

FOURTH EDITION

THE LEGAL ASPECT OF MONEY

WITH SPECIAL REFERENCE
TO COMPARATIVE
PRIVATE AND PUBLIC
INTERNATIONAL LAW

F.A. MANN

THE LEGAL ASPECT OF MONEY

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

BY

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PREFACE TO THE FOURTH EDITION

Studeamus ergo nec desidiae nostrae praetendamus alienam. Sunt qui audiant, sunt qui legant, nos modo dignum aliquid auribus dignum chartis elaboremus.—Pliny iv.16.

So let us pursue our studies rather than make the idleness of others the pretext for our own. There are always those who listen and those who read. It is for us to labour towards what is worth being heard or printed.

SINCE the publication of the third edition in 1971 radical changes have transformed the law of money: inflation which resulted in a depreciation of the pound's internal purchasing power by more than 70 per cent between the beginning of 1971 and 1981 and rendered it necessary to reorganize and enlarge the first part of this book; the increase of comparative material, largely due to the universal existence of inflation,—during the ten years mentioned the purchasing power of the U.S. dollar fell by more than 50 per cent and that of the Deutsche Mark by about 65 per cent; the failure of monetary economists to agree on the causes of or a remedy for our economic ills or even to describe the problems in terms of acceptable simplicity such as is required by Sir Winston Churchill's wise and prescient words which served as the motto to the Preface to the third edition; the collapse of the International Monetary Fund's par value system in 1971, the consequent floating of currencies, including sterling, and the absence of an effective international monetary system; the demonetization of gold, the commercial price of which at times increased about twenty times; the creation of the European Monetary System; the emergence of basket clauses such as the ECU and the Special Drawing Right (though, in another sense, the former is being used as a unit of account and the latter also has the different function of providing intergovernmental credit facilities); the vast expansion of 'Euro-currencies'; the much delayed lifting of exchange control in Britain thirty-five years after the end of the war,—since it was effected by a general consent rather than abrogation of the legislation, it seemed advisable to retain Chapter XIII, particularly since it still appears to be the only available attempt at a rational and systematic analysis of the Act; the sensational decision of the House of Lords in *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443, provoked by an equally sensational, but in the Preface of 1970 hoped for, step taken by Lord Denning's Court of Appeal in

Schorsch Meier G.m.b.H. v. Hennin, [1975] Q.B. 416, and the total change, long advocated in this book, which it caused to the whole of English law on foreign money obligations. I am conscious of the good fortune that permitted me to make a fourth edition available, which, while leaving unchanged the general character, purpose, and scope of the book as described in the earlier Prefaces, attempts to take care of these and other developments and states the law as at 1 May 1981.

I have to thank many foreign friends who were kind enough to send me interesting material which otherwise I would probably have overlooked—even so the comparative surveys do not claim to be complete or unerring; the book by Professor Lopez-Santa Maria on *Le Droit des obligations et des contrats et l'inflation monétaire: Chili et droits hispano-américains* (Paris, 1980) became available while the manuscript was in the hands of the printer and could be taken into account only in exceptional cases. I also have to thank Miss Claire Dillon, B.A. (Oxon.), who prepared the Tables of Cases and the Index and helped in correcting proofs.

Once again this Preface is being written on the day on which forty-eight years ago I married. But she to whom veiled tribute was thus paid and intended to be repeated today, died almost a year ago. Let this book be a means of remembering and honouring 'uxorem singularis exempli'.

F. A. M.

London

12 October 1981

PREFACE TO THE THIRD EDITION

There is no sphere of human thought in which it is easier for a man to show superficial cleverness and the appearances of superior wisdom than in discussing questions of currency and exchange.

Sir Winston Churchill, *Hansard*, vol. 468, col. 160
(28 September 1949).

ALTHOUGH the prefaces to the previous editions have been reprinted and, in essence, the present edition which states the law as at 1 October 1970 leaves the character of this book unchanged, it may be as well, probably for the last time, to explain its purpose and scope.

It is a book about money. This is a conception which means many different things to different readers. If a lawyer decides to shut out certain subjects, his decision is not necessarily wrong merely because others may expect them to be included. The law of bank or postal Giro accounts or the law relating to Treasury Bills or the Bank Rate or credit or financial transactions between international persons—these are only some of the many matters which a book on money could legitimately discuss. The present one does not do so, because a line had to be drawn somewhere and there seemed to be strong arguments for drawing it at the point which leaves intact such distinct, or at least distinguishable, branches of the law as, for instance, banking and finance, negotiable instruments, or the status and function of the Central Government and the Bank of England within the framework of the country's financial organization.

