The Halcyon The Great* [1975] 1 WLR 515, 520. Dr Mann's comments on this subject were approved by the Federal Court of Australia in *Conley & another v Deputy Commissioner of Taxation* [1998] FCA 110 and in *Sturdy Components Pty Ltd v Burositzmobelfabrik Friedrich W Dauphin GmbH* [1999] NSWSC 595 (New South Wales Supreme Court).

[243] ie to this extent, endorsing the substance of the decision in *Moss v Hancock* (para 1.10).

[244] In *Marrache v Ashton* [1943] AC 311, Lord Macmillan remarked (at 317) that since Spanish banknotes were not currency in Gibraltar 'they must be regarded in Gibraltar as commodities'. Similarly in *Moll v Royal Packet Navigation Ltd* (1952) 52 SRNSW 187, the court held that an obligation to pay in a foreign currency was in law an obligation to deliver a foreign currency, with the result that a breach of the obligation gave rise to an action in damages, rather than in debt. In 1985, the Court of Appeals (2nd Cir) noted that, in an action 'brought to recover sums expressed in foreign money the obligation—whether characterised as an unpaid debt or a breach of contract—is treated as a promise to deliver a commodity': *Vishipco Lines v Chase Manhattan Bank* (1985) 754 F 2d 452, 458. Even as recently as 1996, the Court of Appeal said that foreign banknotes which had already been issued by a foreign central bank but which were held in England 'are not to be regarded here as legal tender, but as commodities or objects of commerce': *A Ltd v B Bank* [1997] 6 Bank LR 85 (CA). Statements of this kind were of uncertain validity when they were made, but in any event, they cannot now stand in the face of the *Camdex* decision.

this reason parties to a transaction may be concerned to stipulate for a particular currency. The fact that the identity of the currency may be a material feature of the transaction does not translate the currency into a commodity, whatever the nature of the transaction.

1.85 In view of these remarks[245] and the attitude of the English courts to foreign currency obligations following the decision in *Miliangos v George Frank (Textiles) Ltd*,[246] the requirement for an entirely separate treatment of sterling and foreign currency obligations is—in the view of the present writer—much less compelling. As a result, the present edition seeks to deal with money and monetary obligations in a broad sense, with appropriate commentary where any remaining practical or theoretical distinctions between domestic and foreign money throw up specific points requiring discussion.

1.86 Returning now to the main theme, what can be said about the status of foreign money in England? The following general propositions are suggested:

(a) First of all, foreign money is to be regarded as 'money' under precisely the same circumstances as sterling is to be so regarded—ie it is always to be regarded as 'money' except where delivered for its intrinsic metallic, rarity, or curiosity value. This parity of treatment flows inexorably from the Court of Appeal judgment in *Camdex*, to which reference has just been made. It must also be said that the decision in the *Miliangos* case and the dismantling of exchange controls in the United Kingdom[247] have tended progressively to diminish the importance of a sharp distinction between sterling and foreign currency obligations.[248] In some respects, it may be said that *Camdex* was a natural development following the decision in *Miliangos*. The latter decision was to be welcomed on pragmatic grounds, whilst the former perhaps explained some of the more theoretical consequences of the *Miliangos* case.

(b) Whilst foreign money may be 'money' under English law, it cannot constitute legal tender for settling debts in this country.[249] Anything which is legal tender must be money, but not all money is legal tender. Legal tender is such money as is 'current coin of the realm'. But this statement merely makes the obvious

[245] It should be said that Simon Brown LJ made very similar remarks, and Otton LJ agreed with both judgments. See also the discussion in Goode, Payment Obligations, para 1-05. The status of foreign money obligations as duties of payment (rather than delivery) is also recognized in Germany: Heermann, *Geld-und Geldgeschafte* (Mohr Siebeck, 2008), 31.

[246] [1976] AC 443. The consequences of that decision are considered in Ch 8.

[247] On this subject, see Ch 14.

[248] For reasons given at para 1.64, the key area of distinction now lies in the field of taxation. The statement in the text was approved by the Federal Court of Australia in deciding that a foreign currency was 'money' for the purposes of relevant provisions of the Corporations Act and associated regulations: see *In re Sonray Capital Markets Pty Ltd* [2012] FCA 75, at para 99.