This is a book about the law of money. It is not a book about economics, finance, sociology, political science, or history. To the lawyer economic life and its incidents are facts which, if and in so far as they are material to the elaboration or application of legal rules, depend on evidence. Just as a book on the sale of goods does not usually discuss, for instance, the causes of variations in demand and supply or the practices adopted by various trades, so a book on the law of money should not, and the present work does not, venture outside the boundaries of the strictly legal approach. Thus the origin, growth, and function of that misnamed and by no means novel phenomenon, the Euro-currency market, or problems of the supply of money or the management of exchange rates cannot be explained or even described within the covers of this book. Similarly the law

has to accept the remarkable fact that, while man has conquered the moon, he has signally failed to conquer the problem of the value of money, its stability and its relationship with full employment, credit, and economic growth. A lawyer will refrain from entering unfamiliar territory, for he is much too conscious of the wisdom of that great man's words which form the motto to this Preface and which, alas, have remained largely unheeded.

This is a book on the English law of money. There is no law of money that is common to the nations of the world. But money is a universal institution. Hence the comparative method has peculiar value. It discloses where English law has adopted the right or the wrong road. The lesson, however, is useless if practical conclusions are not drawn from it. Chapter X dealing with the effect of legal proceedings upon foreign money obligations, is the foremost example of a field which English law has stubbornly refused to plough afresh in accordance with foreign experience and objectively ascertainable principles of logic and justice. This country's failure even to consider the European Convention on Foreign Money Liabilities, printed in Appendix IV, is explained, though not necessarily excused, by the majority Report of the (unfortunately defunct) Standing Committee on the Reform of Private International Law (Cmnd. 1648). Now Lord Denning has, perhaps somewhat surprisingly, decried the present state of the English law,—compare his speech in *Re United Railways of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007, at pp. 1067, 1068, with the pronouncement heading Chapter X. Perhaps the Master of the Rolls's voice will succeed where, for more than thirty years, others have failed.

The fact that this book is devoted to English law imposes some limits upon the use of foreign material, for not all of it is of potential interest to the English lawyer. Such is the test that was applied throughout; it accounts for most omissions of foreign sources, which have occurred, although, no doubt, some of these have been overlooked inadvertently.

On the other hand the concern with English law does not by any means exclude, but, on the contrary, demands the consideration of such rules of public international law as bind Britain. The development in this branch of the law has been so rapid and far-reaching that the fourth Part of the book has probably been more thoroughly changed than any other, though all parts have been fully revised and brought up to date and many have been rewritten. In that connection the course of lectures on *Money in Public International Law* given at the Hague Academy of International Law (Recueil 96 (1959 i) 1) has, with the kind permission of the Academy's

Curatorium, to some extent been incorporated into the present work.

A German translation of the second edition appeared in 1960. A German translation of the present edition is planned.

F. A. M.

London

12 October 1970

PREFACE TO THE SECOND EDITION

SINCE the first edition of this book appeared in October 1938 the legal aspect of money has undergone radical changes. In preparing the second edition it thus became necessary, while retaining the broad character of the work, to write what to a large extent can only be presented as a new book.

Those changes arise from four causes, viz. the establishment of the International Monetary Fund by the Articles of Agreement, concluded by forty-four nations in July 1944 at Bretton Woods and at present binding upon fifty-four nations; the introduction of exchange control in this country and the extension of exchange control over the greater part of the world; the depreciation of money during and after the Second World War which in some countries led to the ruin of the existing, and the creation of new, currency systems and which in this country provoked devaluation in September 1949; and the very considerable amount of new, or old but newly discovered, material. Many important decisions rendered both in this country and abroad had to be considered. The literature on the subject was greatly enriched by Professor Nussbaum's book on *Money in the Law*, of which two editions appeared in 1939 and 1950 respectively, and by discussions in almost all modern textbooks on Private International Law, particularly in the sixth edition of Dicey's *Conflict of Laws* to which more than forty pages dealing with foreign currency obligations were contributed by Professor Kahn-Freund.