[249] For an unsuccessful attempt to introduce an exemption to this rule, see 'The Euro and Sterling Choice Bill', which is considered in Ch 2.

point that foreign money cannot be tendered in discharge of an obligation to pay pounds sterling.[250]

(c) It is submitted that foreign money is negotiable in England. Negotiability merely means that an instrument is capable of being transferred by endorsement or delivery (rather than by assignment), and such transfer takes effect free from prior equities or claims, even where the note concerned has previously been stolen. Banknotes and coins are, of course, invariably transferred by delivery and the negotiability of such instruments in England should be accepted by a court without further evidence.[251] It is true that, in a case involving the negotiability of Prussian State bonds, evidence that those bonds were negotiable in Prussia was not sufficient to confer upon them negotiable status in England. To hold otherwise would, according to the Court of Appeal, mean that German currency would be identical to its equivalent in English money.[252] This approach to the problem is, it is suggested, flawed; at least in the modern context, the only material distinction (in England) between sterling and foreign currency is that the former serves as legal tender for debts expressed in sterling, whilst the latter currency plainly does not fulfil that function.

(d) A number of statutory instances may be cited which confirm that foreign money is to be regarded as 'money' within the United Kingdom. Many Acts of Parliament include specific provision to this effect. For example, the Companies Act 2006 allows that shares which are to be paid up in 'cash' may be paid for in foreign currency.[253] For stamp duty purposes, 'money' is again stated to include foreign currency,[254] and rules which criminalize the forgery of money in the United Kingdom apply equally to foreign money as they do to sterling.[255] It is perhaps fair to say that, if statutory references to 'money' are given their ordinary and natural meaning, then the term will usually include

[250] On the discharge or performance of monetary obligations generally, see Ch 7. As noted in Ch 2, the identification of legal tender remains a feature of all legislation which creates a monetary system, but the concept of legal tender is of ever-diminishing importance.

[251] This is the position in New York—see *Brown v Pereira* (1918) 182 App Div 992; 176 NY Supp 215 (Supreme Court of New York).

[252] *Picker v London & County Banking Co* (1887) 18 QB 515, 510, approved in *Williams v Colonial Bank* (1888) 38 CR D 388, 404, affirmed (1890) 15 AC 267.

[253] See ss 738(4) and 739(1) of the 2006 Act and the discussion of the predecessor legislation in *Re Scandinavian Bank plc* [1987] 2 All ER 70.

[254] Stamp Act 1891, s 122.

[255] See Forgery and Counterfeiting Act 1981, s 27(i)(b) and Counterfeit (Currency) Convention Act 1935, s 1. In Australia, it was held that the words 'currency, coinage and legal tender' in s 51(xii) of the Australian Constitution include foreign money; with the result that it was within the powers of the Government to make regulations controlling the export of foreign money: see *Watson v Lee* (1979) 144 CLR 374, 396, approved in *Leask v Commonwealth of Australia* [1996] HCA 29 (High Court of Australia). The practice of punishing the falsification of foreign money is well established and reflects an obligation arising under international law. In this context, see the interesting decision of the US Supreme Court in *US v Arjona* (1887) 120 US 479 and the general discussion on this subject in Ch 20.

foreign money, as well as sterling.[256] Following the *Camdex* decision which has already been noted, references to 'money' will perhaps more generally be taken to include both the domestic unit and foreign money.[257]

(e) An action for money had and received can be brought regardless of the currency in which the relevant funds were received, and it follows that foreign currency is 'money' for the purposes of this type of action.[258]

(f) An obligation to pay a fixed sum in a foreign currency may be a 'debt', with the result that it can provide a basis for a statutory notice leading to a winding-up petition.[259]

1.87 Of course, the fact that an obligation is expressed or payable in a foreign currency may have specific consequences before the English courts. For example, sterling must be regarded as a constant measure of value because that is the role which a currency performs within the context of its domestic legal system[260] but a foreign currency may appreciate or depreciate in value as against sterling. Such movements clearly have commercial consequences and may also have legal implications. Issues of a legal character have tended to arise in the context of taxation matters. For example:

(a) In one case,[261] a company was obliged to pay interest in respect of debentures issued by it. Bondholders could either accept the sterling amount of interest payable in London or (alternatively) they could present their warrants for payment in New York, receiving payment in US dollars at a preset exchange rate of US$4.86 to one pound. Under what is now section 349(2) of the Income and Corporation Taxes Act 1988, the company was obliged to withhold 25 per cent of the interest payable to bondholders and to despatch these sums to

[256] *The Halcyon The Great* [1975] 1 WLR 515; *Daewoo v Suncorp-Metway* [2000] NSWSC 35 (New South Wales Supreme Court).