The present edition of this book contains eight new chapters. Chapter VII takes the place of the inadequate discussion on pp. 197-200 of the former edition and incorporates portions of an article published in the *Law Quarterly Review* of 1952. Chapters XI to XIV constitute an elaboration of problems of exchange control and of the rate of exchange, which was necessitated by the events referred to above; the substance of Chapter XIII was published during the current year in the *International and Comparative Law Quarterly*, while Chapter XIV is in many respects founded upon a paper published in 1944 in the *Modern Law Review*. Finally, Chapters XV to XVII are new, though they almost repeat what appeared in the *British Year Book of International Law* for 1949. The author is indebted to the editors of these four publications for their

permission to make use of this material. The rest of the book has been extensively revised and although in some places it was possible to shorten the discussion, the book exceeds the size of the first edition by more than half.

F. A. M.

London

12 October 1953

PREFACE TO THE FIRST EDITION

'Although the civil law is not of itself authority in an English Court it affords great assistance in investigating the principles on which the law is grounded.'—Blackburn J. in *Taylor v. Caldwell* (1863), 3 B. & S. 826.

IN general words, the object of this work is to treat the legal aspects of money in a systematic and comprehensive manner. There were, however, so many obstacles on the way to this goal which the author was unable to overcome in their entirety, that he must ask for the reader's indulgence. In support of this plea for leniency a few observations may perhaps be offered.

The first cause of the difficulties lies in the fact that there does not seem to exist any English (or American¹) work dealing with the subject as defined above. The century from the end of the Bank Restriction period to the outbreak of the Great War in 1914, which witnessed so rich a development in the field of law, was marked by an unheard-of stability of economic and, consequently, of monetary conditions. It is, therefore, not surprising that lawyers were led to regard money, not as a problem of paramount importance, but as an established fact. This security was not shaken until the great and sometimes even chaotic disturbances of the monetary systems with which every country has been visited since 1914,² and which deeply imprinted themselves on the economic situation and the law not only of foreign countries but also of this country. Though it was never doubted that, whatever happened, the pound sterling remained the same in character and (internal) value, business men and courts were confronted with many intricate questions which originated from the depreciation or collapse of foreign currencies or from the changes in the international value of the pound. Thus, many important decisions of the English courts came into being, and yet it is probably no exaggeration to say that, in so far as the fundamental legal problems of money are concerned, the observations of Sir John Davis on the *Case de Mixt Moneys*³ still were the only English source of information, and that in respect of many questions of

¹ The book by Bakewell, *Past and Present Facts about Money in the United States* (New York, 1936), is only of very limited value.

² A survey is given by Griziotti, 'L'Évolution monétaire dans le monde depuis la guerre de 1914', *Rec.* 1934 (48), pp. 1 sqq.

³ (1604) Davis's Rep. (Ireland) 18.

detail there was no guidance at all in the otherwise rich treasures of the common law. There is obviously a gap to be filled, but, in view of the lack of preliminary studies on the one hand, and the immense number of problems and foreign material on the other, this gap is so great that it could not be attempted to give more than a first introduction on the lines of a general survey of and a guide to an inaccessible, though theoretically fascinating and practically vital, part of the law.

The choice of problems suitable for and requiring discussion has been restricted to three groups. In the first place, all those questions have been included which, for the sake of systematical elucidation, had to be answered; for it is believed that the subject demands particular care in putting and arranging the questions, in drawing clear distinctions and demarcations, and in working a way through the labyrinth of material. Secondly, all those questions have been dealt with which have been raised or answered in the cases decided by English courts; it is hoped that all, or at least all important, cases have been considered, but as some have been hunted up which hitherto have escaped the attention due to them, the suspicion is justified that there are many more either hidden in the reports or known but treated under the head of other than purely monetary problems. Thirdly, only those problems have been treated which had been, or might reasonably be expected to be, of practical importance from the point of view of English (municipal or private international) law; mere theory and speculation have in general been eliminated, though in the first part it was necessary to give a certain amount of space to theory; the question of which problems might become important for the law of this country is naturally a difficult one, but in such connections judgment has been based on the experiences of foreign countries.