[257] In many cases, the relevant legislation will make the point clear. For a recent example, see Art 3 of the Financial Collateral Arrangements (No 2) Regulations 2003, SI 3226/2003, where 'cash' is defined to mean 'money in any currency credited to an account, or a similar claim for repayment of money and includes money market deposits'. In contrast, the Supreme Court of Victoria declined registration of a mortgage to secure a US dollar obligation, on the grounds that (i) a mortgage could only be registered to secure payment of 'money', and (ii) as a foreign currency, US dollars fell to be treated as a commodity, rather than money: *Bando Tading Co Ltd v Registrar of Titles* [1975] VR 353.

[258] See, eg, *Harrington v MacMorris* (1813) 5 Taunt 228 and *Ehrensperger v Anderson* (1848) 3 Exch 148, where actions for money had and received were allowed to proceed even though the moneys concerned had been advanced in India in the local currency (and not in sterling). The contrary decision in *McLachlan v Evans* (1827) 1 Y & J 380 cannot stand.

[259] *Re Rickett, ex p Insecticide Activated Products Ltd v Official Receiver* [1949] 1 All ER 737; *Sturdy Components Pty Ltd v Burositzmobelfabrik GmbH Friedrich W Dauphin GmbH* [1999] NSWSC 595 (New South Wales Supreme Court) and *Daewoo v Suncorp-Medway* [2000] NSWSC 35 (New South Wales Supreme Court). The last-mentioned case considers and largely dismisses the commodity theory of foreign money.

[260] See *Treseder-Griffin v Co-operative Insurance Society* [1956] 2 QB 127 (CA). See also para 8.10.

[261] *Rhokana Corp Ltd v IRC* [1938] AC 380 (HL).

the Revenue on account of the tax liability of the holder. On despatching the warrants, the company thus paid to the Revenue 5 shillings per pound. When some of the warrants were cashed in New York at the fixed rate of exchange, the holders in fact received significantly more than the equivalent of one pound because, by that time, only US$3.39 was required to purchase one pound sterling. As a consequence, the Revenue argued that the amount deducted should have been 25 per cent of the larger sum received by the bondholders concerned. At first instance, the Revenue's claim was dismissed on the grounds that foreign money was a commodity and thus could not be regarded as 'interest of money' for the purposes of the statutory rule.[262] Given that US dollars were being used as a means of payment, this view was not sustainable even by reference to the broader commodity theory discussed earlier in this section; it is even less sustainable in the light of the *Camdex* case. The Court of Appeal reversed this ruling, mainly on the grounds that the phrase 'interest of money' was apt to include foreign currency obligations and everything which, in a commercial sense, could be said to constitute a 'payment'.[263]

(b) The Court of Appeal has rightly held that—for income tax purposes—profits arising from the sale of US dollars were to be treated as a trading profit and taxable accordingly.[264]

(c) Foreign currency (but not sterling) is a chargeable asset for capital gains tax purposes—one may gain or lose as a result of disposing of foreign currency.[265] This is consistent with the strict legal view expressed earlier, namely that (so far as English law is concerned) the pound does not gain or lose value,[266] but other currencies can gain or lose value in relation to it, thus creating a taxable gain or profit.

1.88 It is perhaps fair to say that these instances do not really reflect upon the status of foreign currencies before the English courts. They merely illustrate the incontrovertible facts that

(a) in the United Kingdom, taxation will usually be assessed in or by reference to sterling amounts;[267]

(b) so far as English law is concerned, sterling is a uniform and unchanging measure of value;[268] and

[262] [1936] 2 All ER 678.

[263] [1937] 1 KB 788 (CA).

[264] *Landes Brothers v Simpson* (1934) TC 62; *Imperial Tobacco Co Ltd v Kelly* [1943] 2 All ER 119. But a different view was taken in *McKinlay v HT Jenkins & Sons* (1926) 10 TC 372 and *Davies v The Shell Company of China* (1951) 32 TC 133. See Anon, 'Taxation of Foreign Currency Transactions' (1952) 61 Yale LJ 1181. See also *Pattison v Marine Midland Ltd* [1984] 1 AC 362, noted at para 7.79.

[265] Taxation of Chargeable Gains Act 1922, s 21(1)(b).

[266] See the opening comments in this para.

[267] Compare the Privy Council decision to the effect that a reference in the Australian income tax legislation to 'pounds' referred to units of Australian currency and that a tax assessment had to be made in that currency even though the underlying income had been earned in British pounds: see *Payne v Federal Commissioner of Taxation* (1936) 55 CLR 158.

[268] *Treseder-Griffin v Co-operative Insurance Society* [1956] 2 QB 127 (CA).

(c) transactions in foreign currencies and fluctuations in their value (relative to sterling) may create profits, gains, or losses which may have an impact upon the ultimate sterling tax liabilities.

1.89 Apart from these relatively specialist cases, it is suggested that—so far as the English courts are concerned—sterling and foreign currency obligations fall to be treated in an essentially similar manner, for example as regards the payment of interest,[269] performance,[270] the consequences of breach, and other matters.[271]

[269] The identity of the currency concerned may of course have an impact on the *rate* of interest, but will not normally affect the *right* to it.

[270] It should be noted that so far as the English courts are concerned, a sterling obligation must be performed by payment in sterling. Where a foreign currency obligation is payable in England, the debtor has the option to pay either in the stipulated currency or in sterling—see para 7.30.

[271] Of course, transactions involving foreign currencies may raise specific conflict of law issues. But that is equally true of other factors which may affect a transaction, such as the place of payment or the residence of the parties. It should also be emphasized that the view expressed in the text is by no means universally held. For example, although the conclusions to be drawn from the *Camdex* decision are stated in similar terms in Brindle and Cox (eds), *The Law of Bank Payments* (Sweet & Maxwell, 3rd edn, 2004) para 2-009, the authors do doubt some of the reasons for the decision and maintain that foreign currency could helpfully be treated as a commodity in a variety of cases and for different purposes. In particular, they argue that:

(a) if a contract to exchange one foreign currency for another is treated as two parallel obligations to pay money, then one party could insist that the obligations be set off, so that only a net amount would be payable by one party. As the authors rightly point out, such a result would usually be absurd, because the object of the transaction is to make available to each party the *gross* amount of the required currency in order to meet with some other obligation expressed in that currency. But it is submitted that, in such a case, it will not be difficult to imply into the contract a term which excludes any right of set-off, if that reflects both the obvious intention of the parties and the custom of the market in which their contract is made. It is true that the *Camdex* case involved a statutory (rather than a contractual) obligation to pay over foreign currency in exchange for Zambian kwacha. But the purpose of such laws is to ensure that foreign exchange resources are made over to the State; again, the exclusion of a right of set-off should therefore be a relatively straightforward matter of statutory interpretation;

(b) relying upon the decision in *Richard v American Union Bank* (1930) 253 NY 166, 170 NE 532, the authors also point out that, in the context of a breach of a foreign exchange contract, it would be easier to recover damages for a fall in the value of the relevant currency if it were viewed as an obligation to deliver a currency, rather than as a simple debt obligation. Following the decision in the *Camdex* case, and as a result of the decision in *President of India v La Pintada* [1985] 1 AC 104, damages for a reduction in the value of a currency would only be recoverable under the second limb of the rule in *Hadley v Baxendale* [1854] 9 Exch 341, ie where the loss would only have been in the contemplation of the parties as at the date of the contract. This line of argument is plainly right and, in the view of the present writer, represents one of the best arguments in favour of preserving the 'commodity' treatment of foreign money under these circumstances. As a practical matter, however, it may be hoped that the courts would resolve the problem by allowing claims for monetary depreciation. If, eg, a business customer asks a bank to provide a set amount of US dollars against sterling on a specific date, the bank will know that the customer requires those dollars on that day to meet a dollar obligation to a third party; it will likewise know that the customer will have to obtain those dollars from elsewhere if the bank fails to provide them and that the sterling cost of doing so may have increased. It should not therefore be too difficult to bring such losses within the second 'limb' of *Hadley v Baxendale*. The possibility of recovering such losses was noted in *Barclays Bank (International) Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270.