Within these limits the legal aspects of money will be discussed from a purely legal point of view. Though economic theory will not be disregarded, it is no disparagement of it to say that its usefulness for legal research is not very great. Anglo-American monetary science has undoubtedly neglected the problem which from the point of view of the law is the vital one, namely nominalism and its various phenomena. In this respect it has therefore been necessary to have resort to the research of continental economists. Nevertheless, the lawyer's gratitude is due to those economists who have dealt with the economic and, more particularly, the monetary history of Great Britain, to which the law will have to attribute considerable importance. Mr. Feavearyear's short but excellent book on *The Pound Sterling* (1931) is of particular assistance.

Though this book is devoted to the discussion of English law, an extensive space has been conceded to comparative research. The usual argument that comparative studies are necessary and useful because they place a wealth of experience at our disposal, and show what is right and what is wrong with us, is fortified by many circumstances. When Sir John Davis wrote more than 300 years ago, he largely drew on continental scholars, and if his observations have been accepted by the common law, as in the absence of other material they seem to have been, it follows that the sources of the English law of money are to a great extent of foreign origin. This may perhaps also be regarded as a justification for the fact that it is a lawyer originally trained under a foreign legal system who now ventures to revive the study of the law of money. Furthermore, the developments since 1914 have given rise to an abundance of foreign decisions and legal literature to which international value may justly be ascribed. In France, Italy, and Germany three important works have been published by Mater, Ascarelli, and Nussbaum respectively. The writer is particularly indebted to Professor Nussbaum,⁴ who by his indispensable treatise as well as by many other publications dealing with various monetary problems paved the way for further research to a greater extent than any one of his contemporaries. Finally, it appears that in many foreign laws monetary problems have not been regulated by legislative measures, but left to be moulded and solved by judge-made law. This is a further reason why a comparison with English law is interesting.

The foreign material is so vast that the selection presented to the English reader is bound to be incomplete. Paramount importance has been attributed to the decisions of Supreme Courts; decisions of courts of first and second instance have generally been disregarded, because it is believed that decisions of such courts are very often unsuitable for comparative research, as their authority, under no circumstances binding, is especially assailable, and as the picture they convey can, therefore, too easily become misleading. Legal literature will be referred to rather eclectically, though a much greater quantity of books and articles have been consulted. All available decisions of the Supreme Court of the United States which

⁴ Formerly Professor at Berlin University, now visiting Professor at Columbia University in New York. Professor Nussbaum has announced that he is engaged in preparing a comprehensive study of the legal aspects of monetary theory and practice which, prepared under the auspices of the Columbia Council for Research in the Social Sciences, will 'primarily rest on Anglo-American law and will consider as well important developments which have occurred since the publication of the German volume'. See the article in 35 (1937) *Mich. L.R.* 865, which constitutes the first chapter of the forthcoming volume.

'are always considered with great respect in the courts of this country'⁵ and many decisions of American State Courts have been used. Otherwise, comparative research has chiefly been directed to French and German law. The method of dealing with comparative material will vary. Sometimes it will be used as a mere illustration; in other connections it will be referred to as a persuasive, or at least supporting, authority; in a third group of cases it will serve as a contrast to elucidate a rule of English law or to test its soundness.

Within these limits and on these foundations an attempt has been made to investigate the legal aspects of money, the subject being divided into two distinct parts the difference between which needs emphasis: the first part deals almost exclusively with English money in English municipal law, and comparative material is used for the single purpose of showing the position of a given domestic currency within the frame of the given domestic law. Where questions connected with a currency other than the domestic one are considered in the first part, this is due to the necessity of elaborating certain connections between both. But otherwise, all questions relating to foreign currency, i.e. to the position of a currency within the ambit of a municipal or private international law of a country other than that to which the currency belongs (e.g. American money in England, German currency in France), have been reserved for the second part. It is the present writer's experience and conviction that this separation between domestic and foreign money obligations is absolutely essential for a clear exposition of the subject although it cannot be carried through without exceptions, and although it may sometimes cause inconvenience or overlapping. There is in each case not only a difference of problems, but there are also many differences of approach to the problems, which make it impossible to apply to the one case, without qualification, considerations operative in, or decisions relating to, the other.

The final revisions of the manuscript were completed on 29 July 1938; decisions and literature which appeared after that date could not be taken into consideration.

F. A. M.

London
12 October 1938

⁵ *Beresford v. Royal Insurance Co.*, [1937] 2 All E.R. 243 (C.A.), at p. 252 B per Lord Wright.

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