1.90 It should be said, however, that there remains some modern authority that would differentiate more sharply between domestic and foreign currencies. For example, the Australian Currency Act 1965 acknowledges—admittedly by implication—that transactions can lawfully be entered into by reference to a foreign currency.[272] Although not strictly inconsistent with these sections, it is necessary to note the decision of the Federal Court of Australia in *Conley & another v Deputy Commissioner of Taxation*.[273] In that case, the tax authorities served on a bank a statutory demand to pay over monies held in a taxpayer's US dollar account with the bank's Sydney branch. The notice required the bank to pay over an amount sufficient to meet outstanding taxes of some A$50,000,000. In the light of the commodity theory of money, there was some discussion as to whether the US dollar account was 'money' for the purposes of the legislation. The court did not explicitly decide this issue, although it referred to an earlier decision to the effect that a foreign money obligation should be regarded as an obligation of debt, rather than delivery.[274] Nevertheless, the court held that the notices were invalid because they did not stipulate for a rate or mode of conversion. *Conley* was later cited as authority for the proposition that the legislation referred only to Australian currency and not to foreign money.[275] On the other hand, the Supreme Court of New South Wales has held that a debt expressed in German marks could provide the grounds for a statutory notice leading to the winding up of a company, even though the required form of notice specifically contemplated that the relevant debt had to be expressed in Australian dollars.[276]

N. Eurocurrencies

1.91 The enormous growth of the eurocurrency market over recent decades requires that a section should be devoted to a discussion of its characteristics.[277]

[272] See in particular ss 9 and 11(1) of the 1965 Act.

[273] [1998] FCA 110.

[274] *Vehicle Wash Systems Pty Ltd v Mark VII Equipment Inc* [1997] FCA 1473 (Federal Court of Australia), suggesting that the decisions in *Jolly v Mainka* (1933) 49 CLR 242 and *Vishipco Line v Chase Manhattan Bank NA* 754 F 2d 452 (1985) may require reconsideration. On these cases, see paras 2.59 and 18.41.

[275] *Laming Holding BV v Commissioner of Taxation* [1999] FCA 612 (Federal Court of Australia).

[276] *Sturdy Components Pty Ltd v Burositzmobelfabrik Friedrich W Dauphin GmbH* [1999] NSWSC 595. In relation to the problems caused by foreign currency claims in the insolvency sphere, see paras 8.23–8.29.

[277] On the origin of the eurocurrency market, see Stigum, *The Money Market* (McGraw Hill, 3rd edn, 1989); Carreau and Juillard, *Droit international économique*, paras 1564–1582. As the writers point out, no work exists which seeks to provide a comprehensive legal analysis of the eurocurrency market. However, much valuable material and commentary is to be found in Robinson, *Multinational Banking* (Sijthoff, 1972). See also Carreau, 'Deposit Contracts' in *International Contracts* (materials reprinted from the proceedings at the Columbia Law School Symposium on International Contracts, Matthew Bender & Co, 1981).

1.92 The term, 'eurocurrency' is generally taken to refer to a deposit denominated in a currency other than that of the country in which the deposit-holding branch is situate.[278] Eurodollars are thus US dollars deposited with and payable by a bank outside the United States.[279]

1.93 In order to assist in a consideration of the legal nature of eurocurrencies, it may be as well to provide some historical background. The creation of the eurodollar market[280] is a fascinating and complex subject, but a brief discussion must suffice for the present purposes. The eurodollar market originally came into being for essentially economic reasons. During the course of the 1960s and 1970s, the United States spent heavily overseas for defence, investments, and imports. The United States thus began to incur substantial trade and payment deficits and, as a result, substantial quantities of US dollars accumulated in foreign hands abroad.

1.94 The eurodollar market thus has its origins in US trade deficits, but the growth of the market was fuelled by a combination of regulatory factors. First of all, regulatory policy in the US prohibited the payment of interest on current accounts and limited the rates payable on time deposits. Furthermore, reserve requirements were imposed on US dollar liabilities of banks within the US itself; federal deposit insurance premiums were assessed with reference to the domestic base of dollar liabilities but the corresponding liabilities of overseas branches were excluded from this calculation. As a result, it was possible to obtain a higher rate of return on eurodollars than was available on its purely domestic counterpart. Developments in 1964 and 1965 then led to massive growth in this market. In 1964, the United States enacted its interest equalization tax; this amounted to a tax on the export of capital and effectively barred both American and foreign companies from using the financial markets in the United States to finance their operations outside that country. In 1965, the effect of this tax was reinforced by new regulations on foreign direct investment and by the Federal Reserve Board's Voluntary Foreign Credit

[278] See Smedresman and Lowenfeld, 'Eurodollars, Multinational Banks and National Laws' 64 NY University LR 733 (October 1989).

[279] The US Supreme Court defined eurodollars as 'United States dollars that have been deposited with a banking institution located outside the United States with a corresponding obligation on the part of the banking institution to repay the deposit in United States dollars': *Citibank NA v Wells Fargo Asia* (1990) 495 US 660. The expression 'eurocurrency' results from the original growth of the eurodollar market in London, but the definition is of general application. A more complete definition is given by Carreau and Juillard, *Droit international économique*, para 1585:

> un dépôt international de monnaie étrangère peut être simplement défini comme l'opération selon laquelle une personne (le déposant) place (dépose) pour une durée limitée (le terme) une somme d'argent, exprimée en une monnaie nationale donnée, dans une banque (le dépositaire) située en dehors du pays d'émission de celle-ci, à charge pour la banque de payer un intérêt et de restituer le principal à l'échéance convenue.

[280] Reference will be made throughout to the eurodollar market since it is obviously the predominant one, but any currency can be a 'eurocurrency' if it is deposited with a bank outside the currency of issue. As will be noted, however, participation in the eurodollar market is confined to financial institutions.

Restraint Program. Borrowers seeking to fund their overseas activities in US dollars were thus pushed towards the eurodollar market.[281] The eurodollar market thus developed in order to allow transactions in US dollars outside the regulatory framework of the issuing State.

1.95 The eurodollar market itself is principally a market which subsists between large banks and financial institutions. These banks will place deposits with each other for relatively short periods[282] and they will carry interest at the market rate prevailing when the deposit arrangement is agreed. The recipient institution will then use the deposit as a means of funding a transaction for a customer. Apart from eurocurrency loans, the existence of such large pools of dollar deposits also led to the growth of the eurobond market. Since eurobonds are bearer instruments, it has not always been easy for governments to ensure that interest paid on such instruments is declared and assessed for taxation purposes.[283]

1.96 It may also be instructive to consider how a 'eurodollar' comes into existence. Suppose that A holds a dollar deposit with B Bank in the United States. A decides to transfer that deposit to C Bank, which is located outside the United States. As a result, A has a US dollar deposit with (or claim against) C Bank whilst C Bank has a corresponding claim against B Bank. At this point, A's eurodollar deposit is in many ways merely an indirect means of holding a dollar deposit with a bank within the United States.[284] At this point, however, one can begin to grasp the 'multiplier' effect of the eurodollar market. C Bank has an asset in the form of proceeds of the deposit which has been placed with it. C Bank could thus lend those dollar funds to a borrower. He may in turn use them to acquire assets or investments. The seller may then elect to deposit those dollar proceeds with another bank outside the United States, D Bank. It will be seen that the first deposit originating within the United States has spawned a whole series of assets and liabilities, each of which are equivalent in amount to the first deposit. To this extent, it may be said that the operation of the banking system actually *creates* eurodollars. The eurodollar market is in many respects unregulated and, of course, this is one of the main

[281] On the points just made, see Pigott, 'The Historical Development of Syndicated Eurocurrency Loan Agreements' in *Selected Legal Issues for Finance Lawyers* (Lexis Nexis UK, 2003) 247. For discussion of the eurodollar market and the reasons for its growth in London, see Schenk, 'The Origins of the Eurodollar Market in London 1955–1963' (1998) 35(2) *Explorations in Economic History* 221.

[282] One, three, or six months would be typical maturities but the precise period would be subject to agreement between the institutions concerned.

[283] The difficulty is well illustrated by a decision of the ECJ. The Kingdom of Belgium issued bearer bonds in the euromarket. In an effort to ensure that these were not used as a means of avoiding Belgian taxation, the terms of the bonds specifically prohibited their acquisition by residents of that country, but the Court held that this was an insufficient justification for a restraint on the free movement of capital: Case C-478/98 *Commission v Belgium* [2000] ECR I-7857. See also Case C–242/03 *Ministre des Finances v Weidert* ECR I-7379.

[284] It is appreciated that this analysis is not attractive from a legal perspective, but it perhaps reflects the financial realities of the position.

attractions to those involved in the market. As will be seen below, this state of affairs has consequences for the status of eurodollars as 'money'.

1.97 This very brief introductory survey provides the factual matrix against which to answer a question which must be considered in a monetary law context, namely, what is the legal nature of the eurodollar?

1.98 It is very clear that eurodollars could not be treated as 'money' under the former State theory of money, for such dollars do not exist in physical form. But the revised State theory merely attributes to the legislature the power to define the unit of account which is intended to form the domestic medium of exchange. Eurodollars are clearly denominated by reference to a domestic unit of account which is intended to serve as the general medium of exchange in the United States. If, as they plainly do, dollars serve that purpose in the United States, then they constitute 'money'; and dollars cannot forfeit their characterization as 'money' merely because they are held outside the country of origin. This formulation, however, gives rise to a further conceptual difficulty because of the 'multiplier' effect which was described earlier—eurodollars are created by the banking system outside the United States, and it is thus difficult to describe the United States as the country of origin at all. This state of affairs has led some writers to conclude that money may exist both in a *public* and *national* form, and also in a *private* and *international* form.[285] If this distinction is accepted, then it is plain that it is the location of the deposit-holding bank which is key to the existence of the eurodollar; that bank must be situate outside the United States. A deposit with a US bank at one of its branches within the United States is simply a deposit in the national currency; an inter-bank deposit in dollars with the London branch of the same bank is a eurodollar deposit. It is possible to identify other characteristics which distinguish eurodollar from national currency obligations. For example, because of the amounts involved, payment will be made by means of a bank transfer, rather than through any other medium.[286] Equally, a bank which accepts a eurodollar deposit will receive the proceeds of that deposit by means of a credit to its own account with an institution within the United States and, as has been shown, that is a 'national dollar' credit rather than a 'eurodollar' credit. Every eurodollar deposit is thus ultimately 'mirrored' by a national currency deposit held through the correspondent banking network.[287]

[285] Once again, the increasing role of private law in the monetary field should be noted. For the suggestion made in the text, see, Carreau and Juillard, *Droit international économique*, para 1567, where the authors speak of 'deux "monnaies" différentes, l'une publique et nationale qui est la monnaie support (ou sous-jacente) et l'autre privée et transnationale qui est la monnaie "dérivée"'. For further discussion on this subject, see Carreau, 'Le système monétaire international privé (1998) 274 Rec 313.

[286] Although see the situation which arose in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728. The case is discussed at para 7.11.

[287] On these and other points, see Carreau and Juillard, *Droit international économique*, paras 1586–1587.

1.99 In terms of their legal analysis, both a eurodollar deposit and a national deposit involve a debt claim against the institution which has accepted the deposit.[288] Furthermore, the eurodollar claim, as much as the national currency, is subject to the laws of the country which issues that currency—the *lex monetae*—in two particular aspects.[289] First of all, the issuing State is at liberty to redefine its monetary system and to change the unit of account. Even in the context of a eurodollar (international) deposit, the parties have inescapably contracted by reference to the US dollar. Any change in that unit of account would thus be applied to the eurodollar contract, for a monetary obligation implies an obligation to pay in whatever is the lawful currency of the issuing State *when the payment falls due*.[290] Secondly, it has been noted that a eurodollar deposit is ultimately mirrored by a corresponding national deposit. Partly, as a consequence of that position, the reciprocal payments involved in a eurodollar deposit contract ultimately involve a transfer through or affecting the clearing system of the issuing State.[291] Fundamental questions of performance may thus in practice be affected by the laws of the issuing State, even though the contract itself may be governed by a different system of law.[292] At least in theory, therefore, a eurodollar deposit involves a greater degree of legal risk for it is at the mercy of both the *lex monetae* in the extended manner just described, and the law applicable to the contract.[293]

1.100 Is it possible to draw any meaningful conclusions from this general discussion? One is left with the impression of a currency which lacks a 'country of issue' in the sense in which that expression was understood in the context of the more traditional State theory of money. To the extent to which eurodollars can be regarded as 'money',[294] it may be said that they exhibit features of both the State and the

[288] See Carreau and Juillard, *Droit international économique*, paras 1586–1587. The position is the same in England—see *Foley v Hill* (1848) 2 HLC 28; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110; *Rowlandson v National Westminster Bank Ltd* [1978] 1 WLR 803.

[289] On the *lex monetae* principle generally, see Ch 13.

[290] On this subject, see para 9.03.

[291] In part, this is because the settlement of dollar transactions involves sizeable overdrafts among participants on any given day, and these can only safely be undertaken in the context of the Federal Reserve's function as lender of last resort—see Smedresman and Lowenfeld, 'Eurodollars, Multinational Banks and National Laws' (October 1989) 64 NY University LR 733. Further, the effect of a wholesale eurodollar transaction is to transfer dollars from the reserve account of the Federal Reserve to the reserve account of another bank. Evidence to that effect was given by Dr Marcia Stigum in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 but was rejected by the Court.

[292] The contract would usually be governed by a different system of law because, by definition, eurodollar deposits are held with banks outside the US, and such deposit contracts will usually be governed by the law of the place in which the account is held.

[293] On the points made in this paragraph, see Carreau and Juillard, *Droit international économique*, paras 1603 and 1609. It must, however, be said that, where the contract creating the eurodollar deposit is governed by English law, the exposure to the *lex monetae* is limited because English law does not recognize the transfer through the US clearing system as the fundamental feature of performance—see *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728.

[294] For the reasons discussed at para 1.57 in relation to bank deposits generally, it is submitted that eurodollars can be regarded as 'money' at least once the maturity date has arrived.

Societary theories of money. The connection with the State theory stems from the inescapable link to the *lex monetae* and the unit of account prescribed by it. On the other hand, the eurodollar market came into being and enjoyed its massive growth outside the country which issues that currency and without the formal or official sanction which may be regarded as an implicit requirement of the traditional State theory. Thus, if eurodollars are 'money', they owe their existence, at least in part, to their acceptance as a means of payment by financial institutions executing transactions within a private law framework—in other words, to the Societary theory of money.[295]

1.101 It is fair to conclude that, whilst the State theory remains dominant within the field of monetary law,[296] the growth of the eurodollar market has breathed some new life into the Societary theory.

[295] It must, however, be said that English law does not at present accept any distinction between eurodollars and other foreign currency claims, and thus affords no special status to eurocurrencies. This conclusion is a necessary consequence of the decision in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, where the court rejected the suggestion of an implied term depriving the creditor of the right to receive payment in cash. See also the discussion at 63–4 of the fifth edition of this work. It should be added for completeness that the US Supreme Court likewise had an opportunity to consider the eurodollar market in *Citibank NA v Wells Fargo Asia* (1990) 495 US 660. The court below apparently tended to the view that—wherever they were made—eurodollar deposit contracts should be governed by New York law, since they were ultimately to be settled there. This reflects the greater importance which US courts have tended to ascribe to the place of performance as a feature in identifying the governing law of the contract. The case was, however, principally concerned with the liability of the head office of a bank for deposits placed with its overseas branches. For an illuminating discussion of the earlier stages of this litigation, see Smedresman and Lowenfeld, 'Eurodollars, Multinational Banks and National Laws' (October 1989) 64 NY University LR 733.

[296] It is submitted that this must be so, given that the creation of the euro is both a very recent and very important illustration of that theory. On the whole subject, see Chs 29 and 30, where the legal framework for the euro is considered.